

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL NO. 1 of 2012**

**With**

**CRIMINAL APPEAL NO. 4 of 2012**

**With**

**CRIMINAL APPEAL NO. 5 of 2012**

**With**

**CRIMINAL APPEAL NO. 140 of 2012**

**With**

**CRIMINAL APPEAL NO. 142 of 2012**

**With**

**CRIMINAL APPEAL NO. 148 of 2012**

**With**

**CRIMINAL APPEAL NO. 192 of 2012**

**With**

**CRIMINAL APPEAL NO. 582 of 2012**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS.JUSTICE HARSHA DEVANI**

**सत्यमव जयते**

**and**

**HONOURABLE MR.JUSTICE BIREN VAISHNAV**

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

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PATEL RAMESHBHAI KANJIBHAI....Appellant(s)  
Versus  
STATE OF GUJARAT & 1....Opponent(s)/Respondent(s)

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**Appearance:****Criminal Appeals No.1/2012, 4/2012 and 5/2012**

MR YOGESH LAKHANI, SR. ADVOCATE with MR JAYPRAKASH UMOT and MR NARENDRA JAIN, ADVOCATES for SV RAJU ASSOCIATES, ADVOCATE for the Appellant(s) No.1 - 29  
MR KB ANANDJIWALA, LEARNED SPECIAL PUBLIC PROSECUTOR with MR SC SHAH, LEARNED SPECIAL ASSISTANT PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No.2  
MR HK PATEL & MS NISHA M THAKORE, ADDITIONAL PUBLIC PROSECUTORS for the Opponent(s)/Respondent(s) No.1

**Criminal Appeal No.140/2012, 142/2012 and 148/2012**

MR MIHIR DESAI, SR. ADVOCATE with MR KALPESH N SHASTRI, ADVOCATE for the Appellants  
MR HK PATEL & MS NISHA M THAKORE, ADDITIONAL PUBLIC PROSECUTORS for the Opponent(s)/Respondent(s) No.1  
MR YOGESH LAKHANI, SR. ADVOCATE with MR JAYPRAKASH UMOT and MR NARENDRA JAIN, ADVOCATES for SV RAJU ASSOCIATES, ADVOCATE for the private respondents

**Criminal Appeal No.192/2012**

MR HK PATEL & MS NISHA M THAKORE, ADDITIONAL PUBLIC PROSECUTORS for the Appellant  
MR YOGESH LAKHANI, SR. ADVOCATE with MR JAYPRAKASH UMOT and MR NARENDRA JAIN, ADVOCATES for SV RAJU ASSOCIATES, ADVOCATE for Opponent(s) No.1-31

**Criminal Appeal No.582/2012**

MR KB ANANDJIWALA, LEARNED SPECIAL PUBLIC PROSECUTOR with MR SC SHAH, LEARNED SPECIAL ASSISTANT PUBLIC PROSECUTOR for the Appellant  
MR YOGESH LAKHANI, SR. ADVOCATE with MR JAYPRAKASH UMOT and MR NARENDRA JAIN, ADVOCATES for SV RAJU ASSOCIATES, ADVOCATE for Opponent(s) No.1-31  
MR HK PATEL & MS NISHA M THAKORE, ADDITIONAL PUBLIC PROSECUTORS for the Opponent(s)/Respondent(s) No.32

=====

**CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI  
and  
HONOURABLE MR.JUSTICE BIREN VAISHNAV**

**Date : 20/10/2016**

**ORAL COMMON JUDGMENT**

**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

Considering the length of the judgment, it is deemed fit to provide an index for ready reference.

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1. A horrific, horrendous, gruesome and barbaric act came to be committed at Sardarpura village in the dead of night on 1st March, 2002 between 11:30 pm to 02:30 a.m., when a huge mob attacked Shaikh Mohalla, initially, by intense stone pelting, and thereafter by vandalizing and destroying houses and setting them on fire and pouring inflammable substances like kerosene, petrol, etc. in the house of Mahemoodmiya Hussainmiya, the only house with a concrete roof in the mohalla, wherein the women and children residing in Shaikh Mohalla and a few men had taken shelter, and setting it ablaze, resulting in twenty eight persons being burnt to death and several others being injured, out of whom, a few succumbed to their injuries, while the others survived to tell the tale about the incident.

2. In connection with the said incident, a first information report came to be lodged on 2nd March, 2002 by one Ibrahimbhai Rasulbhai Shaikh, who has lost thirteen members of his family in the incident. The facts, as stated in the first information report, are as follows:

2.1 The first informant has stated that he is a resident of Sardarpura, Shaikhvas, taluka Vijapur, and is a labourer. That there are about fifteen houses belonging to Shaikh families in their village and there are about fifty houses of Muslim Pathans. On the previous day, that is, on 1st March, 2002, there was a declaration of Bharat Bandh on account of killing of Hindus by Muslims at Godhra and hence, they were all at home. At night at about 11:30, the Patels of the village had broken the gallas [small cabins] and pelted stones and burnt them and a mob of about one thousand Patels had pelted stones on their houses and had come with weapons like sticks, dhokhas, dharias in their hands and there was commotion, whereupon, the police vehicle came in a little while and had resorted to firing to disperse the crowd and hence, the mob had fled. Thereafter, after some time, the mob of Patels got together again and started burning the houses. The people of the mob were throwing petrol and kerosene and indulging in arson and were throwing stones and hence, they also retaliated; however, since there were more members in the mob, they were afraid and hence, had returned back and since the lights were on, he had seen and recognized the following members of the mob: (1) Patel Ambaram Maganlal, (2) Patel Rajeshkumar Punabhai, (3) Patel Chaturbhai Kanabhai, (4) Patel Rameshbhai Kantibhai, (5) Patel Jagabhai Davabhai, (6) Patel Baldevbhai Ranchhodbhai, (7) Patel Rameshbhai Gangaram, (8) Patel Sureshbhai Baldevbhai, (9) Patel Chaturbhai Vitthalbhai, (10) Patel Rajeshkumar Karshanbhai, (11) Patel Madhabhai Vitthalbhai, (12) Patel Rameshbhai Prabhabhai, (13) Patel Bhikhabhai Joitabhai, (14) Patel Bakabhai Mangalbhai, (15) Patel Kalabhai Nathabhai, (16) Patel Rameshbhai Kanjibhai, (17) Patel Ashwinbhai Baldevbhai, (18)

Patel Pashabhai Mohanbhai, (19) Patel Tulsibhai Girdharbhai, (20) Patel Prahladbhai Jagabhai, (21) Patel Ashwinbhai Jagabhai, (22) Patel Sureshbhai Ranchhodbhai, (23) Patel Ramanlal Jivanlal, (24) Patel Jayantibhai Ambalal, (25) Patel Jayantibhai Jivanbhai, (26) Patel Vishnukumar Prahladbhai, (27) Patel Dashrathbhai Ambalal and (28) Patel Rameshbhai Ramabhai. It is further stated that the above referred persons had thrown stones at their houses and the members of their families were hurt and he had sustained injury on the head, left hand and left foot as well as on his back on account of stone pelting. His son-in-law Mahemoodmiya Hussainmiya had a pucca house and hence, for their safety, the ladies and children and male members of their house had taken shelter therein and he had stayed at his own house. The above accused and the other members of the mob had vandalized their houses and burnt them and caused damage to them and after some time, the members of the mob had gone away and he had gone to his son-in-law's house and seen that the members of the mob had burnt the people who were hiding in the house, out of whom, Rafiqbhai Manubhai and Firoz Maqboolmiya, being alive, were taken out. In this room, his wife Ruksana @ Jayda, his daughters Parveen and Razia had died. Ashiyanabanu Asif Hussain was alive. She was rescued and taken out. Sairabanu daughter of Abbasmiya Kesarmiya, Yunushussain Sherumiya Rasulmiya, Arifhussain Manubhai Shaikh, Sultanbhai Mahemoodmiya Hussainmiya Shaikh, Javedmiya Mustufamiya Rasulmiya, Rasidabanu wife of Jamalbhai Dosubhai, Idrishbhai Akbarbhai Shaikh, Mehmoodabibi wife of Sherumiya Rasulmiya, Wahidabanu wife of Nazirbhai Akbarbhai, Batubibi wife of Babumiya Motamiya, Mumtazbanu wife of Maqbool Hussain Kesarmiya, Faridabanu

daughter of Maheboobbhai Hussainmiya, Mumtazbanu daughter of Sherumiya Rasulmiya, Samimbanu wife of Mustumiya Rasulmiya, Safarbanu wife of Mahemoodmiya Hussainmiya, Hussainabibi wife of Hizbul Hussainmiya Shaikh, Abbasmiya Kesarmiya Shaikh, Bismillabanu wife of Bhikhumiya Kalumiya, Ruksanabanu wife of Abbasmiya Kesarmiya, Zohrabanu wife of Manubhai Hussainbhai, Rifakathussain son of Hizbulmiya Hussainmiya, Irfanhussain Mahemoodmiya Shaikh, Bachumiya Nathumiya Shaikh and Sherumiya Rasulmiya Shaikh had died.

3. Accordingly, a first information report came to be registered vide Vijapur Police Station I – C.R. No.46/2002. Pursuant thereto, the investigation was initially carried out by Shri K.R. Vaghela, whereafter, the investigation was handed over to Shri R.D. Baranda and upon his transfer; the investigation was handed over to Police Inspector Shri K.P. Patel. Shri B.V. Jadeja, Deputy Superintendent of Police, Visnagar was the Visitation Officer in this case who supervised the investigation. During the course of investigation, the Investigating Officer arranged for drawing of inquest panchnamas, panchnamas of the scene of offence, panchnamas of recovery of clothes of the deceased, videography of the scene of offence and photographs, map of scene of offence and various other panchnamas, reference to which shall be made at a later stage, and also recorded the statements of witnesses, most of whom, in the meanwhile, had been shifted to different relief camps. Upon conclusion of the investigation, the Investigating Officer submitted charge-sheet in the court of the learned Judicial Magistrate First Class, Vijapur on 27th July, 2002 against fifty-five accused persons,

which came to be numbered as Criminal Case No.724 of 2002. The case, thereafter came to be committed to the Court of Sessions, where it was numbered as Sessions Case No.275 of 2002. At the stage when the case was pending for framing of the charge, the trial was stayed by the Supreme Court in Writ Petition (Criminal) No.109 of 2003, W.P. (Crl) No.11-15/2003, Transfer Petitions (Criminal) No.194-202/2003, SLP(Crl.) 3770/2003, SLP (C) No.7951/2002, and allied matters filed by National Human Rights Commission (NHRC) in the Supreme Court of India, on 21<sup>st</sup> November, 2003.

4. Subsequently, the Supreme Court passed an order dated 26th March, 2008 inter alia directing that an appropriate notification shall be issued by the State Government regarding creating a Special Investigation Team (SIT), the constitution of which shall be as follows: -

1. Shri R.K. Raghavan, retd. Director of the CBI.
2. Shri C.B. Satpathy, retd. DG, Director, Uttar Pradesh Police College, Moradabad
3. Ms. Geeta Johri
4. Shri Shivanand Jha
5. Shri Ashish Bhatia

The court further observed that officers at serial No.3 to 5 are IG rank officers and directed that Shri Raghavan will be the Chairman of the Committee and Ms. Geeta Johri shall be the Convener. The Committee shall in its first meeting work out the modalities to be adopted for the purpose of enquiry/investigation. If any person wants to make statement before the SIT for giving his or her version of the alleged incidents, the SIT shall record it. Those who want to give their version shall, in writing, intimate the Convener of the

Committee so that the SIT can call him or her for the purpose of recording his/her statement. The court further observed that it was needless to state that the SIT shall not confine the investigation by recording statements of those who come forward or give his or her version and shall be free to make such inquiries/investigation as felt necessary by it. One of the cases in which such further investigation was ordered was Sardarura (sic. Sardarpura), Mehsana Sessions Case No.275/2002 arising out of FIR No.46/2002 dated 28.2.2002 of Police Station Bijapur (sic. Vijapur), Mehsana. In compliance with the above directions issued by the Supreme Court, the Government of Gujarat issued a notification dated 01.04.2008 (Exh. 896) constituting a Special Investigation Team in terms of the said directions. Pursuant thereto, by a FAX message (Exh. 897) issued by Geeta Johri, I.G.P., C.I.D Crime, Member and Convener, Special Investigation Team, Gandhinagar, Shri G.V. Barot, Assistant Director, Anti Corruption Bureau, Ahmedabad was directed to take over the charge of the further investigation into Mehsana, Vijapur Police Station I.C.R. No.46/2002 under section 173 (8) of the Code of Criminal Procedure. During the course of investigation, the Special Investigation Team published an advertisement in leading newspapers in the State of Gujarat, inviting people to contact the SIT in person or through written application, to give any relevant information or evidence in connection with the present case under investigation by the SIT, as a result whereof, applications in this case were also received, and statements of forty four witnesses including the complainant and fifteen police personnel, were verified and their further statements were recorded by the SIT, whereas statements of thirty nine new witnesses were also recorded by it. Certain

other steps were taken by the SIT, which included preparation of an additional sketch with the help of the Revenue Circle Inspector. Subsequently, upon conclusion of investigation, the SIT submitted certain supplementary charge-sheets which came to be numbered as Sessions Cases No.120 of 2008, No.7 of 2009 and No.72 of 2010.

5. During the pendency of the trial, the original accused No.10 of Sessions Case No.275 of 2002, viz., Patel Jayantibhai Jivanbhai died and therefore, an order came to be passed holding that the trial had abated qua him. Accused No.19 – Rohit Prajapati being a juvenile, an order came to be passed at Exhibit-61 dropping him from framing of the charge in the present case and it was ordered that his case be sent to the Juvenile Justice Board, while the accused No.1 of Sessions Case No.7 of 2009 – Patel Kantibhai Prabhudas had died and hence, an order of abatement came to be passed vide Exhibits-540 and 543.

6. A consolidated charge came to be framed vide Exhibit-78 on 25<sup>th</sup> August, 2010. The charge has been extensively reproduced in the impugned judgment and order at pages No.17 to 33 thereof. With a view to avoid prolix, the charge is not reproduced hereunder. Suffice it to say that the accused were charged with the commission of offences punishable under sections 143, 144, 147, 148, 302 read with section 149 of the Indian Penal Code, section 307 read with section 149 of the Indian Penal Code; sections 307, 323, 324 and 325 read with section 149; sections 323, 324 and 325 read with section 149 of the Indian Penal Code, sections 395, 397, 396, 435, 436, 447, 448 read with section 149 of the Indian Penal Code;

sections 447, 448, 336, 337 read with section 149 of the Indian Penal Code; sections 336 and 337 read with section 295-A of the Indian Penal Code; section 153A and section 297 read with section 120-B of the Indian Penal Code.

7. With a view to bring home the charge against the accused, the prosecution examined. in all. one hundred and twelve witnesses out of whom, twenty six witnesses were from Shaikh Mohalla where the incident took place, four Shaikh witnesses were residing opposite Kapurvas, three of them belonged to the Fakir community and were residing at the entry point of Sardarpura, two witnesses were Pathans residing at Pathan Mohalla, two witnesses were Ravalas residing at Ravalas and one witness was from Sundarpur, eight witnesses came to be examined from Memon, Mansuri and other communities, twenty medical witnesses, seventeen panch witnesses and twenty police officers came to be examined. One witness each, came to be examined from the Forensic Science Laboratory, Gujarat Electricity Board, Home Department, District Magistrate's Office and the Graveyard. A Talati-cum-Mantri, Circle Officer, and a photographer were also examined. The prosecution also produced a plethora of documentary evidence as referred to in detail in paragraph 11 of the impugned judgment and order. By and large, the documentary evidence is comprised of various panchnamas, medico-legal certificates of the injured persons, postmortem reports and ancillary documents, etc. After recording the evidence, the learned Sessions Judge put the incriminating material to each of the accused under section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") and their response was in the nature of complete

denial. The accused also filed detailed statements under section 313 of the Code, reference to which shall be made at an appropriate stage. In short, the accused pleaded not guilty and sought a trial. During the course of hearing, on behalf of the accused detailed memorandum of arguments under section 314 of the Code came to be submitted raising various contentions on various issues and dealing with the testimonies of each of the important witnesses in detail. Along with the written submissions, detailed charts in respect of each of the relevant witnesses were submitted, setting out the names of accused named by each witness in different statements recorded by the police and the SIT and also in the applications made to the SIT and the affidavits prepared by some witnesses for tendering the same before the Supreme Court as well as in the deposition and the names of such accused as were identified by such witness. Detailed charts were also prepared setting out facts in respect of each of the accused, as to which witness had named him, and in which statement, and whether he had been identified by such witness. Several other charts were also prepared on behalf of the accused. However, the record reveals that while detailed submissions were made before the court by the learned Special Public Prosecutor, no written submissions have been submitted on behalf of the prosecution. After the hearing was concluded, on behalf of the accused an application had been made for site inspection by the learned trial Judge. Pursuant thereto, the learned trial Judge visited the scene of offence on 16th June, .2011 and prepared a memorandum (Exhibit-1081) recording details about the site inspection.

8. The trial court after considering the evidence on record and the submissions advanced by the learned advocates for the respective parties, by the impugned judgement and order dated 9th November, 2011, held that the prosecution had proved its case beyond reasonable doubt in respect of thirty one (31) accused persons and while acquitting them of the offences punishable under sections 120-B, 395, 397 and 396 of the Penal Code convicted them for the offences punishable under sections 143, 147, 144, 148 and 302 read with section 149 of the Penal Code; section 307 read with section 149 of the Penal Code, sections 323, 324 and 325 read with section 149 of the Penal Code; sections 435 and 436 read with section 149 of the Penal Code; sections 447 and 448 read with section 149 of the Penal Code; sections 336 and 337 read with section 149 of the Penal Code; sections 295A, 153A and section 297 of the Penal Code and section 135 of the Bombay Police Act. The trial court further held that the prosecution had failed to prove its case beyond reasonable doubt qua thirty-one (31) accused persons and acquitted them by giving them the benefit of doubt. In the case of the rest of the accused being eleven in number, the trial court held that the prosecution had failed to prove the charge against them and acquitted them.

9. Against the impugned judgment and order the State of Gujarat filed an application seeking leave to appeal being Criminal Miscellaneous Application No.2663 of 2012 which came to be allowed by an order dated 27th April, 2012 and the appeal preferred by the State, being Criminal Appeal No.192 of 2012 came to be admitted. The Special Investigation Team also filed an application seeking leave to appeal being Criminal Miscellaneous Application No.1975 of 2012. The application

came to be disposed of by an order dated 27th April, 2012 in the following terms:

- “1. The present application for leave to prefer an appeal has been preferred by Special Investigation Team (hearing after referred to “SIT” for short) against the common judgment and order passed by the learned Sessions Judge in Session Case nos. 275/2002, 120/2008, 7/2009, whereby the learned Session Judge has acquitted 31 respondents, who are original accused for the offence under section 143, 147, 148 and 302 read with sections 149, 307 and other charged offences. We may record that the State has also preferred an appeal being Criminal Appeal no. 192/2012 with Criminal Misc. Application No. 2663/22012 for leave to prefer appeal. Today, as per the order passed by this Court in the aforesaid Criminal Appeal with application for leave to prefer appeal, leave has been granted to the State to prefer an appeal and the appeal of the State being Criminal Appeal no. 192/2012 has been admitted.
  2. We have heard Mr. Anandjiwala with Mr. Suresh Shah, learned Special PP for SIT. Peculiar circumstances in the present application is that the application for leave to prefer appeal has been preferred by SIT constituted by the Apex Court as per its decision in case of National Human Rights Commission Vs. State of Gujarat and Ors reported in 2009 (6) SCC 342 and more particularly the observation made by the Apex Court at para 10 which is reproduced as under:
- “10. We make it clear that SIT shall be free to work out the modalities and the norms required to be followed for the purpose of inquiry/investigation including further investigation. Needless to say the sole object of the criminal justice system is to ensure that a person who is guilty of an offence is punished.”**
3. The aforesaid shows that constitution of SIT by the Apex Court as per above referred decision is to ensure that the person who is guilty of an offence is punished. Attempts of the SIT in the present application for leave to prefer appeal as well as in the

*appeal are to show that the learned Sessions Judge ought not to have granted acquittal to the concerned accused who are respondent Nos. 1 to 31 herein. Further we find that there is no conflict in the stand in the appeal preferred by the State as well as the appeal of the SIT. Since, SIT has investigated into the matter keeping in view the above referred observation made by the Apex Court, if the leave is granted to SIT more particularly when the State appeal has also been admitted and the stand is common against the acquittal granted by learned Session Judge, it would be just and proper to grant leave to SIT. Hence, leave granted. Application disposed of accordingly."*

10. During the pendency of the appeals, successive applications for suspension of sentence pending appeal and release on bail being Criminal Miscellaneous Application No.2813 of 2015 came to be filed by some of the appellants/accused under section 389 (1) of the Code, which came to be rejected by an order dated 30th November, 2015. Being aggrieved, the applicants approached the Supreme Court in Petitions for Special Leave to Appeal (Crl.) CRLMP No.5221/2016 and allied matters. The special leave petitions came to be dismissed by a common order dated 1st April, 2016, which reads thus:

*"O R D E R*

*WEB COPY*

*Delay condoned.*

*We are not inclined to interfere with the order passed by the High Court. However, we request the High Court to decide the appeal within three months, if possible. It will also be permissible for the petitioner to move an application before the High Court for interim bail on the ground of sickness. In case, appeal is not decided within three months, the petitioner(s) may renew the request for bail which shall be considered on its own merits.*

*The special leave petitions are dismissed."*

11. Accordingly, these appeals were taken up for hearing on a day to day basis after the admission board was over. The hearing commenced on or about 28<sup>th</sup> June, 2016. Since the entire record was read and re-read by the learned counsel for the appellants/accused and lengthy submissions were made, the hearing itself went on till on or about 9<sup>th</sup> September, 2016 and hence, it was not possible to decide the appeals within three months.

12. All these appeals arise out of the common judgment and order dated 9th November, 2011 passed by the learned Sessions Judge, Designated Court, Mehsana in Sessions Cases No.275/2002, 120/2008, 7/2009 and 72/2010 and hence, the same were taken up for hearing together and are decided by this common judgment.

13. Criminal Appeal No.1 of 2012 has been filed by, in all, twenty-nine (29) accused, viz., original accused No.1, 2, 5, 6, 11, 14, 16, 18, 27, 28, 30 to 35, 37, 38, 40 to 44, 46, 48 to 50, 52 and 54 in Sessions Case No.275 of 2002; Criminal Appeal No.4 of 2002 has been filed by Patel Kalabhai Bhikhabhai, original accused No.9 in Sessions Case No.7 of 2009; Criminal Appeal No.5 of 2012 has been filed by Patel Dahyabhai Vanabhai, original accused No.7 in Sessions Case No.120 of 2008; Criminal Appeal No.140 of 2012 has been filed by Gulamali Akbarmiya Shaikh, challenging the acquittal of Patel Govindbhai Mohanbhai, original accused No.10 in Sessions Case No.7 of 2009; Criminal Appeal No.142 of 2012 has been filed by Ibrahimbhai Rasulbhai Shaikh, Gulamali Akbarmiya

Shaikh, Mustufamiya Rasulmiya Shaikh and Mohd. Sattar Bachumiya Shaikh challenging the acquittal of original accused No.12, 17, 21, 22, 25, 26, 29, 36 and 39 in Sessions Case No.275 of 2002; Criminal Appeal No.148 of 2012 has been filed by Ibrahimbhai Rasulbhai Shaikh and Gulamali Akbarmiya Shaikh challenging the acquittal of original accused No.3 to 6 in Sessions Case No.120 of 2008; Criminal Appeal No.192 of 2012 has been filed by the State of Gujarat challenging the acquittal of original accused No.4, 8, 9, 12, 17, 20, 21, 22, 25, 26, 29, 36, 39, 47, 51 and 53 of Sessions Case No.275 of 2002 as well as original accused No.1 to 6 and 8 of Sessions Case No.120 of 2008, and original accused No.2, 3, 5 to 8, 10 and 11 of Sessions Case No.7 of 2009 and Criminal Appeal No.582 of 2012 has been filed by the Special Investigation Team challenging the acquittal of original accused No.4, 8, 9, 12, 17, 20, 21, 22, 25, 26, 29, 36, 39, 47, 51 and 53 of Sessions Case No.275 of 2002 as well as original accused No.1 to 6 and 8 of Sessions Case No.120 of 2008, and original accused No.2, 3, 5 to 8, 10 and 11 of Sessions Case No.7 of 2009.

### **SUBMISSIONS :**

14. Mr. Y. S. Lakhani, Senior Advocate, learned counsel for the appellants took the court through the entire depositions of the witnesses as well as the relevant documentary evidence, at length and in great detail. The reading of the evidence itself took about three weeks. The learned counsel submitted that though the incident is in the nature of a gruesome and ghastly act allegedly done by a group of persons and the victims and their relatives are justified in asking for justice and conviction of offenders whose complicity is found in the offence, at the

same time, the court would see that an innocent person or a person who is apparently found to have been involved falsely is not convicted. It was submitted that while appreciating the evidence on record, the following fundamental principles are required to be kept in mind:

- (i) It is the prosecution which is obliged to prove the case beyond all reasonable doubt against each of the accused and should stand on its own legs. A primary duty of the prosecution, therefore, is to prove all the facts which are alleged, to the satisfaction of the judicial mind.
- (ii) The accused are not required to prove their defence even if it is specifically set up and failure to prove the defence would in no way strengthen the prosecution case or put the prosecution on any better footing.
- (iii) The burden on the accused to prove the defence is not that heavy as that of the prosecution to prove its case and the accused are only to show the court that the defence that they are setting up is either possible or plausible.
- (iv) While appreciating the evidence of the witnesses, the court would, of course, ignore and not attach much importance to those minor, negligible and natural contradictions as well as the omissions which have intervened because of passage of time or because of the reason that the witnesses are rustic or for the lack of photogenic memory; however, if the contradictions,

omissions and improvements are found to be apparent, deliberate, major and substantial, which definitely affect seriously the core of substratum of the prosecution case, the court will not hesitate to reject the entire testimony of the witness and will place it out of consideration.

- (v) It is not the quantity but quality of evidence which is required to prove the complicity of the accused in the crime and for that, the nature of the evidence has to be of sterling quality. The testimony of an unreliable and/or untrustworthy witness cannot be used to corroborate the testimonies of other witnesses of the same nature.
- (vi) When there are large number of accused and large number of witnesses, the court will examine the evidence very carefully and with great caution, to rule out all or any possibility of false or over implication of the accused.
- (vii) If the court finds any reasonable doubt in the prosecution case which is not fanciful, the court would always give benefit of doubt to the accused.

14.1 Referring to the charge (Exhibit-78), the learned counsel submitted that (1) there is no specific allegation or charge against any accused of having done a specific act or committing a specific offence. In other words, there is no allegation of any substantial act or offence, and (2) in the entire charge, there is no allegation made against anybody of

having committed any offence or an act either on 27<sup>th</sup> February, 2002 or 28<sup>th</sup> February, 2002.

14.2 It was submitted that no evidence worth the name has been found or has been deposed by any of the witnesses as to – (1) who has killed whom, (2) who has attacked whom with deadly weapons, (3) who has beaten whom, (4) which accused set the cabins on fire, (5) which accused set the houses on fire, (6) who entered the houses of witnesses, (7) who has committed the loot or robbery, (8) which accused has entered the kabrastan (graveyard), (9) which accused caused damage to the tomb, (10) who committed deliberate or malicious acts intended to outrage the feelings of any class by insulting their religion or religious feelings, and (11) who promoted enmity between different groups on the ground of religion?

14.3 It was pointed out that while weapons and other articles numbering sixteen, comprising of thirteen weapons and three gallons came to be seized, the prosecution has failed to prove the use of any of them against any of the accused. It was submitted that the trial court has held that none of the articles connect any of the accused with the offence and hence, the entire evidence has not been believed. It was submitted that in the absence of any substantive act having been committed by any of the accused, the prosecution wanted to bring all the accused within the sweep of section 149 of the Penal Code, creating on them a constructive and/or vicarious liability.

14.4 Referring to the situation in the context of which the incident had occurred, it was pointed out that on 27<sup>th</sup> February, 2002, the Sabarmati train incident had taken place because of

which, communal riots had erupted in the entire State of Gujarat. On 28<sup>th</sup> February, 2002, a call for Gujarat Bandh was given. On 1<sup>st</sup> March, 2002, a call for Bharat Bandh was given. A majority of the Kar Sevaks who were affected in the Sabarmati train carnage and who were injured and were victims of such incident, hailed from Mehsana district. As admitted by the police officers in their depositions, there are certain sensitive centres like Visnagar, Vijapur, Kheralu, Vasai, etc. which were badly affected because of the riots, and that, a number of communal incidents were reported from these places. But in Sardarpura, exceptional communal harmony prevailed. On 27<sup>th</sup> February, 2002, on 28<sup>th</sup> February, 2002 and even on 1<sup>st</sup> March, 2002, the witnesses did say that they had followed their daily pursuits, went to the bazaar, opened up their gallas/shops, even the Muslim witnesses have said that they have gone to offer the namaaz until this incident occurred. During all these three days, there is not a single case reported of any attack made by any Hindu person upon the minority community. Except the incident of burning the cabins on 28<sup>th</sup> February, 2002 in the late evening hours or at night, though reported, the evidence is to the effect that it was not by the people of Sardarpura. It was submitted that there is no evidence that the incident of burning of cabins had taken place at the hands of the people of Sardarpura.

14.5 It was further submitted that admittedly, there were communal disturbances in village Sundarpur and many Muslim families of Sundarpur have expressed their desire to stay at Sardarpura, which place they had found to be the safest. PW-70 Munsafkhan Pathan, who is a retired police officer, had requested PSI Shri Parmar (PW-90) to arrange for the migration

of those families from Sundarpur to Sardarpura and to place them in Pathan Mohalla. On 1<sup>st</sup> March, 2002, in the evening hours, arrangements were made by the PSI for the purpose of shifting them and it has come in evidence that some of them have come in vehicles and some of them have come on foot. It was pointed out that during the course of transit from Sundarpur to Sardarpura; none of the persons were attacked though the village people knew that Muslims are coming from Sundarpur to Sardarpura. It was submitted that Pathan Mohalla is not an enclosed place and has no gates and hence, the mohalla could have been a very easy and soft target for the Hindu community of Sardarpura; however, no attack was made thereon.

14.6 The attention of the court was invited to the maps at Exhibits-420 and 421, prepared by PW-37 Babubhai Sathwara, Circle Officer to submit that the maps do not disclose the actual and real position of the scene of offence and that the maps are not as per the scale. It was pointed out that the first map was prepared about two and a half years after the incident, and the second map was prepared after the SIT had taken over the probe. It was submitted that from the evidence of the witness, it is clear that the maps have been prepared only on the basis of the panchnama of the scene of offence and that there is no mention in either of the maps that the same were prepared after verification of the spot. It was submitted in the map (Exhibit-420), the measurements of any of the houses except that of Mahemoodmiya are not reflected. It was submitted that when the measurements are not taken, and the physical position of the houses and the articles are not stated in the panchnama, one cannot just rely on the

panchnama. It was pointed out that the witness has not measured the distance between the two rows of houses in Shaikh mohalla. It was submitted that on a perusal of the map, it appears that the houses in the opposite rows of houses are equidistant, whereas from the cross-examination of the witnesses, it has been revealed that the houses of one row are not equidistant from the houses in the opposite row and that the distance between each and every house differs. Thus, the map appears to have been prepared without even visiting the scene of offence and as such does not reflect the true and correct position of the scene of offence. It was submitted that while preparing a map, it has to be on the actual basis of what is found at the scene of offence and not on the basis of panchnama. It was contended that since the maps are prepared only on the basis of panchnama of the scene of offence and they do not reflect the real and correct position of the scene of offence immediately after the incident and that these maps which are not even as per scale, cannot be relied upon and read in evidence. It was submitted that the record reveals that Munsafkhan Pathan's statement was recorded for the first time on 6<sup>th</sup> March, 2002. He, being a retired police officer, is an experienced person and is said to have been present soon after the incident, when the entire police force had come, yet until 6<sup>th</sup> March, he did not give his statement to the police. The day on which his statement came to be recorded, the complaint regarding burning of gallas on 28<sup>th</sup> February by Hari Magan came to be lodged. It was submitted that Munsafkhan appears to have guided the people and dictated the complaint to Hari Magan as if the cabins were set on fire by the Patels of Sardarpura. It was submitted that it is the case of the witness that the complaint was then given to

PSI Shri Parmar, who in turn has denied having received any such complaint, and thereafter, the complaint was lodged on 6<sup>th</sup> March, 2002. It was submitted that a peace meeting is stated to have been held at the residence of Munsafkhan in connection with the incident of burning of cabins, where people of different communities had gathered, including PSI Shri Parmar. It was urged that all stories that have come later are improvements engineered by this man with the help of an NGO called Citizens for Justice and Peace headed by Ms. Teesta Setalvad and assisted by Shri Raees Khan. According to the learned counsel, Munsafkhan is the person who could see that manipulations are made and the panchnama is not an exception, which is shown to have been drawn on 3<sup>rd</sup> March, 2002 from 7:00 to 11:00 hours. Referring to the panchnama, at Exhibit-424, it was submitted that the same has been very craftily drafted with deliberate intention. Reference was made to the panchnama of the scene of offence to point out that while some of the houses were totally burnt, no damage was caused to some houses and some houses were not burnt. It was pointed out that even Bhikumiya's house, which is towards the Patel's houses, is also burnt and that on the side towards the kabristan also, there are houses which have not sustained any damage due to fire, though the articles inside are burnt and that a similar position exists in the case of the houses in the opposite row. It was pointed out that damage on both sides of Shaikh Mohalla has been caused by fire and on both the sides, certain houses are not damaged.

14.7 Next, it was submitted that though Pathan Mohalla was a soft target, it has not been attacked. The attention of the court was invited to the fact that there are many vas (where people

reside) in the village Sardarpura, viz., Memonvas, Mansurivas, Nagorivas, Pathanvas and Shaikhvas, to submit that except Shaikhvas, no attack has been made to cause injury to anybody who was residing in these areas where the people belonging to the Muslim community are residing. It was submitted that all the vas/mohallas are open and there are no gates. It was submitted that the attack which was made on Shaikhvas was not made by the people of Sardarpura for the reason that none of the areas where Muslims were residing were attacked and that the people of Sardarpura had not committed the offence in question. It was submitted that looking to the pattern of attack, namely, entering Shaikh Mohalla from the front and making an attack from the back *prima facie* indicates that late in the night, the mob allegedly has come from Sundarpur-Kamalpur road, reached the kabrastan and the attack was made starting from the rear side of Shaikhvas. It was submitted that if from Sundarpur one takes the kabrastan road, then from the kabrastan, one can directly come to the rear side of Shaikhvas and the mob from Sundarpur did not have to come through the village, but could have come from the rear side.

14.8 It was submitted that on 28<sup>th</sup> February, 2002, a day prior to the incident, another incident of causing damage and setting on fire the cabins near the Panchayat office was reported, wherein the cabins and gallas belonging to different communities have been burnt. It was submitted that there are two grounds to believe that this is not an act committed by the people of Sardarpura. Firstly, that there is no charge against the accused who are Patels of Sardarpura that they have committed this offence on 28<sup>th</sup> February, 2002 and secondly,

that in communal events, the people belonging to the Hindu community would not cause damage to the property of other castes who also belong to the Hindu community. It was submitted that at the relevant time, the mobs in communal frenzy were moving around from village to village and since shops belonging to all communities are destroyed, there is a possibility of people from outside having come. It was submitted that there is no evidence in the charge-sheet that the incident of 28<sup>th</sup> February, 2002 was committed by Patels of Sardarpura. It was submitted that the possibility of this incident having taken place at the hands of the people of adjoining villages, particularly of village Sundarpur, cannot be ruled out.

14.9 It was submitted that it has come in evidence that one Mukesh Madha, a Kar Sevak from Sundarpur, who had escaped from the Sabarmati carnage, arranged a meeting at Sundarpur and instigated the village people and, in fact, in pursuance thereto, an incident did take place at Sundarpur. The Muslims of Sundarpur were not feeling safe, and hence, they had made a request to one Himatkhan Taj Khan to be shifted to Sardarpura, which they felt was safer. It was pointed out that till 11:35 hours, no one was attacked at Sardarpura.

14.10 The attention of the court was invited to the testimony of PW-84 Imtiyazali Hussainmiya Kureshi who has been examined at Exhibit-657 and more particularly to paragraph 3 thereof to point out that the said witness has deposed that on the 28<sup>th</sup>, Mukeshbhai Madhabhai, who is a member of the Bajrang Dal and had gone to Ayodhya for Kar Seva, had convened a meeting at Sundarpur village where he

had said that their Karsevaks had been killed and had accordingly instigated them; and that he had further instigated them that people from their mohalla were at Sardarpura and that they should be killed. At that time, persons from the village named in his deposition were present. Reference was also made to the first information report registered vide Vijapur Police Station I-C.R. No.54 of 2002 which had been lodged by one Malek Himmatkhan Tajkhan against various persons of village Sundarpur as well as to the first information report registered vide Vijapur Police Station I-C.R. No.62 of 2002, which had been lodged by one Panchal Babubhai Ambalal against a mob of 500 Muslims. It was submitted that having regard to the surcharged atmosphere in Sundarpur, and considering the fact that Muslims had migrated to Sardarpura as well as the complaint of Himmatkhan Tajkhan, there is a possibility of the people of Sundarpur having come and committed the offence. It was also submitted that there is a positive evidence led by the prosecution to point out and indicate that a large mob from Sundarpur had entered village Sardarpura as a consequence whereof, lathi-charge was resorted to, tear gas shells were burst and even firing was resorted to by the police. The incident near the Panchayat office took place at about 10 p.m. on 1<sup>st</sup> March and cabins were burnt and the house of one Fakir was burnt at that time and not the cabins at the corner of Shaikh mohalla. It was submitted that there is definite evidence that cabins at the panchayat office were burnt, which is substantiated by the testimonies of as many as eight witnesses.

14.11 As regards the time of the incident, reference was made to the testimonies of PW-90 Galbabhai Khemabhai

Parmar (G.K. Parmar) to point out that PSI Parmar was there throughout right from the afternoon and that PSI Rathod joined him at about 8:30 p.m. Referring to the first information report registered vide Vijapur Police Station I-C.R. No.45 of 2002 (Exhibit-856), it was pointed out that the same refers to the offence that had occurred at 22:00 hours and came to be registered at 23:50 hours. Referring to the testimony of the police witnesses, it was submitted that the police had gone to Vijapur in view of the fact that there was peace in village Sardarpura and hence, the incident must have occurred after 11 o'clock. It was submitted that this being a contemporaneous record namely, a first information report lodged by a police officer which is proved on record, which the police officer says in his deposition and is supported by other police witnesses, there is no question of disbelieving it. It was submitted that this piece of evidence has to be accepted as having been proved and thereafter, the entire set of evidence leading to the incident in question is required to be considered. Reference was made to the testimony of PW-92 Jivagiri Vihagiri Goswami to point out that he was with PSI Parmar in the mobile van. It was submitted that the testimony of this witness further substantiates that the incident occurred at 10 p.m. and thereafter, they had made two rounds of the village and no persons of the public were seen in the village and seeing that the atmosphere had calmed down, they had gone off to Vijapur. Reference was made to the testimony of PW-99 Krishnakumar Kantilal, an unarmed constable and more particularly, paragraph 5 thereof to point out that he had stated that approximately at about 10 p.m., they were at the Panchayat office at which point of time, the mob of around one thousand people had come from the direction of Sundarpur

and another mob of around five hundred people had come from the direction of Sardarpura and that they had resorted to lathi-charge and rounds of firing, whereafter the crowd had dispersed. During patrolling, they had seen two cabins and a hand-cart burning. Reference was made to the testimony of PW-101 Khodidas Govindbhai, a police constable attached to the second mobile with Police Sub-Inspector Shri M.L. Rathod, to point out that he had deposed that at about 22:00 hours at night, at the time when they were patrolling, they had seen two to three gallas burning at the corner of Shaikhvas. It was submitted that it has come on record that till 23:50 hours there was no other incident except the burning of cabins. Reference was made to the testimony of PW-102 Laljibhai Arjanbhai Desai who was discharging duties as a writer with Police Sub-Inspector Rathod and was assisting him in the investigation, wherein he has inter alia deposed that at 22:00 hours, they were standing near the Gram Panchayat office when a mob of about five hundred persons had come from the direction of Sardarpura and another mob had come from the direction of Sundarpur and had surrounded their mobile vans and that upon the mob becoming uncontrollable, they had resorted to bursting the tear gas shells and firing of rounds, whereafter, the mob had dispersed. It was submitted that, therefore, definite evidence has come from the testimonies of the police officers as to what happened on that day at 10 p.m.

14.12 It was further submitted that from the testimonies of the police, it is evident that the atmosphere was severely surcharged in Sardarpura as well as other villages and that people had gathered at the outskirts near the Panchayat office. The evidence of the police officers gets further fortified by the

evidence of the Superintendent of Police. It was submitted that it is a well-settled legal position that the evidence has to be read as a whole. It was submitted that all the police officers and Superintendent of Police, have adduced positive evidence to the effect that the mobs of different villages on foot were gathering at a particular village and were making an attempt to injure persons and cause damage to the properties. This had also happened at the Panchayat office and bus-stand at Sardarpura where a huge crowd is said to have come from Sundarpur side with a view to commit the crime. Reference was made to the testimony of PW-52 Hijbulmiya Hussainmiya Shaikh to point out that in his cross-examination, it had been elicited that at the time when he was at Prahladbhai's bhatta, he had seen a mob coming from the direction of Sundarpur. He has further admitted that on 1<sup>st</sup> March, 2002 in the evening, he had seen a big mob from the direction of Sundarpur at about 6 to 7 in the evening and the mob was saying that wherever the miyabhais are staying, they should be burnt. It was submitted that this witness is a witness from the Muslim community, residing in a different Shaikhvas and he also has confirmed the fact that a mob had come from the direction of Sundarpur. Reference was made to the testimony of PW-112 Gautamkumar Vishnubhai Barot (G.V. Barot), the Deputy Superintendent of Police and Investigating Officer (SIT) and more particularly, paragraph 75 thereof, wherein he has admitted that prior to the incident taking place, many Muslims from Sundarpur had come to Sardarpura. It was pointed out that in paragraph 80 of his testimony, he has stated that the mob which had come from Sundarpur had taken part in the incident but had not burnt. It was submitted that the witness as an Investigating Officer has come to the conclusion that

people who had come from Sundarpur had participated in the incident. It is reemphasized that all the police officers have spoken in their examination-in-chief that the crowd had come from the direction of Sundarpur, may be from Sundarpur or other villages, which fact is supported by the testimony of the Superintendent of Police, Mehsana, the Investigating Officer (SIT) and even a witness from the Muslim community, which clearly supports the theory of the defence which indicates a plausible situation of the participation in the incident by outsiders. It was contended that when there is a possibility of participation of outsiders, whether it is physically or practically possible is for the court to examine. It was submitted that the atmosphere of Sundarpur was surcharged on account of the hate speech of Karsevak Mukesh Madha and the court in the quest of search of truth would surely ascertain as to whether the possibility of the offence having been committed by the outsiders from Sundarpur exists.

14.13 The attention of the court was invited to the topography of the scene of offence with reference to the testimonies of PW-38 Inayathussain, PW-39 Janmahammad, PW-40 Mahammad Arif, PW-48 Sabirhussain Kadarmiya, PW-49 Iqbalmiya Rasulmiya, PW-53 Kulsumbibi Kadarmiya, PW-54 Sharifmiya Bhikhamiya, PW-58 Sabirhussain Imam Fakir, PW-70 Munsafkhan, PW-47 Ibrahimmiya Rasulmiya and PW-80 Ruksanabanu. It was submitted that from the testimonies of the witnesses, it is clear that the impact of the attack was found more on the rear side so far as burning, use of force, etc., is concerned. Reference was also made to the testimony of PW-110 Kakusinh Ranjitsinh Vaghela (K.R. Vaghela) and more particularly, paragraphs 23 to 26 of his testimony as well

as to the testimony of PW-88 Hasmukhlal Thakorlal Modi, the Scientific Officer of the Forensic Science Laboratory, who has carried out inspection of the scene of offence. It was pointed out that the evidence of the witnesses reveals that there was damage on the rear side also and that in fact, from the rear side, the damage and impact is more severe. It was submitted that the mob which is stated to have gathered at 10 o'clock near the Panchayat office, which is said to have dispersed after firing was resorted to, that mob has come again and used the road leading to Kamalpur. Thus, the attack is possibly made from the rear side. It was submitted that the defence set up by the accused and the facts established on record also support the case of the defence that the attack on Shaikh mohalla was by a mob consisting of persons from village Sundarpur and other villages.

14.14 As regards the nature of the evidence adduced by the prosecution, it was submitted that the statements recorded by the Investigating Officer have been recorded belatedly and subsequently versions have been given in the affidavits filed by some of the witnesses before the Supreme Court, whereafter the witnesses remained silent for six years and after the Special Investigation Team (SIT) came to be constituted under the orders of the Supreme Court, a few of the witnesses have sent applications which again indicate improvements having been made, and subsequently, the statements containing the improved versions were made before the Special Investigation Team. It was submitted that it has come on record in evidence that these witnesses were taking shelter in relief camps after the incident; such relief camps were administered by their community; and they were

taken care of by the leaders of their community and assisted by legal minds and there were also visits by the police officers. It was submitted that it seems that initially most of the witnesses have avoided and refused to give statements and have, accordingly, deferred the process of giving statements to a later date so that they could mould the story as per the advice they had received. It was submitted that it has come on record that at least eight to nine of the witnesses have affirmed affidavits on 6<sup>th</sup> November, 2003 for being sent to the Supreme Court and that ready material was provided to them for the purpose of affirmation. This ready material was prepared under the knowledge and supervision of the witnesses and hence, all of them would have known as to where they were prepared, who prepared them, who got them typed, who got them translated as many of them did not know English. It was submitted that after six years, the witnesses have come out with a revised and improved version in the form of applications to the Special Investigation Team and in pursuance thereof, their statements came to be recorded. It was submitted that there are a large number of witnesses, some of whose statements were recorded by the Investigating Officer during the course of investigation, whereas statements of other witnesses came to be recorded for the first time by the Special Investigation Team. It has also come in evidence that the witnesses had a number of opportunities to ventilate their grievance, if any, or at least to say what they wanted to say but they did not chose to do so or opt for it, therefore, the conduct of the witnesses seems unusual and unnatural and tacit silence has been maintained for years, which cannot be excused on any count nor can any explanation thereto be accepted.

14.15 It was submitted that the question that arises for consideration is whether the witnesses are reliable and trustworthy. While evaluating their testimony, whether the court can rely on them or whether limited sentences from their testimony as has been done by the trial court while rejecting the other part, can be used. It was submitted that there are a large number of improvements in the testimonies of the witnesses. The learned counsel invited the attention of the court to an application made under section 311 of the Code by one Raeeskhan Azizkhan Pathan at Exhibit-989, wherein it has *inter alia* been stated that on 6<sup>th</sup> November, 2003 when the persons named therein came to their office, he had informed Teesta on phone and she had spoken to each person briefly on phone and their affidavits were prepared by her and were mailed to him on his e-mail account by late evening and that subsequently under her instructions, he had informed Mr. Tirmizi who had sent Mr. Y.A. Shaikh, Notary to his office and after taking print-outs of the affidavits on stamp paper, the same were handed over to the notary and all the witnesses signed them in his presence and that after the affidavits were prepared, they were handed over to Mr. Tirmizi's junior and that copies thereof were not given to anybody, including him. It was submitted that it is a matter of record that an application was made for bringing the affidavits on record, which came to be rejected by the trial court. Moreover, some of the witnesses themselves have stated that a part of the facts mentioned in the affidavits are false and incorrect. It was submitted that when apparent contradictions have been brought on record, even considering the affidavits as previous statements, the endeavour on the part of the accused is to

point out the circumstances in which the affidavits were prepared and filed before the Supreme Court, particularly when none of the witnesses have been able to explain and point out to the court as to how, when and where the affidavits were prepared and who prepared them and who got them typed.

14.16 The learned counsel for the appellants submitted that the prosecution, with a view to prove its case against the accused, has resorted to false stories by introducing theories through the testimonies of witnesses with reference to the people of the Patel community of village Sardarpura, to show that they were pre-determined and acted in a pre-planned manner with pre-meditation. It was submitted that the prosecution has not brought on record any credible or acceptable evidence that satisfies the ingredients of the offences alleged against the accused persons and that false theories are sought to be brought on record by the prosecution which are as follows:

14.17 According to the learned counsel, the first theory put forth by the prosecution is regarding the incident of setting cabins on fire near the Panchayat office on 28<sup>th</sup> February, 2002. It was submitted that in the entire charge, there is no reference to any incident of 28<sup>th</sup> February, 2002 of setting on fire the gallas and cabins. However, subsequently, with a view to show that the main incident was a pre-planned and pre-concerted one, the witnesses have started putting up stories that the Patels of Sardarpura have set the cabins on fire and were out to damage the properties of Muslims and also to cause injury to them, including taking their lives, as a

corroboration to the main incident of 1<sup>st</sup> March, 2002. It was submitted that there are three categories of witnesses:

- (i) where the witnesses have not even whispered in their depositions about the alleged incident of 28<sup>th</sup> February namely, PW-39, 49, 50, 51, 53, 55, 58, 59, 61, 66, 67, 73, 74, 78, 79, 80, 81, 84 and 85;
- (ii) where though the witnesses have referred to the incident of 28<sup>th</sup> February in their depositions, they have not stated that they were set on fire by a mob of Patels of Sardarpura namely, PW-40, 41, 42, 43, 44, 51, 52, 54, 57, 60, 63, 64, 65, 68, 75, 76 and 87; and
- (iii) those who have referred to the incident of 28<sup>th</sup> February, and have said that it was done by a mob of Patels of Sardarpura namely, PW-46, 47, 48, 56, 66, 69, 70, 71, 72, 77, 82 and 83.

14.17.1 Referring to the testimony of PW-46 Pathan Sabirmiya Akumiya, it was pointed out that he is not a witness to the main incident, and that neither has his statement been recorded by the first investigating agency, nor has he volunteered to give his statement at the relevant point of time and that for the first time in his application dated 6<sup>th</sup> May, 2008 addressed to the SIT, he has referred to the incident of 28<sup>th</sup> February, 2002. However, thereafter, in his statement recorded by SIT on 20<sup>th</sup> May, 2008, he has not referred to this incident. Therefore, for the first time before the court, he has stated these facts which he has not stated before the investigating agency and thus, it is a vital omission on his part, which is proved on record.

14.17.2 Referring to the testimony of PW-47 Ibrahimbhai Rasulmiya Shaikh, it was pointed out that while this witness has stated about the incident of 28<sup>th</sup> February, 2002 in paragraph 3 of his testimony, contradictions have been duly brought out by the prosecution in the cross-examination. It was submitted that in the first information report lodged on 2<sup>nd</sup> March, 2002, he has not referred to the incident of 28<sup>th</sup> February; the local police had recorded two statements on 10<sup>th</sup> March, 2002 and 1<sup>st</sup> June, 2002, wherein he has remained silent about the incident. He has not referred to this incident in his affidavit before the Supreme Court made on 6<sup>th</sup> November, 2003 nor has he stated so before the SIT in his statement dated 11<sup>th</sup> June, 2008. Therefore, for the first time, he has stated this fact before the court, which is a vital omission that has been proved on record.

14.17.3 Reference was made to the testimony of PW-48 Sabirhussain Kadarmiya Shaikh to point out that while this witness has deposed with regard to the incident of 28<sup>th</sup> February, 2002, it has been brought out in his cross-examination that in his statement recorded on 6<sup>th</sup> March, 2002, he has not made any reference to this incident and hence, a vital omission has been proved on record.

14.17.4 Reference was made to the testimony of PW-66 Akbarmiya Rasulmiya Shaikh, to point out that while this witness has deposed with regard to the incident in paragraph 2 of his testimony, in his cross-examination, a contradiction has been brought out that in his previous statements he had not mentioned this incident. It was submitted that the witness has deposed a fact which was not the case of the prosecution and

he has confirmed the fact that he has not stated so in his statement recorded by the police on 10<sup>th</sup> March, 2002 as well as in his statement recorded by the SIT.

14.17.5 Referring to the testimony of PW-69 Mahemoodmiya Hussainmiya Shaikh, it was pointed out that while the witness has deposed with regard to the incident of 28<sup>th</sup> February in paragraph 2 of his testimony, this witness is not a witness of the incident, despite which he says so. However, a vital omission has been proved that he has not stated so in his statement dated 6<sup>th</sup> March, 2002.

14.17.6 Referring to the testimony of PW-71 Mangabhai Ramabhai Raval, it was pointed out that the witness has deposed with regard to the incident in paragraph 2, however, a contradiction has been brought out in paragraph 8 of his testimony that the entire portion has not been stated by him in his previous statement. It was submitted that the local police agency has not recorded the statement of this witness nor has he volunteered to say anything. After the SIT came to be constituted, an application came to be made in 2008 and in pursuance thereto, his statement came to be recorded in May, 2008, wherein he has not stated such facts. Therefore, he has deposed about the incident for the first time before the court.

14.17.7 Referring to the testimony of PW-72 Prahladbhai Nathabhai Raval, it was pointed out that in paragraph 2 of his deposition, he has stated that the Patels of their village had set the gallas in the bazaar on fire, however, the fact that he had not stated the same before the SIT in his statement dated 20<sup>th</sup> May, 2008 has been brought on record in his cross-

examination. It was submitted that the omission has been proved as a contradiction by the Investigating Officer. Moreover, the statement of this witness was not recorded by the local police at the relevant time nor did he volunteer to do so and after the formation of the SIT, he sent an application whereafter the SIT recorded his statement.

14.17.8 Reference was made to the testimony of PW-77 Badrunisha Akbarmiya Shaikh to point out that while she has deposed with regard to the Patels of Sardarpura having set cabins on fire on 28<sup>th</sup> February, 2002, in her cross-examination, it has been brought out that she had not stated such facts in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, therefore, the contradiction had been brought on record. It was further pointed out that PW-82 Sabirabibi Sabirhussain Fakir has stated with regard to the incident of 28<sup>th</sup> February in her examination-in-chief, however, in her cross-examination, a contradiction has been brought out that she had not said so in her statement dated 22<sup>nd</sup> May, 2008. It was further pointed out that similarly, PW-83 Sharifabanu Sabirhussain Fakir has deposed with regard to the burning of the cabins by the Patels of Sardarpura, however, it has come out from her cross-examination that she had not stated so in her statements dated 3<sup>rd</sup> March, 2002 and 24<sup>th</sup> June, 2008. It was submitted that the fact that the incident of 28<sup>th</sup> February was at the instance of Patels of Sardarpura has been stated for the first time before the court to see that the main incident is corroborated.

14.17.9 Referring to the testimony of PW-87 Patel Jitubhai Chhaganbhai, who was the Talati-cum-Mantri of Sardarpura at

the relevant time, it was pointed out that he has deposed that at around 10:30, the cabins in front of the Panchayat had been burnt on 28<sup>th</sup> February and that he had given a report to the Taluka Panchayat office. The cabins belong to Hindus, Muslims, Harijans, Patels, etc. It was submitted that the witnesses have deposed that a mob of people of Sardarpura/Patels had set these cabins on fire; however, if the mob of people of Sardarpura or Patels wanted to set cabins on fire, they could have easily identified the cabins/gallas belonging to Muslims only. Since the incident is an outcome of communal riots, Patels of the village would not set on fire any property belonging to Hindus and would target only those properties which belonged to Muslims. Therefore, the defence put up by the accused is consistent with the theory that the incidents that have occurred at Sardarpura have been committed by mobs from village Sundarpur and other villages and that the people of Sardarpura have not played any role. It was submitted that coupled with the testimony of the above witnesses, no charge has been framed for any incident of 28<sup>th</sup> February against the accused persons and that till the charge-sheet came to be filed, it was not the case of any of the witnesses that the gallas were set on fire by the Patel community on 28<sup>th</sup> February and therefore, there is no charge.

14.18 The learned counsel submitted that the second major story created by the prosecution is in the nature of existence of focus lights, halogen lights, etc. It was emphatically argued that the introduction of light theory is a major concoction by a number of witnesses, which would ultimately affect the reliability and credibility of the witnesses. It was submitted that as per the first information report, the

alleged incident had taken place at Shaikhvas between 11:30 of 1<sup>st</sup> March to 2:30 a.m. of 2<sup>nd</sup> March whereas the charge speaks of the incident of 9:30 to 2:30. It was submitted that positive evidence has come on record to the effect that street-lights of the village were not working as the electric connection of the Panchayat was disconnected for non-payment of electric dues. Therefore, the question that would arise is as to how the witnesses could identify the accused late at night, that is, virtually at midnight, in pitch darkness. It was submitted that to answer this question, the prosecution has come out with a story that two of the accused persons have fixed halogen lights from the overhead electric wires of the electric poles on the street and that the focus lights and the tubelights were fixed from such electric line of the street and further that in the light of flames of the jeep which was set on fire, the witnesses had seen the incident. It was submitted that during the course of submission of the first charge-sheet, the theory of availability of light itself, either in the nature of halogen lights or focus or tube-lights, was not put forth by the prosecution. Admittedly, the place of incident at Shaikh Mohalla, particularly Mahemoodmiya's house, is surrounded by the kabrastan and the rearwalls of the house of another mohalla, whereas on the public road, no street-lights were available and majority of the houses in Shaikh Mohalla had no electric connection. Moreover, there is no evidence that the light of any of the houses was on and that in that light, the witnesses had seen the accused.

14.18.1 Reference was made to the testimony of PW-48 Sabirhussain Kadarmiya Shaikh to point out that the said witness, in his deposition, has come out with a totally new story, namely that on 28<sup>th</sup> February, 2002, he was at home

with his family, when at around 7:30 in the evening, Patel Ambalal Maganbhai and Amratbhai Somabhai Mahervadia from Kapurvas opposite their house, were standing below the electric pole opposite their house and Amratbhai Somabhai climbed over the pole and joined the wires with the ends of the tube-light and directly started the light and at that time, Ambalal Maganbhai was standing near the pole and he and his father and members of the family were sitting inside the house, when Ambalal Maganbhai looked at his father and said that now they would enjoy beating the bandiyas and after uttering such words, he left. Reference was made to the cross-examination of the said witness to point out that the defence has brought out a contradiction, inasmuch as, the said witness had not stated such fact in the statement recorded by the police on 6<sup>th</sup> March, 2002. It was submitted that thus, the story about light is created after eight years for the first time before the court. It was submitted that the father of the witness is not examined in this case and his mother Kulsumbibi who has been examined as PW-53, is silent in this regard. It was submitted that while this witness says that from Kapurvas in front of his house, these two persons had come and were standing near an electric pole opposite their house, he has not stated this story in his immediate first version recorded on 6<sup>th</sup> March, 2002 and for the first time, has come up with this story in the court, after eight years. It was submitted that the witness had added a further allegation for the first time that on 1<sup>st</sup> March, 2002, there was a focus light in Shaikh Mohalla. It was contended that the witness for the first time has started propounding a case that light was available and that in that light, they could see the accused committing the offence, which is also not stated in his statement dated 6<sup>th</sup> March, 2002.

It was submitted that on both aspects, contradictions have been brought on record in his cross-examination, which has been proved through the testimony of the Investigating Officer.

14.18.2 It was submitted that the next witness who has been examined in support of the above theory is PW-54 Sharifmiya Bhikumiya Shaikh, who has deposed that on 1st March in the evening at around 7 o'clock, Amratbhai Somabhai Mahervadia had put a halogen lamp on the electric pole and at that time, he had said that today they would enjoy beating the bandiyas. It was submitted that the witness has not stated as to on which pole and situated at which place, the light was put. He has also not stated about the utterances of these words as alleged in his first statement dated 6<sup>th</sup> March, 2002. Referring to the cross-examination of the witness, it is pointed out that it has come on record that the witness has not made any grievance in this regard to anyone.

14.18.3 Referring to the testimony of PW-56 Ayubmiya Rasulmiya Shaikh, it was pointed out that this witness has also deposed that on 1<sup>st</sup> March, 2002, he had gone towards Munsafkhan's house and while he was returning home, he had seen the halogen lights on the street-lights focussed towards their mohalla. Thereafter, he had asked Kanubhai Sarpanch regarding the street-light bill having not been paid and he [Kanubhai Sarpanch] had said that the light bill was paid and had also said that now they would enjoy beating the Muslims. He has further deposed that Wireman – Mathurbhai Trikambhai had climbed up and started the lights and thereafter, he had returned home. It was submitted that there is no evidence in the entire record that there was any electric pole situated

opposite the entrance of Shaikh Mohalla. It was contended that while the witness refers to a street-light, admittedly, street-lights were not available due to disconnection for non-payment of bill by the Panchayat. It was submitted that the witness has not mentioned as to at which point of time Wireman – Mathurbhai Trikambhai had started the light and that the entire version which is vital and important has not been stated by him in his immediate version recorded by the Investigating Officer on 10<sup>th</sup> March, 2002 and such contradiction has been brought out in his cross-examination, which reveals that four vital facts have not been stated in his statement recorded by the police. According to the learned counsel, the facts have been improved deliberately as it was pitch dark on that night.

14.18.4 Reference was made to the testimony of PW-60 Bachumiya Imammiya Shaikh to point out that the said witness has stated that on 28<sup>th</sup> February, 2002, at around 5 o'clock in the afternoon, Wireman Mathurbhai Trikambhai had directly started the light on the street-light pole at the entrance of the mohalla and Becharbhai Odhavbhai and Kanubhai Sarpanch were there below the pole. It was submitted that specific evidence has come on record that street-lights were not working and the entire set of facts were not stated by this witness in his immediate version which was recorded on 3<sup>rd</sup> March, 2002 and that the contradiction has been brought on record in the cross-examination of the witness, which has been proved through the testimony of the Investigating Officer. It was pointed out that the witness has made a reference to Becharbhai Odhavbhai who is not even an accused in this case and that on certain allegations against him, an application to arraign Becharbhai Odhavbhai as an accused had been made

pending trial, which came to be rejected. It was submitted that Kanubhai Sarpanch being a known person, giving his name was very easy and hence, he is sought to be implicated like this by all the witnesses.

14.18.5 Reference was also made to the testimony of PW-65 Akbarmiya Nathumiya Shaikh to point out that the witness has stated that on 28<sup>th</sup> February, 2002 between 5 to 6 o'clock in the evening, Mathurbhai Trikambhai (Wireman), Kanubhai Sarpanch, Becharbhai Odhavbhai had put focus lights on the street-lights. It was submitted that in the cross-examination of the witness, a contradiction is brought out, namely that, this witness in his statement recorded on 10<sup>th</sup> March, 2002 had not stated this fact and that the witness has sought to involve Becharbhai Odhavbhai, who is not even an accused and Kanubhai Sarpanch. It was submitted that thus, there is a vital omission on facts which has been proved as a contradiction through the testimony of the Investigating Officer.

14.18.6 Reference was made to the testimony of PW-70 Munsafkhan Yasinkhan Pathan to submit that in his entire examination-in-chief, the witness has not made any reference to availability of light. According to the learned counsel, this witness is the real mastermind who created the story. In his statement recorded on 6<sup>th</sup> March, 2002 he has not stated anything about the existence of light, whereas in his cross-examination, he has admitted that the street-lights of the mohalla were working. It was submitted that even in his affidavit affirmed on 31<sup>st</sup> March, 2004, he is silent about halogen or focus lights and that he has created the story for the first time in both his statements before the SIT dated 11<sup>th</sup>

June, 2008 and 14<sup>th</sup> July, 2008. It was submitted that though in both his statements before the SIT, he had stated about lights, he has deliberately avoided saying so in the examination-in-chief. Reference was made to paragraph 20 of the deposition of this witness to point out that he has admitted that at the time of the incident, the street-lights were not on.

14.18.7 Reference was also made to the testimony of PW-71 Mangabhai Ramabhai Raval to point out that the said witness has deposed that late at night, mobs of Patels were seen and that the focus lights were on. It was pointed out that no statement of this witness was recorded at the initial stage by the Investigating Officer nor had he volunteered to do so, though he claims to be an eye-witness, and that after the Special Investigation Team came to be constituted, he had sent an application in 2008 and pursuant thereto, his statement came to be recorded on 20<sup>th</sup> May, 2008. It was pointed out that even in that statement which was recorded after six years, the witness has not referred to the fact of focus light being on so that he could see the incident even from a distance of a hundred feet. It was pointed out that the contradiction has been brought on record in the cross-examination of the witness. According to the learned counsel, this witness is a got up witness, who has been subsequently brought into the picture.

14.18.8 Reference was made to the testimony of PW-86 Patel Dineshbhai Bhagwanbhai, the Deputy Engineer, UGVCL to point out that the said witness has stated that there was a possibility that a wire could have been connected; however, he has stated that there was no evidence that there was a live

wire. Moreover, the witness has not verified the actual position at site. Reference was made to the queries raised by the SIT at Exhibit-666 and the reply given by the witness dated 14<sup>th</sup> May, 2008 (Exhibit-667) to submit that the opinion which the witness has given is not stated in the reply, inasmuch as, no opinion in that regard was sought for by the SIT. It was submitted that admittedly, from the deposition of the witness, it is proved that street-lights were not started till 22<sup>nd</sup> June, 2002 and that the street-light cables and meters were removed. It was further pointed out that the witness has admitted that he had never visited Shaikh Mohalla and that he has no personal knowledge about the position of the wires. It was submitted that, therefore, the testimony of the said witness, in no way, supports the prosecution case.

14.18.9 Reference was also made to the testimony of PW-87 Patel Jitubhai Chhaganbhai namely, the Talati-cum-Mantri of Sardarpura to point out that the said witness has stated that on the street-light poles, tubelights and bulbs have been fixed, however, in February, the Panchayat did not pay the bills and hence, the street-light connection had been disconnected by the GEB.

14.18.10 Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar who was discharging duties as a Police Sub-Inspector at Vijapur Police Station, to point out that the said witness in his examination-in-chief has stated that on 1<sup>st</sup> March, 2002 when they were patrolling, lights were on from the Panchayat building till Shaikhvas and that the second time between 1:45 to 2:00, the lights were shut off. It was argued that being a responsible police officer, this witness should not

have tried to support the case of the prosecution by deposing incorrectly. It was submitted that the witness has deposed regarding the light being on from the Panchayat building till Shaikh Mohalla for the first time before the court. Referring to the cross-examination of the witness, it was pointed out that a specific question is put to him and the contradiction has been brought out. Reference was also made to the testimony of PW-91 Mahendrasinh Lalsinh Rathod (M.L. Rathod) to point out that the said witness has also deposed that at around 8:30, when they had gone to Sardarpura, the street-lights were on. It was submitted that in his cross-examination, a contradiction has been brought on record, namely that, the witness had not stated this fact in his statement recorded by SIT on 17<sup>th</sup> June, 2008. Reference was further made to the testimonies of four other police witnesses. Referring to the testimony of PW-99 Krishnakumar Kantilal, it was pointed out that the said witness has deposed that when they were patrolling at Sardarpura village for the first time, the tube-lights on the street-lights of the Sardarpura village were on. The attention of the court was drawn to the cross-examination of the witness to point out that a contradiction has been brought on record to the effect that in his statement recorded on 9<sup>th</sup> March, 2002, the said witness had not stated that the street-lights were on and that when they reached Shaikhvas, they had not seen halogen lights at any place. It was submitted that thus, very conveniently, the police officers have deposed in the same manner making an attempt to support the prosecution case by making incorrect statements. Therefore, purposefully, in his examination-in-chief, for the first time after eight years, the witness has deposed that on the first occasion when they had gone for patrolling, the tube bulbs of the street-lights were on.

Reference was made to the testimony of PW-100 Razakbhai Allarakhabhai, an unarmed police constable to point out that the said witness has stated that while patrolling, they had gone towards Shaikh Mohalla where three cabins were burnt and there were no persons and at that time, the street-lights were on. Referring to the cross-examination of the witness, it was pointed out that an omission has been brought out to the effect that such statement had not been made in his statement recorded on 9<sup>th</sup> March, 2002. Reference was also made to the testimony of PW-102 Laljibhai Arjanbhai Desai to point out that the said witness has also, in line with the testimonies of the other witnesses, stated that on the first occasion when they went for patrolling, the lights in the village were on, and on the second occasion at 1:45, the street-lights were shut off. It was pointed out that in the cross-examination of the witnesses, it has been brought out that in his statement dated 9<sup>th</sup> March, 2002, he had not stated the fact with regard to the street-lights being on at the time when they first carried out patrolling of Shaikh Mohalla. Reference was also made to the testimony of PW-103 Ganpatbhai Narsinhbhai to point out that the witness in his examination-in-chief has deposed that for the first time, when they went for patrolling and resorted to firing, the lights were on. It was pointed out that in the cross-examination of the witnesses, the omission has been brought out that in his statement dated 6<sup>th</sup> March, 2002, he has not stated that while they were patrolling, the street-lights were on. Reference was also made to the testimony of PW-110 Kakusinh Ranjitishn Vaghela to point out that in his cross-examination, the witness has admitted that when he went to Shaikh Mohalla, at that time, there was darkness at Shaikh Mohalla as well as the adjoining areas. The witness has also

admitted that they had carried out the rescue operation at Shaikhvas in the light of the vehicles and batteries. It was pointed out that the said witness has also admitted that he had not seen any halogen lights put up at the scene of incident nor had anybody pointed out the same to him. He has further admitted that he had not investigated as to whether there was any light at the scene of offence, and that, in his investigation it has come out that there were no lights at the time of incident at the scene of offence. While the witness has thereafter stated that at the time of the incident, there were lights but he had not seen the lights; however, verifying from the record, the witness has stated that the fact regarding existence of lights in Shaikh Mohalla has not been disclosed in the statements of any witnesses. He has further deposed that he has come to know from the persons residing at Sardarpura that at the time of the incident, the lights were on. It was submitted that the witness has not independently made any investigation on the aspect of existence of any kind of light at or near the scene of offence, be it focus lights, halogen lights, tube lights or any other light, nonetheless he has tried to support the prosecution case by stating that at the time of the incident, the lights were on.

14.18.11 In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Bollavaram Pedda Narsi Reddy and others v. State of Andhra Pradesh***, (1991) 3 SCC 434, wherein the appellants therein were admittedly persons with whom the two witnesses had no previous acquaintance; the occurrence happened on a dark night and the court observed that when the crime was committed during the hours of darkness and the

assailants were utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. The court, in the facts of the said case, held that in the absence of cogent evidence that PWs 1 and 2 therein by reason of the visibility of the light at the place of occurrence and proximity to the assailants, had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the appellants therein were the real assailants. The court took note of the fact that there was no whisper in the Ex-P-1 statement that there was some source of light at the scene, and was accordingly of the view that the omission could not be ignored as insignificant. The court observed that when the Investigating Officer had visited the scene, he made reference to the street lights, petrol bunk light, etc. and whether the street lights and the petrol bunk light had been burning at the time of the occurrence and the spot where the incident happened was so located as to receive the light emanating from these sources were required to be made out by the prosecution. When this significant fact was left out in the earliest record, the improvement in the course of investigation and trial could be of no avail. The court further held that when no natural light was available and the street light was at a distance, it was unlikely that the eyewitnesses by momentary glance of the assailants who surrounded the victim had a lasting impression and the chance of identifying the assailants without mistake.

The credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression.

14.18.12 Reference was also made to the decision of the Supreme Court in the case of ***Arokia Thomas v. State of Tamil Nadu***, (2006) 10 SCC 542, wherein, the court observed that undisputedly, at the place of occurrence, there was no electric light. In the first information report, it was nowhere stated as to what was the source of light in which the witnesses identified the accused persons. When the question was put to PW-1 by the investigating officer during the course of investigation as to whether he identified the accused persons in torchlight, moonlit night or in the light of the vehicle, he kept mum and nowhere stated before the police that he identified the accused persons in the light of the vehicle. For the first time, it appeared that PW-1 had disclosed in his evidence before the Sessions Court after more than two and a half years of the date of occurrence that he identified the accused persons in the light of motorcycle. The court was of the view that the evidence of the witness disclosing that he identified the accused persons in the light of the vehicle was highly doubtful, especially when this statement had been made for the first time in the Sessions Court.

14.18.13 Reliance was also placed upon the decision of the Supreme Court in the case of ***State of M. P. v. Ghudan***, (2003) 12 SCC 485, wherein the court agreed that the finding recorded by the High Court that if really there was a tube-light at the place of the incident by which the witness identified the

respondent, then the investigating agency would certainly have shown the existence of a tube-light and its placement in the sketch because it was a very important fact mainly because the identification of the accused was a vital factor to be proved by the prosecution. The court was of the opinion that the benefit of the omission to point out the existence of such light in the sketch, should go to the accused.

14.18.14 It was submitted that from the above facts and circumstances, in essence and substance, it is clear that an improved version has been put forth by the witnesses regarding putting up sources of light prior to the incident, at or near the scene of offence, so as to show that the main incident was a pre-planned and pre-concerted one with a view to establish the charge of conspiracy.

14.19 The learned counsel next submitted that the third theory put forth by the prosecution is as regards a meeting held by Haresh Bhatt, leader of the Vishwa Hindu Parishad giving a hate speech and distribution of trishuls by him. It was submitted that this theory is sought to be propounded through the testimony of PW-46 Pathan Sabirmiya Akumiya and PW-60 Bachumiya Imammiya Shaikh. Referring to the testimony of Pathan Sabirmiya Akumiya, it was pointed out that the witness has deposed that about twenty to twenty-five days prior to the incident, Haresh Bhatt, leader of the Vishwa Hindu Parishad had come to their village and had convened a meeting of youth of the Patel community at the Mahadev temple at Sardarpura. At that time, he was serving at the water works and when Haresh Bhatt came, there was a mob of Patel youth at the temple. He was standing and watching and Haresh Bhatt

was giving a speech that "*Muslims are a burden to Hindustan and that they have no right to live in Hindustan and that this time, if we get the opportunity and there are riots, not one Muslim should remain alive*" and thereafter, Haresh Bhatt had distributed trishuls. Reference was made to the testimony of the said witness to point out that an omission in the nature of contradiction has been brought out in the cross-examination of the said witness to the effect that he had not stated such facts in his statement recorded by the police on 20<sup>th</sup> May, 2008 as well as the application made before the SIT. It was submitted that insofar as this witness is concerned, his statement was not recorded at the relevant time and that it was only after he had sent an application to the SIT on 6<sup>th</sup> May, 2008 that his statement came to be recorded for the first time on 20<sup>th</sup> May, 2008. It was submitted that at no point of time, this theory has been placed by him, though he has claimed that he had seen the speech being delivered by Haresh Bhatt and that for six years, the witness has remained silent. It was pointed out that the witness belongs to the Pathan community and was not a victim and that he had a number of opportunities to inform the authorities as regards these facts, but he did not do so. It was submitted that there is no apparent logic behind this witness coming out after six years and telling the Investigating Officer, more so, because the Godhra incident was not anticipated and that there was no question of any preparation being made in advance. It was submitted that this theory is created after six years just with a view to show the court that the incident is a pre-planned and pre-conspired one. It was submitted that there is no investigation on this aspect and that had this fact been found to be correct, Haresh Bhatt would also have been arraigned as an accused, whereas he has neither been

arrested nor named as an accused or put to trial. It was submitted that an attempt has been made after six years to show that this is a pre-concerted and pre-planned attack by the Patel community of Sardarpura.

14.19.1 Referring to the testimony of PW-60 Bachumiya Imammiya Shaikh, it was pointed out that this witness has deposed that on 27<sup>th</sup> February, 2002, he was sitting under the banyan tree at the entrance of his mohalla when three to four vehicles came from the market and went towards Mahadev. The vehicles belonged to Haresh Bhatt and leaders of the Bajrang Dal and a meeting of Patels had been convened inside Mahadev and trishuls were distributed, and Haresh Bhatt was saying that if this time, there are riots, not a single Muslim should escape and if they wanted weapons, they should ask him. It was submitted that this witness has improved upon the evidence of PW-46 Pathan Sabirmiya Akumiya to show that the meeting was held on 27<sup>th</sup> February. It was pointed out that the statement of this witness was recorded on 3<sup>rd</sup> March, 2002, however, he did not refer to the incident and for the first time, he has narrated the same in his application addressed to the SIT. Referring to the cross-examination of this witness, it was pointed out that subsequently, the witness has denied that in his application dated 9<sup>th</sup> May, 2008 and statement dated 10<sup>th</sup> May, 2008 before the SIT, he had stated that fifteen days prior to the incident taking place on 27<sup>th</sup> February, 2002, he had stated that Haresh Bhatt and leaders of Bajrang Dal had come to the neighbouring villages. He has also stated that he himself has not witnessed Haresh Bhatt coming, but that Iqbalbhai had informed him. It was submitted that this witness has stated before the SIT in both the statements that fifteen days prior to

27<sup>th</sup> February, 2002, Haresh Bhatt and leaders of Bajrang Dal had come. He has thereafter improved upon the version and lastly, he has stated that he has not seen Haresh Bhatt coming and that Iqbalbhai had told him about it. It was submitted that in these circumstances it is apparent that the theory of Haresh Bhatt having come and incited people is a got up one.

14.19.2 Referring to the testimony of PW-110 Kakusinh Ranjitsinh Vaghela, it was pointed out that in the cross-examination of this witness, it has come out that during the course of his investigation, he had not learnt any fact about Haresh Bhatt having distributed Trishuls at the Mahadev Temple or that Naranbhai Lallubhai, MLA of Unjha had organized a public meeting and given an inciting speech. It was submitted that the witnesses, through their testimonies, have engineered such circumstances which may lead the court to believe that the incident is an outcome of a preplanned act.

14.20 It was submitted that the fourth theory put forth by the witnesses to create evidence of a conspiracy, is the Bhajiya theory. Referring to the testimony of PW-47 Ibrahimbhai Rasulbhai Shaikh, it was pointed out that the witness has deposed that on 1<sup>st</sup> March, 2002, they had gone to work in the field and had returned to Shaikh Mohalla as the situation in the village was tense and Basirabibi had met him and told him that she had gone to the shop of Dahyabhai Vanabhai to buy gram flour and that Dahyabhai Vanabhai had told her that they may eat as many Bhajiyas as they like today, however, from tomorrow, they might not get to eat them. The attention of the court was invited to the cross-examination of the said witness to point out that an omission has been brought out in the

nature of contradiction to the effect that the witness had not stated regarding the said incident in the first information report dated 2<sup>nd</sup> March, 2002 as well as his statements dated 10<sup>th</sup> March, 2002 and 1<sup>st</sup> June, 2002. It was submitted that therefore, for the first time in the affidavit and in the year 2008 before the SIT, this theory of Bhajiya appears after six years. It was submitted that in the affidavit submitted before the Supreme Court, the name of the shop owner has been mentioned as Dahyabhai Hirabhai, whereas no such person is an accused in this case. Reference was also made to the testimony of PW-78 Basirabibi Bachumiya Shaikh, wherein she has deposed that at 5 o'clock in the evening of 1<sup>st</sup> March, she had gone to purchase gram flour from the shop of Dahyabhai Vanabhai and he had asked her as to what she wanted to do with the flour and she had informed him that she wanted to make Bhajiyas, whereupon Dahyabhai Vanabhai had told her that for the last time today, they may eat Bhajiyas. Tomorrow, they would eat only provided they would remain alive. Referring to the cross-examination of the witness, it was pointed out that an omission has been brought out to the effect that in her statements dated 17<sup>th</sup> April, 2002 and 11<sup>th</sup> June, 2008 she has not stated such facts. It was further pointed out that the first statement of this witness was recorded on 17<sup>th</sup> April, 2002, that is, forty-six days after the incident and even at that point of time, she has not stated this fact and for the first time before the SIT on 22<sup>nd</sup> May, 2008, she has referred to such incident. It was submitted that therefore, considering both these depositions together, it transpires and comes on record that this theory was first introduced by the complainant in his first affidavit dated 6<sup>th</sup> November, 2003 after more than nineteen to twenty months of the incident and

for him, this incident is in the nature of hearsay only. It was submitted that Basirabibi does not refer to the incident in her initial statement recorded by the police and after the affidavit, when the SIT came to be constituted and further investigation was carried out, Basirabibi had the opportunity to introduce this theory in May, 2008. It was contended that the sole purpose for introducing such facts is that the prosecuting agency wanted to show the court through the witnesses, that this was a pre-concerted and pre-planned act.

14.21 The learned counsel further submitted that another theory put forth by the prosecution through the testimony of PW-46 Pathan Sabirmiya Akumiya is the water pump keys story. It was pointed out that this witness is the only witness introducing this theory. Referring to the testimony of the said witness, it was pointed out that he has deposed that on 1<sup>st</sup> March, 2002 at around 8 o'clock, Becharbhai Odhavdas Patel had come to take the water-works keys from him, but he had not given it to him and hence, he had gone and thereafter, at around 08:30 at night, he had come again and said that Sarpanch had called for the keys and had taken away the keys from him. It was submitted that the statement of this witness is not recorded by the first investigating agency, nor did he volunteer to give his statement till the SIT was constituted. Therefore, for the first time in his application dated 6<sup>th</sup> May, 2008 to the SIT, he has introduced this theory. It was submitted that by virtue of introducing this theory, the prosecution wants to establish that in anticipation of the attack on Shaikh Mohalla, keys of the water-works were taken from the bore operator to show that it was pre-planned and pre-concerted act.

14.22 It was submitted that the next theory propounded by the prosecution is that Naranbhai Lallubhai Patel, MLA of Unjha, had given a speech inciting the Patels of Sardarpura. It was submitted that this theory was brought in by PW-47 Ibrahimhai Rasulbhai Shaikh. Referring to paragraph 13 of his evidence, wherein the witness has been cross-examined, it was pointed out that this witness in his affidavit before the Supreme Court has introduced a story regarding Naranbhai Lallubhai Patel in paragraph 29 thereof, but in a query raised by SIT in respect thereto, when he was confronted in respect of the contents of the affidavit, he replied that he did not know Naranbhai Lallubhai Patel, MLA, nor did he know anything about holding of any meeting. Referring to the contents of paragraph 12 of his testimony, it was pointed out that the witness has understood what has been stated by him in his affidavit which was translated in Gujarati and he affirmed it after understanding the contents thereof. Secondly, he cannot give any answer in relation to who prepared the affidavit, where he got it typed and before whom it was notarized etc. Thirdly, the witness has admitted that he had visited the office of Citizens of Justice. It was submitted that when the witness has clearly stated in his statement to SIT in response to a question put to him with reference to the averments regarding Naranbhai Lallubhai Patel, that he did not know Naranbhai Lallubhai Patel, nor did he know about the meeting held etc., it is apparent that on vital and material facts, the allegations, averments were not made by the witnesses but they were created by outsiders which clearly supports the defence version. Reference was also made to the testimony of PW-49 Iqbalmiya Rasulmiya Shaikh, to point out that the witness has

deposed that three days prior to the incident, Naranbhai Lallubhai, who was the MLA of Unjha, had come to Mahadev Temple at Sardarpura and had held a meeting of Patels. The Patels were saying in the mike that Naranbhai Lallubhai would say two words. At that time, Naranbhai Lallubhai had said that the Government was theirs and they may do as they please. He has further deposed that he had heard him while he was sitting at his cabin at the entrance of Shaikh Mohalla. It was pointed out that the statement of this witness was recorded on 10<sup>th</sup> March, 2002; however, he has not stated so at the first opportunity.

14.22.1 Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar to point out that the said witness has admitted that in his statement dated 16<sup>th</sup> June, 2008, he has stated that three days prior to the incident, Minister Naranbhai Lallubhai Patel had held a meeting due to which, fear had been created amongst the people belonging to Muslim community and that in this regard, Nazirmahammed Akbarmiya Shaikh had represented on 28<sup>th</sup> February, 2002, near the entrance of Shaikh Mohalla with regard to the fear felt by the Muslim community and that he had told them that they were there and that nothing would happen to them. In this connection, the witness has stated that on 28<sup>th</sup> February, 2002, nobody from Shaikh Mohalla had met him and no such representation was made to him and that he does not know Nazirmahammed Akbarmiya Shaikh. Referring to the testimony of PW-110 Kakusinh Ranjitsinh Vaghela, it was pointed out that the said witness has stated that in his investigation, no facts had been revealed with regard to Naranbhai Lallubhai Patel, MLA of Unjha having given any inciting speech. It was

submitted that Naranbhai Lallubhai Patel is not an accused in this case. The investigating agency has found the allegations with respect to Naranbhai Lallubhai and his meeting to be not reliable and sufficient to take any action against him, but the witnesses have tried to bring in this theory at a belated point of time to show that it is pre-concerted and pre-planned act on the part of the accused.

14.23 It was submitted that the next theory propounded by the prosecution is that a witness is asked to remove his cabin for the risk of burning fodder. Reference was made to the testimony of PW-60 Bachumiya Imammiya Shaikh to point out that the said witness has deposed that four days prior to 27<sup>th</sup> February, 2002, he was sitting at Rafiqbhai's galla and at that time, Raghubhai Revabhai had come and told him that his cabin was touching his house and that he should lift it from there as the fodder was stored in his house which would get burnt. Referring to the cross-examination of the witness, it was pointed out that this witness has not stated these facts in his statement recorded on 2<sup>nd</sup> March, 2002 before the police and that the contradiction has been proved through the testimony of the Investigating Officer. It was, accordingly, submitted that the witness has come out with these facts for the first time in his application dated 9<sup>th</sup> May, 2008 to the SIT. By introduction of this theory belatedly, the witness has tried to falsely implicate as many persons as possible in this incident.

14.24 It was submitted that yet another theory put forth by the prosecution is forcing and asking the witnesses to close down their cabins. Referring to the testimony of PW-60 Bachumiya Imammiya Shaikh, it was pointed out that this

witness has deposed that on 28<sup>th</sup> February, 2002, there was a call of Gujarat Bandh and that in the morning at around 10 o'clock, he was sitting at his galla, at that time, Patel Rajeshbhai Punjabhai, Rameshbhai Kantibhai, Maheshbhai Jivanbhai had come and had said that as there is a call of Gujarat Bandh, he should close his galla. Rameshbhai Kantibhai had caught hold Rafiqbhai from the waist and thereafter, those people had gone towards Mahadev. Referring to the cross-examination of the witness, it was pointed out that these facts were not stated by the witness in his statement dated 3<sup>rd</sup> March, 2002 recorded by the police. It was submitted that even the factum of the accused going to Mahadev is sought to be brought to show the intention of Patel community of Sardarpura to do something. It was submitted that these facts are not stated in the statement dated 3<sup>rd</sup> March, 2002 recorded by the Investigating Officer and that this fact is mentioned for the first time before the SIT in his application dated 9<sup>th</sup> May, 2008. Referring to the testimony of PW-62 Rafiqmiya Mohammadhussein Shaikh, it was submitted that this witness has stated that on 28<sup>th</sup> February, 2002 in the morning at around 9 to 10 o'clock, he was at his cabin, when some persons belonging to the Patel community had come and were getting the shops and cabins shut and they had also come to his cabin and had told him to shut his cabin and that if he did not close his cabin, they would burn it. That he had shut his cabin and at the time when he was closing the cabin, the Patels were hurling abuses and had entered into a scuffle with him and that the members of his mohalla had come, and Rameshbhai Kantibhai, Sureshbhai Baldevbhai, Rajeshbhai Punjabhai had all entered into a scuffle with him and that he had left the scuffle and had gone to his house in the mohalla.

That at that time, the mob had gone towards Mahadev temple. Referring to the cross-examination of the witness, it was pointed out that a contradiction is brought out and that this witness in either of his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008, has not stated about this incident and has deposed such facts for the first time in the court after eight years.

14.25 Next, it was submitted that yet another theory has been propounded by the prosecution with regard to shifting of shop and goods in the shops. Reference was made to the testimony of PW-63 Bhikumiya Kalumiya Shaikh to point out that the said witness has deposed that on 28<sup>th</sup> February, 2002, gallas were burnt in the bazaar. Thereafter, they had come home, and at around 4 o'clock, he had gone to the bazaar, at that time, Shankerbhai, who had a shop adjoining the shop of Anifbhai Abdulbhai, was lifting the stock from his shop and that he asked him as to why he was suddenly emptying his shop and he said that he was to take another shop on rent and that the goods were to be kept in the compound of Mahakali Mandir. Thereafter, they had returned. Referring to the cross-examination of the witness, it was pointed out that in his statement dated 10<sup>th</sup> March, 2002 recorded by the police, he has not stated such facts. It was submitted that two statements of this witness have been recorded. In the first statement dated 10<sup>th</sup> March, 2002, he has not come out with any such facts and for the first time when his statement is recorded by the SIT on 10<sup>th</sup> May, 2008, the witness has narrated these facts. It was submitted that this is yet another attempt on the part of the prosecution to show that the main incident was a pre-planned and pre-concerted one.

14.26 It was submitted that the next theory advanced by the prosecution is regarding a conversation between accused No.49 and Becharbhai Odhavbhai. Referring to the testimony of PW-68 Gulamali Akabarmiya Shaikh, it was pointed out that the witness has deposed that on 27<sup>th</sup> February, 2002 in the evening at around 4 o'clock, he was doing colour work at the Jain Derasar, Sardarpura. He was working in the front, outside the Derasar and on that day in the evening at around 4 o'clock, Ambalal Maganlal Kapur and Becharbhai Odhavbhai passed from there and they were talking about cutting the bandiyas. The attention of the court was invited to the cross-examination of the said witness, to point out that it has been elicited that in both his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 as well as in his applications dated 9<sup>th</sup> May, 2008 and 11<sup>th</sup> April, 2008, the witness has not stated these facts. It was pointed out that this witness has also referred to a conversation between PW-68 and PW-57 about Mukeshbhai Dahyabhai, viz., that on 1<sup>st</sup> March, 2002, after the gallas had been burnt in the village, he had come home and in the evening at around 5:00 to 5:30 hours, they were sitting at the entrance of the mohalla, at that time, Mustumiya Rasulmiya had gone to the shop of Dahyabhai Vanabhai and upon returning, he had told him that Dahyabhai's son, viz., Mukeshbhai Dahyabhai had said that today, they may eat as much as they like. That when he had asked Mustufabhai, he replied that he did not know anything in this regard. It was pointed out that these facts have not been stated by this witness in his statements referred to hereinabove as well as the above referred applications and that he has stated these facts for the first time before the court. It was submitted that moreover, PW-57 Mustufamiya

Rasulmiya Shaikh is silent about this fact and does not say anything regarding Mukeshbhai Dahyabhai having said such a thing. It was submitted that thus, PW-68 Gulamali Akbarmiya Shaikh has created a story which was not part of the record, which shows how the witnesses have created the stories one after the other.

14.27 The learned counsel submitted that one more theory advanced by the prosecution is regarding a tractor containing two, three or four barrels of kerosene and one barrel of petrol parked on the road and such barrels being carried by the accused. Reference was made to the testimony of PW-71 Mangabhai Ramabhai Raval, who has deposed that on 1<sup>st</sup> March, 2002 at around 9 o'clock, Ramabhai Mohanbai Patel had parked a tractor on the side of his house wherein, there were two, three, four barrels of kerosene and one barrel of petrol. Thereafter, he had seen Natubhai Kacharabhai Patel, Jayantibhai Ambaram Patel, Kalabhai Bhikhabhai Patel, Bakabhai Mangalbhai Patel, Kantibhai Prabhudas, Jitendrakumar Kantilal, Bhikhabhai Joitabhai, passing through the road in front of his house. They had gone towards the house of Kantibhai Prabhudas at Kapurvas and that he had himself seen the cans of kerosene and that when they had passed in front of his house, a smell was emanating and hence, he had known. From Kantibhai Prabhudas's house, there are two windows for going towards Kapur Mohalla, and from there, they had gone to Shaikh Mohalla through Mahadev. It was submitted that this witness's statement was not recorded at the first point of time, nor did he volunteer to give his statement at any point of time before 2008. This fact he has stated for the first time in his application dated 7<sup>th</sup> May, 2008

and in furtherance thereto, when his statement was recorded by SIT, this fact was not stated by him in his statement dated 20<sup>th</sup> May, 2008, which clearly shows in what way the applications and affidavits have been engineered at the instance of somebody in respect of facts to which the witnesses are in fact not witnesses. It was submitted that in the cross-examination of the witness, a contradiction has been brought on record and that this is the only witness who has spoken about these facts. Moreover, Ramabhai Mohanbai Patel, who is stated to have parked the tractor, is not an accused in this case.

14.28 The learned counsel submitted that the next theory put forth by the prosecution is regarding taking away of bore well account books. Reference was made to the deposition of PW-78 Basirabibi Bachumiya Shaikh to point out that the said witness has deposed that on 28<sup>th</sup> February, 2002 in the evening, Jayantibhai Ambarambhai had come and had taken the books of account of the bore well from her husband. It was submitted that all these theories have been advanced for bringing various accused within the sweep of the offence in question. Referring to the cross-examination of this witness, it was pointed out that a contradiction has been brought out, viz., that the witness has not stated these facts in her statements dated 17<sup>th</sup> April, 2002, 22<sup>nd</sup> May, 2008 as well as 11<sup>th</sup> June, 2008 and therefore, for the first time in the court, she has introduced this theory of the accounts book being taken away to falsely implicate Jayantibhai Ambarambhai.

14.29 It was submitted that yet another theory advanced by the prosecution is the "Kuber Tobacco theory". The learned

counsel referred to the testimony of PW-74 Sikandarmiya Rasulmiya Shaikh to point out that the witness has deposed that on 27<sup>th</sup> February, 2002, he had gone for doing labour work in the agricultural field of Baldevbhai Vanzara and that upon returning from the field, Kanubhai Joitabhai was sitting at the galla of Ishwarbhai Gopalbhai and he had said that he (the witness) would not get Kuber. That his people had burnt the train at Godhra and that he would not get Kuber. It was submitted that this theory has been got up to implicate Kanubhai Joitabhai who is the Sarpanch of the village. It was pointed out that at the relevant time, the statement of this witness was not recorded by the police, nor had he on his own given any statement. In his application before the SIT also, he has not referred to this fact, but for the first time he has stated this fact in the statement recorded by SIT on 22<sup>nd</sup> May, 2008. It was submitted that before the SIT, he has stated that Ishwarbhai Gopalbhai had told him that he would not get Kuber and now before the court, for the first time, he changes the story to bring in Kanubhai Joitabhai. Referring to the cross-examination of the witness, it was pointed out that the contradiction has been proved.

14.30 The learned counsel submitted that another theory put forth is that of electric current/wires joined with an iron rod at the place of the incident. Reference was made to the testimony of PW-48 Sabirhussain Kadarmiya Shaikh to point out that the witness has deposed that at the time of the incident, a long iron rod was there through which current had been passed and that in the house, the rod had been kept in the window through which the current was passing and that the said rod touched the D.S.P. and he also felt the current and

that the police had broken the lock on the door of the house with a gun and the wire through which the current was passing was also broken with the gun. From the said house, cries for help were coming. Referring to the cross-examination of the witness, it was pointed out that a contradiction has been brought out to the effect that these facts were not stated in his statement dated 6<sup>th</sup> March, 2002 recorded by the police. It was submitted that this fact has been stated for the first time in his statement before the SIT on 10<sup>th</sup> May, 2008, after a period of six years. Reference was made to the testimony of PW-46 Pathan Sabirmiya Akumiya to point out that the witness has deposed that the police had taken them to the room of Shaikhvas where the incident had taken place, that is, Mahemoodbhai Ismailbhai's room and the D.S.P. was standing there and the door of the room was opened. The D.S.P. had gone towards the window of Mahemoodbhai's room and had felt the current and the D.S.P. had said that the current was flowing and upon his saying so, other policemen separated the wires with a stick. Those wires appear to have been connected with the pole in front of the house of Natvarbhai Pabhabhai. Reference was made to paragraph 13 of the testimony of the said witness to point out that a suggestion had been put to the said witness that the above facts stated by him are not correct. It was submitted that such suggestion was put to him because his statement was not recorded by the police at the relevant time and he had volunteered for the first time to give his application on 6<sup>th</sup> May, 2008, wherein these facts were mentioned for the first time. It was submitted that both these witnesses have brought this theory after six years of the incident. Reference was also made to the testimony of PW-105 Anupamsinh Shrijaysinh Gehlot, District Superintendent of

Police, to point out that the said witness had admitted that the SIT had questioned him with regard to the people in Shaikh Mohalla having suffered shocks from the electric wires. The witness has admitted that they had carried out the work in the light of the headlights of the vehicles and that at that time, he had seen electric wires lying on the road of Shaikhvas and several police staff had felt the current and hence, the wires had been moved to the side with a stick. It was submitted that the D.S.P. has not stated that he had received any shock on account of an iron rod having been tied. He has stated that several policemen had felt the current and removed the wires with a stick, whereas no police officer had stated that he had received electric shock. The panchnama of the scene of offence and the panch witnesses also do not support this theory in any manner. It was urged that therefore, the stories are created to show how horrible the incident was that live wire was placed there for electrocution. It was submitted that the medical evidence also does not show that anyone had died due to electrocution or had received any such injuries.

14.31 The learned counsel further submitted that the next theory put forth by the prosecution is the four acid bottles theory which has been narrated by the witness in his statement before the SIT. Reference was made to the testimony of PW-52 Hizbulmiya Hussainmiya Shaikh to point out that the said witness has deposed that Patel Jagabhai Jivanbhai, who was a member of the mob, had acid bottles with him. Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar to point out that in his cross-examination, he has admitted that in his statement dated 16<sup>th</sup> June, 2008, he had stated that Hizbulmiya Hussainmiya Shaikh in his affidavit

before the Supreme Court had stated that upon asking Jagabhai Jivanbhai Patel as to why he was taking four acid bottles with him, he had said that he was taking it for the purpose of cleaning toilet. However, considering the atmosphere and the circumstances at that time, he had told him that they needed protection. It was submitted that in the above affidavits and the applications submitted to the SIT at a later point of time, all these theories are put up only with a view to show that the people of the Patel community of this village have pre-planned or conspired to do something against the Muslim community.

14.32 It was submitted that one more theory propounded by the prosecution to show that the incident was a pre-planned and pre-concerted one is with regard to breaking Memon Janbhai's shop by the Patels of the village and entering into one Valikaka's house and causing damages. Reference was made to the testimony of PW-72 Prahladbhai Nathabhai Raval, to point out that the said witness has deposed that on 1<sup>st</sup> March, 2002 in the evening at around 9 o'clock, he had returned from Sundarpur and there were mobs of Patels going around the village. He was at home and at around 10:00 to 10:30 hours, the shop of Memon Janbhai was broken and the people entered Valikaka's house and were shouting, kill and cut the bandiyas, and that his house was next door and that they had abused his brother Gugabhai Nathabhai. It was pointed out that the witness has further deposed that at Valikaka's house, Jagabhai Nathabhai Bhotu, Bhikhabhai Badarbhai, Talshibhai Haribhai, Ashokbhai Bhaktibhai, Girishbhai Manilal, Talshibhai Haribhai, Jagabhai Ranchhodbhai, Kanubhai Ranchhodbhai and others whose names are not

known were present, and that those persons had resorted to vandalizing the shop after which they had left. It was pointed out that there are two aspects in relation to the testimony of this witness, viz., that in the morning, the mobs of Patels were roaming and the witness has tried to implicate eight persons who are named herein. Referring to the cross-examination of the witness, it was pointed out that an omission in the nature of contradiction has been brought out in the testimony of the said witness, viz., in his statement dated 20<sup>th</sup> May, 2008 recorded by the SIT he has not stated these facts. It was submitted that this witness's statement was not recorded by the local police at the relevant time and that even in the statement recorded by SIT after six years of the incident, the witness has not mentioned these facts and for the first time such facts have been mentioned before the court to support and corroborate the prosecution case against the Patels of Sardarpura. Reference was made to the testimony of PW-39 Janmahammad Ismailbhai Memon, to point out that this witness does not say anything about this incident and on the contrary, they had made an application within eight days from the date of the incident which only refers to the damage caused to their shop. Referring to the application (Exhibit-439) made by the said witness, it was pointed out that the same does not mention the name or community of people who had looted and damaged the shop. Reference was made to the testimony of PW-42 Altafhussein Valibhai Memon, to submit that there is no reference to what has been deposed by Prahladbhai Raval. It was pointed out that in the cross-examination of this witness, it has come out that no damage was caused to his shop and his house, and hence, there was no question of Prahladbhai telling this fact to the court for the

first time. Reference was also made to the testimony of PW-43 Arifbhai Valibhai Memon, to point out that in his cross-examination, it has come out that no damage was caused to his shop and house and that no injury had been caused to his family members.

14.33 It was submitted that in its attempt to establish the charge of conspiracy against the accused, the prosecution has propounded yet another theory viz., four to five Patels and accused No.38 had put a petrol soaked rag below the cabin of PW-47 on 28<sup>th</sup> February, 2002. Reference was made to the deposition of PW-47 Ibrahimbhai Rasulbhai Shaikh, who is also the first informant, to point out that the said witness has deposed that on 28<sup>th</sup> February, 2002, two to three cabins belonging to Muslims and other lower communities had been burnt in the market in the presence of Shri Rathod and Shri Parmar and thereafter, four to five Patels had come to the entrance of their mohalla and Rajeshbhai Punjabhai had put a petrol soaked rag below his cabin and had thereafter left, after which he had gone near his cabin and thrown away the petrol soaked rag. Reference was also made to the cross-examination of the said witness to point out that a contradiction has been brought out to the effect that he had not deposed these facts in the first information report dated 2<sup>nd</sup> March, 2002, statements dated 10<sup>th</sup> March, 2002, 1<sup>st</sup> June, 2002, 11<sup>th</sup> June, 2008 as well as affidavit dated 6<sup>th</sup> November, 2003. It was submitted that these facts have not been narrated by this witness in any of these prior statements and hence, such an incident is a got up incident merely with a view to show that the main incident was a pre-planned one.

14.34 The learned counsel submitted that the last theory put forth by the prosecution is regarding two meetings said to have been held at Munsafkhan Pathan's residence. The first meeting is stated to have been held to file a complaint and the second meeting was in the nature of a peace meeting. Reference was made to the deposition of PW-70 Munsafkhan Yasinkhan Pathan, to point out that the said witness has deposed that on 1<sup>st</sup> March, 2002 in the morning, he was at home, at that time, all those persons whose cabins had been burnt had come to his house and as the Patels of their village had burnt their cabins, they were discussing about lodging a complaint. Amongst those who had gathered were Motibhai Maganbhai, Haribhai Maganbhai, Mangabhai Ramabhai, Iliyaskhan Basirmiya, Dilshadmiya as well as the members of their mohalla. Upon Haribhai Maganbhai saying that the complaint be given as witnessed, he (the witness) had drafted the complaint. On that day there was a declaration of Bharat bandh and all forms of transport having been shut down, they could not go to Vijapur. Upon making a phone call to the Vijapur Police Station and informing them about the incident of burning of gallas, from the police station they were informed that PSI Shri Parmar was coming for patrolling at Sardarpura. When he returned home after offering namaaz, PSI Shri Parmar had come and the persons who had gathered in the morning had also come, at that time, Haribhai Maganbhai had handed over the written complaint to PSI Shri Parmar. Thereafter, since from the atmosphere it appeared that mobs after mobs would gather in the village and resort to violence, with a view to ensure that there is no breach of peace and the incident of the previous night is forgotten and there is harmony, there was a discussion regarding calling the leaders of the village; and in

the presence of PSI Shri Parmar, Patel leaders of the village were informed on telephone and in the presence of Shri Parmar, they had visited the leaders of the Patel community, and that Someshwar Shankarlal Pandya, Mafatlal Sundarlal Chauhan, Motibhai Maganbai Parmar, Keshabhai Mohanbai Raval, Mangalbai Ramabhai Raval, Pathan Bachumiya Bapumiya, Memon Janmahammad Ismailbai, Kadarbai Ismailbai, Prajapati Revabhai Shankarbai, Prajapati Revabhai Methabhai etc. belonging to lower communities had gathered together. However, the former Sarpanch belonging to the Patel community, viz., Patel Dashrathbai Kacharabhai had come to his (the witness's) house and at that time, the sitting Sarpanch of the village, Patel Kanubhai Joitabhai had come and efforts were made to call the leaders of the Patel community to ensure that there are no riots in the village and at that point of time, he said that it was not within his means and had left. The learned counsel submitted that insofar as the first meeting is concerned, various persons had attended the same. However, except for Mangabhai Raval, no other witness has been examined by the prosecution. It was submitted that in the cross-examination of the witness, an omission had been brought out, viz., that the above referred facts were not stated by him in his statements recorded on 6<sup>th</sup> March, 2002, 11<sup>th</sup> June, 2008 and 14<sup>th</sup> July, 2008. It was submitted that the entire set of facts of the first meeting, representation of five people at the house of Munsafkhan, dictation and preparation of complaint in the name of Haribhai Maganbai, making a telephone call to the Vijapur police station and then having dispersed, and again having gathered in the afternoon and having handed over the complaint to PSI Shri Parmar, have not been mentioned in all the three statements referred to

hereinabove. Moreover, in the affidavit dated 31<sup>st</sup> March, 2004 also, these facts have not been mentioned. Reference was made to the testimony of PW-71 Mangabhai Ramabhai Raval, who has deposed that from the cabins which had been burnt on the previous day, his cabin as well as the cabins of Balabhai Ramabhai, Prahladbhai Ganpatbhai, Nayi Mangaldas Gulabchand, Hansar Muslim, Munsafkhan, Jamal Dilshadmiya, Motibhai Maganbhai Parmar, Haribhai Maganbhai Parmar, Girish Mafatlal, Kantibhai Khemabhai etc. had been burnt. Haribhai Maganbhai and all those whose cabins had been burnt in the market had gathered together in the market and had decided that something is required to be done with regard to burning of their cabins and they had gone to Munsafkhan's house. They had told Munsafkhan that their cabins had been burnt and Munsafkhan made Haribhai Maganbhai give a complaint. Munsafkhan had written the complaint as stated by Haribhai Maganbhai. Reference was made to the cross-examination of the said witness, to point out that these facts have not been stated by him in his statement recorded by the SIT on 20<sup>th</sup> May, 2008. It was submitted that out of five persons named by Munsafkhan, Mangabhai Ramabhai is the only person who has been examined. Mangabhai's statement had not been recorded upto 2008, and that even when his first statement was recorded by the SIT on 20<sup>th</sup> May, 2008, he did not come out with the story of the first meeting. Therefore, the witness has come out with this story for the first time in the court, like Munsafkhan himself, who has also deposed in this regard for the first time in the court. It was submitted that as far as second meeting is concerned, separate group of persons are mentioned for holding a peace meeting; two persons named have been examined, viz., PW-71 Mangabhai Ramabhai

and PW-39 Janmhammad Memon. The other witnesses are not examined and the two witnesses who are examined do not refer to the second meeting at all. It was submitted that through the testimony of PW-56 Ayubmiya Rasulmiya Shaikh, whose name is not referred to as a person present or participating in the second meeting for peace, the prosecution has further come out with a case whereby this witness in his examination-in-chief, comes out with a story which gives an impression that he was present during the meeting held at Munsafkhan's house. Reference was made to the cross-examination of the said witness, to point out that an omission had been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, the witness had not stated these facts. Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar to point out that the said witness has not made any reference to any complaint having been given to him by Haribhai Maganbhai, nor does he say that he had gone to Munsafkhan's house. It was further pointed out that there is no reference to Kanubhai Joitabhai having said that it was not within his means to do anything. It was submitted that the allegation against Kanubhai Joitabhai has not been proved on record. It was further pointed out that in respect of the incident for which the first meeting was held, a complaint was registered on 6<sup>th</sup> March, 2002, being Vijapur Police Station I – C.R. No.51 of 2002. It was submitted that this contemporaneous record which has come on 6<sup>th</sup> March, 2002 does not refer to violent mobs of Patels of their village.

14.35 It was submitted that all these stories and theories which are apparently got up, created and concocted, have been attempted to be brought in for the first time either in the

affidavits dated 6<sup>th</sup> November, 2003 submitted before the Supreme Court, applications made to the SIT in the year 2008, or in the statements before the SIT in 2008, or for the first time before the court. None of the stories have been told at the first available opportunity by different witnesses. It was submitted that this has been done deliberately and at the instance of either NGO or somebody else to serve two purposes; firstly, to show that the Patel community people of village Sardarpura were enraged since the day prior to the date of incident and did various things which indicated that they were pre-planning or pre-conspiring some act, and secondly, to implicate as many persons as possible under the name of different theories, including those who are leaders of the community.

14.36 The next contention put forth by the learned counsel for the appellants was as regards veracity of the first information report lodged by PW-47 Ibrahimbhai Rasulbhai Shaikh. It was submitted that the first information report is not a substantive piece of evidence and at the same time, it is not expected that everything under the sun has to be mentioned in the first information report, but the first information report being one of the most important pieces of evidence has to be filed at the first immediate available opportunity and has to incorporate the important and vital facts. It was submitted that from the evidence of the police officers, it has come on record that a cognizable offence has been disclosed before 5:00 a.m. on 2<sup>nd</sup> March, 2002 and the police officers have reached the place of incident at about 1:00 or 1:45 a.m. and that they were there since then. Reference was made to the testimony of PW-105 Anupamsinh Gehlot to point out that the said witness has deposed that when they reached Shaikhvas at Sardarpura

village, they had saved the people who were alive and had sent the corpses of the deceased for postmortem and had seen the houses, which had been set on fire, and from that, he felt that a cognizable offence has been committed. He had not lodged the complaint in respect of the cognizable offence, but had instructed his Police Inspector to lodge a complaint. That when two persons had told them that the room had been set on fire and that there were people inside, he had not instructed any of the police officers accompanying him to record the complaint of any of the two persons and that he had not instructed any officer to ascertain the facts from the said two persons. It was submitted that when the entire set of facts reveal a serious cognizable offence having been committed, it was the lawful duty of the officer to record the first information report immediately, for the reason that injured persons viz. the victims who were injured in the incident as well as other persons of Shaikh Mohalla were also present at the spot where the D.S.P. remained present for more than three hours. More so, considering the fact that the D.S.P. has also admitted that a cognizable offence was disclosed, it was the duty of the officer to record the complaint at the earliest. It was pointed out that though the D.S.P. has stated that he had instructed the Police Inspector to record the complaint, no complaint was recorded by the Police Inspector. It was pointed out that the D.S.P. also had a discussion in respect of the incident with the Collector, Mehsana, in the morning at around 4:30 to 5:00 hours, however, the first information report was not recorded, despite the fact that it was the duty of the police officer to lodge the complaint upon receipt of information of commission of a cognizable offence.

14.36.1 Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar to point out that the said witness has stated that on the night of 1st March, 2002, when they reached Shaikh Mohalla, two persons had shown them the house of Mahemoodmiya, however, they had not recorded the statements of those two persons, nor had they asked them their names or addresses. That he had not asked the said persons anything with regard to the incident and that in respect of the incident, the two persons had only shown the house of Mahemoodmiya and told them that women and children had been burnt inside. It was submitted that in the cross-examination of the said witness, he has admitted that during the rescue operation, he was also of the opinion that a cognizable offence had been disclosed in respect of the incident. It was submitted that even PW-110 Kakusinh Ranjitsinh Vaghela has admitted that in the primary interrogation at the spot, disclosure of a cognizable offence having been committed, was apparent. However, no one either cared to register a first information report or record the information obtained from the persons who were interrogated. It was submitted that all the police witnesses have admitted that there was disclosure of a cognizable offence when they were at the spot at 02:30 hours on 2<sup>nd</sup> March, 2002 and that it is clear from the testimony of PW-90 PSI Shri Galbabhai Khemabhai Parmar that they had reached Sardarpura at about 01:45 p.m. It was contended that thus, it is clear that though the commission of a cognizable offence was known to the police officers, they have neither given the complaint themselves nor have they recorded the complaint of persons who were interrogated. Even the initial interrogation as admitted by the witnesses disclosed that a mob had attacked

the house of Mahemoodmiya. It was submitted that there was no disclosure at all that the mob from the village Sardarpura or Patels of village Sardarpura had attacked the house of Mahemoodmiya and therefore, the late filing of the first information report or late recording of the first information report, assumes importance.

14.36.2 Reference was made to the inquest panchnama (Exhibit-198) of deceased Ashiyanabanu Ashiqhussain Bachumiya Shaikh, to point out that the same was drawn at 07:00 to 07:30 a.m. on 2<sup>nd</sup> March, 2002 in the presence of panch witnesses by PW-93 Hargovandas Mohandas Sadhu, ASI. The said witness in his cross-examination has admitted that while drawing inquest on the dead body of Ashiyanabanu, it was known to him that in the communal riots when the deceased had received injuries, it can be said to be a cognizable offence. It was submitted that it may be pertinent to note that PW-55 Ashiqhussain Bachumiya Shaikh, in his testimony, has claimed to be an eyewitness, despite which, he has not disclosed anything to the ASI, nor has he taken any steps for lodging the complaint. Moreover, he had also not disclosed names of any of the accused at that point of time and that the statement of the said witness appears to have been recorded, long after the recording of the first information report by the Investigating Officer (PW-110). It was submitted that therefore, it is clear that in the present case, the first information report (Exhibit-487) has been lodged after drawing up of the inquest panchnama by PW-93 Hargovandas Mohandas Sadhu, ASI. Reference was made to the decision of the Supreme Court in the case of **Ramesh Baburao Devaskar and others v. State of Maharashtra**, (2007) 13

SCC 501, for the proposition that a first information report cannot be lodged in a murder case after inquest has been held. In the facts of the said case, the court noticed that the first information report had been lodged on the basis of the statements made by PW-11 to the informant himself at the spot. The court was of the view that if the said prosecution witness who claimed that he was an eyewitness was the person who could lodge the first information report, there was absolutely no reason as to why he himself did not become the first informant.

14.36.3 Next, it was submitted that PW-110 Kakusinh Ranjitsinh Vaghela, Investigating Officer has deposed that he had recorded the information given by Ibrahimbhai Rasulbhai Shaikh at about 09:30 a.m. on 2<sup>nd</sup> March, 2002, whereas the first informant PW-47 Ibrahimbhai Rasulbhai Shaikh, has categorically stated that the first information was recorded at 12:00 hours on 2<sup>nd</sup> March, 2002. It was submitted that the first information was recorded at Mehsana Civil Hospital, whereafter PW-110 Kakusinh Ranjitsinh Vaghela sent the complaint to Vijapur Police Station for registering the offence. Referring to the first information report (Exhibit-487), it was pointed out that the same discloses registration time of 11:30 a.m. on 2<sup>nd</sup> March, 2002, whereas another inquest panchnama drawn in respect of twenty-eight dead bodies, which commenced at 10:00 a.m. and was completed at 02:00 p.m. on 2<sup>nd</sup> March, 2002, bears the crime registration number of the case. It was submitted that while drawing up the inquest panchnama, all the dead bodies were identified by one Nazir Mohammad (PW-51) and all their belongings, except the clothes of the deceased persons, were handed over to the said Nazir

Mahammad. It was pointed out that though Nazir Mahammed claimed to be an eyewitness, he did not disclose anything about the incident or the accused to the Investigating Officer, who himself was present there and that the statement of Nazir Mahammad was recorded at a highly belated stage on 10<sup>th</sup> March, 2002. It was argued that looking to the overall circumstances, the police officers, by failing in their duty of recording the first information at the earliest point of time, had given ample time to the first informant, PW-47 Ibrahimbhai Rasulbhai Shaikh, to concoct a case and involve the accused by naming them falsely. It was submitted that if the evidence of PW-47 Ibrahimbhai Rasulbhai Shaikh is seen, though the first information report (Exhibit-487) discloses full names of almost twenty-eight accused, the witness has been unable to identify twenty of them before the court. It was submitted that though commission of a cognizable offence had been revealed, none of the police officers who were present there at 02:30 a.m. on 2<sup>nd</sup> March, 2002, have recorded anyone's complaint though they have interrogated persons who were found at Shaikh Mohalla, who included injured persons as well as the persons who were not injured. It was submitted that though it may be the primary duty of the police to shift the injured to the hospital, at the same time, it was also their lawful duty to record a complaint of any of those persons who were interrogated if any disclosure with regard to commission of a cognizable offence was made. It was submitted that if the persons interrogated did not give a complaint, it was the duty of the police officers to give information to the police station on behalf of the State as a first informant. Referring to the provisions of section 157 of the Code, it was submitted that the same mandates that if from information received or otherwise,

an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence, whereas in the present case, even though high ranking police officers were present and the commission of cognizable offence was revealed to them, neither have they given a first information report, nor have they recorded a first information report at the instance of any of the persons who were interrogated by them at the spot. In these circumstances, the first information report given by PW-47 cannot be treated as the first information of the commission of the offence in question.

14.37 Next, it was submitted that apart from the fact that the first information report was lodged after a considerable delay, there was an inordinate delay in recording the initial statements of witnesses. It was pointed out that from the depositions of the witnesses, there is a clear and unexplained delay in recording the statements of witnesses who were in relief camps, run and administered by their community people. It has also come on record that many of the eyewitnesses had several opportunities of getting their statements recorded as they were in the company of police personnel while at the hospital, while travelling, etc., yet, at the relevant time, they had chosen to remain completely silent and did not ventilate their grievances. It was pointed out that at the relief camp, there were several persons belonging to their own community and that it has been brought out in evidence that they also had access to legal advice. It was submitted that even after a long delay, the witnesses have furnished certain material which

they have affirmed and sent to the Supreme Court through a Non-Governmental Organisation, though they have denied the suggestion, but the issue as to who prepared the affidavits, where the affidavits were prepared and where the affidavits were got typed, and who translated the Gujarati version, is still a mystery. It was submitted that in the present case, some of the witnesses have come up for recording their statements six years after the alleged incident. Some witnesses are such whose statements were recorded after the constitution of the SIT pursuant to the orders passed by the Supreme Court and that even such witnesses have admitted that during the intervening period of about almost six years, they had a number of opportunities to ventilate their grievances, but for the reasons best known to them, they did not choose to act. It was submitted that the cross-examination of the witnesses clearly shows that no acceptable explanation worth the name has come forth for not offering their statements earlier and that this gross and unexplained delay itself is fatal to the prosecution case. It was submitted that non-disclosure of the offence at any point of time is a vital and important fact and also the non disclosure of the names of the assailants by the witnesses for an unreasonable period becomes fatal to the prosecution case, particularly when the defence has been successful in pointing out to the court about the introduction of various stories/theories. It was submitted that names of some of the accused have been introduced for the first time in their affidavits dated 6<sup>th</sup> November, 2003, filed before the Supreme Court at the instance of an NGO called Citizens of Justice and Peace run by Ms. Teesta Setalvad, that is, more than twenty months after the incident. It was further submitted that the application at Exhibit-989 filed by one Raeeskhan Pathan who

was associated with the above referred NGO and the contents thereof are all sufficient to create a doubt about the authenticity and genuineness of the contents of such affidavits and the applications submitted to the SIT. However, unfortunately, the application was not entertained by the trial court.

14.37.1 It was submitted that PW-70 Munsafkhan who was himself working in the Police Department as a Head Constable on the date of the incident and was residing at Pathan Mohalla, had taken a keen interest along with the NGO in tutoring the witnesses, not only at the time of recording the statements before the investigating officer in the year 2002, but also before the SIT in the year 2008 and also at the time of deposing before the court. It was submitted that the manner in which the witnesses who were staying in the relief camps, some of whom were even illiterate, claimed that the affidavits in English language were prepared by them as dictated by them in Gujarati and then translated by the typist before they were affirmed and sent to the Supreme Court, casts a shadow of doubt on the veracity of the witnesses. It was urged that, therefore, it clearly appears that an effective tutoring has taken place of all the witnesses at all stages by some outside agency/persons who were interested in falsely implicating the accused persons who belong to Patel community of village Sardarpura.

14.37.2 On the aspect of delay in recording of statements of witnesses, as also their unusual conduct, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Shahid Khan v. State of Rajasthan***, (2016) 4 SCC

96, wherein statements of two of the witnesses were recorded after three days of the occurrence and no explanation was forthcoming as to why they were not examined for three days. The court held that the delay in recording the statements casts a serious doubt about their being eyewitnesses to the occurrence and that it may suggest that the investigating officer was deliberately killing time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced.

14.37.3 Reliance was placed upon the decision of the Supreme Court in the case of ***State of Orissa v. Mr. Brahmananda Nanda***, AIR 1976 SC 2488, wherein the court held thus:

*"2. ... It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of the most serious character. Though according to this witness, she saw the murderous assault on Hrudananda by the respondent and she also saw the respondent coming out of the adjoining house of Nityananda where the rest of the murders were committed, she did not mention the name of the respondent as the assailant for a day and a half. The murders were committed in the night of 13th June, 1969 and yet she did not come out with the name of the respondent until the morning of 15th June, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than 15th June, 1969 on account of fear of the respondent. There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the Club House which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he*

*had come to the village in connection with the case and had also visited her house on 14th June, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the respondent to the police or even to A.S.I. Madan Das and should have waited till the rooming of 15th June, 1969 for giving out the name of the respondent. This is a very serious infirmity which destroys the credibility of the evidence of witness. ....”*

14.37.4 Reliance was placed upon the decision of the Supreme Court in the case of **Ganesh Bhavan Patel and another v. State of Maharashtra**, AIR 1979 SC 135, wherein the court held thus:

**“15.** As noted by the trial court, one unusual feature which projects its shadow on the evidence of PWs Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 of the CrPC were recorded on the following day. Welji (PW 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, be itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case.

14.37.5 The decision of the Supreme Court in the case of **Babuli alias Narayan Bahera v. State of Orissa**, (1974) 3 SCC 562, was cited wherein the court held thus:

**10.** One of the important points in favour of the appellant was that Ghanshyam had not disclosed the name either of the appellant or of the other accused to any one of the scores of people whom he had met until the first information report was lodged about 20 hours after the occurrence. Ghanshyam met Babaji, PW 2, within minutes of the incident but told him not a word about the incident. Some time during the night he went back to the scene of offence where nearly 200 persons had gathered but he did not disclose the name of any of the accused to those persons. He went to the police station the next morning but beat a hasty retreat without giving information of the offence. But the most important point is that after meeting Babaji in a Math he went to a village called Palasa where he met Chakradhar Panda (PW 8). Chakradhar says in his evidence that Ghanshyam told him that the blow on the head of the deceased dealt immediately after the deceased got down from his bicycle was given by the approver Ratnakar. The High Court has failed to appreciate the significance of this aspect of Ghanshyam's evidence. It says "That does not affect his testimony as to what he saw at the time of assault". According to Chakradhar, Ghanshyam implicated the approver and some of the other accused but not the appellant. We are unable to appreciate as to how this does not affect Ghanshyam's testimony. It is difficult to agree that this was "an error of inference" committed by the eyewitness as the High Court calls it. Witnesses are expected to depose to what they have seen and heard and not to draw inferences from what they see. The privilege of drawing inferences is given to Courts not to witnesses.

14.37.6 Reliance was also placed upon the decision of the Supreme Court in the case of **Din Dayal v. Raj Kumar alias Raju and others**, AIR 1999 SC 537, wherein the court noted that the witness Din Dayal had accompanied the deceased to the hospital but after reaching there, he did not disclose the name of the accused to the Police Constable who was on duty even though he disclosed other facts regarding the incident. This circumstance had been relied upon by the High Court together with some other reasons for doubting the truthfulness

of the evidence of this witness. The High Court also referred to the improvements made by Din Dayal and those improvements clearly indicated that they were deliberately made with a view to make the presence of other eyewitnesses acceptable. The court confirmed the view taken by the High Court.

14.37.7 Reliance was placed upon the decision of the Supreme Court in the case of ***Mohinder Singh and another v. State of Punjab and others***, AIR 2003 SC 4399 wherein, the court held thus:

***"10. It is an admitted fact that the original ten accused persons are all closely related except A-8 and they include all the male members of the two families of A-7 and A-9 who were residing in the village concerned, while A-8 is supposed to be a follower of the family members of A-7 and A-8. The motive suggested in this case pertains to an attack on A-10 about two years prior to the present incident. There is no evidence on record that during this period there was any such incident or occasion where any of the accused persons tried to take revenge for the attack on A-10. The prosecution has not come out with any special reason why the accused planned such a brutal attack on the deceased so long after the attack on A-10, nor has it produced any material to show any proximate cause. In this background, we are inclined to agree with the defence that the motive suggested, on the facts of this case, seems to be very weak and stale. But then the existence or otherwise of motive in a case of this nature would only be a link evidence, therefore, bearing in mind this fact, we will examine the manner in which the complaint Ext. PL/1 came into existence. It is the case of PW 4 that after the incident, he with his brother proceeded on foot to Hajipur. Herein it is to be noted that it has come in the prosecution evidence that there was a police outpost in the village itself but for reasons known only to PW 4, he preferred to go to Hajipur and that too on foot while he had a tractor and a scooter in his house. It has come in evidence that he reached Hajipur T-point at 7 p.m. and lodged a complaint with PW 19 orally which was reduced to writing by PW 19***

and forwarded to Hajipur Police Station which is about 2 km from that place. If we consider the prosecution evidence in this regard accepting PW 4's afore-statement that he lodged the complaint at 7 p.m. (which is not controverted), the said complaint should have reached the police station at least by 8 p.m. i.e. duly providing for the time consumed in reducing the complaint to writing and transmitting it to the police station. But a perusal of the complaint itself, as also Diary No. 23/31 of Hajipur Police Station does show that the said complaint was received at about 11.15 p.m. There is absolutely no explanation for this delay in the complaint reaching the police station. Both the courts below have merely rejected this argument addressed on behalf of the appellants by holding that PW 4 Lakhbir Singh's statement had been recorded at about 11 p.m. at the T-point, Hajipur, hence, there is no delay in the FIR reaching the police station. This, we think, is a factual error. We notice from the evidence of PW 4 that he has specifically admitted in his cross-examination that when he met the police at the T-point at Hajipur, it was 7 p.m. and they came back to the place of incident at 10 p.m. This is what the witness actually stated:

"It took us about half an hour at the T-point where the police met us. It was at 7 p.m. when the police met us. We reached the spot at about 10 p.m."

It is the case of the prosecution that the complaint was reduced to writing at the T-point and forwarded to the police station before the IO left for the place of incident. Therefore, in our opinion the courts below were factually wrong when they observed that PW 4 met the police and his statement was recorded only at about 10 p.m. This is not the only piece of evidence which shows that the police had come to know of the incident by about 7 p.m. on that day, and they actually recorded the statement of PW 4 only at the village after due deliberations and sent the same to Hajipur Police Station well past 10 p.m. It is seen from the evidence of PW 9 who is also related to the complainant that when he went to the place of incident at about 7 p.m., the police arrived there within half an hour which in our opinion corroborates that part of PW 4's evidence that he had met the police by about 7 p.m. and then came to the place of incident immediately thereafter, with the police, therefore, a legitimate inference can be drawn that though PW 4 informed PW 19 of the incident at 7 p.m. at the T-point at Hajipur, the

*actual complaint in question was drafted in the village after the police arrived at the place of incident. It is surprising to note that PW 19 in his evidence does not state the specific time at which the complaint was recorded. He in his examination merely states that on 11-9-1995 when he was on naka duty at the T-Point, Hajipur, PW 4 made a statement which was recorded as Ext. PL which was read over to him and he signed the same and thereafter PW 19 made his endorsement and sent the same to the police station on the basis of which FIR, Ext. PL/1 was recorded. He then states that thereafter he went to the village where the incident took place and conducted inquest and other proceedings. But this does not explain the delay in the complaint reaching the police station, therefore, in the absence of any explanation from PW 19 as to the actual time of recording the complaint and in view of the evidence of PW 9 that by about 7.30 p.m. the police had arrived in the village, we find sufficient force in the argument advanced on behalf of the appellants that the complaint must have come into existence nearly 4-5 hours after the incident in question. If that be so, the only conclusion that could be arrived at on facts of this case is that when PW 4 met PW 19, he did not have the knowledge as to who were the actual assailants.*

**11.** *It is in the above background, having failed to be convinced as to the motive as also having found no explanation in the prosecution case as to the inordinate delay in the complaint reaching the police station, we will examine the evidence of the two eyewitnesses.”*

14.37.8 Reliance was also placed upon the decision of the Supreme Court in the case of **Maruti Rama Naik v. State of Maharashtra**, (2003) 10 SCC 670, wherein it has been held thus:

**“7.** *We will now consider whether the evidence of PW 4 in any manner corroborates the evidence of PW 3 or for that matter the said evidence of PW 4 is acceptable at all. PW 4 has admitted that he is a close relative of deceased Krishna Mahada Naik. While he had noticed the incident of the attack on the deceased Krishna Mahada Naik, he has not spoken in any manner about the*

*subsequent attack which includes the attack on PW 3. According to this witness, at the relevant time, he was going to the bus-stand to board a bus to reach his factory where he was working when he saw the assault on the deceased Krishna Mahada Naik by the assailants including the appellants. Having noticed the incident, he did not go to any one of his relatives' house to inform about the attack in question. He knew at that point of time that Krishna Mahada Naik was injured and still alive, still he did not make any effort whatsoever to get any help to shift the injured to a hospital. According to this witness, even after seeing Krishna Mahada Naik lying injured in a critical condition, he without informing anybody about the incident, went to the bus-stand, took a bus and went to his factory and even at that point of time, he had sufficient opportunity to inform the other people about the incident or for that matter, even the police which he did not do. It is interesting to note from the evidence of this witness that even though he had an opportunity of approaching the police, he did not go to them because he did not know whom he had to inform about the incident in the police station. The witness further states that he went to the factory, worked for a while, took leave from the factory and went back home. Even after reaching home, he did not bother to find out from anybody there about the fate of the victims nor did he inform anybody about he having witnessed the incident. It is only at about 6 p.m. when PW 21 recorded the statement for the first time, he came out with the fact of having witnessed the incident. It is rather surprising as to how and in what manner, PW 21 came to know that PW 4 was a witness to the incident. The prosecution has also failed to explain the delay in recording the statement of this witness, therefore, bearing in mind the conduct of PW 4 in not informing anybody about his having witnessed the incident and the delay in recording his statement makes us hesitant to place any reliance on his evidence."*

14.37.9 Reliance was also placed upon the decision of the Supreme Court in the case of ***Shankarlal v. State of Rajasthan***, (2004) 10 SCC 632, wherein it has been held thus:

**"5.** Even according to the prosecution the only witness to the incident in question is PW 6, therefore, as contended by learned counsel for the appellant, we will have to examine his evidence carefully. If we do so then we notice that on the date of incident he had gone to Village Upli for some work. From there he came back by bus at about 11 o'clock. He then allegedly went to the village to meet Ram Rakh where he was told by his wife that the latter had gone to the field. It is the prosecution case itself that the distance between the field of Ram Rakh and the village is about 4-5 miles and PW 6 covered that distance on foot and when he reached near the field of Ram Rakh he heard a quarrel and when he went towards the place of quarrel he saw the appellant attack the deceased with an axe. It is his further case that when he reached near the deceased, the appellant ran away. It is at this point of time he states that he got scared and he took a different route than the one he took on the way and reached the village at about 4 or 4.15 p.m. It is his case that when he went to the house of Ram Rakh he could not find him, therefore, he came near the village square where he met PW 2 Khyali Ram. From the above evidence of PW 6 it is apparent that though there were persons available on his way back, he did not inform anybody about the incident. Even when he reached the village and met Ram Rakh's wife he did not inform her about the incident and it was for the first time he informed about this incident to PW 2 at the village square at about 4.15 p.m. Contrary to what he stated in the examination-in-chief that he saw only one assault on the deceased, in the cross-examination he stated that he saw the appellant attack the deceased twice and both the injuries were caused in his presence. It is also to be noticed from his cross-examination that when he met PW 2 Khyali Ram and told him about the incident in question, PW 2 supposedly told him that he had already come to know of the incident from PW 14. The prosecution has not found how PW 14 came to know of the incident. In this background if we appreciate the evidence of PW 6 we notice the fact that he is purely a chance witness whose presence at the place of the incident is highly doubtful. His conduct too seems to be unnatural in not informing anyone else in the village until he met Khyali Ram at the village square. We also notice that there is unexplained delay in filing the complaint inasmuch as according to the prosecution the incident in question took

*place at about 1.30 p.m. and a complaint was lodged only at 3.15 a.m. on 5-4-1980. Though the distance is about 30 miles from the place of incident, the complainant had the facility of using the tractors available in the village and they did use the same for travelling to the police station. In such circumstances this unexplained long delay also creates a doubt in our mind as to the genuineness of the prosecution case."*

14.37.10 The decision of the Supreme Court in the case of **Lallu Manjhi and another v. State of Jharkhand**, (2003) 2 SCC 401, was cited for the proposition that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

14.37.11 It was submitted that all the above referred precedents lead to the only conclusion that if the explanation given for delay and unusual conduct is found to be implausible and not probable, then it is highly unsafe to rely on such testimonies. Adverting to the facts of the present case, it was submitted that it is an undisputed fact that the witnesses have not been in a position to not only satisfactorily explain the delay in recording the complaint, but also failed to explain their unusual conduct and hence, no reliance can be placed

nor can any credence be attached to the respective testimonies and that the same are required to be discarded in their entirety.

14.38 The learned counsel has adverted to the testimonies of each of the witnesses individually and has made detailed submissions in support of his contention that the testimonies of the witnesses are required to be discarded. However, reference to the same shall be made at a later stage while dealing with the testimonies of the said witnesses. The learned counsel has also made detailed submissions as regards the evidence against each of the accused persons and the witnesses, who had implicated them. Reference to such submissions, however, shall be made while considering the complicity of the individual accused.

14.39 The next contention raised by the learned counsel for the appellants-accused was that no specific overt act has been attributed to any of the accused by any of the witnesses. The attention of the court was invited to the conduct of the witnesses as well as their depositions, to submit that in the first version given by the witnesses, they have chosen not to implicate any of the accused with any weapon. However, subsequently, a new version has been evolved for the purpose of involving maximum number of accused by the witnesses who are residents of Shaikh Mohalla and who have subsequently attributed different weapons like dharias, pipes and swords to different accused, despite the fact that none of the deceased and/or injured witnesses have received any injury that can be caused by any of the above mentioned weapons. It was submitted that though some of the deceased

as well as the witnesses are shown to have received some injuries in the nature of abrasions and/or cut lacerated wounds, such injuries are not attributed to any of the accused and it is quite possible that the same may have been caused due to stone pelting. It was submitted that it is unbelievable that a huge mob of about one thousand to one thousand five hundred people is present with weapons and no injury is caused to the persons specifically attacked by the mob. Thus, the only conclusion that can be drawn is that none of the accused persons had the weapons as ascribed to them by the witnesses. It was submitted that it may be pertinent to note that this is a case where the prosecution has involved all the accused as having been present in the mob and only a few accused are involved by saying that they were instigating the mob. None of the witnesses have attributed any specific overt act to any of the accused and that there is a great degree of variance in the involvement of each of the accused, thereby further discrediting the versions given by the witnesses.

14.40 Next it was contended that the prosecution has failed to establish any common object of committing the offence of murder under section 302 or any other offence under the Indian Penal Code, nor is there any evidence that the persons in the mob even knew that the offence in question was likely to be committed. It was emphatically argued that apart from the very shaky evidence of the witnesses which is full of material contradictions, omissions and embellishments severely affecting the core of the prosecution case, the omnibus allegations made by the witnesses regarding accused being present as a part of the mob would not make them liable

under the constructive and vicarious liability concept by invoking section 149 of the Penal Code for the reason that:

- (i) The trial court *prima facie* has not believed the allegations of conspiracy among the accused and has acquitted them of the charges under section 120-B of the Penal Code;
- (ii) Since 27<sup>th</sup> February, 2002, viz., date of the Godhra train carnage, till the incident in question, viz., on 1<sup>st</sup> March, 2002, which is said to have occurred any time on or after 11:30 p.m., not a single witness nor any person belonging to the Muslim community of Sardarpura, was caused any injury by any accused or any person of the Hindu community, much less any person belonging to the Patel community. It was submitted that even the slightest attack was not made during 27<sup>th</sup> February, 2002 or 28<sup>th</sup> February, 2002 or 1<sup>st</sup> March, 2002 till 11:30 hours by any person in the village of Sardarpura belonging to the Hindu or Patel community, to any person of the Muslim community,
- (iii) Evidence has come on record to the effect that no incident of any communal disharmony had ever occurred at Sardarpura and that exceptional communal harmony had prevailed. Since village Sardarpura was found to be safe, fifty Muslims from the adjoining village Sundarpur had preferred to be shifted to Sardarpura and were, in fact, shifted by the police and were given shelter at the Pathan Mohalla;

(iv) It was submitted that even if the evidence of the witnesses is accepted at its face value, namely, that the mob firstly came to Shaikhvas at 09:00 to 09:30 p.m. and set three cabins at the corner of Shaikhvas on fire and the second mob came to Shaikhvas at 11:00 to 11:30 p.m. (though such evidence runs contrary to the original say of the witnesses in their statements recorded under section 161 of the Code), none of the witnesses who claim to have been present in Shaikh Mohalla are said to have been either attacked or caused any injury by any weapons like dharia, sword, pipe or stick, which the accused were allegedly wielding. It was submitted that the witnesses have not deposed regarding use of any weapons by the accused and the trial court has also not found that the weapons were used in causing any injury to anybody by the accused.

(v) The above referred facts proved on record clearly indicate that there was no object, much less a common object of any of the persons in the mob to cause any injury to anybody. The witnesses who were visible to the mob were also not attacked by any accused with weapons.

(vi) There were other mohallas which were inhabited by members of the Muslim community in village Sardarpura, known as Pathanvas, Nagorivas, Memonvas, etc. and that no such mohalla or vas had been attacked by the Hindu community of village Sardarpura, nor was anybody from such mohalla or vas injured and that, none of the houses

or cabins of such mohalla or vas have been damaged or set on fire.

(vii) It was submitted that the evidence on record further indicates that Shaikhvas is situated at the end of the village. The entry point of the Shaikhvas is a little wide and on moving through the lane of houses towards the opposite side, it becomes narrow. Somewhere from half-way of the lane in Shaikhvas, it is not possible to take a four-wheeler or a jeep inside. Moving further down the lane, it becomes narrower until the last pucca house which is Mahemoodmiya's house and on both the sides, there are narrow lanes from which one can move outside Shaikhvas.

(viii) In the above fact situation and considering the postmortem notes of all thirty-two persons who have died, twenty-eight persons died inside the room, one died on the way to Mehsana Hospital, and two died on the way to Ahmedabad Hospital and one died after reaching Ahmedabad Hospital, the deceased have received burn injuries coupled with suffocation and they have died because of burns and asphyxia due to suffocation.

(ix) Thus, at the last moment, after making an entry into Shaikh Mohalla, very few people could gather or come near the room of Mahemoodmiya. Though allegations have been levelled that one of the windows was broken (though the same is not supported by the panchnama of the scene of offence or by the FSL officer) as well as that there was an attempt to break open the door, it

transpires that the room remained closed for a period of one hour to two hours, which has resulted in the death of the persons inside. Having regard to the fact situation, the effect and impact of attack was found from the rear side of the room also. Thus, it is not possible that a mob of five hundred to one thousand people could gather, spread fear and remain in Shaikhvas as there was no sufficient space which could accommodate such a huge crowd. Even if it is so believed for the sake of argument that a large number of persons were there, none of the accused has caused any injury to anybody by any weapon until the incident in question occurred at the room of Mahemoodmiya.

(x) It was submitted that the above facts clearly indicate that the mob did not have the object to kill, to cause injury or to commit any offence under the Penal Code, much less, share any common object. It was submitted that the incident which has taken place at the end of Shaikhvas in a closed room was never in furtherance or prosecution of any such common object which even remotely can be said to have been conceived by the persons in the mob, nor was it known to the persons in the mob that it is likely to be committed, even if it were to be assumed that the accused or others were in the mob.

(xi) In the above circumstances, the only allegation of the witnesses against the accused that they were part of the mob or that they were seen in the mob, assumes importance. Such omnibus allegation in the above stated and proved fact situation can never be said to satisfy the

tests and parameters prescribed by the Supreme Court to bring the accused within the sweep of constructive liability under section 149 of the Penal Code, particularly when there is absolutely no evidence to the effect even for the incident in question as to who poured kerosene, who ignited it, etc.

(xii) It was submitted that therefore, the background of the incident, the previous gathering of a mob from another village, absence of any specific motive, nature of assembly, nature of allegations regarding use of arms, behaviour of the members of the mob at or after the incident and the common object, if any, are the relevant factors which are required to be considered by this court.

14.40.1 In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***State of U. P. v. Dan Singh and others***, AIR 1997 SC 1654, wherein, the court observed that what has to be considered in that case was whether there was any unlawful assembly at the place of occurrence and, secondly what was the common object of the said assembly and, particularly, who were the members of the said unlawful assembly. It is only after the court comes to the conclusion that the respondents or any of them, was member of such unlawful assembly who shared the common object of killing the Doms can they be convicted even if no overt act can be assigned to any one of them.

14.40.2 The decision of the Supreme Court in the case of ***Chandra Shekhar Bind and others v. State of Bihar***, AIR

2001 SC 4024 was cited for the proposition that where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three witnesses who give a consistent account of the incident. It was held that in a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable and that, even though it is the quality of the evidence that matters and not the number of witnesses, still it is useful to adopt such a mechanical test.

14.40.3 Reliance was also placed upon the decision of the Supreme Court in the case of **Binay Kumar Singh v. State of Bihar**, AIR 1997 SC 322, wherein the court held that there is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as member of an unlawful assembly. All the same when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting.

14.40.4 Adverting to the facts of the present case, it was submitted that having regard to the evidence which has come

on record, the common object to kill has not been established. It was submitted that when no accused or any other person in the mob has caused injury by any weapon or otherwise, the common object of the unlawful assembly, if believed on the facts of the case, cannot be to cause any injury to anybody, much less to kill. It was submitted that there was no common object to cause any injury, much less, to commit the offences punishable under sections 302, 323, 324, 325 and 307 of the Penal Code. It was submitted that the most important proved fact on which the accused can take shelter is that the witnesses have not seen anybody causing any injury. It was submitted that the offences under sections 336 and 337 of the Penal Code relate to causing hurt by endangering human life due to some rash and negligent act and hence, would clearly not be attracted in the facts of the present case. As regards the offence under section 295A of the Penal Code which relates to deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs, it was submitted that except those alleged words attributed by witness Mohammad Sattar, none of the witnesses at the initial stage, has said anything about any inciting/insulting words having been used. All the other witnesses who have referred to such utterances have said so from 10<sup>th</sup> March, 2002. It was submitted that therefore, if the use of words is not ultimately reliably proved, nothing beyond that can be brought on record. As regards the offence under section 153A of the Penal Code, it was submitted that sanction for prosecution under the said provision had been taken and the order was passed only on the words alleged to have been used by the accused. It was submitted that if section 295A of the Penal Code is not applicable, section 153A, *ipso facto*, also would not be

attracted. It was submitted that there is no evidence as to who caused damage to the tomb in the graveyard and there is no evidence of any witness as to at which point of time the act was done and as to who committed such act. It was submitted that in the entire facts and circumstances of the present case, when there is no allegation against any accused as regards causing any injury, as regards pouring kerosene, igniting any of the houses, the court would find a safe formula if the court is convinced that all or any of the accused are guilty of any of the offences alleged.

14.40.5 It was submitted that a perusal of the testimonies of the witnesses, clearly shows that omnibus allegations have been made against all the accused and that no specific role has been attributed to any of the accused by any of the witnesses. Reliance was placed upon the decision of the Supreme Court in the case of **Baladin and others v. State of Uttar Pradesh**, AIR 1956 SC 181, for the proposition that it is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142 of the Indian Penal Code. The court in the facts and circumstances of the case observed that the evidence as recorded was in general terms to the effect that all those persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc., and was of the view that this kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. Reliance was also placed upon

the decision of the Supreme Court in the case of ***Sherey and others v. State of U.P.***, (1991) Supp (2) SCC 437, for the proposition that when there is a general allegation against a large number of persons, the court naturally hesitates to convict all of them on such vague evidence and that the court has to find some reasonable circumstance which lends assurance. The court, accordingly, found it safe only to convict those accused whose presence was not only consistently mentioned from the stage of first information report, but also to whom overt acts had been attributed.

14.40.6 It was pointed out that many of the witnesses have, for the first time, identified the accused in the court without having named them in their earlier statements, to submit that it would be hazardous to place reliance upon the evidence, inasmuch as, false implication of the accused cannot be ruled out. Reliance was placed upon the decision of the Supreme Court in the case of ***Dana Yadav alias Dahu and others v. State of Bihar***, AIR 2002 SC 3325, for the proposition that if a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence.

14.40.7 The learned counsel further placed reliance upon the decision of the Supreme Court in the case of ***Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and others***, (1998) 6 SCC 609, wherein the court held thus:

***"12. That the High Court felt it difficult to sustain the convictions of the appellants in the absence of any foundation laid by PWs 2 and 12 to indicate as to how***

*they came to know the appellants would be evident from the observations made by the High Court (quoted earlier) that there was a high degree of probability of PWs 2 and 12 knowing the two appellants respectively as they were attached to the Agripada Police Station and they (the appellants) were the inmates of the lock-up for some time prior to the incident in question. We are constrained to say that the above reasoning of the High Court is convoluted and strained. It was for the above two witnesses to testify that they had seen them while they were in the lock-up earlier and that is how they knew them from before the incident. In the absence of any such assertion, the High Court was not at all justified in making the above observation on the basis of a "high decree of probability". To sustain the conviction, the High Court was required to record a positive finding on the basis of reliable and acceptable evidence that the two witnesses knew the appellants from before and not on the basis of a high degree of probability. Rather, it appears to us, the defence of the appellants that while they were in the lock-up earlier, their photographs were taken and thereafter shown to the witnesses to implicate them in the case is probabilised by the admission made by the Investigating Officers as also PW 2, that they were shown their photographs."*

It was submitted that in the light of the above decision, the witness has to say before the court as to how he knows a particular accused, which is conspicuously missing in the present case.

14.40.8 Reliance was also placed upon the decision of the Supreme Court in the case of ***Indira Devi and others v. State of Himachal Pradesh***, AIR 2016 SC 2721, for the proposition that while it is no doubt correct that an injured witness is generally reliable, but even an injured witness must be subjected to careful scrutiny if circumstances and materials available on record suggest that he may have falsely

implicated some innocent persons also as an afterthought on account of enmity and vendetta.

14.41 Insofar as the legal principles which are required to be kept in mind while appreciating the evidence on record, the learned counsel for the appellants/accused placed reliance upon the decision of the Supreme Court in the case of **Kali Ram v. State of Himachal Pradesh**, AIR 1973 SC 2773, for the proposition that one of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the court cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have been present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. The court observed that it may, of course, presume as mentioned in

section 114 of the Indian Evidence Act, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of a particular case. Whether or not a presumption can be drawn under the section in a particular case depends ultimately on the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. The court further held that another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It was further held that it is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable. It is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The court observed that it needs all the same to be emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create

adverse reaction in the society or amongst those members of the society who believed the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record.

14.41.1 The decision of the Supreme Court in the case of ***Masaltı v. State of Uttar Pradesh***, AIR 1965 SC 202, was cited wherein it was contended before the court that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. The court while accepting the above submission held that where a criminal court has to deal with evidence pertaining to the commission of the offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witness who give a consistent account of the incident. The court observed that in a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. The court further observed that it is no doubt the quality of the evidence that matters and not the number of witnesses who give such evidence, but sometimes, it is useful to adopt a test like the one which the High Court had adopted in dealing with the said case.

14.41.2 Strong reliance was placed upon the decision of the Supreme Court in the case of ***Dilavar Hussain S/o Mohammadbhai Laliwala v. State of Gujarat***, 1991

*Criminal Law Journal* 15, wherein the court observed that to bring home the guilt, the prosecution was required to prove the presence of the witnesses, possibility of seeing the incident by them and identification of the appellants therein. The court was of the view that mere presence of witnesses was not sufficient. More important was if they saw the incident. The court upon appreciation of the evidence on record found that the identification of the accused from out of the mob even if they were known to the witnesses from before was highly doubtful. The learned counsel referred to the entire decision and submitted that in a similar set of facts, the court had found that the prosecution had failed to prove beyond a shadow of doubt that the dreadful crime was committed by the appellants and had acquitted them.

14.41.3 Reliance was also placed upon the decision of the Supreme Court in the case of ***Mohd. Iqbal M. Shaikh and Others v. State of Maharashtra***, 1998 SCC (Cri) 1064, wherein the court observed that it was established from the prosecution evidence itself that the witnesses were inhabitants of Gandhi Chawl where the ghastly incident occurred and immediately on the next day of the occurrence, they were shifted to a local school for safety and were staying there. Normally, therefore, there was no justification on the part of the investigating agency in not examining them for that length of time. The only explanation offered by the Investigating Officer was that on account of riot, the police was busy with law and order problem but that problem did not continue for that length of time and in fact, the Investigating Officer had failed to indicate as to why the eye-witnesses though available had not been examined till 29<sup>th</sup> January, 1993. The court

observed that it was conscious of the fact that merely because a witness was examined after a considerable period from the date of occurrence, his evidence need not be discarded on that ground alone but at the same time while assessing the credibility and intrinsic worth of such witnesses, the delay in their examination by the police has to be borne in mind and their evidence would require a stricter scrutiny before being accepted. The court further expressed amazement while noting that a witness who happened to be a resident of the locality where the incident occurred and took an active part in rescuing the injured persons from the burnt house in the presence of the police and then accompanied them to the hospital and was also available at the hospital when the police had come but for some mysterious reasons, the police did not chose to ask him anything about the occurrence. The court was of the view that this conduct on the part of the investigation was highly reprehensible and indicated the callousness on the part of the investigating agency in carrying out the investigation in the case. In relation to one of the witnesses, the court found that in his former statement made to the police, he had omitted to state several aspects and those omissions had been confronted to the witness to which he denied and the Investigating Officer also had brought out as to what the witness had stated in his examination under section 161 CrPC and those material omissions amounted to contradiction and such contradiction made the witness untrustworthy. The court placed reliance upon its earlier decision in the case of *Dilavar Hussain v. State of Gujarat* (supra) and observed that in a country like India where it is difficult to find a witness who has not made any embellishment or exaggeration, and therefore, in such case the court would

be justified in separating the chaff from the grain and then act upon the grain. But where the evidence consists of only chaff, the question of separating the chaff from the grain would not arise. When all the witnesses suffer from the same infirmities, the question of one corroborating the other would not arise. If a witness is partly reliable and partly unreliable then one may look for corroboration to the reliable part of the ocular version of a witness. But if a witness is wholly unreliable, the question of corroboration would not arise. The court observed that it was no doubt true that the incident with which it was concerned was a ghastly one and on account of communal frenzy several people belonging to one community were burnt alive by some others but unless and until the prosecution evidence conclusively established those others as the perpetrators of the crimes, it was not possible for a court of law to record conviction on mere conjectures and hypothesis.

14.41.4 Reliance was further placed upon the decision of the Supreme Court in the case of **Rai Sandeep @ Deepu v. State (NCT of Delhi)**, (2012) 8 SCC 21, wherein the court was of the considered opinion that the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should

be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have a co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar tests to be applied, can it be held that such a witness can be called as "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished.

14.41.5 Reliance was also placed upon the decision of the Supreme Court in the case of ***Bhagirath v. State of Madhya Pradesh, (1976) 1 SCC 20***, for the proposition that it is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the court, on its own, make out a new case for their prosecution and convict the accused on that basis. The court observed that when the substratum of the evidence given by

the eye-witnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances of the case, left to the court was to throw out the prosecution case in its entirety against all the accused.

14.42 As noted earlier, the learned counsel for the appellants had made detailed submissions as regards the veracity or otherwise of the testimonies of each witnesses and had also invited the attention of the court to the evidence against each of the accused persons individually, which, as stated earlier, shall be referred to at an appropriate place.

14.43 In conclusion, it was submitted that the appeals preferred by the appellants/convicts deserve to be allowed by acquitting the appellants of the offences with which they are charged.

15. Mr. K.B. Anandjiwala, learned Special Public Prosecutor appearing on behalf of the Special Investigation Team, opposed the appeals preferred by the appellants – convicts and advanced submissions on the acquittal appeals preferred by the SIT.

15.1 Dealing with the contention raised by the learned counsel for the appellants as regards the delay in filing the first information report, the learned counsel submitted that the first information report was not registered at the time of drawing the inquest panchnama of the dead body of Ashiyanabnu for the reason that the police were busy in providing treatment to the injured persons. It was submitted that PSI Sadhu held the inquest of Ashiyanabnu at 7:30 a.m. on 2<sup>nd</sup> March, 2002, and

that at the relevant time all the police officers were involved in discharging different duties. It was submitted that in these circumstances, when all the police officers were engaged in attending to other important duties, it cannot be said that there was a delay in filing the first information report. It was submitted that the first information report based on the information given by PW-47 Ibrahimmiya Rasulmiya has been rightly treated by the trial court as the first information report. According to the learned counsel, Ibrahimmiya had lost about thirteen family members and was under great shock and therefore, his mental condition should also be judged from the fact that he had forgotten the names of his wife and daughter while giving the information and had accordingly referred to his wife as Rukshana instead of Zayda, which clearly shows under what tension and shock he was, that through oversight he had mentioned his daughter's name as his wife's name. It was submitted that the incident occurred between 11:30 to 2:30 at midnight and that after the victims were rescued, they were immediately taken to the hospital at around 5:00 hours in the morning and they were given treatment at which point of time, they were under a great shock and were not in a position to lodge the FIR. The police were also engaged in bringing the victims to the hospital and providing for medical treatment and hence, there was some delay in lodging the first information report, which cannot be said to be an inordinate delay so as to affect the veracity of the first information report. It was submitted that having regard to the trauma suffered by the injured persons and the family members of the deceased, the recording of the first information report at around 9:30 in the morning cannot be said to be delayed.

15.2 Next it was submitted that it is the case of the defence that during the cross-examination of the witnesses, certain contradictions and omissions have been brought on record through the evidence of the witnesses which make it clear that they have by their versions created an absolutely different story and hence no reliance should be placed on the evidence of such witnesses as the discrepancies, contradictions and omissions are the most material feature of the case which would destroy the evidence of the witnesses. Dealing with such submission, it was submitted that while considering the facts and circumstances of the case, one must keep in mind that Shaikh Mohalla had been attacked by a mob consisting of more than one thousand to one thousand five hundred people, who resorted to burning and damaging the houses of residents; and that the house of Mahemoodmiya was burnt due to which thirty two persons including women and children lost their lives; that the witnesses who were examined were either injured witnesses or they had lost their kith and kin in the said incident and hence, their mental condition is also required to be taken into consideration.

15.3 It was submitted that another aspect of the matter is that since there were two persons having the same name in the village viz. Ashwinbhai Baldevbhai, on 1<sup>st</sup> June, 2002, Ibrahimmiya gave an application to the police that he had named a particular accused person and that the name of the grandfather of the accused was required to be added so that the person could be identified, however, now the witness is sought to be contradicted by such application which was given only for a limited purpose.

15.4 It was further submitted that in this case, some of the witnesses have named the accused for the first time before the court and have identified them, whereas some of the witnesses, mainly female witnesses, have not named the accused but have identified them by their faces before the court. It was pointed out that on behalf of the defence it has been contended that the evidence of such witnesses cannot be accepted in the absence of any test identification parade having been carried out. It was submitted that in this regard, three aspects have to be kept in mind. Firstly, that the first informant and other injured witnesses who are examined in this case have, in all, lost thirty-two persons and all of them have sustained injuries. In such a situation, their mental condition is required to be considered, and if names of certain accused were not given in the statements which were recorded and subsequently such accused are named in the court in their depositions, their evidence cannot be discarded only because the contradictions or omissions have been brought on record. The second aspect is that in this case, all the witnesses are residents of village Sardarpura since their childhood or for a number of years, and most of them were doing agricultural labour work in the fields of the Patels and were acquainted with the accused. Some of them are illiterate and less educated and in a certain mental condition, they may not have disclosed the names of all the persons in their statements. However, that by itself cannot be a ground to discard their evidence as they had named the accused in their depositions before the court. Thirdly, the female witnesses may not be aware of the names of the accused, but since they belonged to the same village and knew the accused persons by their face and have accordingly, identified them before the court. It was

submitted that it is the identification before the court which is the substantive evidence, and having regard to the fact that the accused were known to the witnesses, there was no necessity of carrying out a test identification parade.

15.4.1 In support of such submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Ashok Debbarma alias Achak Debbarma v. State of Tripura**, (2014) 4 SCC 747, for the proposition that when the accused persons are close to the witnesses and they are identified by face, the fact that no T.I. Parade was conducted at the time of investigation is of no consequence. The court held that while the evidence of identification of an accused of a trial is admissible as substantive piece of evidence, it would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis for the conviction of an accused. The court observed that the test identification parade is not a substantive piece of evidence and to hold the test identification parade is not even the rule of law but a rule of prudence so that the identification of the accused inside the courtroom can be safely relied upon. The court was of the view that if the witnesses are trustworthy and reliable, the mere fact that no test identification parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. It was also held that statements made to the police during investigation are not substantive piece of evidence and the statements recorded under section 161 CrPC can be used only for the purpose of contradiction and not corroboration. The court was of the view that if the evidence tendered by the witness in the witness-box is creditworthy and reliable, that evidence cannot be rejected merely because a

particular statement made by the witness before the court does not find a place in the statement recorded under section 161 CrPC. The court further observed that the witnesses may be knowing the persons by face, and not by their names. Therefore, the mere fact that they had not named the accused persons in the section 161 statement at that time, that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.

15.4.2 It was further submitted that during the course of trial, to suppress the identity of persons, the accused have used ways and means like growing beards, wearing caps, etc. so that the witnesses could not easily identify them. In this regard, the attention of the court was invited to certain applications made by some of the witnesses at Exhibits-560, 514 and 554. It was further submitted that there were a number of factors which led to the non-identification of the accused namely, the delay in trial; after the incident occurred, the witnesses left Sardarpura and after a lapse of seven years, they have lost their memory qua identification, hence, many accused have tried to suppress their identification. It was submitted that though seven years have passed, the witnesses have not forgotten the horrendous act which they have faced and seen.

15.5 Next it was submitted that a significant aspect of the case is regarding the affidavits dated 6<sup>th</sup> November, 2003 made before the Supreme Court. It was submitted that the first charge-sheet came to be filed on 27<sup>th</sup> July, 2002 and subsequent thereto, an application for transfer of investigation and transfer of case had been made before the Supreme Court

as allegations were made against the police officers who had not carried out the investigation properly that they would not get proper justice. The allegation was also against Public Prosecutor that he was a member of the BJP which fact was conceded and, therefore, the petition had been preferred before the Supreme Court. It was submitted that insofar as the affidavits are concerned, they are xerox copies which are brought on record and there is no mention about the number of the petition before the Supreme Court where such affidavits are stated to have been filed. There is also no material to show that such affidavits were tendered before the Supreme Court. No certified copy or xerox copy of the certified copy has been tendered on record. Therefore, there is nothing to show that these nine affidavits were produced before the Supreme Court in a petition for transfer of investigation and transfer of the case. It was submitted that once the charge-sheet is submitted against fifty-five accused persons, subsequently if affidavits are prepared and submitted, they cannot be said to be previous statements within the meaning of section 161 and 162 of the Code and cannot be used to contradict the witnesses. It was, accordingly, contended that all contradictions brought on record on the basis of the affidavits have to be ignored and cannot be taken into consideration.

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15.5.1 In support of such submission, the learned Special Public Prosecutor placed reliance upon the decision of this court in the case of **Ghanshyam Madavlal Patel v. State of Gujarat**, 2015 (2) G.L.H. 732, wherein the court placed reliance upon the decision of the Supreme Court in the case of **State of NCT of Delhi v. Mukesh**, for the proposition that from the scheme of the Code of Criminal Procedure and the

Evidence Act, it appears that the investigation and the material collected by the prosecution prior to the filing of the charge-sheet under section 161 of the Code, are material for the purposes of section 145 of the Evidence Act, 1872. The expression "previous statements made" used in section 145 of the Evidence Act cannot be extended to include statements made by a witness, after the filing of the charge-sheet. The court was of the view that section 146 of the Evidence Act does not contemplate such a situation and the intention behind the provisions of section 146 appears to be to confront a witness with other questions, which are of general nature, which could shake his credibility and also be used to test his veracity. The aforesaid expression must, therefore, be confined to statements made by a witness before the police during investigation and not thereafter. The learned Special Public Prosecutor submitted that it is doubtful as to whether such affidavits were ever tendered before the Supreme Court, but the purpose behind making the affidavits was absolutely different, namely, that the police were not investigating properly. Therefore, also the affidavits cannot be used as previous statements and the omissions and contradictions brought on record are to be ignored.

15.6 Next, it was submitted that considering the situation prevailing in Sardarpura in the evening of 1<sup>st</sup> March, 2002, the police force should have remained there and should not have gone away after dispersing the crowd. Dealing with the contradiction brought out in the testimonies of a majority of the witnesses to the effect that in their police statements they had stated that at the time of the first incident, the police had resorted to firing whereas before the SIT they had stated that

the police had not resorted to firing, it was submitted that it appears that the police, to protect themselves, have recorded in the statements of the witnesses that they had resorted to firing. It was emphatically argued that the incident could have been prevented if the police would not have left the village immediately after resorting to firing after which the crowd had dispersed, because immediately thereafter the crowd had gathered again and all the houses in Shaikh Mohalla were ransacked, burnt and destroyed and an incident occurred at Mahemoodmiya's residence, where innocent persons lost their lives. It was submitted that there is a vast distance between the Panchayat office where the firing was resorted to and Shaikh Mohalla and hence, even if firing was resorted to at the panchayat office, the witnesses may not be aware of the same. It was further submitted that in the light of the above fact, if any omissions or contradictions are found in respect of things which are not material, the same are required to be ignored.

15.7 It was submitted that insofar as the contradiction sought to be brought out in the testimonies of the witnesses qua the statements made in the affidavits filed before the Supreme Court is concerned, the affidavits were filed before the Supreme Court after submission of the charge-sheet and, therefore, cannot be taken into consideration for the purpose of contradicting the witnesses. Insofar as the contradictions sought to be brought out in the cross-examination of the witnesses, it was submitted that when before the SIT, the first information report as well as the earlier statement was read over to them, the question of repeating everything once again does not arise.

15.8 As regards the existence of sufficient light at the time of the incident, the learned counsel submitted that the first informant has, in the FIR, stated that the lights were on. Therefore, at the first point of time, this witness has stated that lights were on and that he had identified the accused in the said lights. It was further submitted that the date of the incident was two days after full moon night and so, there would be sufficient light to identify members of the crowd.

15.9 It was submitted that the witnesses have named only the persons whom they saw and they have not implicated more persons, which indicates that they are not tutored. It was submitted that the testimonies of the witnesses are natural and trustworthy and are required to be accepted. It was submitted that since the people knew each other, they would not fail to recognise the accused and that the witnesses could not identify residents of Sundarpur though they might have been part of the mob as the residents of Sundarpur would not be known to them.

15.10 In connection with the main incident, the learned Special Public Prosecutor submitted that a huge crowd had come to the scene of offence. Some persons were armed with weapons and some of them were carrying cans and tins filled with kerosene and petrol, which were used for setting the houses on fire. It was submitted that for destruction of a house, some instruments or weapons are required. Some of the witnesses have attributed weapons to some of the accused and have stated that some of them were having in their possession tins or cans of kerosene or petrol, but the fact is that all these persons came to Shaikh Mohalla in a particular

manner and thereafter, they committed a certain act. Moreover, the crowd was uttering the words "kill them, cut them, burn them". These aspects disclose the mental condition of those persons. According to the learned Special Public Prosecutor, all the persons in the mob had come with the specific object to do away with a specific class of persons. They were aware that a large number of people are residing in this mohalla; and accordingly to fulfill their common object, these persons came together and performed certain acts of demolishing the houses or damaging the houses, setting the house on fire which shows that all the persons in the mob were members of the unlawful assembly. It was submitted that, therefore, section 149 of the Penal Code would be clearly applicable in the facts of the present case.

15.11 Reference was made to the decision of the Supreme Court in the case of **Ramesh & Others v. State of Haryana**, (2010) 13 SCC 409, wherein the court in the facts of the said case found that there was overwhelming material to show that the appellants variously armed, including the firearms, assembled at one place and thereafter, came to the place of occurrence and started assault together and when protested by the deceased, one of the members of the unlawful assembly shot him dead and some of them caused injury by firearm, gandasa, lathi, etc. to others. All of them had come and left the place of occurrence together. The court in the above facts found that there was no escape from the conclusion that the appellants therein were members of the unlawful assembly and offences had been committed in pursuance of the common object and hence, each of them would be liable for the offences committed by any other

member of the assembly. It was submitted that once it is established that there was an unlawful assembly, the members who were in the mob, even if they have not played any role, they have come together and left the place together, knowing full well that the object of the assembly is unlawful to eliminate a particular class of people, then, all are responsible for the said act. It was submitted that the persons who are named or identified before the court as members of an unlawful assembly can be held responsible for the offences which were committed with the aid of section 149 of the Penal Code. It was submitted that the motive is very obvious that on 27<sup>th</sup> February, the Sabarmati Express Bogie No.6 was burnt. Some Hindu Kar Sevaks became victims of the burns and died. Some of the Kar Sevaks were from Mehsana district and tension prevailed. At various places, meetings were held. The people were instigated to take vengeance on the Muslims in the same manner in which they killed the Kar Sevaks. Shaikh Mohalla was the only place where there were twenty houses of Muslims and hence it was selected intentionally. In the rest of the places, if houses of Muslims were burnt, there was a possibility of Hindu houses being burnt. It was submitted that though there are about fifty houses in Pathan Mohalla, they were so situated that it may not have been possible to harm the properties of the Muslims without harming the properties of Hindus. It was submitted that the manner in which the mob carried out these acts, the preparation made for the same, shows that they were all members of an unlawful assembly. It further shows that there was a conspiracy hatched and in furtherance of that conspiracy, certain acts have been done. It was submitted that a conspiracy would normally be hatched in secrecy, may be two persons at the initial stage, but

subsequently, the persons who were performing some act, they became members of the conspiracy and, therefore, they can be held responsible. Perhaps they might not have knowledge of the initial plan but they have acted in furtherance of the conspiracy/plan.

15.12 It was contended that invocation of section 149 of the Penal Code has not been challenged. The words uttered by accused persons have been brought out through the consistent testimonies of the witnesses; the fact that the accused have come at a particular place and burnt the houses and destroyed them, etc. clearly show the formation of an unlawful assembly. It was submitted that the evidence of witnesses is duly corroborated by medical evidence. Besides, there was no previous animosity with the accused persons. The witnesses have named only those persons whom they had seen and no attempt has been made to falsely implicate more persons. The first information report is lodged at the earliest point of time having regard to the facts and circumstances of the case. It was submitted that thirty people died due to burns out of whom, eleven were children. Two persons died due to suffocation and twenty-three others sustained injuries. It was submitted that the analysis report submitted by the Forensic Science Laboratory shows kerosene was present and, therefore, the fact that kerosene was present inside the house has been clearly established.

15.13 In support of his submissions, the learned counsel placed reliance upon the decision of this court in the case of ***Varjuben W/o Devjibhai Dahyabhai Dafda & another v. State of Gujarat*** rendered on 15th July, 2014 in Criminal

Appeal No.1405/2009 wherein the court laid down the following principles which were required to be kept in mind while appreciating the evidence in a criminal case:

*"17. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under: -*

*I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.*

*II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details*

*III. When eyewitness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.*

*IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the*

*root of the matter would not ordinarily permit rejection of the evidence as a whole.*

V. *Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.*

VI. *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

VII. *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

VIII. *The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

IX. *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

X. *In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

XI. *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

*XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.*

*XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to mount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.*

[See *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 Cri LJ 1096 : (AIR 1983 SC 753)* *Leela Ram v. State of Haryana AIR 1995 SC 3717* and *Tahsildar Singh v. State of UP (AIR 1959 SC 1012)*.]

15.14 Reference was further made to the following legal principles which are required to be kept in mind while appreciating the evidence of injured eye-witnesses as enunciated by the court in the above decision: -

*"18. When the evidence of an injured eyewitness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind: -*

*(a) The presence of an injured eyewitness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.*

*(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not*

*allow the real culprits to escape and falsely implicate the accused.*

(c) *The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.*

(d) *The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.*

(e) *If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.*

(f) *The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.”*

15.15 Reliance was also placed upon the decision of the Supreme Court in the case of ***Om Prakash v. State of Haryana***, (2014) 5 SCC 753, for the proposition that the common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and behaviour of the assembly at or before the scene of occurrence. It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful

assembly, it cannot be held that he is a member of the assembly. What is really required to be seen is that the member of the unlawful assembly should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of section 141 of the Penal Code. The core of the offence is the word "object" which means the purpose or design and in order to make it common, it should be shared by all. Reliance was also placed upon the said decision for the purpose of dealing with the contention pertaining to delay in lodging the first information report. The court held that while it is true that the court has a duty to take notice of the delay and examine the same in the backdrop of the factual score, whether there has been any acceptable explanation offered by the prosecution and whether the same deserves acceptance being satisfactory, but when delay is satisfactorily explained, no adverse inference is to be drawn. The learned counsel for the appellants therein had emphasised on the concept that effort has to be made at the earliest, but the "earliest" according to the court could not be put in the compartment of absolute precision. The court observed that apart from what it had stated, the impact of the crime on relations who are eye-witnesses, the shock and panic which would rule supreme at the relevant time and other ancillary aspects are also required to be kept in mind.

15.16 Reliance was placed upon the decision of the Supreme Court in the case of ***Sunil Kumar v. State of Rajasthan***, (2005) 9 SCC 283 AIR 2005 SC 1096, wherein the court held thus:

**“8.** “Common object” is different from a “common intention” as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The “common object” of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot *eo instanti*.”

15.17 The decision of the Supreme Court in the case of **Kuriya and Another v. State of Rajasthan**, 2012 Criminal Law Journal 4707 <=> (2012) 10 SCC 433, was cited wherein the court held that “sterling worth” is not an expression of absolute rigidity. The use of such an expression in the context of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the witnesses, if any, noticed by the court.

Linguistically, "sterling worth" means 'thoroughly excellent' or 'of great value'. This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. It is only an expression that is used for judging the worth of the statement of a witness.

15.18 It was submitted that in the present case, most of the witnesses have been cross-examined and confronted by their affidavits which were said to have been tendered before the Supreme Court in a transfer petition being SLP No.109 of 2003. All these affidavits are dated 6<sup>th</sup> November, 2003. The trial court has not accepted the affidavits; however, xerox copies have been produced. These affidavits are xerox copies. Even the certified copies have not been produced on record. The number of the petition before the Supreme Court is also not mentioned at the head of the affidavits. There is nothing to show that these affidavits have been tendered before the Supreme Court. The evidence of witnesses would show that in the affidavits, some of the witnesses have written down their statement to the effect that the same has been given to the NGO and Teesta Setalvad and the advocates of the NGO have prepared the same; however, both the advocates have not been examined in this case. The original statements written down by the witness are not produced on record. Therefore, in all probability it appears that these affidavits are drafted by the advocates of the said NGO, therefore, the trial court was justified in not exhibiting the same. It was submitted that from these affidavits, omissions have been brought on record; however, it is crystal clear that the petition before the Supreme Court was for transfer of investigation as well as for transfer of sessions case. In 2008, the Supreme Court passed

an order directing the formation of a Special Investigation Team and that looking to the nature of the petition, the affidavits would not disclose the nature of the incident which has taken place on the night of 1<sup>st</sup> March. It was submitted that, therefore, the fact regarding the incident would be missing from the affidavit. Not only that, but the charge-sheet was submitted prior to the filing of the affidavits and, therefore, such subsequent statement would not be a statement under section 162 of the Code and, therefore, the trial court should not have permitted the use of such statements for confronting the witnesses. It was submitted that a similar question arose before this court in the matter of **Ghanshyam Madavlal Patel v. State of Gujarat, 2015 (2) G.L.H. 732** wherein this court held as under:

*"29. In State of NCT of Delhi (supra), the challenge before the apex Court was against the judgment and order passed by a learned Single Judge of the Delhi High Court in a Criminal Revision Application. The learned Single Judge had set aside the order passed by the trial Court rejecting the prayer made on behalf of the accused to confront the P.W 1 with a statement made by him in a television interview on Zee News on 8th February, 2013, after the filing of the charge-sheet, for the purpose of contradicting him with his previous statement, in order to test his veracity and to impeach his credibility, as provided for under Section 146 of the Evidence Act, 1872. On the basis of certain statements made by the P.W 1, the complainant, and other materials, a charge-sheet was filed by the Investigating Authority against the accused. After the charge-sheet had been filed, the complainant gave a T.V interview on Zee News on the same subject. In the said circumstances, the question which arose before the apex Court was whether, under the provisions of Section 145 of the Evidence Act, a subsequent statement made after the filing of the charge-sheet could be treated as a "previous statement" and be utilised for the purpose of Section 145 thereof. The apex Court considered the*

*provisions of Section 145 of the Evidence Act and made the following observations: -*

*"Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that, from the scheme of the Code of Criminal Procedure and the Evidence Act, it appears that the investigation and the materials collected by the prosecution prior to the filing of the charge-sheet under Section 161 of the Code, are material for the purposes of Section 145 of the Evidence Act, 1872. The expression "previous statements made" used in Section 145 of the Evidence Act, cannot, in our view, be extended to include statements made by a witness, after the filing of the charge-sheet. In our view, Section 146 of the Evidence Act also does not contemplate such a situation and the intention behind the provisions of Section 146 appears to be to confront a witness with other questions, which are of general nature, which could shake his credibility and also be used to test his veracity. The aforesaid expression must, therefore, be confined to statements made by a witness before the police during investigation and not thereafter.*

*Coupled with the above is the fact that the statement made is not a statement before the Police authorities, as contemplated under Section 161 of the Code. It is not that electronic evidence may not be admitted by way of evidence since specific provision has been made for the same under Section 161 of the Code, as amended, but the question is whether the same can be used, as indicated in Section 161, for the purposes of the investigation. If one were to read the proviso to sub-section (3) of Section 161 of the Code, which was inserted with effect from 31st December, 2009, it will be clear that the statements made to the police officer under Section 161 of the Code may also be recorded by audio-video electronic means, but the same does not indicate a statement made before any other Authority, which can be used for the purposes of Section 145 of the Evidence Act.*

*The decision referred to by the learned counsel in the case of Bipin Shantilal Panchal [supra] has to be read and understood in that context. The said decision appears to have been rendered in a situation where, at*

*every stage, the prosecution's attempts to adduce evidence was being objected to on behalf of the accused. It is in such circumstances that the decision was rendered. This is a case where, however, an attempt of the defence to introduce evidence, which is not contemplated within the scheme of the Code or the Evidence Act, was before the Court and the Court decided that the same could not be permitted. The decision in the case of Bipin Shantilal Panchal [supra] cannot, therefore, be applied to the facts of this case.*

*In this regard, reference may be made to the decision rendered by a Bench of six Judges of this Court in Tahsildar Singh & Ors. vs. State of Uttar Pradesh [A.I.R. 1959 S.C. 1012], wherein, in somewhat similar circumstances, it was stated that "previous statement" would be such statements as made during investigation."*

*30. A close reading of the decision of the Apex Court in the case of State of NCT of Delhi (supra) reveals as under: -*

*(I) In the said case, a prayer was made on behalf of the accused to confront the p.w. no.1 with a statement made by him in a television interview on Zee News after the filing of the charge-sheet, for the purpose of contradicting him with his previous statement to test his sincerity and to impeach his credibility as provided for under section 146 of the Evidence Act, 1872.*

*(II) The question that fell for the consideration of the Apex Court was whether under the provisions of section 145 of the Evidence Act, a subsequent statement made after the filing of the charge-sheet could be treated as a previous statement and be utilized for the purposes of section 145.*

*(III) What was argued before the Apex Court was that the interview given by the p.w. no.1 on television after the filing of the charge-sheet could not be said to be a previous statement for the purposes of section 145 of the Evidence Act.*

31. On behalf of the accused, it was submitted that the use of the expression previous statement made in section 145 of the Evidence Act should not be interpreted to mean, the statement made only at the time of the investigation under section 161 of the Code, but should also be extended to any period before the witness is actually examined and that, accordingly, a statement, which is made even after the filing of the charge-sheet by the prosecution witness, could be used to confront him for the purpose of any contradiction which may be evident.

32. The Apex Court took the view that from the scheme of the C.R.P.C. and the Evidence Act, the investigation and the materials collected by the prosecution prior to the filing of the charge-sheet under section 161 of the Code, are material for the purposes of section 145 of the Evidence Act, 1872. The Court further explained that the expression previous statement made used in section 145 of the Evidence Act, would not include statement made by a witness after the filing of the charge-sheet. The Court finally concluded by observing that the statement made by the witness in a television interview would not fall within the ambit of a statement before the police authorities, as contemplated under section 161 of the Code.

33. In the present case, the factual scenario is quite different. The first informant had, much prior to the filing of the charge-sheet, had given an interview before a local T.V. channel, which was recorded in a C.D. However, the investigating officer did not come to know about the same, otherwise, probably, he would have investigated in that direction too. The trial commenced and the first informant, as an eye witness to the incident, turned hostile. At a later stage, the family members of the two victims learnt about such interview given by the first informant within three days of the fatal accident to a local T.V. Channel. The prayer before the trial court was that since the new facts had surfaced, the prosecution should be permitted to examine the two witnesses and further confront the first informant with the statement he had made before the T.V. Channel. Over and above, the prayer was that the C.D. itself may be admitted in evidence as it is a document by itself."

15.19 Reliance was also placed upon the decision of the Supreme Court in the case of ***Subal Ghorai and Others v. State of West Bengal***, (2013) 4 SCC 607, wherein the court after reference to various decisions of the Supreme Court on the aspect of scope of section 149 of the Penal Code, held thus: -

*"52. The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assemble is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults*

*intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.*

53. *But this concept of constructive liability must not be so stretched as to lead to false implications of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this court do not dilute the concept of constructive liability. They embody a rule of caution."*

15.20 It was, accordingly, urged that the prosecution through the testimonies of the eye-witnesses, many of whom are injured eye-witnesses, has duly established the charge against the accused persons and that the trial court has rightly convicted the appellants/convicts of the offences in question,

and that there being no merit in the appeals filed by the convicts, the impugned judgment and order of conviction and sentence deserves to be upheld and the appeals deserve to be dismissed.

15.21 Adverting to the appeals filed by the SIT against the acquittal of the accused persons who have been given the benefit of doubt by the trial court, it was submitted that a conspiracy came to be hatched by the members of the mob. The crowd from Sardarpura, after being dispersed from the Panchayat office, went to Shaikh Mohalla and pelted stones and burnt the cabins. It was submitted that various incidents that had occurred prior to the commission of the offence, clearly indicate that the entire incident was pre-planned and pre-concerted and the hatching of a conspiracy by the accused is clearly established.

15.22 It was submitted that having regard to the evidence that has come on record, in all probabilities, there was sufficient light to identify the persons in the mob whom the witnesses have named, and therefore, the trial court was not justified in acquitting the accused despite the fact that they were identified by the witnesses before the court. In this regard, the learned counsel placed reliance upon the testimonies of PWs-47, 48, 56, 60, 65, 68 and 84. It was submitted that PW-47 Ibrahimiya Rasulmiya Shaikh has stated in the first information report that he identified the accused in the light and that no contradiction has been brought out in this regard. It was pointed out that PW-48 Sabirhussain Kadarmiya Shaikh has deposed that he has identified persons in the focus light. Reference was made to

the testimony of PW-56 Ayubmiya Rasulmiya Shaikh, wherein the witness has deposed that while returning home, he had seen that the halogen light of the streetlight had been focused towards their mohalla. It was submitted that of course, an omission has been brought out in the cross-examination to the effect that the witness has not stated these facts in the statement dated 11<sup>th</sup> March, 2002; however, such omission would not amount to a contradiction so as to discredit the version of the witness. Reference was made to the testimony of PW-60 Bachumiya Imammiya Shaikh wherein the witness had stated that on 28<sup>th</sup> February, 2002 at about 5 o'clock in the evening, wireman Mathurbhai Trikambhai had directly started the light on the streetlight pole at the corner of their mohalla and Becharbhai Odhavbhai and Kanubhai Sarpanch were standing below. The focus light had been fixed on the pole in the kabrastan and the light was falling on their mohalla. It was pointed out that though an omission has been brought out in the cross-examination of the witness to the effect that he had not stated these facts in his statement recorded by the police on 3<sup>rd</sup> March, 2002, it cannot be said to be a material omission in view of the fact that while investigating the present case, the main concentration of the Investigating Officer was as regards the incident of 11/11:30 and, therefore, there is no mention of the earlier events in the statements recorded by the Investigating Officer. Reference was made to the testimony of PW-65 Akbarmiya Nathumiya Shaikh to point out that the said witness has deposed that on 28<sup>th</sup> February, 2002 between 4 to 5 o'clock, Mathurbhai Trikambhai (Wireman), Kanubhai Sarpanch and Becharbhai Odhavbhai had put a focus light on the streetlight pole. Reference was made to the cross-examination of the witness, to point out that he has deposed

that on the 28<sup>th</sup>, there was a police bandobust. The lights of the panchayat had been disconnected. There was no one in front of his house, he was there alone. Mathurbhai Trikambhai and Kanubhai Sarpanch had put on the lights and had gone away, but he had not felt any anxiety. He had not gathered the people of the mohalla. He had also not said anything about putting up of the lights to the police. After the incident, the police had come for the purpose of taking them to Ilol, and he had told them about the lights having been put up. The police had gone and did nothing. He had also narrated the incident to others, but they did nothing. He had declared this incident about lights in 2008. It was pointed out that an omission has been brought out in the cross-examination of the witness to the effect that he had not stated these facts in his statement recorded by the police on 10<sup>th</sup> March, 2002. It was submitting that not stating about the incident regarding putting up of lights which was prior to the main incident cannot be said to be a material omission. It was contended that from the testimony of the above witnesses, it is evident that there was sufficient light for the witnesses to identify the accused persons and that the accused, prior to committing the offence in question, had put up lights at strategic positions so that they could identify the victims, and thus, had pre-determined and pre-conspired to commit the offence in question.

15.23 Proceeding to the next incident in support of the prosecution theory of there being a conspiracy, the learned Special Public Prosecutor referred to the testimony of PW-78 Basirabibi Bachumiya Shaikh wherein the witness has deposed that on 1st March in the evening at around 5 o'clock, she had gone to purchase gram flour from the shop of Dahyabhai

Vanabhai and Dahyabhai Vanabhai had asked her as to what she would do with the flour and she had said that she wanted to make bhajiyas. Dahyabhai Vanabhai had told her today was their last day, they may eat bhajiyas, tomorrow they would eat them if they are alive. It was submitted that the evidence of this witness finds corroboration in the testimony of the first informant PW-47 Ibrahimmiya to whom the witness had disclosed this fact, though she may not have stated so in her own statements. It was submitted that this evidence goes to show that a conspiracy was hatched long back and the incident was a pre-determined one.

15.24 As regards the theory put forth before the trial court regarding taking away of the water pump key, the learned counsel submitted that he does not press this point.

15.25 The learned Special Public Prosecutor, next referred to the incidents where hate speeches were given prior to the incident to instigate the Patels of Sardarpura to assault and kill the Muslims. The attention of the court was invited to the evidence of PW-46 Sabirmiya Akumiya Pathan who has deposed that twenty to twenty-five days prior to the incident, Haresh Bhatt, a leader of the Vishwa Hindu Parishad had visited the village and convened a meeting of Patel youth. Haresh Bhatt had given a speech in vitriolic language saying that the Muslims are a burden on Hindustan and they have no right to reside in Hindustan. This time if there is an opportunity and there is violence, not a single Muslim should escape. Thereafter, Haresh Bhatt had distributed trishuls. Reference was made to the evidence of witness PW-60 Bachumiya Imammiya who has deposed that on 27<sup>th</sup> February, 2002, when

he was sitting below the banyan tree in the corner of the mohalla, three to four cars came from the market side and went towards Mahadev, which were vehicles of Haresh Bhatt and leaders of the Bajrang Dal. Inside the Mahadev temple, a meeting of Patels had been convened and trishuls had been distributed and at that time Haresh Bhatt was saying that if there are riots this time, not a single Muslim should escape. If they want weapons, they should ask him. The attention of the court was also drawn to the testimony of PW-49 Iqbalmiya who has deposed that three days prior to the incident, Naranbhai Lallubhai who at the time was the member of the legislative assembly from Unjha, had come to the Mahadev temple at Sardarpura and had convened a meeting of Patels. The Patels were saying on the mike that Naranbhai Lallubhai would say a few words. At that time Naranbhai Lallubhai said that the Government was theirs and that they could do whatever they wish. Referring to the cross-examination of the witness, it was pointed out that the witness has not been contradicted in this regard and his testimony in this regard stands unchallenged. It was submitted that in the cross-examination of the witnesses, so many facts have been brought on record which had prompted the people to act in a particular manner and that the hate speech given by Naranbhai Lallubhai, an MLA was as good as an assurance to the accused. It was submitted that the evidence adduced by the prosecution clearly shows that the entire incident was a result of a conspiracy which had been hatched prior in point of time from the occurrence of the incident.

15.26 The learned Special Public Prosecutor, thereafter referred to the testimony of PW-71 Mangabhai Ramabhai Raval

to point out that the said witness has deposed that late in the night at around 9 o'clock, Ramabhai Mohanbhai Patel had parked a tractor on the side of the road wherein there were two to three and four barrels of kerosene and one barrel of petrol. Thereafter, Natubhai Kachrabhai Patel, Jayantibhai Ambaram Patel, Kalabhai Bhikhabhai Patel, Bakabhai Mangalbhai Patel, Kantibhai Prabhudas, Jitendrakumar Kantilal, Bhikhabhai Joitabhai passed through the road in front of his house and went towards Kantibhai Prabhudas's house at Kapurvas. He has seen them take the cans of kerosene with them and when they passed in front of their house, the smell of kerosene was emanating therefrom and hence, he learnt about it. Referring to the note before the commencement of recording of the testimony of this witness, it was pointed out that the said witness has stated that he was pressurized not to depose against Hindus. It was pointed out that the witness has stated that Ramesh Kanti and Kanubhai Joita had threatened the witness in connection with depositing against the accused. It was submitted that it may be significant to note that it is shocking that witnesses, who had earlier named persons in their statements recorded by the police, have later on, before the Special Investigation Team resiled from their statements, by stating that the police had recorded the names on their own whereas in their depositions, they have named the accused and have identified them. Thus, it is evident that the witnesses were under pressure not to depose against the accused. It was submitted that from the testimony of Mangabhai Raval, it is clear that the accused had collected kerosene and petrol for the purpose of using the same for commission of the offence. The incident in question is, therefore, the result of a conspiracy hatched among the accused.

15.27 Next it was submitted that the prosecution case that there was a pre-planned conspiracy is further fortified by the testimony of PW-60 Bachumiya Imammiya Shaikh who has deposed that four days prior to 27<sup>th</sup> February, 2002, he was sitting at Rafiqbhai's galla at which point of time, Raghubhai Revabhai (accused No.26) had asked him to remove his cabin which was touching his house as his house was filled with fodder which would get burnt. It was pointed out that though an omission has been brought out in the cross-examination of the witness to the effect that such fact has not been stated by him in his statement dated 3<sup>rd</sup> March, 2002, such omission cannot be said to be a material omission so as to amount to a contradiction as the same related to an incident prior to the main incident. It was pointed out that the said witness has also deposed that on 28<sup>th</sup> February, 2002, there was a call of bandh and in the morning at around 10 o'clock when he was sitting at his galla, Rajeshbhai Punjabhai, Rameshbhai Kantibhai and Maheshbhai Jivanbhai had come and told him that there was a call of Gujarat Bandh and that he should close down his galla. Moreover, PW-62 Rafiqmiya Mohammadhussain Shaikh has deposed that on 28<sup>th</sup> February, 2002, certain persons belonging to the Patel community had forced him to close down his cabin, failing which, they threatened to set it on fire and also attempted to beat him. It was submitted that thus, prior to the incident, the cabins of the victims have been removed from places which could catch fire and the people also have been asked to close down cabins and which is clearly indicative of the fact that there was pre-planning as well as a pre-concerted effort on the part of the accused persons.

15.28 Insofar as the version given by PW-78 Basirabibi Bachumiya Shaikh regarding Jayantibhai Ambarambhai having come on 28<sup>th</sup> February, 2002 and taken away the bore-well account book is concerned, the learned counsel has not placed much reliance upon the said aspect. Similarly, the learned counsel has also not placed much reliance upon the incident narrated by PW-74 Sikandarmiya Rasulmiya Shaikh regarding Kanubhai Joitabhai telling him that as their people had burnt the train at Godhra, he would not get Kuber (a brand of tobacco).

15.29 Insofar as the aspect of connecting a rod with electric supply and inserting it into Mahemoodmiya's room is concerned, the learned Special Public Prosecutor placed reliance upon the testimony of PW-2 Dr. Pravinkumar Popatlal Soni who had examined Abedabanu Manubhai Shaikh, aged 13 years, to point out that the history given in the case of the said patient was that on the previous day, she had been given current. It was pointed out that the doctor has further deposed that if a room catches fire or if an electric live wire falls on any person, injuries of the nature sustained by Abedabanu could be caused. Reference also was made to the testimony of PW-48 Sabirmiya Kadarmiya Shaikh to point out that the said witness has deposed that a long iron rod was joined with current and was placed in the room and there were shouts of help and screams coming from the room. It was submitted that thus, evidence has come on record that an iron rod has been placed in the room and connected to electrical wires and that Abedabanu had sustained injuries on account of electric current. Reference was also made to the testimony of PW-105 DSP Anupamsinh Shreejaysinh Gehlot to point out that it has

come out from his testimony that many wires were lying on the road outside their house. It was submitted that this is another factor which supports the prosecution case that the incident was a pre-planned and pre-conspired one.

15.30 As regards the theory of carrying acid bottles is concerned, the learned counsel has not placed much reliance upon it and has admitted that nobody has sustained any acid injury.

15.31 As regards the breaking of Memon's shop is concerned, the learned counsel has submitted that there is no evidence in this regard and insofar as the Memons are concerned, they have not stated anything in this regard. Similarly, much stress has not been laid on the theory of putting of a kerosene-soaked rag below the cabin of Ibrahimmiya.

15.32 Insofar as the peace meetings held at the house of Munsafkhan Pathan are concerned, it was submitted that the second meeting for peace which was called at the residence of Munsafkhan in the presence of Sarpanch has been proved through the testimony of PW-70 Munsafkhan. The version given by Munsafkhan finds support in the testimony of PW-90 PSI Parmar, who was the person who brought some Muslims from Sundarpur as they were apprehending some damage to their lives. Referring to the testimony of PW-70 Munsafkhan, it was pointed out that as per the version given by the said witness, two meetings were called on 1<sup>st</sup> March and that the Sarpanch had come in the second meeting. There are two aspects regarding the incident which took place on 28<sup>th</sup>

February. The first information report given by Haribhai was drafted by him and was handed to him and when PSI Parmar came, it was given to him for registering the offence. In the second meeting, leading persons of the village were called. Two persons remained present out of those persons and the Sarpanch Kantibhai had made a statement that it was not within his means to do anything, which would clearly show that the accused were hatching up a conspiracy. It was submitted that on the strength of the first information report given by Haribhai, an offence was registered. Referring to the testimony of PW-56 Ayubmiya Rasulmiya Shaikh, it was pointed out that this witness was present in the meeting. The attention of the court was invited to the cross-examination of this witness to point out that the witness has been cross-examined in respect of his statement dated 10<sup>th</sup> March, 2002, whereas another statement of the witness was recorded on 19<sup>th</sup> May, 2008, wherein this aspect has been mentioned, but has gone unchallenged as he has not been contradicted in this regard.

15.33 It was submitted that after the Godhra incident, incidents that have taken place are suggestive of the fact that a conspiracy was hatched. In furtherance of the conspiracy, the incidents started at 9:30 or so near the Panchayat office. A huge crowd gathered and Shaikh Mohalla houses were targeted. The police were satisfied that the crowd had dispersed and left the village. At that time, the police did not realise that the same crowd would again gather and could do some mischief. It is a fact that the police had left the place and soon thereafter, the incident in question took place. It was submitted that from 11:30 to 2:30, the crowd remained in Shaikh Mohalla and surrounded the house of Mahemoodmiya

which clearly shows that they wanted to see that the house is completely destroyed and the persons inside the house are dead. All the persons who were inside the house of Mahemoodmiya were raising shouts for help; however, nobody could come to their rescue out of fear of the crowd. It was pointed out that a number of people who were inside the house succumbed to burn injuries, suffocation, etc. When the persons were inside the house which was set on fire, the crowd very well knew that the persons would be killed.

15.34 It was submitted that the incident at Godhra occurred on 27<sup>th</sup> and this incident of 1<sup>st</sup> March is in two parts. The incident took place after two days because this was the period during which the conspiracy was hatched. After the incident of Godhra, in two days, certain incidents had taken place in respect of which FIRs were lodged. Some role was played by the leaders instigating people to do certain acts. On 28<sup>th</sup> February, shops were closed and cabins were burnt in respect of which the first information report was lodged only on 6<sup>th</sup> March. A peace meeting was held at the residence of Munsafkhan Pathan wherein Kanubhai Sarpanch remained present. PSI Shri Parmar was also present, despite which an incident took place at Panchayat office and the police had to resort to firing rounds in the air. A first information report came to be lodged whereafter three cabins at Shaikh Mohalla were burnt where the Muslims were the targets. Reference was made to section 10 of the Evidence Act to point out that certain circumstances can be taken into consideration for inferring a conspiracy. It was pointed out that the police had left the scene of offence despite the situation being tense. It was submitted that the mere fact that some of the victims

survived would not mean that they were not inside the house, inasmuch as, it would all depend upon which part of the house they were all hiding. It was submitted that it is a clear case of conspiracy namely, fixing of halogen lights, etc. which shows that particular things were done to facilitate the offence. From the evidence of about sixteen witnesses, certain circumstances have been brought on record to show that a conspiracy was hatched. It was submitted that none of the circumstances have been properly considered by the trial court. It was submitted that the sequence of events after the Godhra incident are suggestive of the fact that these are all in furtherance of the conspiracy hatched by the accused persons. It was submitted that some three cabins at the corner of Shaikh Mohalla were burnt. When PSI Parmar was patrolling, he saw these cabins being burnt. This aspect shows that Muslims were targeted. On 28<sup>th</sup> most of the shops which were burnt were of Muslims. It was submitted that ten or eleven shops were situated side by side and hence, if the eight shops belonging to Muslims are set on fire, then the adjoining shops would also catch fire and that is how three shops of members of the Hindu community were also burnt, though that may not have been the intention of the mob. According to the learned counsel, on certain aspects, the court can draw inferences.

15.35 The learned Special Public Prosecutor further submitted that looking at the sequence of events which have taken place, it is clear that in furtherance of the conspiracy, the above acts are done and that this is a clear case of conspiracy. The fixing of halogen lights is suggestive of the fact that a particular thing was done in furtherance of the conspiracy to facilitate the members of the mob. In the

circumstances which are borne out from the evidence of sixteen witnesses, certain omissions are bound to be there in the evidence, which are brought out in the cross-examination. It was submitted that the court has to consider the mental condition of the witnesses, the feeling of horror, shock, etc., inasmuch as, at the time when their statements were recorded, their kith and kin were being buried. Hence, if they have not stated any aspect due to shock and mental condition, it has to be ignored. It was submitted that certain circumstances have been brought on record, which would show that a conspiracy was hatched and in furtherance of the conspiracy, particular acts had been done. Reference was made to the findings recorded by the trial court while analysing the evidence of the witnesses in the context of the offence under section 120B of the Penal Code, to submit that the trial court has failed to appreciate the evidence on record in proper perspective while holding that the charge under section 120B has not been established. It was submitted that the trial court has not considered the circumstances properly and that the sequence of events after the Godhra incident are suggestive of the fact that these acts are done in furtherance of the conspiracy. Reference was made to the testimony of PW-105 Shri Anupamsinh Shreejaysinh Gehlot to point out that he had information from a particular pump that Patels had purchased kerosene and petrol and on these aspects, instructions were given to some policeman. Referring to the testimony of the said witness, it was pointed out that it appears that petrol pump owners have also played an important role in this incident. Tractors containing kerosene and petrol were brought to the village. As far as Basirabibi is concerned, her husband had died and, therefore, it is possible

that in such a mental condition, she may not have made any statement with regard to the bhajiya incident. It was submitted that none of the circumstances have been properly considered and that the sequence of events which have taken place after the burning of train at Godhra, namely, burning of ten shops, burning of cabins near the Panchayat office on 28<sup>th</sup> February, burning of three cabins in the evening at Shaikh Mohalla on 1<sup>st</sup> March, are all aspects which are suggestive of the fact that these acts have been done in furtherance of the conspiracy of removing particular Muslims of the village, whereafter the main incident had taken place. It was submitted that the real plan of the conspirators may not come to the knowledge of any person but the manner in which these incidents have taken place is suggestive of the fact that a conspiracy was hatched to eliminate a particular class of persons.

15.36 Reference was then made to the findings recorded by the trial court while acquitting the accused persons to whom the benefit of doubt was given, reference to which shall be made at a later stage.

15.37 It was submitted that looking to the facts and circumstances of the present case, all the accused persons had a meeting on 28<sup>th</sup> February, 2002 and 1<sup>st</sup> March, 2002 at the Mahadev temple. The political leaders have also delivered speeches to instigate the people of the Patel community to retaliate against the Muslims. Prior to 28<sup>th</sup> February, 2002, about ten cabins were burnt near the Panchayat office and primary school, most of which belonged to Muslims and one or two of the cabins belonged to Ravals, etc. Thereafter, on 1<sup>st</sup> March, 2002 in the evening, the crowd gathered near the

Panchayat office. One crowd consisting of around one thousand people came from the direction of Sundarpur village and another crowd comprised of about five hundred persons were from Sardarpura village. It was submitted that all these circumstances clearly show that an unlawful assembly was formed, the object whereof was absolutely unlawful namely, to do away with the Muslims. It was submitted that since the police resorted to firing, temporarily the crowd had dispersed and again came together towards the Shaikh Mohalla and three cabins were burnt at around 10 p.m. The crowd again gathered and came to Shaikh Mohalla at about 11:30 p.m. and burnt/ransacked almost all the houses of Shaikh Mohalla. Not only that, but the jeep, car and scooter were also burnt and thereafter, the crowd proceeded to the house of Mahemoodmiya in which the ladies, children and gents have taken shelter. It was submitted that Mahemoodmiya's house was set on fire knowing full well that the persons who had taken shelter inside the house would be burnt and killed. It was contended that, therefore, this is a clear case of unlawful assembly within the meaning of sections 141 and 149 of the Penal Code and that it is also a case of conspiracy under section 120B of the Penal Code.

15.38 In support of such submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Ramesh and Others v. State of Haryana**, (2010) 13 SCC 409, for the proposition that when an assembly is found to be unlawful and if the offence is committed by any member of the unlawful assembly in prosecution of the common object, every member of the unlawful assembly shall be guilty of the offence committed by another member of the

assembly. The court in the facts of the said case noted that all the accused have come and left the place of occurrence together and accordingly found that there was no escape from the conclusion that the appellants therein were members of the unlawful assembly and the offences have been committed in pursuance of the common object and hence, each of them would be liable for the offence committed by any other member of the assembly.

15.39 The learned Special Public Prosecutor then referred to the findings recorded by the trial court while acquitting the respondent accused by giving them the benefit of doubt, and assailed such findings by submitting that the trial court has failed to appreciate the evidence in proper perspective and hence the judgment and order of acquittal deserves to be set aside.

16. Mr. Mihir Desai, Senior Advocate, learned counsel with Mr. Kalpesh Shastri, learned advocate for the appellants in Criminal Appeals No.140, 142 and 148 of 2012, invited the attention of the court to the findings recorded by the trial court in relation to each of the accused persons whose acquittal have been challenged in these appeals and has made his submissions thereon, reference to which shall be made at a later stage while considering the case of each individual accused person.

16.1 On the merits of the appeals, the learned counsel reiterated the submissions advanced by the learned Special Public Prosecutor and further submitted that it is settled legal position as held by the Supreme Court as well as this High

Court in a catena of decisions that once a person is held to be a party to an unlawful assembly with a common object, no overt act needs to be attributed to that person for being found guilty of the offence in question. It was submitted that this is a case where there is no doubt and it cannot be seriously disputed that a large mob entered into an area in which they were not residing and they went to the end of the area of the locality/mohalla and certain people were killed. It was submitted that there is no doubt about this fact and the fact that there was an unlawful assembly and the kind of statements which were being made which the witnesses have repeated one after the other. It was submitted that the common object of the unlawful assembly was to inflict physical harm to persons and kill the persons of a particular community which cannot be doubted. If this is not doubted, then as per the Supreme Court decisions, each person who is a member of that unlawful assembly would be guilty irrespective of whether any overt act had been committed by that person. In that context, the only thing which one has to verify is whether a particular person was present in the assembly or not. Nothing more needs to be done. It was, accordingly, submitted that once it is shown that there is some amount of credible evidence that a person was a part of a mob which has gone inside, there is no question of there being any bystander and that everybody who had gone inside was shouting and screaming, etc. The only question which the court is required to then answer is as to whether such person was a part of the mob or not. It was submitted that as far as the testimonies go, there are a few things that may be borne in mind namely, that the incident of 1<sup>st</sup> March took place at night and on 2<sup>nd</sup> March, 2002 the first information report came to be lodged wherein

twenty-eight persons have been named. Subsequently, fifty-five persons have been chargesheeted and the first chargesheet came to be filed on 27<sup>th</sup> July, 2002. In the meanwhile, two petitions came to be filed in the Supreme Court, one by the National Human Rights Commission wherein prayer for seeking transfer of the case outside Gujarat was made, and the second petition was filed by some other individual or organisation seeking transfer of investigation. Thereafter, on 6<sup>th</sup> November, 2003, eight affidavits in respect of this case came to be filed or are affirmed. It was submitted that there are a total of thirty-eight victim witnesses out of whom, eight have filed affidavits. On 21<sup>st</sup> November, 2003, the Supreme Court stayed all the trials arising out of incidents that occurred in the aftermath of the Godhra incident, including the trial in relation to the incident arising from village Sardarpura. It was submitted that the case thereafter came up in the year 2008 and on 26<sup>th</sup> March, 2008, the Special Investigation Team came to be appointed to which the State of Gujarat agreed. Consequent thereon, a notification dated 1<sup>st</sup> April, 2008 came to be issued whereby the Special Investigation Team came to be constituted. Therefore, for a period of five years, there was a freeze on cases. It was submitted that thereafter, a judgment came to be passed by the Supreme Court on 1<sup>st</sup> May, 2009. It was submitted that subsequently, the Supreme Court lifted the stay on the trial and further investigation came to be carried out by the Special Investigation Team in 2008. It was submitted that the Special Investigation Team thereafter carried out further investigation in the case.

16.2 According to the learned counsel, when there is a contradiction brought out in the testimony of a witness, one

needs to bear in mind two aspects of the case, firstly, that this was a riot case and not an individual case, wherein normally the Supreme Court has adopted a two witness test; secondly, these cases had a journey of investigation being transferred from one agency to another, the trial was stayed and in the context where the Supreme Court felt that the witnesses were under threat. It was submitted that the National Human Rights Commission conducted a survey in Gujarat and the report came to be submitted in July, 2002 wherein it was stated that the first information reports and statements are not recorded properly and, therefore, there was a need to file petition for transfer of investigation and need to appoint Special Courts and Special Public Prosecutors, before the Supreme Court. It was submitted that the Supreme Court was conscious of the fact that the witnesses in this case would need protection as they had been terrorised, would have been under fear rightly or wrongly and, therefore, guidelines concerning witnesses had been given. It was submitted that in the peculiar facts of this case, what the witnesses have stated in the court and what they have stated earlier needs to be looked into. Moreover, the following factors are required to be kept in mind: -

- (i) many of the witnesses were injured witnesses;
- (ii) those not injured also lost relatives in this particular carnage;
- (iii) there was no personal enmity between any of them and the persons who have been named; and
- (iv) the peculiar facts of this case of which cognizance was taken by the Supreme Court.

16.3 It was submitted that in this context, the emphasis given on the contradictions in relation to the earlier statements

and the statements which they have made in the court needs to be looked into. As far as the affidavits are concerned, it was submitted that out of thirty-eight victim witnesses, eight have filed affidavits with their limited prayer to transfer the case and not with the intention to decide who was guilty and who was not. Affidavits were made on 6<sup>th</sup> November, 2003 after the first chargesheet was filed on 27<sup>th</sup> July, 2002 and the Special Investigation Team became the investigating agency on 26<sup>th</sup> March, 2008. Therefore, there is a period between 2002 and 2008 when there was no investigating agency. It was submitted that, therefore, there was no question of exhibiting the affidavits and, therefore, it would not be correct to look at these documents which are not exhibited. As regards whether the affidavits can be treated as previous statements under section 161 of the Code or can be used for contradicting the witnesses under section 145 of the Evidence Act, it was submitted that the same cannot be used for contradicting the witness under section 145 of the Evidence Act as this was a peculiar case where there was a freeze from 2002 to 2008 so far as the conduct of the trial is concerned. However, as far as the prosecuting agency is concerned, there was no stay on investigation and after they filed the chargesheet, their work was over. It was submitted that in the facts of the present case, subsequent investigation came to be carried out by another agency after the Supreme Court directed constitution of the SIT in the year 2008, whereafter the second chargesheet came to be filed in 2008 and the stay on the trial came to be lifted. It was submitted that in these facts, the affidavits stated to have been filed in the Supreme Court and the applications made to the SIT cannot be used for the purpose of

contradicting the witness under section 145 of the Evidence Act.

16.4 The learned counsel submitted that the trial court has wrongly acquitted the accused persons of the charge of conspiracy under section 120B of the Penal Code. It was pointed out that the incident of burning of the train at Godhra took place on 27<sup>th</sup> February, 2002; however, there was no attack on the members of the Muslim community on 27<sup>th</sup> February and on 28<sup>th</sup> February. There was no attack on any of the members of the said community during day time on 1<sup>st</sup> March, 2002. It was submitted that the attack was made only two days after the incident, that too, in the dead of night. Therefore, it cannot be treated as a spontaneous reaction of the accused due to the burning of the train at Godhra. It was submitted that the incident in question was a result of planning and meeting of minds and was a planned conspiracy. It was submitted that the events which led to the occurrence of the incident are also required to be kept in mind. About twenty to twenty-five days prior to the incident, a speech was given by a political leader instigating the Patels of Sardarpura village. It was pointed out that evidence has come on record that three days before the event, another political leader had made provocative statements inciting the members of the Patel community. Next, it was submitted that though the streetlights of the entire village were shut down due to non-payment of the bills on the part of the panchayat, on this particular night, lights and halogen lamps were put up at the place where the violence took place, focussing on the mohalla, which clearly indicates that there was a clear plan on the part of the accused persons to assault the persons at Shaikh Mohalla.

16.5 It was submitted that a number of statements have been made by different persons of the village one or two days prior to the event which clearly indicate that a conspiracy was hatched to attack and kill the persons belonging to the Muslim community. It was pointed out that the key to the water pump was taken away one day before the incident with the idea that when the attack is made, no water would be available to extinguish the fire. It was pointed out that many of the persons named had participated in the offence and it is obvious that it was a pre-conceived conspiracy and that the only reason to put on the lights was to ensure whom they were attacking. It was submitted that comments made by various persons and events after 27<sup>th</sup> February, 2002 would clearly amount to hatching of a conspiracy as contemplated under section 120B of the Penal Code and, therefore, the accused should be held guilty of the charge under that section. In support of his submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Krishna Mochi v. State of Bihar**, (2002) 6 SCC 81, for the proposition that in the matter of appreciation of evidence, what matters is the quality of evidence and not the number of witnesses, but sometimes, in appropriate cases, the court may adopt a test like the one adopted by the Allahabad High Court in the case referred to therein. The court observed that though in that case, the basis of conviction of the appellant before the Supreme Court was credible evidence of four or more eye-witnesses, but still the court observed that ordinarily, in cases where there are a large number of offenders and large number of victims, it would be safe to convict only if the case is supported by two or three or more witnesses who give

consistent account of the incident. The court had observed such a rule of caution ordinarily, which would obviously mean that there is no blanket ban upon rule of universal application that if the number of eye-witnesses is less than two, in no case conviction can be upheld. The court further held thus: -

**“30.** *Thus, it appears that this Court laid down that in the matter of appreciation of evidence what matters is the quality of evidence and not the number of witnesses, but sometimes, in appropriate cases, the court may adopt a test like the one adopted by the Allahabad High Court in that case. Though in that case the basis of conviction of the appellants before this Court was credible evidence of four or more eyewitnesses, but still the Court observed that, ordinarily, in cases where there were a large number of offenders and a large number of victims it would be safe to convict only if the case is supported by two or three or more witnesses who give consistent account of the incident. This Court has observed such a rule of caution ordinarily, which would obviously mean that there is no blanket ban or rule of universal application that if the number of eyewitnesses is less than two, in no case conviction can be upheld. That apart, as in that case the appellants were convicted on the basis of evidence of four or more eyewitnesses, as a matter of fact the Apex Court was not called upon to go into this question, but even then it has made such observations. As noted above, no rule of universal application was intended to be laid down or has been laid down. The decision is, therefore, not applicable to the facts of the present case.*

**31.** *It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which*

*may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurance or giving out threats to his life and/or property at the instance of persons, in/or close to powers and musclemen or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time.*

**32.** *Thus, in a criminal trial a Prosecutor is faced with so many odds. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong*

*convictions and it equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time. In the case Inder Singh v. State (Delhi Admn.), (1978) 4 SCC 161, Krishna Iyer, J. laid down that: "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." In the case of State of U.P. v. Anil Singh, 1988 Supp SCC 686, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of State of W.B. v. Orilal Jaiswal, (1994) 2 SCC 73, it was held that justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice, according to law. In the case of Mohan Singh v. State of M.P., (1999) 2 SCC 428, it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.*

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**33.** *Thus, in the present case where there was more or less a caste war between the haves and the have-nots, gruesome murder of 35 persons of one community in which several persons were injured, great commotion in the locality, people became panicky as the accused persons were members of MCC, which is a very violent organisation, even if the complicity of the accused is proved by credible evidence of one or two witnesses, it would not be unsafe to convict an accused, rather a duty is enjoined upon the court not to acquit an accused on this ground alone unless the prosecution case is*

*otherwise found to be untrustworthy. It is well settled that in a criminal trial credible evidence of even a solitary witness can form the basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy inasmuch as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses, but the quality of their evidence. Thus, I do not find any substance in the submission of the learned counsel appearing on behalf of the appellants on this count."*

16.6 Reliance was also placed upon the decision of the Supreme Court in the case of **C. Muniappan v. State of Tamil Nadu**, (2010) 9 SCC 567, wherein the court held that the test identification parade is a part of the investigation and is very useful in a case where the accused are not known beforehand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not a substantive evidence. Actual evidence is what is given by the witness in the court. The court further held thus: -

*"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is give to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the*

*investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."*

16.7 Reference was also made to the decision of the Delhi High Court in the case of **Duli Chand and Another v. The State**, 1998 Criminal Law Journal 988, wherein the court inter alia held that it has to be kept in view that considering the large scale killing which took place on 1<sup>st</sup> and 2<sup>nd</sup> November, 1984, the contradictions about date, particularly after lapse of many years are likely to occur and are natural and it would not discredit the witnesses.

16.8 It was submitted that through the testimonies of the eye witnesses, the prosecution has duly proved the charge of criminal conspiracy under section 120B of the Penal Code as well as the complicity of the respondents accused in the offence in question. The trial court was, therefore, not justified in acquitting them by giving them the benefit of doubt. The impugned judgment and order of acquittal, therefore, deserves to be reversed and the respondents/accused are required to be convicted of the offences with which they are charged.

17. Mr. H. K. Patel, learned Additional Public Prosecutor appearing in the acquittal appeal preferred by the State of Gujarat, invited the attention of the court to the findings recorded by the trial court while acquitting thirty-one accused persons (the respondents in the appeal) giving them the benefit of doubt, reference to which shall be made at an appropriate stage. Adopting the submissions advanced by the learned Special Public Prosecutor and Mr. Mihir Desai, the

learned Additional Public Prosecutor further placed reliance upon the decision of the Supreme Court in the case of **Om Prakash v. State of Haryana**, (2014) 5 SCC 753, on which reliance has also been placed by the learned Special Public Prosecutor. Reliance was also placed upon the decision of the Supreme Court in the case of **Sushanta Das and others v. State of Orissa**, (2016) 4 SCC 371, wherein the court held that when one reads section 149 of the Penal Code, since at the very outset, it refers to participation of each member of an assembly, it has to be necessarily shown that there was an assembly of five or more persons which is designated as unlawful assembly under section 149 of the Penal Code. When once, such a participation of five or more persons is shown, who indulge in an offence as a member of such an unlawful assembly for the purpose of invoking section 149, it is not necessary that there must be specific overt act played by each of the members of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such person knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a member of an unlawful assembly, the offence as stipulated under section 149 of the Penal Code will stand proved. Reliance was also placed upon the decision of the Supreme Court in the case of **Sikandar Singh and Others v. State of Bihar**, (2010) 7 SCC 477, wherein the court held that section 149 has essentially two ingredients: - (1) the commission of an offence by any member of an unlawful assembly and (2) such offence must be committed in prosecution of the common object of the

assembly or must be such as the members of such assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly, must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact as to whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

17.1 Reference was made to the decision of the Supreme Court in the case of ***Subal Ghorai and Others v. State of West Bengal***, (supra) upon which the learned Special Public Prosecutor has placed reliance. It was submitted that in the facts of the present case, the presence of the accused persons in the mob has been duly established through the testimonies of the eye-witnesses and that having regard to the facts and circumstances of the case, it is not necessary to establish or attribute any overt role of each of the accused persons. It is sufficient that the accused persons were found to be members of the mob for the purpose of attracting section 149 of the Penal Code.

18. In rejoinder, Mr. Y. S. Lakhani, learned counsel for the accused invited attention to the findings recorded by the trial court while acquitting the accused persons by giving them the benefit of doubt, to submit that the findings recorded by the

trial court are based upon a proper appreciation of the evidence on record and do not warrant interference by this court.

18.1 Dealing with the submission that a statement made after the filing of the chargesheet is not a previous statement, reference was made to the decision of the Supreme Court in the case of ***Shri N. Sri Rama Reddy v. Shri V.V. Giri***, (1970) 2 SCC 340, wherein, relying upon a taped conversation, the learned counsel had urged that his client was entitled to test the veracity of the witnesses and impeach the credit of the witness and satisfy the court that the evidence given by the witness before the court was inconsistent and contrary to what he has stated on an earlier occasion. The court after referring to various decisions in this regard held that it was clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in court but also to contradict the evidence given before the court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of other three matters under section 146(1), Exception (2) to section 153 and section 155(3) of the Evidence Act. The court, accordingly, did not find it possible to accept the contention of the learned counsel that the previous statement can be used only for the purpose of corroboration and not for the purpose of contradicting the evidence given before the court. The court held that if a previous statement made by a person can be used to corroborate his evidence given before the court, on principle, it did not see any reason why such previous statement cannot be used to contradict and also for the other

purposes referred to therein. Mr. Lakhani, accordingly, submitted that if any statement is made after the chargesheet is filed, the same can also be used to corroborate or to contradict the witness.

18.2 Reliance was placed upon the decision of the Supreme Court in the case of **Majid v. State of Haryana**, (2001) 10 SCC 6, for the proposition that it is a method recognised by law under section 155(3) of the Indian Evidence Act that the credit of a witness can be impeached by a number of former statements inconsistent with any part of his evidence which is liable to be contradicted. Mr. Lakhani submitted that to test the credibility of a witness any statement made before his evidence is recorded can be put to him to impeach his credibility. It was contended that any statement either oral or in writing made anywhere, before anybody, including in the court proceedings which are prior in point of time on a fact which is found to be inconsistent to what the witness is deposing before the court, can be used to contradict the witness either to impeach his credibility under section 155(3) or to test the veracity of the witness under section 146(1) or to impeach his impartiality under Exception (2) to section 153 of the Evidence Act. It was submitted that when a statement in writing on oath is made by the witness and admitted by him, much less, comes from the custody of the prosecution itself with a request to exhibit it, the defence is justified in getting the version of the witness concerned contradicted in reference to the inconsistent submissions made by him. It was submitted that in this case, incidentally, all these questions which are put and answers elicited from the witness qua those findings are

admitted by the witnesses themselves, therefore, they can be looked into as a piece of evidence on record.

18.3 Dealing with the submissions advanced by Mr. Anandjiwala, the learned Special Public Prosecutor, Mr. Mihir Desai, the learned counsel for the victims as well as Mr. Patel, the learned Additional Public Prosecutor, Mr. Lakhani submitted that insofar as the delay in recording statements is concerned, there are two-fold submissions to make. Firstly, whether the witness was under a particular state of mind due to which he was in shock, or his mental condition was not proper, because of which he could not disclose the facts and the names of all the accused, are questions of fact and the mental condition of a particular witness at a particular point of time can never be by virtue of a counsel's imagination. It was submitted that immediately after the incident, a witness may not be able to state the facts accurately, but whether after a reasonable span of time, the witness still remained in the state of mental shock for days thereafter, is a pure question of fact. Therefore, unless the statute provides for a presumption, whether statutory or otherwise, a question of fact cannot be inferred and it has to come on record by way of positive evidence. The attention of the court was invited to the provisions of section 3 of the Evidence Act and more particularly, to the definition of the expression "fact" which means and includes (i) any thing, state of things, or relation of things, capable of being perceived by the senses; (ii) any mental condition of which any person is conscious. Referring to section 4 of that Act, it was pointed out that the same provides that whenever it is provided by the Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for

proof of it. It was submitted that it was for the prosecution to prove that it was for the court to presume a certain set of facts. It was submitted that the expression "shall presume" refers to a statutory provision. Reference was also made to the provisions of section 5 of the Evidence Act which bears the heading "Evidence may be given of facts in issue and relevant facts" and lays down that evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and all such other facts as are thereafter declared to be relevant, and of no others. The attention of the court was also invited to section 14 of the Evidence Act which bears the heading "Facts showing existence of state of mind, or of body or bodily feeling" and postulates that facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or of body or bodily feeling, is in issue or relevant. It was submitted that what is the state of mind of a particular witness on or after the incident being purely a question of fact, it has to come on record to explain the circumstance as to why at a particular point of time or thereafter, a statement could not be given. Simultaneously, the court will examine the issue that whenever the statement is recorded peremptorily or belatedly, whether any fact or name of the accused has in fact been stated by the complainant to the investigating agency and the agency has not recorded or has wrongly recorded the same. It was submitted that no explanation is coming forth in the deposition of any of the witnesses that he could not give the statement on time. It was submitted that somebody has to give an

explanation that he could not give the statement due to a particular state of mind, whereas nothing has been brought on record to explain the delay on the part of the police and the witnesses. It was pointed out that the police officers were present in the hospital; however, till all the witnesses were discharged, no statement had been recorded despite the continuous presence of the police for a period of thirteen hours.

18.4 Next, it was submitted that the witnesses have not stated that they have made any attempt to give the names and narrated the facts before the police but the police refused to record it. It was submitted that in two cases, the refusal to record statements has come on record but in no case has any evidence come on record to show that a witness wanted his statement to be recorded but the police did not record the same. It was submitted that on 2<sup>nd</sup> March and 3<sup>rd</sup> March, 2002, statements have been recorded wherein most of the witnesses have not disclosed the name of any of the accused. Out of eight witnesses, nearly five witnesses have not named any accused. PW-60 Bachumiya Imammiya has given the name of only one accused whereas two witnesses: PW-55 Ashiqhussain and PW-59 Mohammad Sattar, who are brothers, have given various names but then they have stated before the SIT that most of the names had not been given by them and the police have written the names on their own. It was further submitted that as regards words which are hate words which are put in the mouth of the accused as members of a mob, at the earliest opportunity, there is very scanty evidence in this regard and use of such hate words has been mentioned only by witnesses whose statements came to be recorded at a later date. It was

submitted that it is the prosecution case that to make the accused liable under section 149 of the Penal Code, the use of words by the mob is sufficient to attach a mental condition of the accused that they had intention to kill. It was submitted that the first information report does not reflect any such words having been used by the mob and that most of the witnesses from PW-47 to PW-81 are silent with regard to such words having been used by the mob. It was pointed out that PW-48 Sabirhussain Kadarmiya Shaikh, PW-60 Bachumiya Imammiya Shaikh, PW-66 Akbarmiya Rasulmiya Shaikh, PW-67 Imliazbhai Mahammadhussain Shaikh, PW-74 Sikandarmiya Rasulmiya Shaikh, PW-75 Firozabanu Bachumiya Shaikh, PW-79 Samimbanu Mahemoodmiya Shaikh and PW-81 Dilavarkhan Abbasmiya Shaikh, are totally silent about the use of the hate words. It was submitted that PW-69 Mahemoodmiya Hussainmiya Shaikh and PW-70 Munsafkhan Yasinkhan Pathan have referred to such words having been used, however, in relation to the incident of 9:30 and not in relation to the incident of 11:30. Similarly, PW-55 Ashiqhussain Bachumiya Shaikh has also referred to the use of hate words for the 9:30 incident but not with respect to the 11:30 incident. It was submitted that the next group of witnesses namely, PW-49 Iqbalmiya Rasulmiya Shaikh, PW-58 Sabirhussain Imamsha Fakir, PW-62 Rafiqmiya Mahammadhussain Shaikh, PW-63 Bhikumiya Kalumiya Shaikh, PW-65 Akbarmiya Nathumiya Shaikh, PW-68 Gulamali Akbarmiya Shaikh, PW-76 Hamidabibi Akbarmiya Shaikh, PW-78 Basirabibi Bachumiya Shaikh, PW-50 Zakirhussain Kadarmiya Shaikh, PW-53 Kulsumbibi Kadarmiya Shaikh and PW-54 Sharifmiya Bhikumiya Shaikh, are witnesses who have deposed with regard to use of hate words but contradictions have been brought out to prove that they

have not stated so in their statements recorded before the police. It was submitted that most of the witnesses have not stated these facts in both the statements except PW-63 Bhikhumiya Kalumiya Shaikh whose contradiction qua the police statement is proved and PW-50 Zakirhussain Kadarmiya Shaikh and PW-54 Sharifmiya Bhikhumiya Shaikh, where the contradiction is proved qua the 11:30 incident.

18.5 Referring to the third group of witnesses namely, PW-59 Mohammad Sattar Bachumiya Shaikh, PW-61 Safiqmiya Babumiya Shaikh, PW-64 Rafiqmiya Babumiya Shaikh, PW-73 Faridabibi Ashiqhussain Shaikh, PW-80 Rukshanabanu Ibrahimiya Shaikh, PW-51 Nazirmahammad Akbarmiya Shaikh, PW-52 Hizbulmiya Hussainmiya Shaikh, PW-56 Ayubmiya Rasulmiya Shaikh and PW-57 Mustufamiya Rasulmiya Shaikh, it was submitted that these nine witnesses did say something about the words being used. Out of them, PW-73 Faridabibi Ashiqhussain Shaikh and PW-80 Rukshanabanu Ibrahimiya Shaikh have not named anybody in the court. Out of the remaining seven witnesses, statement of PW-64 Rafiqmiya Babumiya Shaikh was recorded after twenty-six days whereas the statements of PW-61 Safiqmiya Babumiya Shaikh, PW-51 Nazirmahammad Akbarmiya Shaikh, PW-52 Hizbulmiya Hussainmiya Shaikh, PW-56 Ayubmiya Rasulmiya Shaikh and PW-57 Mustufamiya Rasulmiya Shaikh, have been recorded for the first time on 10<sup>th</sup> March, 2002. Only one witness whose statement has been recorded on the same day i.e. 2<sup>nd</sup> March, 2002 viz., PW-59 Mohammad Sattar has stated so. Thus, one witness on the same day has stated regarding the use of these words. It was submitted that PW-59 Mohammad Sattar, has stated before the SIT that he has not

given most of the names finding place in the police statement. It was pointed out that this witness has named five accused in his deposition for the first time and the names of such accused do not find place even in the statement recorded by the SIT. Therefore, PW-59 Mohammad Sattar cannot be said to be a trustworthy or credible witness. It was submitted that if the statement made by this witness is taken out, there is no allegation that any such words were used by the mob, which pre-conceives a mental state of the mob to kill the persons. It was submitted that apart from the fact that most of the names of accused have not been given by the witnesses immediately; almost all witnesses whose statements came to be recorded immediately on 2<sup>nd</sup> and 3<sup>rd</sup> March, 2002 do not attribute hate words to kill somebody, which would seriously affect the credibility and reliability of the witnesses. Reference was made to the provisions of section 114 of the Evidence Act to submit that the same provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

18.6 Adverting to the facts of the present case, it was submitted that having faced such a situation, if the witness does not narrate the incident or the name of the accused within a short proximity of time after the incident, the court will be within its power to presume that the witness might not be in a position to narrate the facts about the incident. But if it is extended from five days to nine days, it is difficult to believe that the very mental condition or state of mind is extended till the time their statements are recorded, unless it is reasonably

explained. The second limb of the submission of the learned counsel was that the total number of persons who were found dead inside the house and the number of persons who died is thirty-two; the clothes which are found from the bodies are sixty-three in number and each of the sixty-three pieces of clothes were found bloodstained and traces of kerosene hydrocarbon were also found. The floor of the room where the incident had taken place from where the samples were taken, also contained blood, and therefore, when the prosecution is claiming that twenty persons who survived claimed to be inside the room, the theory of they being inside the room is under a heavy cloud mainly, for three reasons: firstly, seventeen persons are not shown to have received any injury; secondly, out of the three who are injured and received burn injuries, viz., PW-73 Faridabibi Ashiqhussain Shaikh, PW-78 Basirabibi Bachumiya Shaikh and PW-80 Rukshanabanu Ibrahimmiya Shaikh, have not named anybody and only PW-78 Basirabibi has named some accused. It was pointed out that the clothes of any of the twenty injured persons are not seized by the police to corroborate their say that they were inside the room by verifying as to whether their clothes were also found to have bloodstains and kerosene hydrocarbons. It was submitted that on their physical examination also, it has not come on record that any soot or sooty carbon particles were found, noticed or even seen by the bare eyes on their person or clothes. According to the learned counsel, one important fact which could not have gone unnoticed is singeing of hair. It was submitted that the blood samples of any of the injured persons had not been taken which would have shown the presence of carbon monoxide. It was contended that non-recovery of such facts is important where it is the case of the

accused that the witnesses were not present in the room. It was submitted that PW-76 Hamidabibi Akbarmiya has stated that she sustained burn injuries outside the house and hence, the possibility of PW-73 Faridabibi Ashiqhussain, PW-78 Basirabibi Bachumiya and PW-80 Rukshanabanu not being inside the room, cannot be ruled out, which would also affect the reliability of these witnesses.

18.7 As regards the contention with regard to the charge under section 120B of the Penal Code, it was submitted that the theories referred to hereinabove were sought to be highlighted mainly for the purpose of invoking section 120B of the Penal Code. It was submitted that the accused who have been convicted by the trial court for various offences, have been acquitted of the offence under section 120B of the Penal Code and no appeal has been preferred by the State against such acquittal for the offence under section 120B. It was submitted that, therefore, when in respect of the accused who have already been convicted, the acquittal for the offence under section 120B of the Penal Code has not been challenged, it is not permissible for the State as well as the private parties to challenge the acquittal of the other accused persons for the said offence. It was further submitted that as these theories have not been believed, the trial court has not taken support of those theories. It was submitted that there is no reason why these theories should not be held to be a concoction. It was submitted that in connection with facts which are stated to have occurred on 27<sup>th</sup> February, 28<sup>th</sup> February at any time during the course of the day or on 1<sup>st</sup> March, 2002 in the evening, various theories have been created and if all those theories, apart from the fact that they are not in consonance

with their earlier submissions, and that they are created subsequently, whosoever is the witness, who brings in any of these theories, should be believed to have implicated someone whom he knows is innocent.

18.8 On the aspect of existence of light at the time of the incident, it was submitted that all facts relating to light were put up by the witnesses only with a view to show that the witnesses were in a position to identify the accused. It was submitted that firstly, there was no electricity connection on the street lights; secondly, the entire theory is not acceptable for the reason that the theory of existence of light has been subsequently created and is not supported by the panchnama and the site plan, and thirdly; if the light theory goes, the court will then look for evidence as to whether there was a source of light in which the witnesses could identify the accused.

18.9 It was submitted that the presumption that as it was a day of Beej, there must be moon light, is not available to the prosecution, inasmuch as, availability of light, whether it be moonlight or otherwise, is a question of fact. It was submitted that whether there was a moon light and whether where the incident took place, there was sufficient light, are questions which need to be proved on record by cogent, reliable and oral evidence of the witnesses. It was submitted that the second inference recorded by the trial court, namely, that the village people who are used to work in the dim light can identify people, is again a question of fact to which nobody has deposed. It was submitted that the entire theory of availability of light has been introduced after the SIT came into picture and one of the persons has said so in his affidavit. It was

submitted that having regard to the totality of the facts, the evidence of existence of light is not clear which would surely dent the credibility of the witnesses regarding the identification of the accused.

18.10 On the question of threat being administered to the witnesses, it was submitted that only PW-71 Mangabhai Raval has stated that two of the accused persons had threatened him. He, however, has not named the said two accused persons as having taken part in the offence in question in his statement recorded by the SIT or in his deposition. Therefore, there is no reason to believe that the said accused persons had threatened him. It was submitted that the submission before the court with regard to the witness having been threatened, has been made only with a view to prejudice the court.

18.11 Next, it was submitted that many of the independent witnesses have not been examined by the prosecution, including the Fire Brigade personnel. It was submitted that residents of Sardarpura belonging to various communities, including Patels, whose statements have earlier been recorded have not been cited as witnesses. According to the learned counsel, the prosecution has tried to suppress the genesis of the incident and the facts regarding what had actually happened have not come on record. It was submitted that there is a doubt about the manner in which the incident has taken place as the room was stated to be shut from inside, however, despite this fact, though the room was set on fire, none of the persons inside the room have attempted to come out.

18.12 As regards the scope and effect of further investigation under section 173(8) of the Code, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Hasanbhai Valibhai Qureshi v. State of Gujarat**, 2004 SAR (Cri.) 428, for the proposition that if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

18.13 Reference was also made to the decision of the Supreme Court in the case of **Vinay Tyagi v. Irshad Ali alias Deepak and others**, (2013) 5 SCC 762, wherein the court has held that “further investigation” is where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the court in terms of section 173(8). The power is vested with the executive. It is the continuation of the previous investigation and, therefore, is understood and described as “further investigation”. The scope of further investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as “supplementary report”. “Supplementary report” would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the

initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation", "fresh" or "de novo" investigation. The court further held thus:

**"41.** Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kinds of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the first information report. Then, upon completion of the investigation, the police is required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the court. It is the record of the case and the documents annexed thereto, which are considered by the court and then the court of the Magistrate is expected to exercise any of the three options aforesighted. Out of the stated options with the court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the Magistrate to direct "further investigation" is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

**42.** Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the court shall discharge an accused in compliance with the provisions of Section 227 of the Code.

### **Answer to Question 1**

**53.** The court of competent jurisdiction is duty-bound to consider all reports, entire records and documents submitted therewith by the investigating agency as its report in terms of Section 173(2) of the Code. This rule is subject to only the following exceptions:

(a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

(b) Where an order is passed by the higher courts in exercise of its extraordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on "fresh investigation" or "reinvestigation" or any part of it be excluded, struck off the court record and be treated as non est.

### **Answer to Question 2**

**54.** No investigating agency is empowered to conduct a "fresh", "de novo" or "reinvestigation" in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned Magistrate."

18.14 Reference was also made to the decision of the Supreme Court in the case of ***Khairuddin and others v. State of West Bengal***, (2013) 5 SCC 753.

18.15 It was, accordingly, urged that having regard to the nature of evidence which has been adduced on record, the prosecution has failed to establish the charge against the accused persons and that the judgment and order of conviction and sentence deserves to be set aside and the appeals preferred by the State and the private parties against acquittal of the accused who have been given the benefit of doubt, deserve to be dismissed.

19. In rejoinder to the submissions made by the learned counsel for the appellants-accused in respect of the acquittal appeals, Mr. Himanshu Patel, learned Additional Public Prosecutor placed reliance upon the decision of the Supreme Court in the case of ***Kali Ram v. State of Himachal Pradesh***, (1973) 2 SCC 808, for the proposition that the court may, as mentioned in section 114 of the Indian Evidence Act, presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. It was submitted that the fact it was Beej on the day of the incident cannot be disputed and therefore, the court can take judicial notice that it being the second day after the full moon day, and hence, in view of section 114 of the Evidence Act, a

presumption can be drawn that there was sufficient light and that the victims were able to see faces of the accused in the mob.

19.1 Reliance was also placed upon the decision of the Supreme Court in the case of ***State of Uttar Pradesh v. Krishna Master and others***, (2010) 12 SCC 324, for the proposition that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer in not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which did not have this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police

statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and cannot take the place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. It was submitted that in the facts of the present case, merely because there are minor discrepancies in the testimonies of the witnesses, their evidence cannot be discarded. It was pointed out that the Supreme Court has laid down that the basic principle of appreciation of evidence of a rustic witness who is not

educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly, when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relatives. Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness. The court further held that the discrepancies noticed in the evidence of a rustic witness who is subjected to gruelling cross-examination should not be blown out of proportion. To do so is to ignore the hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime.

19.2 Reference was made to the decision of the Supreme Court in the case of ***Leela Ram (Dead) through Duli Chand v. State of Haryana and another***, (1999) 9 SCC 525, for the proposition that the High Court is within its jurisdiction as the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of the witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason thereof should not render the evidence of

eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate in otherwise acceptable evidence. It was further held that the court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing, while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact, it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

19.3 As regards identification of the accused persons, the learned Additional Public Prosecutor placed reliance upon the decision of the Supreme Court in the case of ***Sheo Shankar Singh v. State of Jharkhand and another***, (2011) 3 SCC 654, for the proposition that it is fairly well-settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so, a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a test identification parade then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the

holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases, the court may accept the evidence of identification in the court even without insisting on corroboration.

19.4 Reliance was also placed upon the decision of the Supreme Court in the case of **Rammi alias Rameshwar v. State of Madhya Pradesh**, AIR 1999 SC 3544, for the proposition that the Supreme Court has time and again said that the post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different. The court further held that when an eye-witness is examined at length, it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two

statements of the same witness) is an unrealistic approach for judicial scrutiny.

19.5 The decision of the Supreme Court in the case of **Kathi Bharat Vajsur and another v. State of Gujarat**, (2012) 5 SCC 724, was also relied upon wherein, the court observed that when an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the court to go into the question as to why he reacted in such a manner. The court observed that there is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as "an unusual reaction" of an eyewitness, the court must only examine whether the prosecution story is in anyway affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. The court was of the view that the unusual behaviour of the injured eyewitness will not, in anyway, aid the appellants to punch a hole on to the prosecution story.

19.6 Reliance was also placed upon the decision of the Supreme Court in the case of **State of Uttar Pradesh v. Dan Singh and others**, AIR 1997 SC 1654, for the proposition that the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. On the question as to who were the persons who were members of the unlawful assembly, the court observed that it was no doubt true that some of the villagers may have been present at the time of the occurrence who were mere spectators and could not be regarded as being

members of the unlawful assembly. It also happens, when people are killed during a riot, there may be a possibility of the incident being exaggerated or some innocent persons being named as being part of the assailants' party. This may happen wittingly or unwittingly. But just because there may be some inconsequential contradictions or exaggeration in the testimony of the eye-witnesses, that should not be a ground to reject their evidence in its entirety. In the cases of rioting, where there are a large number of assailants and a number of witnesses, it is but natural that the testimony of the witnesses may not be identical. What has to be seen is whether the basic features of the occurrences have been similarly viewed and/or described by the witnesses in a manner which tallies with the outcome of the riot, viz., the injuries sustained by the victims and the number of people who are attacked and killed.

19.7 Reliance was also placed upon the decision of the Supreme Court in the case of **Lal Bahadur and others v. State (NCT of Delhi)**, (2013) 4 SCC 557, wherein the court affirmed the following findings recorded by the High Court:

*"14. The High Court on the first issue regarding delay in filing of FIR held that the circumstances of the present case are extraordinary as the country was engulfed in communal riots, curfew was imposed, Sikh families were being targeted by mobs of unruly and fanatic men who did not fear finishing human life, leave alone destroying/burning property. As regards recording of the statements of witnesses by the police on 30th November, 1984 after a delay of 27 days, the High Court observed that the city was in turmoil and persons having witnessed crimes would naturally be apprehensive and afraid in coming forward to depose against the perpetrators, till things settled down; that the State machinery was overworked; and in such circumstances, delay in recording the statements of witnesses cannot*

*be a ground to reduce its evidentiary value or to completely ignore it. The High Court further found that the witnesses prior to the incident were the residents of the same area and knew the assailants and it was not the case of the appellants that the delay could have resulted in wrong identification of the accused."*

20. Mr. K. B. Anandjiwala, learned Special Public Prosecutor, in rejoinder to the submissions advanced by the learned counsel for the accused in the acquittal appeals, submitted that the first informant, PW-47 Ibrahimmiya Rasulmiya Shaikh, in the first information report, mentioned that he saw the incident in the light. Therefore, the fact regarding existence of light has been stated at the first point of time. It was submitted that the police should, therefore, have mentioned regarding the existence of light or otherwise, in the panchnama. Thus, there is a lacuna in the investigation, viz., non-mentioning of the existence of electric light. However, it has come in the evidence of the D.S.P. that the wires were lying on the ground. It was submitted that though the videography covers the houses situated in the Shaikh Mohalla, but the existence of the electric poles has not been recorded. It was submitted that it has come in evidence that there was sufficient light and since the witnesses have been residing at Sardarpura in Shaikh Mohalla since their childhood, therefore, they could identify the accused persons. It was submitted that may be, the female witnesses may not know the names of the accused, but they may be able to identify them by their faces. It was submitted that the fact that the persons named by the witnesses in their depositions have been identified before the court, is a material aspect. It was submitted that having regard to the mental condition of the witnesses, if at the earliest point of time, all names have not been mentioned, it has to be overlooked. It

was submitted that after the incident, all the witnesses were transferred to relief camps. Referring to the testimony of PW-110 Kakusinh Vaghela, it was submitted that from the testimony of the said witness, it is apparent that he has tried to record the evidence at the earliest point of time. The delay in recording the evidence, therefore, will not affect the evidentiary value of the testimony of the witness. According to the learned counsel, these are the factors which have occasioned the late recording of statements and in no circumstances, can they be held responsible for the delay in recording the statements.

20.1 Next, it was submitted that the statements which are recorded after the submission of the charge-sheet, cannot be used to contradict the witnesses. Reference was made to the decision of the Supreme Court in the case of **Tahsildar Singh and another v. State of U.P.**, AIR 1959 SC 1012, for the proposition that section 145 of the Evidence Act is in two parts: the first part enables the accused to cross-examine a witness as to previous statements made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction: in other words, both parts deal with cross-examination; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to section 162 of the Code of Criminal Procedure only enables the

accused to make use of such statement to contradict a witness in the manner provided by section 145 of the Evidence Act. It was submitted that in the present case, the attention of the witnesses has not been called to those parts of the statements under section 161 of the Code which was to be used for the purpose of contradicting the witnesses. It was submitted that, therefore, without drawing the attention of the witness to the relevant part of the statement which is sought to be used for contradicting him, the contradiction is sought to be brought on record. It was submitted that having regard to the fact that the procedure as prescribed under section 145 of the Evidence Act has not been followed for the purpose of bringing the contradiction on record, the so-called contradictions and omissions cannot be taken into consideration.

20.2 Reference was made to the decision of the Supreme Court in the case of ***Binay Kumar Singh v. State of Bihar***, AIR 1997 SC 322, wherein the court has held that the credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in court. The court observed that this principle is delineated in section 155(3) of the Evidence Act and it must be borne in mind when reading section 145 which consists of two limbs. It is provided in the first limb of section 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose for contradicting him. There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching

the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of section 145.

20.3 As regards the accused who have been given the benefit of doubt, it was submitted that the victims have named them in their police statements, whereas before the Special Investigation Team, they say that they have not named them, but before the court, they once again depose and identify them and hence, there is sufficient material to bring home the charge. According to the learned counsel, the accused cannot get the benefit of what has been stated by the witnesses before the SIT, when the first version given by them before the police is consistent with what is stated before the court. It was, accordingly, urged that the appeals preferred by the SIT for setting aside the acquittal of those accused who have been acquitted by giving them the benefit of doubt, deserve to be allowed and the accused are required to be convicted for the offences with which they are charged.

#### DISCUSSION AND FINDINGS:

21. In this case, initially, the investigation was carried out by the local police and the statements of witnesses came to be

recorded. Then, the NGO/s came into the picture and affidavits came to be made by eight witnesses, *prima facie*, without ascertaining the correct facts. In the said affidavits, such witnesses have stated that they have made statements upon detailed questioning on phone by a journalist/human rights activist, Teesta Setalvad and in the presence of Shri Rais Khan Aziz Khan Pathan. Thereafter, pursuant to an order dated 26<sup>th</sup> March, 2008 passed by the Supreme Court directing constitution of a Special Investigation Team to carry out further investigation in the matter, further investigation came to be made by the SIT and supplementary charge-sheets came to be filed against certain other accused. However, during the course of further investigation, the Investigating Officer (SIT) called the witnesses whose statements had been recorded by the police and ascertained the veracity of the statements recorded by the police. Before the Investigating Officer (SIT), many of the witnesses stated that in their statements recorded by the Investigating Officer (Police), they had not named the accused, but the police had written the names on their own and some of the witnesses named a different set of accused as having been part of the mob. As noted hereinabove, initially, at the relevant time after the occurrence of the incident, the Investigating Officer had recorded the statements of witnesses, albeit in some cases somewhat belatedly, and had submitted the charge-sheet on 27<sup>th</sup> July, 2002. Subsequently, eight witnesses made affidavits for the purpose of submitting the same before the Supreme Court in proceedings for transfer of cases. However, no evidence had been brought on record to establish as to whether these affidavits were, in fact, tendered before the Supreme Court and in which proceedings. It appears that the xerox copies of the affidavits were placed on the

record, which are neither certified copies nor xerox copies of the certified copies. Nonetheless, all the witnesses have admitted that they have made the affidavits and have also admitted the contents thereof to the extent the same have been put to the witnesses. Pursuant to the constitution of the SIT and the Investigating Officer (SIT) taking over charge of the investigation, it appears that the SIT issued a public notice calling upon all persons who had knowledge about the incident to approach it. In response thereto, some of the witnesses whose statements had already been recorded by the police as well as some witnesses for the first time, came forward and made applications to the SIT for recording their statements. Thereafter, the SIT also recorded the statements of these witnesses, in some cases, more than one statement of the witness came to be recorded. During the course of trial, the defence has subjected each witness to lengthy cross-examination as to the previous statements recorded by the police as well as by the SIT and also as to the statements made in the applications filed before the SIT and the affidavits that are stated to have been filed before the Supreme Court. Therefore, the evidence which has been brought on record, is quite complex in nature. For example, each witness has been cross-examined as to whether he has named all the accused in his/her police statement/s, his/her statement/s recorded by the SIT as well as in the application/s filed before the SIT and the affidavits stated to have been filed before the Supreme Court for the purpose of demonstrating that the witnesses are not consistent in the statements made from time to time, without bringing on record the nature of the applications, affidavits, further statements as to whether not mentioning certain facts mentioned in the initial statement would actually

amount to an inconsistency. The questions that therefore arise in this context are as to what is the nature of the further statements of the witnesses, the applications filed by some of the witnesses as well as the affidavits made by eight of the witnesses, and as to whether the applications and affidavits can be said to be previous statements within the meaning of section 145 of the Evidence Act with which the witness can be contradicted during the course of his cross examination.

22. At the outset, it may be noted that a perusal of the evidence of the witnesses reveals that some of the witnesses have named some of the accused in their initial statements recorded by the police in March/April 2002 and have also named such accused in their depositions and have identified them in the court. Some of the witnesses have named the accused in their initial statements recorded by the Investigating Officer in the year 2002, but thereafter, before the SIT in the year 2008, they have taken a stand that they have not named some or all of the accused and that the police have written down the names on their own. Nonetheless, at the time of recording of their evidence before the court, these witnesses have named those accused in their depositions and have also identified some of them in the court.

22.1 In case of some of the witnesses, their statements were not recorded by the Investigating Officer (Police) at the initial stage in the year 2002 and for the first time were recorded by the SIT in the year 2008; such witnesses have named the accused in their depositions and have identified them in the court. In some cases, the witnesses in their initial statements recorded by the Investigating Officer (Police) named some

accused, but before the SIT, they have stated some other names and have named such accused in their depositions and identified them in the court. Some of the witnesses had either named or not named the accused in their statements before the police or before the SIT and had not named them in their depositions, but have identified them in the court by their faces.

22.2 Thus, having regard to the fact that the statements of the witnesses were recorded firstly by the Investigating Officer (Police) and thereafter, the Investigating Officer of the SIT, multiple statements of many witnesses have come on the record of the investigation. Accordingly, the learned counsel for the defence has cross-examined the witnesses as to their previous statements made before the Investigating Officer (Police) as well as Investigating Officer (SIT) under section 161 of the Code. Not only that, some of the witnesses have also been cross-examined as to the applications made by them to the SIT and the witnesses who made affidavits which are alleged to have been placed on the record of the Supreme Court in some proceeding (the details whereof are not available on record nor is the fact of tendering such affidavits and in which proceedings, brought on record) have been cross-examined as to the contents of those affidavits. The question that, therefore, arises is as to what is the nature of the applications and affidavits with which the witnesses have been confronted in their cross-examination to contradict them and/or to impeach their credibility.

22.3 In this case, initially investigation was carried out by the local police namely, Police Inspector, Vijapur Police Station,

who upon completion of the investigation found that there was sufficient material to contradict the accused and filed a charge-sheet on 27<sup>th</sup> July, 2002. After the charge-sheet was filed, some petitions came to be filed before the Supreme Court, wherein the trial in the present case and other cases arising out of the riots ensuing on account of the Godhra incident came to be stayed. It appears that insofar as the affidavits are concerned, they are stated to have been filed in one such proceeding which was filed before the Supreme Court in the year 2003 by an NGO. At the time when the affidavits were filed, the investigation was completed and the report under section 173(2) of the Code had already been filed. The purpose behind filing affidavits appears to be to secure transfer of the cases outside the State of Gujarat. The Supreme Court in the year 2008 directed further investigation to be carried out through a Special Investigation Team, pursuant to which the Investigation Officer (SIT) issued a public notice calling upon all persons who had knowledge about the incident to come forward for recording of their statements, if they so desire. In response to the public notice, some of the witnesses filed applications before the SIT pursuant to which their statements came to be recorded. The Investigating Officer (SIT) carried out further investigation and recorded further statements of the witnesses as well as statements of witnesses whose statements had not been recorded earlier and filed supplementary charge-sheets against accused persons who were not named in the earlier charge-sheets.

22.4 At this stage, it may be germane to refer to the provisions of section 161 of the Code, which to the extent the same is relevant for the present purpose reads thus: -

**"161. Examination of witnesses by police.-**(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Provided that statement made under this sub-section may also be recorded by audio-video electronic means."

22.5 Thus, a statement under section 161 of the Code is a statement recorded by the police upon orally examining any person supposed to be acquainted with the facts and circumstances of the case. Section 162 of the Code provides that no statement made by any person to a police officer in the course of an investigation under the 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 such purpose, save as thereafter provided, at any inquiry or trial in respect of any offence under investigation at the time when the statement is made. Thus, for the purpose of falling within the ambit of section 161 and section 162 of the Code, a statement has to be recorded by the police; such statement if reduced in writing shall not be signed by the

person making it; and such statement shall be used only for the purposes provided in the said section. In the aforesaid context, if we examine the nature of the applications, the same were made to the SIT by the witnesses in response to public notices issued by it and are signed statements. These statements have not been recorded by the police so as to fall within the ambit of section 162 of the Code. Moreover, pursuant to the applications, the Investigating Officer of the SIT had called the witnesses and recorded their statements under section 161 of the Code. Insofar as the affidavits are concerned, not only are they signed by their makers, but are sworn statements, which undisputedly have not been recorded by the police and have been made in proceedings which have no direct connection with the investigation in this offence, as they appear to have been filed before the Supreme Court for transfer of trials outside the State of Gujarat. Therefore, the affidavits have been used for a purpose other than that provided under section 162 of the Code. In these circumstances, neither the applications nor the affidavits can be said to be statements under section 161 of the Code nor would the provisions of section 162 of the Code be applicable so as to enable the defence to cross-examine the witnesses as to such statements as contemplated under section 162 of the Code.

22.6 However, while neither the affidavits nor the applications are in the nature of statements made under section 161 of the Code, so as to attract the provisions of section 162 of the Code, section 145 of the Evidence Act is an independent provision and does not relate only to previous statements made under section 161 of the Code. Therefore, a witness can

be cross-examined as to previous statements made by him in the manner provided under section 145 of the Evidence Act. The only requirement is that they should be previous statements made by the witness in writing or reduced to writing, and hence, the question that needs to be addressed is whether the affidavits and the applications can be said to be previous/former statements of the witnesses so as to permit the defence to cross-examine the witnesses as to the statements made therein.

22.7 At this juncture, reference may be made to the decision of the Supreme Court in the case of **State (NCT of Delhi) v. Mukesh**, (2014) 15 SCC 661, wherein after the charge-sheet had been filed, the complainant appeared to have given a television interview on Zee News on the same subject. The question that arose before the Supreme Court was as to whether under the provisions of section 145 of the Evidence Act, a subsequent statement made after the filing of the charge-sheet could be treated as a previous statement and be utilised for the purposes of section 145 thereof. On behalf of the accused, the learned counsel had submitted that the use of the expression "previous statement" made in section 145 of the Evidence Act, cannot be or should not be interpreted to mean, statements made only at the time of investigation under section 161 of the Code, but should also be extended to any period before the witness is actually examined and that, accordingly, a statement, which is made even after the filing of the charge-sheet by the prosecution witness could be used to confront him for the purpose of any contradiction which may be evident. The learned counsel had also submitted that the object of fair trial could also be evident from section 146 of the

Evidence Act, which provides for questions which are lawful in cross-examination and indicates that, when a witness is cross-examined, he may, in addition to questions already raised, be asked any question to test his veracity and to shake his credit. It was, accordingly, submitted that in the interest of justice and having regard to the provisions of section 146 of the Evidence Act, it was incumbent upon the trial court to allow the defence to cross-examine the witness on the statements made by him during the television interview given by him after the filing of the charge-sheet and which interview had not been relied upon by the prosecution. The court held that from the scheme of the Code of Criminal Procedure and the Evidence Act, it appears that the investigation and the material collected by the prosecution prior to the filing of the charge-sheet under section 161 of the Code are material for the purposes of section 145 of the Evidence Act, 1872. The court was of the view that the expression "previous statements made" used in section 145 of the Evidence Act, cannot be extended to include statements made by a witness, after the filing of the charge-sheet. The court was of the view that section 146 of the Evidence Act also does not contemplate such a situation and the intention behind the provisions of section 146 appears to be to confront a witness with other questions, which are of general nature, which could shake his credibility and also be used to test his veracity. The aforesaid expression must, therefore, be confined to statements made by a witness before the police during investigation and not thereafter.

22.8 Thus, a statement made after the filing of the charge-sheet cannot be said to be a previous statement unless the same is recorded under section 161 of the Code. However, the

learned counsel for the appellants/accused has submitted that these statements, viz., the applications and the affidavits, were statements made in writing by the witnesses. Section 145 of the Evidence Act, contemplates cross-examination of a witness as to previous statements made by him in writing or reduced in writing. Accordingly, statements recorded by the police would be previous statements reduced into writing, whereas statements in the nature of the applications and the affidavits would be statements made by the witnesses in writing and would, therefore, clearly fall within the ambit of section 145 of the Evidence Act. It was submitted that these statements had been made by the witnesses in writing, which they have admitted. The prosecution wanted to take shelter behind these documents to corroborate what was stated by the witnesses in their examination-in-chief. Therefore, it was the prosecution which wanted these statements to be admitted in evidence, the same having been made in writing, and, therefore, the defence was wholly justified in cross-examining the witnesses as to such previous statements made by them in writing. It was submitted that in this case, pursuant to the directions issued by the Supreme Court, further investigation came to be carried out in the year 2008 and supplementary charge-sheets came to be filed, wherein, the affidavits and the applications formed part thereof, therefore, any statement made in the interregnum would be a previous statement as contemplated under section 145 of the Evidence Act.

22.9 In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Vinay Tyagi v. Irshad Ali alias Deepak and Others,***

(2013) 5 SCC 762, wherein the court has observed that investigation can be of the following kinds:

- (i) initial investigation;
- (ii) further investigation; and
- (iii) fresh or de novo or reinvestigation.

The “initial investigation” is the one which the empowered police officer shall conduct in furtherance of registration of an FIR. Such investigation itself can lead to filing of a final report under section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of section 156(3). “Further investigation” is where the Investigating Officer obtains further oral and documentary evidence after the final report had been filed before the court in terms of section 173(8). This power is vested with the executive. It is the continuation of previous investigation and, therefore, is understood and described as “further investigation”. The scope of such investigation is restricted to discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the court even after they are discovered at a subsequent stage to the primary investigation. It is commonly described as “supplementary report”. “Supplementary report” would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. It was held that another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence

in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation", "fresh" or "de novo" investigation. The court further held that upon completion of investigation, the police is required to file a report in terms of section 173(2) of the Code. The court thought it proper to term such report as a primary report, as it is the very foundation of the case of the prosecution before the court. It is the record of the case and the documents annexed thereto which are considered by the court and then the court of the Magistrate is expected to exercise any of the three options namely, (i) he may accept the report and take cognizance of the offence and issue process; or (ii) he may disagree with the report and drop the proceedings; or (iii) he may direct further investigation under sub-section (3) of section 156 of the Code and require the police to make a further report. The court further held that the power of the Magistrate to direct further investigation is a significant power which is to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to filing of a supplementary report. Such supplementary report shall be dealt with as part of a primary report which is clear from the fact that the provisions of section 173(3) to 173(6) would be applicable to such reports in terms of section 173(8) of the Code. Both these reports have to be read conjointly and it is

the cumulative effect of the reports and the documents annexed thereto to which the court is expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. The court held that the court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the investigating agency as its report under section 173(2) of the Code.

22.10 The learned counsel, accordingly, submitted that the supplementary charge-sheet forms part of and is required to be dealt with as a part of the primary report and, therefore, the investigation would be deemed to be pending from the lodgment of the first information report till the final supplementary charge-sheet is filed pursuant to any further investigation carried out under section 173(8), and all statements made during the period between the lodging of the first information report till the last charge-sheet is submitted would be statements made during the pendency of the investigation in view of the fact that the last report is a charge-sheet filed under section 173(2) of the Code.

22.11 While it cannot be disputed that the affidavits and the applications are statements made in writing by the witnesses, the Supreme Court in ***State (NCT of Delhi) v. Mukesh*** (supra) has held that the expression "previous statements made" used in section 145 of the Evidence Act, cannot be extended to include statements made by a witness, after the filing of the charge-sheet. Therefore, the question as to whether the applications and/or affidavits made by the witnesses after the filing of the charge-sheet, but before the

filing of the supplementary charge-sheets can be said to be “previous statements made” as contemplated under section 145 of the Evidence Act, needs to be addressed.

22.12 At this juncture, it may be germane to refer to the provisions of section 173 of the Code which provide for “Report of Police Officer on completion of investigation”. Sub-section (1) of section 173 lays down that every investigation under that Chapter (Chapter XII) shall be completed without unnecessary delay. Clause (i) of sub-section (2) thereof provides that as soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government stating the details enumerated thereunder. Sub-section (8) of section 173 of the Code provides that nothing in the section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation a report forwarded under sub-section (2). Thus, sub-section (2) of section 173 of the Code contemplates a report commonly known as a charge-sheet to be filed upon completion of an investigation. At this juncture, it may be apposite to refer to the decision of the Supreme Court in ***Dinesh Dalmiya v. CBI***, (2007) 8 SC 770, wherein the court was dealing with a case where the appellant therein had

moved an application for statutory bail purported to be in terms of the proviso appended to sub-section (2) of section 167 of the Code on expiry of sixty days from the date of his arrest on the premise that no further charge-sheet in respect of the investigation under sub-section (8) of section 173 of the Code had been filed. While considering the said issue, the Supreme Court observed that a charge-sheet is a final report within the meaning of section 173(2) of the Code which is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The court further held that so long as the charge-sheet is not filed within the meaning of section 173(2) of the Code, the investigation remains pending. Filing of a final police report or charge-sheet, however, does not preclude an Investigating Officer to carry on further investigation in terms of section 173(8). The power of an Investigating Officer to make and to prepare for further investigation in terms of section 173(8) is not taken away only because a charge-sheet has been filed under section 173(2). A further investigation is permissible even if an order of cognizance of offence has been made by the Magistrate. The court held that only when a charge-sheet is not filed and investigation is kept pending, the benefit of the proviso to section 167(2) would be available to an offender; once however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of section 173(8) of the Code.

22.13 Thus, it is only so long as a charge-sheet is not filed under sub-section (2) of section 173 of the Code, that the investigation remains pending. Therefore, merely because at

some subsequent date further investigation is carried out by the investigating agency, and investigation remains pending within the meaning of section 173(8) of the Code, it cannot be said that investigation was pending inasmuch as it stood completed once the report under section 173(2) of the Code came to be submitted. In **Abdul Azeez P.V. and Others v. National Investigation Agency**, (2014) 16 SCC 543, the Supreme Court held that merely because certain facets of the matter called for further investigation, it does not lead to a conclusion that the final report is anything other than a final report. In **State of West Bengal v. Salap Service Station and Others**, 1994 Supplementary (3) SCC 318, the Supreme Court held that at the stage of filing supplementary report itself, the trial court which took cognizance cannot reject the same outright since it is only a supplementary report in support of the earlier report. The Special Court had rejected the report without taking it on record holding that no cognizance could be taken since the facts did not support the evidence. The court held that there was no question of taking cognizance at that stage since cognizance had already been taken. The purpose of sub-section (8) of section 173 CrPC is to enable the investigating agency to gather further evidence and that cannot be frustrated. The Supreme Court in **Vinay Tyagi v. Irshad Ali** (supra), has held that the supplementary report shall be dealt with as part of a primary report inasmuch as the provisions of section 173(3) to 173(6) would be applicable to such reports in terms of section 173(8) of the Code; and that both the primary report and the supplementary reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court is expected to apply its mind to determine whether there exist

grounds to presume that the accused has committed the offence. In the opinion of this court, in the light of the above decisions of the Supreme Court, the moment a primary report is submitted under section 173(2) of the Code, the investigation stands completed. Any investigation made subsequent thereto is further investigation after the stage of submission of primary report and may or may not culminate into filing of supplementary reports. Therefore, while the supplementary report/s would form part of the primary report and it is the cumulative effect of the reports and the documents annexed thereto to which the court is expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence, the pendency of further investigation post filing of the primary report cannot be said to be pendency of investigation for the purposes of section 145 of the Evidence Act, accordingly, statements made during the period between the filing of the primary statement and the supplementary charge-sheet would not fall within the ambit of the expression "previous statements made" as envisaged in section 145.

22.14 Thus, once the investigation is completed under section 173(2) of the Code and charge-sheet is submitted and the court takes cognizance of the offence, any further investigation made thereafter, though technically, can be said to be continuation of the investigation, it cannot be said that the investigation was pending and any statement made during the interregnum prior to the supplementary report being filed upon conclusion of further investigation, cannot be equated with a previous statement as contemplated under section 145 of the Evidence Act. Any other view would create an anomalous

situation, inasmuch as, in the light of the principles propounded by the Supreme Court in **State (NCT of Delhi) v. Mukesh** (supra) the expression “previous statements made” used in section 145 of the Evidence Act would not include statements made by a witness after the filing of the charge-sheet. In a case like the present one, the charge-sheet came to be filed on 22nd July, 2002 and the case was committed to the Sessions Court where it was pending trial. Much later, on account of a fortuitous circumstance of some party having approached the Supreme Court for transfer of cases, further investigation came to be directed by the Supreme Court after a period of about six years. Thus, if the submission of the learned counsel for the appellants/accused were to be accepted, whereas if no such further investigation had been ordered, the statements made in the applications and affidavits would not have been “previous statements” within the meaning of section 145 of the Evidence Act, but in view of the fact that further investigation came to be carried out thereafter, the very same statements would be previous statements for the purpose of contradicting the witnesses in their cross-examination. In the opinion of this court, that could not have been the legislative intent. Under the circumstances, any statement made after the filing of the primary report under sub-section (2) of section 173 of the Code, cannot be termed to be a previous statement as contemplated under section 145 of the Evidence Act. Accordingly, the affidavits made by some of the witnesses and the applications filed by the witnesses, cannot be said to be “previous statements made” within the meaning of such expression as contemplated in section 145 of the Evidence Act.

22.15 However, the learned counsel for the appellants/accused has also submitted that apart from the affidavits and applications being previous statements as envisaged under section 145 of the Evidence Act, they are also former statements within the meaning of clause (3) of section 155 of the Evidence Act and hence, can be used to contradict the witnesses to impeach their credibility. The core question that arises in this context is as to whether the affidavits allegedly filed before the Supreme Court and the applications filed before the SIT can be said to be former statements so as to impeach the credibility of the witnesses.

22.16 In this regard, it may be noted that section 155 of the Evidence Act enables the parties to give independent testimony as to the character of a witness in order to indicate that he is unworthy of belief by the court. This section indicates three ways in which the credit of a witness may be impeached: (a) by the adverse party; or (b) with the consent of the court by the party who calls him. They are:

- (1) Evidence of persons that the witness is unworthy of credit,
- (2) Proof that the witness (i) has been bribed; (ii) has accepted the offer of a bribe; or (iii) has received any other corrupt inducement, and
- (3) Former statements inconsistent with the present evidence.

In the present case, we are concerned with the manner in which the credit of a witness may be impeached by the adverse party by proof of a former statement inconsistent with the part of the evidence which is liable to be contradicted. It is an admitted position that the affidavits and applications had been made by the witnesses subsequent to the filing of the

charge-sheet under sub-section (2) of section 173 of the Code, but before further investigation came to be carried out under sub-section (8) of section 173, which culminated into the filing of supplementary charge-sheets.

22.17 The learned counsel for the appellants/accused has submitted that by cross-examining the witnesses as to the statements made in the applications and affidavits, the defence has sought to impeach the credibility of the witnesses as contemplated under clause (3) of section 155 the Evidence Act and hence, it is permissible for the defence to cross-examine the witness by proof of former statements inconsistent with any part of the evidence. It was submitted that the expression "former statement" would mean any statement made by a witness prior to deposing before the court. The learned counsel submitted that the affidavit which is sworn by a witness has a greater value than any statement which he gives before the police whether or not the same has been filed or not. It was pointed out that the prosecution has come forward with a case by giving an application that these are the affidavits which are filed before the Supreme Court, to submit that therefore, there would be no question of doubting those affidavits, viz., that they are not made by the witnesses or that they are not in existence at all. It was submitted that when the witness admits that he had sworn the affidavits, the statement made therein has a value and if the witness is found deposing before the court in complete contradiction to an important statement made in the affidavit, he may not be contradicted; but the same can certainly be used for the purpose of impeaching his credibility as to whether he comes with true facts before the court, whether he tells true facts

before the court, and to test his veracity and credibility, the witness can be permitted to be contradicted. It was submitted that may be on the issues which are involved in the case, perhaps the contradictions may or may not be helpful, but at least that question is for the court to decide as to whether the witness has a tendency to state the truth before the court or has a tendency to lie before the court and his credibility can be decided on that basis. It was submitted that that part of the cross-examination of the witness which could not have been permitted, which the prosecution could have objected to, can be ignored, but those parts, namely, those submissions where the contradictions have been brought on record very specifically, upon the admission of the witnesses, may go against the witnesses. It was contended that as far as the credibility of a witness is concerned, if an admission has come on record through something which is mentioned in the application, that can certainly be examined for the purpose of evaluating the credibility of the witnesses. It was submitted that the facts of the case, the incident which has taken place and which the witnesses have alleged before the court, all these things have been stated in those particular affidavits. The question is as to whether those affidavits may be believed to have been prepared without instructions of the witnesses or that they are prepared with the instructions of the witnesses, which is ultimately for the court to decide as to what part is to be believed and what part is to be ignored.

22.18 It was submitted that having regard to the principles laid down by the Supreme Court in the case of **N. Sri Rama Reddy v. V.V. Giri, (1970) 2 SCC 340**, these affidavits and applications are to be considered for the purpose

of deciding the credibility of the witnesses. In the facts of the said case, the learned counsel for the petitioners therein relying upon a tape-recorded conversation between the witness and one Shri Abdul Gani urged that his client was entitled to test the veracity of the witness and to impeach the credibility of the witness and satisfy the court that the evidence given by the witness before the court was inconsistent or contrary to what he had stated on an earlier occasion. The court recorded that one of the ways by which the credit of a witness may be impeached was dealt with in clause (3) of section 155 of the Evidence Act and that is, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The court, while holding that tape-recording of a former statement of a witness can be admitted in evidence to show the credit of the witness under section 155(3) of the Evidence Act, held that a previous statement made by the person and recorded on tape, can be used not only to corroborate the evidence given by the witness in court but also to contradict the evidence given before the court as well as to test the veracity of the witness and also to impeach his impartiality. The court observed that if a previous statement made by a person can be used to corroborate his evidence given before the court, in principle, it did not see any reason why such previous statements could not be used to contradict and also for the other purposes referred to earlier.

22.19 The learned counsel also relied upon the decision of the Supreme Court in the case of ***Binay Kumar Singh v. State of Bihar***, (1997) 1 SCC 283, wherein it has been held thus:

*"12. The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in court. This principle is delineated in Section 155(3) of the Evidence Act and it must be borne in mind when reading Section 145 which consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that "if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose for contradicting him". There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145."*

22.20 Reliance was also placed upon the decision of the Supreme Court in the case of **Rammi v. State of M.P.**, (1999) 8 SCC 649, wherein it has been held thus:-

*"24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the*

evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of any inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

*"155. Impeaching credit of witness – The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him-*

(1)-(2)

*(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;"*

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to "contradict" the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v. State of U.P.)

28. *In this case the evidence of the conduct and the driver of the bus evinces credibility. As pointed out earlier they are the most natural witnesses for the murder which took place inside the bus. The minor variations which the defence counsel discovered from their former statements did not amount to discredit the core of their evidence. The strained reasoning of the Sessions Judge for side-stepping their evidence is too fragile for judicial countenance. The Division Bench of the High Court has rightly reversed the finding regarding the credibility of their evidence.” [Emphasis supplied]*

22.21 A perusal of the provisions of sections 145, clause (3) of section 155 and section 157 of the Evidence Act reveals that section 145 of the Act provides for cross-examination as to previous statements in writing. As to what is a previous statement has been already discussed hereinabove. Clause (3) of section 155 of the Evidence Act permits the credit of a witness to be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and section 157 of the Evidence Act provides that 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. Thus, statements, which can be used to corroborate the testimony of a witness under section 157 of the Evidence Act, can also be used to contradict such testimony under clause (3) of section 155 thereof. However, what has to be seen is as to whether it is only such statements which can be used to corroborate the testimony of a witness under section 157 of the Evidence Act which can be used to contradict the testimony of a witness under clause (3) of section 155. Section 157 of the Evidence Act does not make all previous statements

admissible to corroborate the testimony of a witness but only two classes of statements: (i) a statement made by a witness relating to the same fact at or about the time when the fact took place and (ii) a statement made before any authority legally competent to investigate the fact. The scope and ambit of section 157 of the Evidence Act has been elucidated by the Supreme Court in **Ramratan v. State of Rajasthan**, AIR 1962 SC 424, as follows: -

**"8. Section 157 is in these terms:**

*"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."*

*It is clear that there are only two things which are essential for this section to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are present, the former statement can be proved to corroborate the testimony of the witness in court. The former statement maybe in writing or may be made orally to some person at or about the time when the fact took place. If it is made orally to some person at or about the time when the fact took place, that person would be competent to depose to the former statement and corroborate the testimony of the witness in court. There is nothing in Section 157 which requires that before the corroborating witness deposes to the former statement the witness to be corroborated must also say in his testimony in the court that he had made that former statement to the witness who is corroborating him. It is true that often it does happen that the witness to be corroborated says that he had made a former statement about the fact to some person and then that person steps into the witness box and says that the witness to be corroborated had made a statement to him about the fact at or about the time when the fact*

*took place. But in our opinion it is not necessary in view of the words of Section 157 that in order to make corroborating evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such statement to the witness who is to corroborate him, at or about the time when the fact took place. As we have said already what Section 157 requires is that the witness to be corroborated must give evidence in court of some fact. If that is done, his testimony in court relating to that fact can be corroborated under Section 157 by any former statement made by him relating to the same fact, and it is not necessary that the witness to be corroborated should also say in his statement in court that he made some statement at or about the time when the fact took place to such and such person. The words of Section 157 are in our opinion clear and require only two things indicated by us above in order to make the former statement admissible as corroborated.”*

22.22 Both clause (3) of section 155 and section 157 of the Evidence Act, employ the expression “former statement”. However, while the expression “former statement” used in section 157 is circumscribed by the words “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”, clause (3) of section 155 is not so circumscribed and merely says “by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted”. The illustrations below section 155 also make it clear that evidence should be offered to show that on a previous occasion, the witness has stated something contradictory to any part of his evidence. Since clause (3) of section 155 of the Evidence Act merely refers to former statements inconsistent with any part of the evidence of the witness which is liable to be contradicted, there appears to be force in the submission of the learned counsel for the

appellants/accused that such a statement could be made at any time before the evidence is recorded by the court. The affidavits and applications having been made prior to the recording of the evidence of the witnesses, therefore, would fall within the ambit of the expression "former statement" as envisaged in clause (3) of section 155 of the Evidence Act and could be used for impeaching the credibility of the witnesses with any part of the evidence which was liable to be contradicted.

23. Before advertiring to the testimonies of the witnesses and analysing them, it may be germane to discuss the general principles of law which the court is required to keep in mind while evaluating the evidence of the witnesses.

24. The decisions on which reliance has been placed by the learned counsel for the respective parties have been referred to hereinabove and the relevant extracts thereof have already been reproduced. On a conspectus of the above decisions, the following principles can be culled out:

[1] Leaving aside the cases of statutory presumptions, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. The court may, of course, presume, as mentioned in section 114 of the Indian Evidence Act, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Whether or not a presumption can be drawn under the section in a particular

case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and confine human behaviour within strait-jackets.

[2] A golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. If a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. The courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused.

[3] Witnesses do have a tendency to exaggerate, however, on account of embellishments; evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record. Therefore, the fact that some witnesses have not referred to certain accused in their police statements but have attributed role to them in the court, does

not lead to the conclusion that the witnesses are not credible witnesses.

[4] The discrepancies or the omissions in the evidence of a witness have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradiction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

[5] It is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. Whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal

jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

[6] The High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narration of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eye-witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

[7] While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is

shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Even the honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.

[8] When an eye-witness is examined at length, it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for the judicial scrutiny.

[9] It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence, it is not sufficient to impair the credit of the witness. No doubt, section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a

reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be contradicted would affect the credit of the witness. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent, it would not be helpful to contradict that witness.

[10] One hardly comes across a witness whose evidence does not contain some exaggeration or embellishment – sometimes, there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety, they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not, however, in the absence of the same.

[11] The court shall have to bear in mind that different witnesses react differently under different situations; whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact, it depends

upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

[12] The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether, if they are otherwise trustworthy.

[13] By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

[14] Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties

therefore cannot be expected to be attuned to absorb the details.

[15] The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

[16] By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

[17] In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

[18] Ordinarily, a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

[19] A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from

imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

[20] The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances, like, non-availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.

[21] In terms of the Explanation to section 162 of the Code, which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. If a significant omission is made in a statement of a witness under section 161 of the Code, the same may amount to contradiction and the question whether it so amounts is a question of fact in each case.

[22] Resort to section 145 of the Evidence Act would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that

he did, and if the former statement was reduced to writing, then section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case, all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

25. Since the prosecution case rests mainly on the testimonies of the eyewitnesses, it may be germane to refer to the relevant parts of their depositions and analyse the same to ascertain their evidentiary value in the light of the submissions advanced by the learned counsel for the accused. However, at the outset, it may be noted with regret that on behalf of the prosecution, the learned Special Public Prosecutor appearing on behalf of the SIT, though assisted by the learned Assistant Special Public Prosecutor who had appeared on behalf of the prosecution before the trial court and despite the fact that he was present before the court almost throughout the hearing of the case, has not thought it fit to advert to the testimonies of the witnesses to deal with the contentions raised by the learned counsel for the accused, nor has he shown willingness to deal with the same when called upon by the court as according to him, the learned counsel for the appellants/accused had already referred to the evidence at length. As regards the appeal preferred by the State, since the SIT had also preferred an appeal, it appears that the concerned officers of the State Government were under the impression that the State was to be represented by the learned Special Public Prosecutor appearing on behalf of the SIT. Right from the inception, the court had inquired from the learned

Additional Public Prosecutor as to who would be appearing in the appeal and he in turn, appears to have orally informed the learned Public Prosecutor about it and had from time to time informed the court that the matter was being pursued with the State Government. However, till the submissions of the learned counsel for the SIT were concluded, the State Government had not taken a decision as to who was to appear in the matter and at the last moment, in a matter involving voluminous evidence, the learned Additional Public Prosecutors assigned to this court have been allotted the matters. While both the learned Additional Public Prosecutors are generally very well prepared and have given no cause for complaint to the court, having regard to the voluminous evidence involved, the reading whereof took about three weeks, it would be too much to expect them to deal with the submissions advanced by the learned counsel for the accused at the last moment without sufficient time to go through the record. In these circumstances, the court was required to carry out this exercise on its own. While the trial court has referred to the testimonies of the witnesses, this court has thought it fit to reproduce the same independently to bring out the correct translated version. In view of the fact that on behalf of the prosecution, the learned Special Public Prosecutor has not thought it fit to deal with the submissions advanced by the learned counsel for the accused in respect of the veracity of the testimonies of each of the witnesses or to assist the court in appreciating the evidence of the individual witnesses, it is only the submissions made by the learned counsel for the accused which have been referred to in connection therewith. A brief reference was made by the learned Special Public Prosecutor to the evidence of certain witnesses while arguing

the acquittal appeals only in connection with the charge of criminal conspiracy under section 120B of the Penal Code, to which reference has been made while recording his submissions as well as while considering the applicability of section 120B of the Penal Code. Absence of any reference to the submissions of the prosecution while dealing with the testimonies of the individual witnesses is, therefore, not through oversight.

26. Since the testimonies of the eye-witnesses would be required to be considered in the backdrop of the scene of offence, at the outset, it would be germane to refer to the testimony of **PW-38 - Inayathussain Bachumiya Shaikh**, a witness to the drawing of the panchnama of the scene of offence, who has been examined at Exhibit-423. This witness has deposed that on 3<sup>rd</sup> March, 2002, he had been called at the police station, and from there, they had gone to Sardarpura village in the morning at around 6 to 7 o'clock. At Sardarpura, there was a person named Bachubhai. Another person viz. Ajitbhai Joshi had also been called as a panch. The place which was burnt was shown to them, which is situated in Shaikhvas. After showing all the places, they came to the corner of Shaikh Mohalla where, a galla was burnt which belonged to Rafiqbhai. The galla was burnt to ashes. Bachubhai had informed them that it was Rafiqbhai's galla, and in the same line, a cart and a cycle were lying in a burnt condition and besides that, there was another galla which belonged to Abhumiya, which was also burnt to ashes. Next to the said galla, there was another galla of Iqbalbhai, which was also burnt to ashes. Thereafter, there was Laxmanbhai's *dhaliya* [a place to tether cattle], which was not damaged. Next to the *dhaliya*, was the house of

Manubhai. Upon entering the house and looking inside, household goods were burnt to ashes and all the articles were lying down, the door was broken and was burnt to ashes. Next to Manubhai's house, there was another house and upon entering the same and inspecting it, the household articles were lying on the ground, the door was covered with soot, the door was an iron door, but he did not remember as to whose house it was. Next to that was the house of Akbarmiya. Upon entering inside the house and inspecting it, the household articles were lying in shambles and were burnt. An iron cot was covered with soot on account of heat. Next to that was an empty parcel of land, where a Bajaj Chetak scooter was lying in a burnt condition. The number of the scooter was written down at the relevant time; however, he does not remember the same. In front of the open land, there was an electric pole. Next to the open land, there was a house, but he does not remember whose house it was. They had gone inside the house and inspected the same and found that the household articles had fallen on the floor and were in a burnt condition. Next to that was another house, but he does not remember the name of the owner. They had entered the house and seen that the household goods were burnt and the door was broken and the goods had fallen on the ground. While drawing the panchnama, they had written down the name of the owner as per the information given by Bachubhai. Thereafter, there was another house. Upon entering the house, the household articles had fallen on the ground. On going further, there was a pucca house and between that house and the house referred to earlier, there was an empty space of 28 feet. Bachubhai had informed that the said house belonged to Mahemoodmiya. In front of the house, there was a veranda which was

approximately 4 feet wide and 11 feet long. Upon climbing the veranda on the wall, the words "Ya Garib Navaz" were written and the number "786" was written in Arabic language and the year 2001 was also written. Upon entering the house, there was an iron door, which was a door with shutters and there was an aldrop inside and one outside. The door was approximately 3 x 6 in size. The door was opened with some force and they had entered inside. On account of being burnt, the iron of the door had become tight. On the shutters of both the doors, iron rods had been fitted. However, the same had been broken with force and the rods had fallen down. Upon entering the house, there was an iron cot and the household articles were burnt and had fallen down and the electric wires which were in a PVC pipe, were burnt from the ceiling and were hanging down. Upon examining the room, there were torn and burnt clothes. The police as per his instructions had collected the same in a plastic bag and had sealed it after putting a slip with his signature. Upon going ahead in the room, there was another door on the opposite side which was also an iron door. One iron rod of the door was broken and the second rod was bent by using force and the said door was comprised of two shutters and both the doors were opening on the side, and on the side of the door, there was an iron window which also had iron rods and opened on the inner side. In the wall, there was a niche wherein a religious lamp (*diya*) was placed and an Islamic calendar was put, which calendar had turned sooty black. On the walls, there were claw marks of palms of hands. A sample was taken on a cotton swab and after putting a slip bearing his signature, it was sealed by. On the side of the main door, there was a window which had iron rods. It also opened on the inside and at the bottom of the window, there were

bloodstains which were collected by means of a cotton swab and put in a plastic bag and sealed after placing a slip with his signature inside. On the ceiling, there was a fan which was also burnt and there was a tube-light which was sooty black. The vessels were lying in a scattered position on the floor. The floor was a cement one. The floor was also sooty and the ceiling also had soot on it. On one side of the wall, there was a three feet tall water platform.

26.1 Thereafter, upon coming out of the main room through the door, behind the said house is the verandah (wall) of the Patel Mohalla. Between the verandah and the side of the house, there was a can which was secured with a wire for the purpose of carrying it. Upon smelling it, the smell of either petrol or kerosene was emanating. The same was sealed after placing a slip bearing his signature. About two steps ahead, there was another can and upon picking it up and looking inside it, it contained 100 grams of kerosene. The police sealed the same and put a slip bearing his signature and seized the same. Behind the house, there was a bathroom and behind the building, there was a garbage dump and next to the garbage dump, there were houses belonging to Ravals. On coming back towards the main door from that side, there was a 4 x 4 tank near the veranda and in front of it, there was an open space. Next to the open space, there was a house which was set on fire and was vandalized. Upon entering it, the household articles were on the ground. Bachubhai had given name of the owner, however, he does not remember the same. In the same line, there were about thirteen to fourteen houses, the names of whose owners have been written down in the panchnama as per the information given by Bachubhai. All the houses were

vandalized and the household goods were lying down and were burnt. In the same line, there were two houses belonging to Bachubhai and the veranda was long and the doors of the two houses were separate and out of the two, upon entering one of the houses, the goods were lying on the ground on account of the damage caused and the stones had fallen on the sheets (the roof sheets), out of which, one sheet was open which was in a broken condition. In front of the house, there was a jeep which was lying in a burnt condition and next to the jeep, there was a can which the police seized after affixing a slip bearing his signature as well as the signature of the other panch. The jeep was of Mahindra Company, but he does not remember its number. After thirteen to fourteen houses, before the public road, there was a wall of the houses of Patels. On the left side of Maheboobmiya's house, was the verandah (wall) of the kabrastan. They entered the kabrastan, where four or five tombs were damaged and the bricks had been taken out and damage had been caused. The aforesaid facts were written down in the panchnama. After coming outside from there, in front of Darbargadh, there was a cement godown the door of which had been broken and the commode had also been broken. The godown belonged to a Memon, whose name he does not remember at present, but Bachubhai had informed them. Next to that was a cloth shop which was also burnt and the door had been broken and the clothes which were lying on the wooden shelf were burnt to ashes. Next to that was a shop which was also damaged and the door was burnt and damage was caused inside, however, he does not remember as to how much damage was caused. From there, they had gone on the road going towards Sundarpur, where there was a pan-galla, which was also burnt to ashes. On proceeding further, in front

of the temple, there was another galla which was a pucca shop, the shutter of which was broken and burnt. On going further from there, next to the telephone office, there were huts belonging to the Fakirs, however, he does not remember their names. Bachubhai had informed him. Sheets were affixed on the roofs and two of the houses had been burnt to ashes and on going further, there were houses of persons weaving baskets. The rest of the panchnama relates to the seizure of articles, which is not very relevant and hence is not referred to at this stage.

26.2 In the cross-examination of the witness, it has come out that the reference to Bachubhai in his examination-in-chief is to Bachumiya Imammiya. He has further deposed that none of the persons whose names have been referred to therein were present except Bachumiya Imammiya. He has admitted that Bachumiya Imammiya had not informed as to in which house the incident of people being burnt had taken place and hence, there is no reference to it in the panchnama. He has admitted that there were no cans inside the house of Maheboobmiya. He has also admitted that there were no rags or pieces of wood inside the house. He has denied the suggestion that behind the house of Maheboobmiya, pieces of wood and bushes were in a burnt condition. Upon drawing his attention to line 6 of paragraph 6 of the panchnama, wherein it was written that "inside and outside the bathroom, half burnt thorns and pieces of wood are lying", he has admitted the same. He has admitted that the bathroom was on the rear side and the door for entering it was also on the rear side. In his cross-examination, he has admitted that the distance between two rows of houses on the opposite sides has not been measured. He has also

admitted that the fact regarding there being electric pole is not referred to in the panchnama. He has admitted that both the windows of Maheboobbhais house had iron shutters which could be closed from inside. He has admitted that all the four walls of Maheboobbhais house and the ceiling had become very black. He has also admitted that the windows and doors on the inside had turned black. He has denied the suggestion that the rods which he said had fallen apart were on account of coming apart from the welding due to the heat. He has admitted that on coming out of the rear door of Maheboobbhais house, there is a garbage dump and on its right side one can go to Ravalvas and on the left side one can go from the public road to the kabrastan. He has admitted that through Ravalvas, the road goes towards Kamalpur and the road on the left side which goes towards the kabrastan goes towards Mahadev and from there, it meets the main road and from that road, one can go to Sundarpur. The telephone exchange is at a distance of about one kilometre from Shaikhvas. From Shaikhvas to Pathanvas, the distance is about 100 to 150 paces. Memonvas is at a distance of approximately 100 paces from Shaikhvas.

26.3 At this juncture, it may be noted that from the testimony of the above panch witness, there is nothing to indicate that the contents of the panchnama have been read out to him and that he has admitted the contents thereof as having been stated by him. The panchnama of the scene of offence is a detailed one with respect to the position of each and every house in Shaikh Mohalla as well as other gallas/shops in the locality which had been damaged, however, insofar as the evidence of the panch witness is concerned, the same does not

refer to the contents of the panchnama in detail and there is no reference to the position of the houses situated in the row towards the rear side of the Patel houses.

26.4 In ***Yakub Abdul Razak Memon v. State of Maharashtra***, (2013) 13 SCC 1, the Supreme Court held that the panchnama must be attested by the panch witness for it to be valid in the eye of law. In case of a literate panch witness, he must declare that he has gone through the contents of panchnama and it is in tune with what he has seen in the places searched, whereas for an illiterate panch witness, the contents should be read over to him for his understanding and then the signature should be appended. If the above said declaration is not recorded, then the panchnama document will be hit by section 162 of the Code.

26.5 A Division Bench of this court in ***Baluram Machhi v. State of Gujarat***, 1985 G.L.H. 455, has observed thus:

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“23. We also find in many cases that neither the complaint nor the panchnames are read over to the panchas when their evidence is recorded. Complaint as well as panchnames are only corroborative pieces of evidence and, therefore, they have to be read over to the complainant or the panch, as the case may be, and the same can be admitted in evidence if and only after the complainant or the panch, as the case may be, admits the contents thereof to be correct.”

26.6 Despite the above clear cut position of law, the learned Special Public Prosecutor who prosecuted the case before the trial court has not thought it fit to read over the contents of the panchnama to the witness. Resultantly, in the absence of the

panch witness having admitted the contents of the panchnama, the panchnama is not admissible in evidence.

26.7 At this juncture, we may digress a little from the merits of the case to refer to the following observations made and directions issued by the Supreme Court in ***NHRC v. State of Gujarat***, (2009) 6 SCC 767, which are relevant for the present purpose:

***“19. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the United Nations General Assembly in Resolution 40/34 of 29-11-1985. According to the first paragraph of this Declaration, victims of crime are described as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing criminal abuse of power. It is they who need protection.***

***20. This is essential to obliterate the apprehension that the Public Prosecutor is not fair in court or is not conducting the prosecution in the proper manner. The State of Gujarat shall appoint Public Prosecutors in each of the cases in consultation with SIT which opinion shall be final and binding on the State Government.***

***21. It needs to be emphasised that the rights of the accused have to be protected. At the same time the rights of the victims have to be protected and the rights of the victims cannot be marginalised. Accused persons are entitled to a fair trial where their guilt or innocence can be determined. But from the victims' perception the perpetrator of a crime should be punished. They stand poised equally in the scales of justice.”***

***“40. We have considered the submissions made by Mr Harish N. Salve, learned amicus curiae, Mr Mukul Rohatgi, learned counsel for the State, Ms Indira Jaising***

and other learned counsel. The following directions are given presently:

**(i)** Supplementary charge-sheets shall be filed in each of these cases as SIT has found further material and/or has identified other accused against whom charges are now to be brought.

**(ii)** The conduct of the trials has to be resumed on a day-to-day basis keeping in view the fact that the incidents are of January 2002 and the trials already stand delayed by seven years. The need for early completion of sensitive cases more particularly in cases involving communal disturbances cannot be overstated.

**(iii)** SIT has suggested that the six "Fast Track Courts" be designated by the High Court to conduct trial, on a day-to-day basis, in the five districts as follows:

- (i) Ahmedabad (Naroda Patia, Naroda Gam)
- (ii) Ahmedabad (Gulbarg)
- (iii) Mehsana (for two cases)
- (iv) Sabarkantha opened (British Nationale case)
- (v) Anand
- (vi) Godhra train case (at Sabarmati Jail, Ahmedabad)

**(iv)** It is imperative, considering the nature and sensitivity of these nominated cases, and the history of the entire litigation, that senior judicial officers be appointed so that these trials can be concluded as soon as possible and in the most satisfactory manner. In order to ensure that all concerned have the highest degree of confidence in the system being put in place, it would be advisable if the Chief Justice of the High Court of Gujarat selects the judicial officers to be so nominated. The State of Gujarat has, in its suggestions, stated that it has no objection to constitution of such "Fast Track Courts", and has also suggested that this may be left to Hon'ble the Chief Justice of the High Court.

**(v)** Experienced lawyers familiar with the conduct of criminal trials are to be appointed as Public Prosecutors. In the facts and circumstances of the present case, such Public Prosecutors shall be appointed in consultation with the Chairman of SIT. The suggestions of the State Government indicate acceptance of this proposal. It shall be open to the Chairman of SIT to seek change of any Public Prosecutor so appointed if any deficiency in performance is noticed. If it appears that a trial is not proceeding as it should, and the Chairman of

*SIT is satisfied that the situation calls for a change of the Public Prosecutor or the appointment of an Additional Public Prosecutor, to either assist or lead the existing Public Prosecutor, he may make a request to this effect to the Advocate General of the State, who shall take appropriate action in light of the recommendation by SIT.*

**(vi)** *If necessary and so considered appropriate SIT may nominate officers of SIT to assist the Public Prosecutor in the course of the trial. Such officer shall act as the communication link between SIT and the Public Prosecutor, to ensure that all the help and necessary assistance is made available to such Public Prosecutor.*

**(vii)** *The Chairman of SIT shall keep track of the progress of the trials in order to ensure that they are proceeding smoothly and shall submit quarterly reports to this Court in regard to the smooth and satisfactory progress of the trials."*

26.8 It may be noted that despite the fact that keeping in view the above directions of the Supreme Court, Special Public Prosecutors have been appointed by the SIT to conduct the trial, unfortunately even basic requirements like reading over the complaint and the panchnama to the complainant/panch as the case may be, have not been satisfied.

27. Reference may now be made to the evidence of the witnesses. The main witnesses, on whose testimonies the prosecution has placed reliance as witnesses to the incident, are PWs 46 to 84. For the sake of convenience, reference shall be made to the testimonies of the individual witnesses in the same chronology as referred to by the learned counsel for the appellants/accused.

28. **PW-47 Ibrahimbhai Rasulbhai Shaikh** is the first informant. He has been examined at Exhibit-485. In his examination-in-chief, he has deposed that Sardarpura is his

native and that his family is comprised of seven members – his wife Zaydabibi, his daughters Rukshanabanu, Farzanabanu, Raziabanu, Parveenabanu and his son Raeshmiya Shaikh. They are three brothers, the eldest is Akbarmiya Rasulmiya, thereafter he and the youngest is Sherumiya Rasulmiya and they have a sister by the name of Shakarbibi. Shakarbibi is married to Mahemoodmiya Hussainmiya of Sardarpura. His sister had four children namely, Faridabanu, Saminbanu, Irfanhussain and Tipu Sultan. Sardarpura is the native place of his brothers and sister. At present, five members of his family are alive. Thereafter, he has stated that four members of his family are alive. His wife Zaydabibi, Raziabanu and Parveenabanu, all three have died. From his younger brother Sherumiya Rasulmiya's family, four members namely, Sherumiya Rasulmiya, his wife Mahemudabibi Sherumiya and their daughter Mumtazbanu Sherumiya and their son Yunusmiya Sherumiya have died. From his sister's family, four members namely, his sister Shakarbibi, her daughter Faridabanu and sons Irfan and Tipu Sultan have died. They had passed away at around 10 o'clock at night on 1<sup>st</sup> March, 2002. The incident took place at 10 o'clock. Thereafter, he had said that they died at around 2 o'clock at night in that house.

28.1 He has further deposed that the incident took place on 1<sup>st</sup> March, 2002. The train was burnt at Godhra on 27<sup>th</sup> February, 2002 due to which on the next day, that is, 28<sup>th</sup> February, 2002, there was a declaration of Gujarat bandh and on that day, at around 9 o'clock in the morning, he was working in the agricultural field as a labourer and had returned home for lunch in the afternoon, at which time, mobs were roaming around in the village. Thereafter, he had gone to his

agricultural field and had returned home at around 7.00 in the evening at which point of time mobs were roaming around in the village. Patel mobs were roaming around. There were two to three cabins belonging to Muslims and other lower communities in the market which had been set aflame and the shops had been set on fire in the presence of Shri Rathod and Shri Parmar. Thereafter, four to five Patels had come to the corner of their mohalla and Rajeshbhai Punjabhai had placed a petrol soaked rag below his cabin and had left. Thereafter, he had gone near his cabin and had thrown away the petrol soaked rag.

28.2 On 1<sup>st</sup> March, 2002, there was a declaration of Bharat bandh given by the Hindu Parishad and in the morning at 9 o'clock, he had taken tea and snacks for Bachumiya Nathumiya and had gone to the agricultural field and he and Bachumiya had returned in the afternoon for lunch at around 1 o'clock. There were mobs roaming around in the village whereafter they had gone back to the field. They had gone to the field at around 3 o'clock and had returned at around 5 o'clock and thereafter, mobs of Patels were roaming around in the bazaar. The situation in the village was tense, and hence, they had come to the Shaikh Mohalla where Basirabibi had met him and told him that she had gone to purchase gram flour from the shop of Dahyabhai Vanabhai whereupon Dahyabhai had told her that eat as many bhajiyas as they like today, tomorrow they would not get to eat them. The Muslims of the mohalla were all sitting and on that day at night at around 10 o'clock, a mob of Patels came shouting "Bharat Mata Ki Jai" from the Mahadevji's temple and were shouting slogans and stating that "kill them, cut them, burn them, not a single one

should remain alive" and they came shouting to the corner of their mohalla and burnt three cabins belonging to Rafiqmahammad, Iqbalmiya and him and started pelting stones, whereupon the police came and the members of the mob dispersed. The police went around and then immediately went away, and once again, a mob of Patels had gathered together and were shouting and came there. They were shouting "kill them, cut them, burn them, not a single one should be left alive". The members of the mob were armed with dharias, swords, trishuls, spears, petrol cans, kerosene tins and they started burning the houses. Manubhai's house, Akbarmiya Nathumiya's house, Rasulmiya Nannumiya's house, Jamalbhai Dosbhai's house and Dilshajmiya Darji's house and Kesarmiya's house had been burnt. At that time, he had seen and identified Patel Ambalal Magan, Rajeshbhai Punjabhai, Rameshbhai Ramabhai, Pashabhai Mohanbhai, Tulshibhai Girdharbhai, Ashwinbhai Baldevbhai, Jayantibhai Ambalal, Dashrathbhai Ambalal, Dahanbhai Vanabhai, Babubhai Vanabhai, Jagabhai Davabhai, Kachrabhai Tribhovandas, Kanubhai Joitabhai, Jayantibhai Mangaldas, Joitabhai Ramabhai, Chaturbhai Kanabhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai, Sureshbhai Baldevbhai, Rameshbhai Pababhai Chaturbhai Vitthalbhai, Madhabhai Vitthalbhai, Bhikhabhai Kalabhai, Rameshbhai Kanjibhai, Prahladbhai Jagabhai and Vishnubhai Jagabhai. He has further stated that he had also seen Ashwinbhai Jagabhai, Vishnubhai Prahladbhai. Kachrabhai Tribhovandas was inciting the mob and was shouting "kill them, cut them, burn them, not one of them should be left alive" and the other members of the mob were also saying "kill them, cut them, burn them, not a single one should remain alive" and had proceeded further in the

mohalla and were burning the houses and looting them and damaging them, and the persons residing in their mohalla, with a view to save their lives, had entered his house. Thereafter, Bachumiya Imammiya's jeep was burnt. The Patels were throwing stones from the top of their houses and were also throwing stones from the side of the kabrastan [graveyard] and the door of his house broke on account of pelting of stones, and his wife, his children and other persons residing in the mohalla came out of the house and with a view to save their lives went to the house of Mahemoodmiya Hussainmiya, and the members of the mob surrounded Mahemoodmiya Hussainmiya's house from all four sides and poured kerosene and petrol and set it ablaze and he had been hurt by a stone on his head and on the finger of his right hand and on his left shoulder as well as on the toes of his left foot and had fallen in the house. From the house, people were shouting for help and were crying, and since he was hurt, he could not go to Mahemoodmiya's house. Thereafter, the police had come and was surveying all the houses of the mohalla, till they reached the house of Mahemoodmiya Hussanmiya, and upon seeing the house, it was burnt and the injured persons were taken out from the house, and the persons who had died due to burns were also taken out. He had gone there and seen that his wife Zaydabibi, his daughter Raziabanu and Pareveenbanu, all three had died and many other of their people had also died. In all, twenty-eight persons had died on the spot. Thereafter, the police had taken all the injured persons in a box to the Mehsana Civil Hospital for the purpose of treatment, whereafter the post-mortem of all the persons who had died was carried out at the Mehsana Civil Hospital and they were buried at the graveyard at Mehsana and he had

lodged the complaint at the Civil Hospital whereafter the Mehsana police had dropped them at Ilol village. They had stayed at Ilol village for about a week, whereafter they had gone to the relief camp at Panpur Patia and his statement had been recorded after ten days by the police. Thereafter, they had filed the affidavit and had made affidavit to the effect that the investigation should be transferred outside Gujarat and they should get justice. They had sent the affidavit to the Supreme Court. He had made the affidavit at Ahmedabad. Thereafter, it had come in the newspaper that if you want to write anything in connection with the incident or want to say anything, you can give an application in writing. The SIT team had taken his application and called him to Gandhinagar and he had gone to Gandhinagar and had personally handed over the application and his statement was recorded. His second statement was recorded at Satnagar. He has stated that he can recognise the persons whom he had seen in the mob and has identified Kachrabhai Tribhovandas, Ambalal Maganlal, Jayantibhai Mangaldas, Ashwinbhai Baldevbhai, Joitaram Ramabhai, Babubhai Vanabhai Rajeshbhai Punjabhai and Dahyabhai Vanabhai in the court room. He has further deposed that he can identify the clothes which his wife Zaydabibi was wearing at the time of the incident as well as the clothes which his daughters were wearing. He has further stated that at the relevant time, inadvertently, his wife's name was shown to be Rukshanabanu Ibrahimbhai whereas actually, his wife's name is Zaydabibi and Rukshanabanu is his daughter, who is alive. He has also identified the clothes of his daughter Parveenbanu and his daughter Raziabani. He has stated that he can identify the weapons which were used by the members of the mob. He has further deposed that at the time of the incident, the people

had cans and tins of petrol and kerosene and that he could identify the same. The witness has stated that he had lodged the first information report at Civil Hospital at Mehsana and has identified his signature on the same. The first information report has been tentatively given Exhibit No.487.

28.3 In the cross-examination of this witness, it has come out that they are residing at Sardarpura since 1972, and that, prior to the incident, he was working as a casual labourer. He has admitted that the majority of the population of Sardarpura is comprised of Patels and that members belonging to the community other than the Patels are less. He has denied that from the time one enters the village till the village is over, houses of Patels are scattered. He has said that according to him, there are Patel Mohallas which are adjoining but they are not scattered. He has stated that from where the village starts, till it ends, there are houses of Patels. The population of Muslims in this village is about 400. He had his own house at Shaikhvas. He had purchased his house at Shaikhvas in 1995. Prior to 1995, he was residing at Rasulpur, which is approximately at a distance of 30 kms from Sardarpura. There were twenty houses of Muslims in Shaikhvas. There was a Pathanvas in the village as well as Memonvas and a Nagorivas. [The expression 'vas' means where one resides, accordingly, where Shaikhs reside, the area is called Shaikhvas, where Pathans reside it is called Pathanvas, etc.] He has denied that Shaikhvas Mohalla is inside the market. He has stated that there are two houses of Shaikhs in the bazaar. He has admitted that Shaikhvas, Pathanvas, Mansurivas, Nagorivas and Memonvas are at different places in the village. Pathan Mohalla is different. He has admitted that Shaikhvas,

Pathanvas, Mansurivas, Nagorivas, Memonvas and two houses of Shaikhs situated in the market were all inhabited by Muslims. He had admitted that at the time of the incident, there were three houses of Shaikhs opposite Kapurvas of Patels. He has admitted that members belonging to his community namely, Muslims were working in the fields of the Patels. He has stated that there are approximately forty to fifty houses in Pathanvas. He has admitted that upon entering Shaikhvas, on the right side, Patels are residing in Kapurvas. There are two rows of houses in Shaikhvas, one on the right side and one on the left side. He has admitted that from where Shaikhvas starts and the line of houses ends, in between Maheboobbhai's house is situated. He has admitted that upon entering Shaikhvas, on the rear side of the right side row, the Patels' Kapurvas mohalla is situated and on entering Shaikhvas on the left side, behind the row of houses, there is only a kabrastan. He has admitted that at the time of entering Shaikhvas on the right side, firstly houses of four Hindu Patels are situated. Outside Shaikhvas, there is a road which is about 30 to 35 feet wide which is the main road for going to the bazaar and upon crossing the road on the opposite side Prajapati mohalla is located and near Prajapati mohalla, a flour mill of a Muslim is situated. In the line of Prajapati Mohalla, there is a Ramji temple where also Patels' houses are situated. He has admitted that upon coming out from Shaikh mohalla, there is a main road which goes towards Mahadev and water works on the right side. Where Shaikh mohalla ends, on the rear side is the place where garbage is thrown and from nearby one can go towards water works. One can also go towards water works from the road from the left side of Mahadev. In his cross-examination, he has denied the

suggestion that the first information report had been recorded at 9.30 in the morning and has stated that it was taken at approximately 12 o'clock. At that time, the doctor had examined him at Civil Hospital. Together with him there were about fifteen persons from his mohalla who had come for treatment. There were no other Muslims other than from his mohalla who had come for treatment. He has admitted that in connection with the first information report, the police have recorded his statement on 10<sup>th</sup> March, 2002 and further statement on 1<sup>st</sup> June, 2002.

28.4 The learned counsel for the appellants/accused has referred to the deposition of the witness wherein he has stated with regard to the incident in question to submit that this part of the incident is not possible. Referring to the cross-examination of the witness, it is pointed out that various contradictions have been brought out in the testimony of the witnesses. It was pointed out that as per the say of the witness, upon the door of his house having been broken, he along with all the people inside the house had come out of the house from the side and in a manner in which the members of the mob could not see them, had gone to Mahemoodmiya's house. It was submitted that it was not possible for the people from the house of the witness to cross the entire road to reach the house of Mahemoodmiya. Referring to the contents of paragraph 14 of the cross-examination of the witness, it was pointed out that the witness has stated that he was not inside the house in which the incident where persons were burnt had taken place and that during the entire incident, he was inside his own house. He has denied that at the time when Mahemoodmiya's house was burnt, at that time, he was inside

the house. He has also denied that he was taken out from under a pile of corpses from the house of Mahemoodmiya and that it had not happened that the skin of the corpses had stuck to him. It was pointed out that the witness has thereafter admitted that in his affidavit dated 6<sup>th</sup> November, 2003 before the Supreme Court, he has categorically stated that he was inside the house where the incident had taken place and that he was taken out from under a pile of corpses of his near and dear ones and that the skin from their bodies were sticking to him. It was submitted that, therefore, the witness is not a truthful witness, inasmuch as, he has deposed contrary to what he has stated in his affidavit. It was further pointed out that in his deposition, he has not stated that the mob had come at 11:30 at night whereas in the FIR he has stated so, to submit that the witness has, therefore, disowned his own statement made in the first information report. It was pointed out that the said witness has stated that he is not in a position to state as to whether on 1<sup>st</sup> March, 2002, mobs of people from the nearby villages had attacked Shaikhvas but has admitted that in his affidavit dated 6<sup>th</sup> November, 2003 made before the Supreme Court, he has stated that there was a huge mob of people from neighbouring villages who had also taken part in the attack. It was submitted that in his cross-examination, the witness has denied the fact that he had lodged the first information report in the morning at 9:30 and has stated that the same was recorded at about 12 o'clock. Reference was made to the cross-examination of the witness wherein suggestions have been put to the witness to bring on record the fact that, in fact, the affidavits were already prepared which were signed by them without understanding the contents thereof. It was further pointed out that the witness in his cross-examination

has stated that he had seen the houses of Manubhai, Akbarmiya Nathumiya, Rasulmiya Nannumiya, Jamalbhai Dosbhai, Dilshajmiya Darji and Kesarmiya being burnt to submit that Rasulmiya, Dilshajmiya and Jamalmiya Dosbhai do not have any houses in Shaikh Mohalla whereas the witness states that their houses are opposite his house. It was pointed out that the witness has denied that in the first information report, he had not named Dahyabhai Vanabhai, Babubhai Vanabhai, Kachrabhai Tribhovandas, Kanubhai Joitabhai, Jayantibhai Mangaldas and Joitabhai Ramabhai, however, upon his attention being called to the first information report, he has admitted that the said names have not been written. It was pointed out that in his cross-examination, the witness has denied that Rameshbhai Gangaram and Rameshbhai Ramabhai are one and the same person and that he has deposed that they are both brothers. It was pointed out that during the course of investigation it has been found that both such persons are one and the same person. Reference was also made to the cross-examination of the witness wherein he has stated that there are two persons in the village named Ashwinbhai Baldevbhai and that he has given the name of Ashwinbhai Baldevbhai Botham. It was submitted that there are two Ashwinbhai Baldevbhais in village Sardarpura and both of them had been joined as accused. Referring to the cross-examination of the witness, it was pointed out that he, in his statement made before the SIT on 9<sup>th</sup> May, 2008, has not named Rameshbhai Ramabhai, Dashrathbhai Ambalal, Babubhai Vanabhai, Kanubhai Joitabhai, Joitabhai Ramabhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai, Sureshbhai Baldevbhai, Rameshbhai Pabhabhai, Chaturbhai Vitthalbhai, Madhabhai Vitthalbhai, Rameshbhai Kanjibhai, Prahladbhai

Jagabhai, Ashwinbhai Jagabhai and Vishnubhai Prahladbhai and that the contradiction has been brought on record and has been proved through the testimony of the Investigating Officer.

28.5 Referring to the testimony of PW-110 Kakusinh Ranjitsinh Vaghela, the Investigating Officer (Police), it was pointed out that an omission has been brought out to the effect that this witness has not stated the facts with regard to the mob of Patels roaming around the village in the evening of 1<sup>st</sup> March, 2002 as well as regarding Rajeshbhai Punjabhai having placed a petrol soaked rag below his cabin and also regarding the incident with regard to Basirabibi narrating the Bhajiya story to him. It was pointed out that the Investigating Officer has admitted that the first informant had said that the first mob came at 11:30 and that all the facts stated by the first informant in paragraphs 13, 14, 15 and 16 of his deposition are not stated in the first information report dated 2<sup>nd</sup> March, 2002 and his statement dated 10<sup>th</sup> March, 2002. In the cross-examination of the Investigating Officer (Police), it has come out that in the first information report, the first informant has not made any reference to the utterances made by the members of the mob, nor has he stated any fact regarding persons from the mohalla having entered his house for the purpose of saving their lives and that upon the Patels throwing stones at them and the door breaking, all the persons had taken shelter in the house of Mahemoodmiya, etc.

28.6 As regards the veracity of the testimony of the said witness, the learned counsel has submitted thus: -

- The time of the FIR as stated by the complainant is 12 o'clock and not 9:30 a.m., and since it is clear and unequivocal, there may not be any question of interpretation or explanation.
- The incident of 28<sup>th</sup> February about the gallas and cabins having been set on fire by the Patel community of Sardarpura in the presence of two PSIs is introduced by the complainant at a later stage.
- The introduction of the theory of petrol-soaked rag having been put below his cabin is also at a subsequent stage.
- In the affidavit before the Supreme Court, the story of the second meeting and the utterances by Kanubhai Joitabhai, Sarpanch, have been introduced for the first time.
- In the affidavit before the Supreme Court, the facts regarding the meeting held by Naran Lallu, MLA and his hate speech have been introduced for the first time.
- The bhajiya theory has been introduced for the first time at a belated stage.
- The witness has disowned the facts regarding time of arrival of the mob and firing resorted to by the police.
- The witness has changed the sequence of events of the main incident.
- The witness has made unbelievable averments in the affidavit regarding his being inside Mahemoodmiya's house under the heap of dead bodies where the skin of corpses stuck to him and had made an averment on oath before the court that he had fallen down because of injury. Out of these two versions, the witness has

stated that the averments in the affidavit are true, which means that the statements made on oath before the court is false.

- It is very difficult to believe the averment that while the jeep was burnt, there were twenty people in the house, the mob had spread in the mohalla and except him all the twenty went to Mahemoodmiya's house.
- The admission made by the witness that a mob of about 500 to 700 people was on the rear side of the house in question, supports the defence version. Further, admission made in the affidavit before the Supreme Court about involvement of the mob of adjoining villages strengthens the defence version.
- It is strange that after giving full names of 28 persons in the complaint, the witness was not able to identify at least 25 of them.
- The witness has added six names in his deposition, which he did not mention in the complaint.
- It is difficult to believe in the above set of facts that he was an eye-witness to the above set of incident.
- Assuming that he was there, apparently he has not given the correct version of the incident and suppressed the genesis and the participation and involvement of the accused. Therefore, it is hazardous to believe the said witness as being reliable and trustworthy.

**28.7 ANALYSIS:** From the testimony of this witness, it emerges that he has deposed that on 28<sup>th</sup> in the evening, at around 7:00 p.m., a mob of Patels had burnt two to three cabins of Muslims and other communities in the bazaar in the

presence of Shri Rathod and Shri Parmar and thereafter, four to five Patels had come to the corner of their mohalla and Rajeshbhai Punjabhai had placed a petrol soaked rag below his cabin and had gone away and thereafter, he had gone there and seen that the rag was soaked with petrol and had taken it and thrown it away. He has also deposed about the bhajiya story narrated to him by Basirabibi. The witness, in his testimony, has stated that he had made an application to the SIT and had made an affidavit for filing before the Supreme Court on 6<sup>th</sup> November, 2003. Surprisingly, the learned Special Public Prosecutor requested the court to exhibit these documents, which request was objected to by the defence and came to be turned down by the court. From the facts as emerging from the record, the affidavits made by the witnesses have no connection with the investigation in the offence in question. These are merely statements made by witnesses for purposes other than investigation, that too, at a stage when the investigation was concluded and the charge-sheet had already been filed. A perusal of the testimony of PW-112 Gautamkumar Vishnubhai Barot, the Investigating Officer (SIT), shows that the defence in his cross-examination has brought out that these affidavits were not prepared by the witnesses; contained incorrect statements as well as facts not actually stated by the witnesses; and the facts stated therein were inconsistent with what was stated in the examination-in-chief of the witness. It may be noted that despite this position, for some inexplicable reason, though such affidavits had no connection with the investigation, the Investigating Officer has placed them along with the charge-sheet papers and to make matters worse, the learned Special Public Prosecutor has made a failed attempt to bring such affidavits on record and get

them exhibited. Thereafter, in view of the fact that the prosecution had sought to bring the affidavits on record, the defence has cross-examined the witnesses as to the statements made by them in the affidavits as if such statements are previous statements as contemplated under section 145 of the Evidence Act to contradict them, and no objection has been raised to such detailed cross examination either by the learned Special Public Prosecutor or by the court.

28.8 The witness was shown the first information report at Mark 153/2 whereupon, he stated that it bears his signatures at pages 2, 4 and 5 and is the complaint given by him at Mehsana Civil Hospital. The police have signed in his presence and the complaint was given by him. At that stage, the defence had objected to the first information report being exhibited, whereupon the court recorded that he has deposed that he had given the complaint at the Mehsana Civil Hospital and it has been written as stated by him and he has acknowledged his signature on the first information report and hence, considering all these circumstances, it appears proper to give it a tentative exhibit number and accordingly, the first information report was tentatively given Exhibit No.487.

28.9 In the cross-examination of this witness, he has stated that Jamalbhai Dosbhai had taken them for making the affidavits and that after making the affidavits, they had handed over the same to Jamalbhai Dosbhai. He has also admitted having gone to the office of Citizens for Justice and Peace and having met Teesta Setalvad on three to four occasions. He does not know how to read English and the draft affidavit was made by him in Gujarati which was then

translated into English by the typist. It has further come out in his cross-examination (paragraph 24) that he has admitted that in paragraph 39 of his affidavit, he had stated that he has made the statement of his own free will and having fully understood the implications of the statement. He has made the statement upon detailed questioning on the telephone of a journalist/human rights activist, Teesta Setalvad in the presence of Shri Raiskhan Azizkhan Pathan. Therefore, though the witness has denied it, from his cross-examination, the defence has elicited facts which establish that the averments contained in the affidavit were made on the basis of detailed questioning on telephone by Teesta Setalvad.

28.10 A perusal of the testimony of this witness shows that though he has not made any reference to any meeting convened by Mukesh Madhabhai at Sundarpur, he has been cross-examined in this regard. He has been cross-examined as regards the contents of his affidavit on matters which he has not even referred to in his examination-in-chief, which could not have been permitted if the affidavit was either treated as a previous statement under section 145 or as a former statement under clause (3) of section 155 of the Evidence Act and new facts have been brought on record on the basis of admissions made by the witness when he was cross-examined as regards the contents of the affidavit. It is surprising that neither the Special Public Prosecutor nor the trial Judge thought it fit to curtail the cross-examination to matters which were within the scope of such provisions.

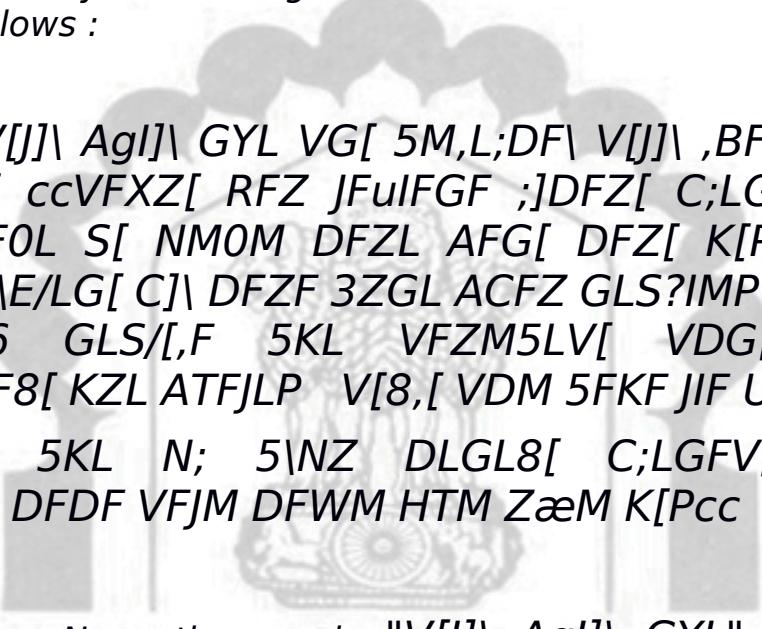
28.11 In the cross-examination of this witness, it is brought out that he had seen the mob burning Bachumiya's

jeep from inside the gate of his house from where he could see the mob, but the mob could not see him. He has, thereafter, admitted that there is no gate in his house. It has also come out that when Bachumiya's jeep was burnt, the mob had spread up to Mahemoodmiya's house and that, at that time, there were about twenty persons comprised of his family members and members of the mohalla in his house.

28.12 From the cross-examination of this witness, it can be seen that while confronting him with the statements made in the first information report, the provisions of section 145 of the Evidence Act have been duly complied with as reflected in the deposition, by showing the part of the writing by which he is sought to be contradicted after he has denied having stated something. However, insofar as the police statements are concerned, it is not clear from the recording of the deposition as to whether the contents of the statement with which the witness was sought to be contradicted have actually been put to him. However, the learned counsel for the appellants/accused has submitted that this is the manner in which the trial court records the evidence in the ordinary course. It was submitted that what is brought to the attention of the witness is put in inverted commas which is in consonance with the principles enunciated by this court in **(The) State of Gujarat v. Madha Bhana**, 1984 GLH 567, wherein the court held thus:

**"[13]** Before parting with this judgment, we would like to observe here that while recording the evidence of the witnesses, particularly with reference to omissions/contradictions with regard to police statements complex sentences have been used by the learned Additional Sessions Judge. In view of this, we had to look into the

*police statements to ascertain as to what was stated by the witness before police and what was omitted. This could have been avoided if the learned Additional Sessions Judge had recorded this part of the evidence in simple sentences in separate paragraphs. Such omissions and/or contradictions should be recorded in simple sentences and they should be very specific and clear so as to give a clear idea as to what is stated by the witness before police and what is not stated by him before police. For example at para 11 of the deposition of Dahyabhai Bhagwanbhai, Ex. 13, it is recorded as follows :*



"V[J]\ AgI]\ GYL VG[ 5M,L;DF\ V[J]\ ,BFjI]\ GYL4  
 S[ ccVFXZ[ RFZ JFulgF ;]DFZ[ C;LGFV[ A]D  
 5F0L S[ NM0M DFZL AFG[ DFZ[ K[P T[ A]D  
 ;F\LG[ C]\ DFZF 3ZGL ACFZ GLS?IMP NFpNEF.  
 56 GLS/[,F 5KL VFZM5LV[ VDG[ DFZJF  
 DF8[ KZL ATFJLP V[8,[ VDM 5FKF JIF UIFPPPP  
 5KL N; 5|NZ DLGL8[ C;LGFV[ Sæ]\4  
 S[ DFDF VFJM DFWM HTM ZæM K[Pcc

*Now, the words "V[J]\ AgI]\ GYL" create an impression that the witness admitted that the incident has not taken place in the above manner while it is the positive case of the witness in his deposition before the Court that the incident took place in the above manner though, of course, he did not state as above before police as proved by the evidence of the Police Officer. It appears from the trend of cross-examination that the suggestion by the defence was that the incident had not taken place as per the say of the witness which is reproduced above in Gujarati and the further suggestion was that a statement was not made by the witness before police. First, the suggestion that the incident had not taken place in the above manner should have been recorded in the following words:*

ccV[ JFT BZL GYL S[ AGFJ D\[ H6FjIF D]HA  
 AG[,M GCL\Pcc

*Then, so far as omission/contradiction is concerned, it should have been recorded as follows :*

*ccV[ JFT BZL GYL S[ 5M,L; ~A~GF HJFADF\ D[\ GLR[ D]HAG]\ ,BFjI]\ GYLPcc*

*Thereafter reproducing the portion of the statement before police which is reproduced earlier. This will give a clear idea that the suggestion of the defence was that the incident had not taken place in the above manner and that the further suggestion of the defence was that such a statement was not made before police by the witness It is further recorded at para 14 of the deposition of this witness as follows :*

*cc V[J]\ AgI]\ GYL VG[ D[\ 5M,L;DF\ ,BFjI]\ GYL S[ C]\ tIF\ 5CMrlM\ tIFZ[ AF,LA[G T[DGL VMZ0LGL ACFZ BF8,FDF\ ;]TF CTFP VG[ T[DGL A[ NLSZLVM C;LGF VG[ ZMXG E[UL ALHF BF8,FDF\ ;]TL CTLPcc*

*It appears from the trend of cross-examination that the suggestion of the defence was that the incident took place in the manner stated above in Gujarati and that the witness had made such a statement before police.*

*The first part of the evidence should have been recorded in the following words :*

*cc V[ JFT BZL GYL S[ ZMXG V[ ZMXG DG[ A[9L SZ V[J]\ ;F\|E/LG[ C]\ ACFZ UIMP VG[ tIF\ 5CM\rlM tIFZ[ AF,LAC[G T[DGL VMZ0LGL ACFZ BF8,FDF\ ;]TF CTFP VG[ T[DGL A[ NLSZLVM C;LGF VG[ ZMXG E[UL ALHF BF8,FDF\ ;]TL CTLP cc*

*The further recording should have been as follows :*

*cc V[ JFT BZL GYL S[ VFZM5LG[ D[\ AGF]  
JBT[ HMI[,M H GCL\Pcc*

*Thereafter, it should have been recorded as follows :*

*cc V[ JFT BZL GYL S[ 5M,L; ~A~GF HJFADF\ D[\  
GLR[ D]HAG]\ ,BFjI]\ K[Pcc*

*Thereafter reproducing the Gujarati version of the police statement reproduced above. It should also have been then recorded in specific words as follows :*

*cc V[ JFT BZL GYL S[ ACFZ GLS/LG[ D[\ AGF]  
JF/L HuIFV[ DFWF EF6FG[ HMIM V[J]\ 56 D[\  
5M,L;DF\ ,BFjI]\ GYLPcc*

*If the omissions and contradictions are recorded in the manner stated above, it will give a clear idea as to what was the suggestion of the defence. It would give a clear idea whether the suggestion of the defence was that the witness had omitted to state a particular fact or whether a witness had made a particular positive statement contradicting his own evidence before the Court. The way in which the learned Additional Sessions Judge recorded the evidence at para 14 reproduced above does not give any such clear idea. Similar complex sentences have been recorded even in the depositions of other witnesses, but it is not necessary to reiterate them. We would only like to observe that it is desirable that such omissions and/or contradictions and suggestions by the defence in cross-examination are recorded in clear, simple and short sentences instead of complex sentences giving a clear idea as to what is the suggestion of the defence in cross-examination. It is desirable that the evidence in this regard is recorded in the form of questions and answers because that will give a clear idea as to what was the suggestion in cross-*

*examination and what was the answer given by the witness.*

*Order accordingly."*

28.13 Insofar as the veracity of the evidence of this witness is concerned, the main discrepancies in his testimony are that he has stated that he had come out of this house and was injured with a stone near Mahemoodmiya's house and he has also stated that as he was injured with stones, he fell down in his house and could not go to Mahemoodmiya's house. Thus, the inconsistency is as regards whether he had gone out of his house or whether he was injured inside his house and remained there. Insofar as the persons inside the house going out after the door was broken, a perusal of the video recording of the scene of offence clearly shows that the door of the house was broken, which clearly corroborates the testimony of the witness to that extent. The same further shows that between Mahemoodmiya's house and the house of this witness, there is some open space and three houses which are not in a straight line. As noticed earlier, the incident has taken place in the dead of the night. The light which was available was in the nature of moonlight, light from houses where lights may have been switched on and light from the flames of the burning jeep and burning houses. Having regard to the topography of the place and the fact that the light was faint, it would have been quite possible for the persons inside Ibrahimmiya's house to make their way to Mahemoodmiya's house. Besides, a peculiar fact about this entire offence is that except for the incident of setting the house of Mahemoodmiya on fire, there is no incident of any person being individually assaulted nor is there any evidence of use of any weapon by

any of the accused. Therefore, there is no reason to disbelieve the version of the witness when he says that the persons, who had hidden in his house, sidled into Mahemoodmiya's house. Besides, having regard to the time gap between the incident and the recording of the evidence of the witness, there is bound to be some inconsistency insofar as the sequence of events is concerned. A person whose own life and the life of his family members is in imminent danger, is hardly likely to notice the sequence of events and would be more concerned with his safety and that of his family members. In these circumstances, some minor discrepancies cannot be given undue importance so as to impeach the credibility of the witness. In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**, AIR 1983 SC 753, the Supreme Court has, *inter alia*, held that ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

28.14 However, one significant aspect which cannot be lost sight of is the fact that the defence has cross-examined

this witness as regards the averments made by him in the affidavit meant for filing before the Supreme Court. While it is true that the whereabouts of the original copy of the affidavit is not known to any of the witnesses as to whether it was in fact submitted before the Supreme Court and in what proceeding, nor has any certified copy thereof been produced, nonetheless when the witness has admitted not only to the making of the affidavit but to the contents of the same to the extent put to him in his cross-examination, such evidence cannot be disregarded. For the reasons recorded hereinabove, the affidavit would be treated as a former statement to impeach the credibility of the witness to the extent the statements contained therein are inconsistent with any part of the testimony of this witness which is liable to be contradicted as envisaged under clause (3) of section 155 of the Evidence Act.

28.15 As can be seen on a plain reading of the testimony of this witness, one glaring aspect is that he has admitted that in his affidavit dated 6<sup>th</sup> November, 2003 before the Supreme Court, he has categorically stated that he was inside the house where the incident had taken place and that he was taken out from under a pile of corpses of his near and dear ones and that the skin from their bodies was sticking to him. Thus, what the witness has deposed before the court is clearly contrary to the averments made in the above referred affidavit. Not only that, the witness has categorically stated that in his examination-in-chief, he has stated that he was not in a position to go inside Mahemoodmiya's house whereas, he has, in paragraph 21 of his affidavit, averred otherwise and that out of the two, what is stated in the affidavit before the Supreme Court is correct.

Though thereafter in the further cross-examination, the witness has again stuck to the original version regarding being outside Mahemoodmiya's house at the time of the incident, however, the averments made on oath in the affidavit made for the purpose of tendering the same before the Supreme Court cast serious doubts regarding the credibility of the witness.

28.16 While, on a reading of the examination-in-chief and the cross-examination of the witnesses, barring the fact stated in the affidavits, the court is of the view that the evidence of the witnesses evinces credibility, nonetheless, it is equally true that the witness in a statement made on oath in an affidavit made for the purpose of submitting the same before the Supreme Court in some proceeding in connection with this case, has made statements which to a certain extent are totally contradictory to the version deposed before the court. To the extent of contradiction, the two statements namely, the statement made in the affidavit and the statement made before the court cannot stand together. If one is true, the other, as a necessary corollary, has to be false. Thus, the statement in the affidavit that the witness was inside the room and was extricated from beneath a pile of dead bodies and the statement that the witness was injured with a stone and fell down near his house and was, therefore, not inside the house, are contradictory to each other and cannot stand together.

28.17 It may be noted that even if the statements made in the affidavits may not be considered to be statements under section 145 of the Evidence Act for the purpose of contradicting the witnesses, as held hereinabove, the same

can be used for the purpose of impeaching the credibility of the witness as provided under clause (3) of section 155 of the Evidence Act by proof of former statement inconsistent with any part of the evidence which is liable to be contradicted. The question to be addressed by the court is whether the testimony of the witness stands impeached on account of statement made in the affidavit which has been admitted by the witness, to such an extent that the same has to be discarded and cannot be relied upon.

28.18 In the present case, the statements made in the affidavit made by the witness are clearly inconsistent with the part of the evidence whereby he has stated that he was inside his house as he was injured with a stone and could not go to Mahemoodmiya's house, which the witness has also admitted. Therefore, it is an admitted position that the witness has stated inconsistent facts in his testimony and the affidavit. In this regard, as noted hereinabove, from the various principles enunciated by the Supreme Court, even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. In the present case, the fact that the witness has made contradictory statements on oath would certainly impeach the credibility of the witness to a great extent and, therefore, his evidence would be required to be scrutinised with care and caution and the court would look to corroboration of his testimony from the

other evidence on record and would not place sole reliance upon the testimony of such a witness.

28.19 A lot of stress has been laid in respect of the fact that the witness has not given the correct name of his wife and referred to his daughter's name as his wife's name. One fails to understand as to how a mistake which is apparent on the face of the record can be attributed any oblique intention, more so, when it does not serve the purpose of the prosecution in any way. Besides, the record clearly shows that the wife of the first informant Zayda had died on account of the injuries sustained by her in Mahemoodmiya's house. Insofar as identification of the accused is concerned, in his cross-examination, this witness has admitted that members belonging to his community namely, Muslims were working in the fields of the Patels. Evidently therefore, the Muslims who were working in the fields of Patels of Sardarpura would be acquainted with the Patels of Sardarpura in whose fields they were working.

28.20 As noticed earlier, this witness, in his testimony, has referred to the burning of cabins of Muslims and other communities in the presence of Shri Rathod and Shri Parmar, however, subsequently, in his cross-examination, he has stated that he had only heard about the same and had not seen Shri Rathod and Shri Parmar being present at the time of the incident. The witness has also referred to Rajeshbhai Punjabhai having placed a petrol soaked rag below his cabin, however, in his original statement under section 161 of the Code, the witness has remained silent about the same. Similarly, for the first time, the witness had mentioned the bhajiya story narrated to him by Basirabibi in the affidavit made for filing

before the Supreme Court. Thus, these incidents which do not find place in the original statement have been stated by the witness at a subsequent stage. Since this part of the testimony of the witness is relied upon by the prosecution for the purpose of establishing the charge under section 120B of the Penal Code, reference to the veracity of such statements shall be made while discussing the theory of conspiracy as put forth by the prosecution.

28.21 A perusal of the medical certificate dated 2<sup>nd</sup> March, 2002 issued by the Medical Officer, General Hospital, Mehsana reveals that the witness had given history of rioting, wherein there was stone throwing and people were shut in a room and petrol etc. was poured and set on fire at or between 00:00 to 02:30 a.m. On the basis of the injuries described in the certificate, the Medical Officer has opined that the injuries could be possible by hard and blunt substance and the patient can recover from both fractures within about 4 to 6 weeks and in respect of other injuries, he can recover within about 5 to 7 days. Thus, this witness is an injured witness who had sustained injuries during the course of incident.

28.22 From the testimony of this witness, it further appears that while in the first information report, the witness had named twenty-eight accused with full names, in his testimony before the court, he has referred nineteen of the accused. In case of one accused, namely, Ashwinbhai Baldevbhai, it is not clear whether he is accused No.55 or accused No.6 of Sessions Case No.120 of 2008. In case of accused Jayantibhai Mangaldas, he has referred to him as Bakabhai Mangalbhai. Additionally, the witness has named six

other persons in his testimony before the court whose names were not stated in the first information report. Before the court, the witness was not able to identify twenty-five persons out of the twenty-eight persons named by him in his deposition and could identify only three persons whose names were originally reflected in the first information report lodged by the witness.

29. It may be noted that the learned counsel for the appellants/accused had submitted a detailed chart before the trial court setting out therein, the names of the accused named by the witness, whether such accused had been identified by the witnesses, whether the accused were named in the complaint, whether the accused were named in the previous statement made before the police or the SIT. In this regard, it may be noted that in case of almost each witness, various statements have been recorded from time to time. Initially, a statement came to be recorded under section 161 of the Code by the police. In some cases, the police have recorded further statements. Later on, eight witnesses had made affidavits before the Supreme Court. Some of the witnesses had made applications before the SIT; the SIT had recorded statements of the witnesses, in some cases, for the first time; SIT had also recorded further statements of the witnesses. Therefore, there are numerous statements of each witness coming on record. However, the exact nature of each such statement has not been brought on record. In the opinion of this court, the initial statement recorded under section 161 of the Code by the police would be a complete statement containing all relevant facts. The subsequent further statements would only be in the nature of statements pointing out incorrect facts recorded in

the earlier statements or adding something to the earlier statements. In the opinion of this court, therefore, what was already stated in the initial statement recorded by the police need not be again stated by the witness in the further statements. Therefore, non-mentioning names of the accused or certain facts in the subsequent statements recorded by the police or SIT or affidavit or application would not detract from the veracity of the statement made before the police, amount to an omission in the nature of a contradiction, if such facts are already stated in the initial statement.

30. The learned counsel then referred to a group of witnesses namely, PW-48 Sabirhussain Kadarmiya Shaikh, PW-50 Zakirhussain Kadarmiya Shaikh, PW-53 Kulsumbibi Kadarmiya Shaikh and PW-54 Sharifmiya Bhikhamiya Shaikh, who are members of the same family residing in scattered houses other than at Shaikh Mohalla. PW-48 Sabirhussain Kadarmiya Shaikh and PW-50 Zakirhussain Kadarmiya Shaikh are brothers and PW-54 Sharifmiya Bhikhamiya Shaikh is their half brother, viz., they have the same mother but different fathers, and PW-53 Kulsumbibi Kadarmiya Shaikh is their mother.

31. **PW-48 Sabirhussain Kadarmiya Shaikh** has been examined at Exhibit-491. In his examination-in-chief, he has deposed that his native place is Sardarpura and that he is residing opposite Kapurvas at Sardarpura and that his father has sold the house about one and a half years prior thereto. Opposite his house is an electric pole. They are three brothers, the eldest is Sharibhai, then Zakirmiya and he is the youngest. His parents are alive. On 27<sup>th</sup> February, 2002, the Godhra incident had taken place and on the next day, that is, on 28<sup>th</sup>

February, 2002, he was present at home with his family and on that day, at around 8:30 in the night, Patel Ambalal Maganbhai and Amratbhai Somabhai Maherwadia from Kapurvas opposite their house, had come and were standing near the electric pole opposite their house and Amratbhai Somabhai had climbed on the pole and had joined the wires with a tube-light and had directly started the light. Ambalal Maganbhai was standing near the pole and people were sitting at his father's place and at that time, Ambalal Maganbhai looked at his father and said that they would enjoy killing the bandiyas (a derogatory term used to refer to Muslims) and after saying so to his parents, they had left. On that day, at night, the Patels of their village had gathered at the corner of the Mohalla and were talking about rioting. On that day at night, the Patels of their village had set on fire shops belonging to Muslims and other lower communities in the market. On 1<sup>st</sup> March, 2002, in the morning upon going to the market, he had seen that his paan-bidi cabin and a tea hotel situated near the Gram Panchayat verandah (it appears that the witness has referred to the compound wall as a verandah, which is the position in case of the deposition with some other witnesses also) were burnt. On that day, that is, on 1<sup>st</sup> March, 2002, there was a declaration of Bharat bandh and hence, he had come home and has informed his father that their galla was burnt and that since the roof of the hotel has a tin shed which has been securely affixed on roof of their hotel, the same has been saved. About one and a half years from the incident, Kachrabhai Tribhovandas, as he was an accused in the case had illegally broken it and taken it away, in connection with which he has lodged a complaint. On that day (1<sup>st</sup> March, 2002), in the evening, since their house was isolated, they were afraid and hence, they had gone to the

Shaikh Mohalla and around 10 o'clock at night, the Patels of their village had come to Shaikh Mohalla with dharia, sticks, pipes, kerosene, petrol cans and chemical cans and had attacked the Mohalla. There were about five hundred to seven hundred people in the mob who had set the Mohalla on fire. Three shops at the corner of the Mohalla had been set ablaze and that since there was a focus light opposite Shaikh Mohalla, he had seen that Patel Ambalal Maganbhai, Kachrabhai Tribhovandas, Kanubhai Joitabhai, Rameshbhai Ramabhai, Jayantibhai Ambaram and Ashwinbhai Baldevbhai, Dineshbhai Baldevbhai, Mathurbhai Ramabhai, Upendra Manilal, Becharbhai Odhavbhai, Madhabhai Vithalbhai, Sanjaykumar Ambalal, Ramanbhai Jivanbhai, Gandabhai Naranbhai, Sureshbhai Ranchhodhbhai and Chaturbhai Kanabhai of their village were present. They were instigating the mob and had started burning the houses at Shaikh Mohalla and were pelting stones. At that time, since the houses of Patels were higher and the houses in the Shaikh Mohalla were lower, they were pelting stones from the top of the houses. There were Patels from the verandah of the kabristan also and they were throwing stones. Stones were coming from all the four sides. At that time, they had faced them to save their lives. Thereafter, since the number of stones increased, and he was injured on the neck with a brick, he had gone inside Akbarmiya Rasulmiya's house. Each of the members of the mob had a deadly weapon in his hand and they intentionally proceeded towards Shaikh Mohalla and were burning houses and their people were hiding in Shaikh Mahemoodmiya Hussainmiya's house and hence, they had gone towards that house and had broken its window and poured petrol and kerosene and set it ablaze. At that time, there was an iron rod to which a wire was

joined and was left in the room and cries of help were coming from the house and screams were heard, they were shouting from 10 o'clock till 2 o'clock at night, however, no one came to save them and at around 2:30, the DSP came and police came whereupon the members of the mob fled and the police came to Shaikh Mohalla and took them out. The other members of the Shaikh Mohalla also came out. At that time, the DSP had gone to Shaikh Mahemoodmiya Hussainmiya's house where the people were burnt and since there was a wire joined to the rod on the window, the DSP also got an electric shock and the lock on the door was broken by the police with a gun and the live wire was also broken with a gun and inside about twenty eight persons were dead, including women, children and men and there were other persons also who had sustained burn injuries and grievous injuries and those persons were taken by the police in a vehicle to Mehsana. Those who had died were taken in a 407 tempo and he had gone to search for his parents who had come to him after some time. Thereafter, they were taken in a police vehicle to Savala and that the Pathans were with them. He has identified certain members of the mob namely, Kachrabhai Tribhovandas, Jayantibhai Ambalal, Sanjay Ambalal, Mathurbhai Ramabhai, Chaturbhai Kanabhai, Ramanbhai Jivanbhai, Ambalal Maganbhai, Ashwinbhai Baldevbhai, Rameshbhai Ramabhai Gangawat, Sureshbhai Ranchhodbhai, Kalabhai Bhikhabhai, Kanubhai Joitabhai, Patel Amratbhai Somabhai Maherwadia and Upendra Manilal in the court room. He has stated that Becharbhai Odhavbhai and Rajesh Govindbhai are not present in the court.

31.1 In his cross-examination, he has stated that his house is situated in Sardarpura opposite Kapurvas, where he was

residing since his birth. He has denied the suggestion that on 1<sup>st</sup> March, 2002, he along with his family had not left their house and gone. He has stated that on 1<sup>st</sup> March, 2002, he and his brother Sharifbhai, along with their family had gone to Shaikh Mohalla. They had gone at around 7:00 to 7:30 to 8:00. At Shaikh Mohalla they had gone to Bachumiya Immamiya's place. He, his parents and Zakir had gone to Bachumiya's house. He has further stated that they were not at Bachumiya's house during the entire incident. Till the incident was over, he was hiding in front of Akbarmiya Rasulmiya's house and he does not know where the other members of his family were. He has stated that till the entire incident was over, he had not seen the members of his family as well as the members of Sharifkhan's family. In his cross-examination, it has also come out that Pathanvas is situated at about 900 feet from their house, whereas Shaikh Mohalla is situated at a distance of 200 feet. Kapurvas is at a distance of 300 feet from his house. Kapurvas is inhabited by Patels. The population of Patelvas must be about 500 to 700 people, and that there are three Patel Mohallas there. In his cross-examination, it has further come out that the area in which they were residing was not known as Shaikhvas and that there were three houses of Shaikhs. There is only one Shaikhvas in their village, the rest of the houses are scattered. In his cross-examination, it has further come out that he had not tried to prevent Amratbhai Somabhai and Ambalal Maganbhai from putting on the lights by connecting the wires. He has further stated that when they put on the lights and said that now they would enjoy beating the bandiyas, he was afraid. He has not informed anyone about the incident on 28<sup>th</sup> but on the 1<sup>st</sup> he had stated this at Shaikh Mohalla. He has stated that the electric pole is opposite his

house and that on 28<sup>th</sup> or 1<sup>st</sup>, he had not informed the police about it nor had he made any application in connection with the incident relating to the electric pole. In his cross-examination, an omission has been brought out to the effect that in his statement dated 6<sup>th</sup> March, 2002 recorded by the police, he had not stated the fact regarding Amratbhai Somabhai and Ambalal Maganbhai putting on the lights by connecting the wires as well as the fact regarding Patels gathering at the corner of his house and talking about indulging in violence as also the fact regarding the Patels of their village having burnt cabins belonging to Muslims and lower communities in the market. In his cross-examination, further omissions are brought out to the effect that in his statement dated 6<sup>th</sup> March, 2002 he had not stated anything regarding having gone to the Gram Panchayat on 1<sup>st</sup> March, 2002 and seen their paan-bidi cabin and tea hotel being burnt and having returned home and informed his father about it. A further omission has been brought out to the effect that he had not stated that on that day in the evening as their house was isolated, they were afraid and had gone to Shaikh Mohalla and at 10 o'clock at night, the Patels of their village had attacked Shaikh Mohalla with dharias, sticks, pipes, and cans of kerosene, petrol and chemicals. A contradiction has been brought out to the effect that in his statement dated 6<sup>th</sup> March, 2002, he had not stated regarding putting up focus lights in Shaikh Mohalla. An omission in the nature of contradiction has been brought out to the effect that he has not named Kachrabhai Tribhovandas, Kanubhai Joitabhai, Dineshbhai Baldevbhai, Mathurbhai Ramabhai, Upendra Manilal, Madhabhai Vitthalbhai, Sanjaykumar Ambalal, Ramanbhai Jivanbhai, Gandabhai Naranbhai and Chaturbhai Kanabhai in

his statement dated 6<sup>th</sup> March, 2002. In the cross-examination of the witness, it has been suggested that in his statement dated 10.05.2008 before the SIT, the witness had not stated that, therefore, he had gone inside Akbarmiya Rasulmiya's house. It may, however, be noted that though the witness had not stated so in his statement dated 10.05.2008, he had stated so in his statement dated 06.03.2002. In his cross-examination, it has further been brought out that in his previous statements dated 06.03.2002 and 10.05.2008, the witness has inter alia not stated that, at that time, the DSP was taken towards the house of Mahemoodmiya Hussainmiya where the persons had been burnt and current had been passed through the rod of the window of that house and upon the rod touching the DSP, he also felt the current and that the police broke the lock on the door with a gun". In his cross-examination, the witness has denied that he had hidden inside Akbarbhai Rasulbhai's house and had voluntarily stated that he had hidden himself in the courtyard/verandah of Akbarbhai Rasulbhai's house. The witness has denied that he had seen the entire incident from the courtyard/verandah. He has deposed that when the mob came towards the corner of Shaikhvas, he had seen it from the corner of Ayubmiya Rasulmiya's house. When the mob advanced and he was injured with a brick, he had gone inside the courtyard/verandah of Akbarmiya Rasulmiya's house, behind which there is the door of the house. The door was open. He had hidden himself under a quilt and had not gone inside the house. At that time, no one else was with him and whatever part of the incident he had seen from the verandah, he had seen by peeping out of the quilt. He has denied that he had seen the incident from the window of Akbarmiya Rasulmiya's

house. He has also denied that at that time, four persons belonging to his community were with him. He has denied that in his statement dated 06.03.2002, he has stated that Jamalbhai Dosikhan, Akhtarmiya Akbarmiya, Makbulmiya Kesarmiya and Arifmiya Akhtarmiya had also hidden with him in the Akbarmiya Rasulmiya's house. He has admitted that he and Bachumiya Nathumiya (Manubhai), Bhaimiya Alammiya, Sherumiya Rasulmiya, Akbarmiya Rasulmiya and others had faced the stone throwing. He has denied that upon stones coming from all four sides, they had entered Akbarmiya Rasulmiya's house. The witness has admitted that he is the son-in-law of Ibrahimmiya Rasulmiya. [It may, however, be noted that it appears that the said witness had subsequent to the incident, married the daughter of Ibrahimmiya Rasulmiya and at the time of the incident, he was unmarried].

31.2 Various omissions are sought to be brought out in respect of his statement dated 10<sup>th</sup> May, 2008, which are not relevant, inasmuch as the statement recorded by the SIT is a further statement, and when the witness has stated something in his first statement recorded by the police it is not necessary to reiterate the same in the subsequent statements.

31.3 In the testimony of PW-110 Kakusinh Ranjitsinh Vaghela [the Investigating Officer (Police)], an omission has been brought out to the effect that this witness has not stated anything with regard to the light theory as deposed in his testimony. It has further come out that the entire incident with regard to paan-bidi cabin having been found to have been burnt on 2<sup>nd</sup> March, 2002 is not stated in his police statement. Moreover, there is no reference to any focus light having been

placed at Shaikh Mohalla. From the cross-examination of the Investigating Officer, it has further come out that in his statement dated 6<sup>th</sup> March, 2002, he has not named Kachrabhai Tribhovandas, Kanubhai Joitabhai, Dineshbhai Baldevbhai, Mathurbhai Ramabhai, Upendra Manilal, Madhabhai Vitthalbhai, Sanjaykumar Ambalal, Ramanbhai Jivanbhai, Gandabhai Naranbhai and Chaturbhai Kanabhai. In the cross-examination of the Investigating Officer, it has further been brought out that in his statement dated 6<sup>th</sup> March, 2002, the witness has stated that at about 12 o'clock at night, the mob had gathered again and he had hidden himself in Akbarbhai Rasulbhai's house.

31.4 From the cross-examination of the Investigating Officer (SIT), it has come out that this witness has not named Rameshbhai Ramabhai, Jayantibhai Ambaram, Ashwinbhai Baldevbhai, Becharbhai Odhavbhai, Ramanvhai Jivanbhai, Gandabhai Naranbhai and Sureshbhai Ranchhodbhai in his statement dated 10<sup>th</sup> May, 2008. The Investigating Officer has further admitted that in his statement dated 10<sup>th</sup> May, 2008, this witness had not stated that he had hidden in the compound of Akbarbhai Rasulbhai's house.

31.5 The learned counsel for the accused referred to the examination-in-chief of this witness, to point out that the statement of this witness was recorded on 6<sup>th</sup> March, 2002; however, he has not stated anything with regard to Patel Ambalal Maganbhai and Amratbhai Somabhai Maherwadia joining the wire of tube-lights on the electric pole in front of their house, nor has he made any reference to the so-called utterances stated to have been made by the said accused

persons in the presence of his father. It was pointed out that the father of this witness has not been examined and that his mother Kulsumbibi who has been examined as PW-53 also has not made any reference to such theory. It was further pointed out that the said witness has also referred to his having seen the accused persons in the mob in the brightness of the focus light opposite Shaikh Mohalla, however, such facts were not stated by him in his statement recorded by the police. It was submitted that this witness has not stated with regard to his being injured on the neck with a brickbat or that he had hidden in the house of Akbarmiya Rasulmiya. It was pointed out that the said witness has also introduced the current theory namely, that a rod had been inserted from the window of Mahemoodmiya's house through which current was being passed and that upon the same touching, the DSP had also felt the current and that a lock had been fixed on the bolts which the police had broken with a gun and that the wire through which the current was passing was also broken with a gun. It was pointed out that the contradictions in the statement of the witnesses have been brought out in his cross-examination and have been proved through the testimonies of the Investigating Officer. It was submitted that the story of joining an iron rod with an electric wire and inserting it inside Mahemoodmiya's house is also not supported by the panchnama and panch witness. The story regarding the DSP receiving an electric shock is not supported by the DSP himself. For the first time in the court, the witness has come out with a new fact regarding Mahemoodmiya's house having been locked from outside and the lock having been broken by the police and this fact is not supported or even stated by any of the witnesses including the police officers and not supported by the panchnama which

does not disclose any broken lock having been found. It was submitted that the witness has changed the sequence of events. It was, accordingly, submitted that the evidence of this witness, on the face of it, cannot be believed as he has changed the sequence of events, which is not in consonance with what has been stated by the other witnesses. It was further submitted that the witness has initially stated that he went to Bachumiya's house and then, he slipped into the house of Akbarmiya Rasulmiya, whereas none of the family members of those persons support this theory. It was submitted that this fact of the family having come to Shaikh Mohalla or that Sabirmiya himself with four others has hidden himself is not supported by the witnesses. The witness has not taken any medical treatment and no medical certificate has been produced to substantiate his presence at the scene of offence. It was argued that both the houses of Akbarmiya Rasulmiya have been ransacked and hence, the mob had gone there. It was submitted that the witness has improved the facts by stating that he had hidden himself under a quilt which is not possible. It was, accordingly, urged that this witness is not a truthful witness, who has improved his version on many aspects and has implicated more accused than he had named in his police statement and hence, no reliance can be placed on the testimony of such witness.

**31.6 ANALYSIS:** From the testimony of this witness as recorded hereinabove, it emerges that the house of this witness is situated opposite Kapurvas in Sardarpura and opposite his house, there is an electric pole. The witness has deposed that on 28<sup>th</sup> February, 2002, at around 7:30 in the evening, Patel Ambalal Maganbhai and Amratbhai Somabhai

Maherwadia were standing below the electric pole opposite their house and Amratbhai Somabhai climbed over the pole and joined the wires with the ends of the tube-light and directly started the light. At that time, Ambalal Maganbhai was standing near the pole and he and his father and members of the family were sitting inside the house when Ambalal Maganbhai looked at his father and said that now they would enjoy beating the bandiyas. On the same day at night, Patels of their village gathered at the corner of their Mohalla and were talking about rioting. On the same day, at night, the Patels of their village set ablaze cabins belonging to Muslims and lower communities in the bazaar. The witness has stated that as his house was an isolated one, he and his family members had come to Shaikh Mohalla in the evening of 1<sup>st</sup> March, 2002. He claims to have seen the accused in the focus light opposite Shaikh Mohalla, which is an improvement on the original statement before the police dated 6<sup>th</sup> March, 2002. He has deposed that he had gone inside the house of Akbarmiya Rasulmiya upon being hit by a stone on his neck. That they had shouted from 10:00 p.m. to 02:00 a.m., but no one came to their rescue. At 02:30 a.m., the DSP came, whereupon the mob fled and upon the police entering Shaikh Mohalla, they came out. He has deposed that the DSP was taken towards the house of Mahemoodmiya Husenmiya, where persons were burnt and current was passed with a rod through the window of the house and upon the DSP touching the same, he felt the current and the police broke the lock on the door with a gun and the wire with the current was also broken with a gun and inside 28 persons had died. He has deposed regarding he having made an application to the SIT.

31.7 In his cross-examination, it has come out that in Shaikh Mohalla, they had gone to Bachumiya's house, however, they were not there throughout the incident. He had hidden himself near Akbarmiya Rasulmiya's house till the incident was over and does not know where his family members were. He has denied that he had hidden inside Akbarmiya Rasulmiya's house, but has clarified that he was hiding in the verandah of his house. In his cross-examination, he has stated that he had not seen the entire incident from the verandah of Akbarmiya's house, but had seen the mob when it entered Shaikhvas at which point of time, he was standing at the corner of Ayubmiya Rasulmiya's house. When the mob went forward and he was injured with a brick, he went on the verandah of Akbarmiya's house, beyond which, there is the door for going inside the house. In his cross-examination, he has also stated that the door was open but he had hidden himself under a quilt and had not gone inside the house and at that time, he was alone and there was no other person there. Whatever part of the incident that he saw from the verandah was by peeping out of the quilt. He has denied that he had seen the incident from the window of Akbarmiya Rasulmiya's house.

31.8 As noted hereinabove, the learned counsel for the appellants accused has contended that the witness has improved upon his version by stating that he was hiding under a quilt. In this regard, it may be noted that the facts regarding his hiding on the verandah of Akbarmiya's house under a quilt have been elicited in his cross-examination and are not in the nature of improvements made in his examination-in-chief. The statement of this witness has been recorded soon after the incident on 6<sup>th</sup> March, 2002, and hence, he does not appear to

be a got up witness. The testimony of this witness, to the extent of his presence at Shaikhvas at the time of the incident, that he had seen the accused and that he had hidden in Akbarmiya Rasulmiya's house, is consistent inasmuch as he has stated these facts in his statement dated 6<sup>th</sup> March, 2002 recorded by the police, though there is an improvement regarding his having seen the accused in the focus light. However, the core of his testimony to the aforesaid extent is consistent and can be relied upon, though, the facts which have been stated for the first time, long after the incident are required to be disregarded. Insofar as the witness hiding in Akbarmiya Rasulmiya's house is concerned, this house is situated on the row which is on the rear side of the Patels' houses. A perusal of the video recording of the scene of incident reveals that Akbarmiya Rasulmiya's house has a latticed wall with a grilled entrance gate and thereafter there is a big open compound/yard with what appears to be bathrooms on the right side. The house has a verandah with a sheet roof and on the verandah, there are two jute stringed cots and some vessels and a water pot and except for a few stones and brickbats lying in the compound, by and large the house appears to be intact and does not appear to have been ransacked or set on fire. Besides, having regard to the grilled gate and the latticed wall, it would be quite possible for a person inside to see what is happening outside. Moreover, it is the case of the witness that he saw the accused when the mob entered Shaikhvas and not from Akbarmiya's house. The version of the witness that he was hiding in Akbarmiya's house is quite plausible and there is no reason to disbelieve this part of his testimony. It may be clarified that PW-38, the panch-witness in his testimony has not specifically deposed with

regard to the situation of the houses in the row towards the rear side of Patel houses and the contents of the panchnama have not been read over to the witness and hence, with a view to understand the position of the houses, the court has taken the liberty to refer to the video recording of the scene of offence which gives a better insight of the scene of offence.

31.9 As noted hereinabove, insofar as reference to connecting street lights directly by the two persons mentioned hereinabove is concerned, this version has come for the first time at a belated stage and does not form part of the original version given by this witness before the police. Similarly, the fact with regard to the DSP feeling current from the rod placed inside the window has also come on record at a subsequent stage. These facts have been brought on record for the purpose of establishing the theory of conspiracy under section 120B of the Penal Code. Hence, the evidentiary value of this part of testimony of the witness shall be considered while discussing the theory of conspiracy as put forth by the prosecution. Moreover, insofar as directly connecting the street light is concerned, though the witness's mother Kulsumbibi has been examined by the prosecution, she is silent with regard to such incident having taken place. This witness in his deposition before the court has named, in all, eighteen persons in connection with the main incident of 1<sup>st</sup> March, 2002 and has named two persons in connection with the incident of 28<sup>th</sup> February, 2002 for directly connecting the street light. Out of the eighteen accused named by him, this witness has not named the said two persons, nor has he stated facts with regard to their directly connecting the street light on 28<sup>th</sup> February, 2002, in his initial statement dated 6<sup>th</sup> March, 2002

and has for the first time, named these persons and introduced the theory of light having been directly connected before the SIT on 10<sup>th</sup> May, 2008. This witness has not named Kachrabhai Tribhovandas, Kanubhai Joytabhai, Dineshkumar Baldevbhai, Mathurbhai Ramabhai, Upendra Manilal, Madhabhai Vitthalbhai, Sanjay Ambalal, Ramanbhai Jivanbhai and Chaturbhai Kanabhai in his statement dated 6<sup>th</sup> March, 2002 recorded by the police. Therefore, out of eighteen persons named by this witness as having been involved in the main incident of 1<sup>st</sup> March, 2002, the witness had only named Patel Ambalal Maganbhai, Rameshbhai Ramabhai, Jayantibhai Ambaram, Ashwinbhai Baldevbhai, Sureshbhai Ranchhodbhai in his statement dated 6<sup>th</sup> March, 2002, though some of these accused persons had been named by him in his further statement dated 10<sup>th</sup> May, 2008 recorded by the SIT. Out of eighteen accused persons, this witness has identified thirteen accused, out of whom, Rameshbhai Ramabhai has been identified with a wrong name and insofar as Ashwinbhai Baldevbhai is concerned, it is not clear as to whether the witness is accused No.55 or accused No.6 in Sessions Case No.120 of 2008.

31.10 In the deposition of this witness, he has come out with a totally new account of the incident by stating that the house was locked from outside and that the lock had to be broken by the police by using a gun. On behalf of the appellants-accused, the testimony of this witness is, *inter alia*, assailed on the ground that the fact regarding this witness having initially gone to Bachumiya's house and then slipped into the house of Akbarmiya is not supported by the family members of those persons and further, that both the houses of

Akbarmiya had been ransacked and then the mob had gone there and that the witness has improved the facts by stating that he had hidden himself under a quilt which is not possible. In this regard, it may be noted that even in his statement dated 6th March, 2002, this witness has stated that he had slipped into the house of Akbarmiya Rasulmiya and this part of his testimony has remained consistent throughout. As to how and in what manner he had hidden inside Akbarmiya Rasulmiya's house are facts which are elicited during the course of cross-examination of the witness. As discussed while discussing the case of PW-47, the witness, though wholly truthful is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment. In the aforesaid premises, in the opinion of this court, the presence of this witness at the scene of offence at the time of incident cannot be disbelieved.

32. **PW-50 Zakirhussain Kadarmiya Shaikh**, has been examined at Exhibit-505 (page 16021). He has deposed that he is a native of Sardarpura and that his family is comprised of two brothers, viz., he and his younger brother Sabir and his parents. His mother's name is Kulsumbanu Kadarmiya Shaikh and father's name is Kadarmiya Allumiya Shaikh and his younger sister's name is Farzana. They were residing in front

of Patel Mohalla. Ravalvas is situated behind Patel Mohalla and his father had a tea hotel opposite the Gram Panchayat where he (his father) used to sit. On 27<sup>th</sup> February, 2002, the train was burnt at Godhra. On 28<sup>th</sup> February, 2002, there was a declaration of Gujarat bandh and on 1<sup>st</sup> March, 2002, there was a declaration of Bharat bandh. Since their house was isolated, they had gone to Shaikh Mohalla in the evening. On 1<sup>st</sup> March, 2002, in the evening, at around 7:30, a mob of Hindus of their village came from Mahadev side to the corner of Shaikh Mohalla and burnt three cabins. At that time, upon the police coming, the mob had dispersed. Upon the police going away, the mob immediately came back towards Shaikh Mohalla. The mob entered Shaikh Mohalla and had vandalized houses and resorted to arson and started throwing stones. Upon entering the Mohalla, Kantibhai Prabhudas, Upendra Manilal, Jagabhai Jivanbhai were instigating the mob to kill the Muslims, cut them, burn them. Upon the mob entering the mohalla, they were frightened, and hence, with a view to save their lives, they had fled to the fields from the direction of Mahemoodmiya's house. His younger brother Sabir Shaikh was left at the Mohalla, whereas, he and his parents had fled towards the fields. From the fields, they could hear cries for help and screams. They also had heard shouts of "cut the Muslims and kill them". After two to two and a half hour, the atmosphere calmed down and they came to the village. They came from the fields to the village where police cars were standing near Shaikh Mohalla and hence, they had gone towards the mohalla where they learnt that twenty-eight persons were dead and some people were injured. The persons who were burnt were taken to the Mehsana Civil Hospital and the police took them along with Pathans to Savala. They

stayed at Savala for around seventeen days. Thereafter, they had come to Himatnagar-Nazirabad Camp. The witness has identified Kantibhai Prabhudas in the court room and has stated that Jagabhai and Upendra are not present in the court room (though in fact they were present).

32.1 In the cross-examination of this witness, an omission has been brought out that in his statement dated 6<sup>th</sup> March, 2002 and 11<sup>th</sup> June, 2008, he has not stated that on 1<sup>st</sup> March, 2002 as their house was an isolated one, they had gone to Shaikh Mohalla in the evening. A further omission has been brought out that in both the above statements, he has not stated any facts regarding their having gone to Shaikh Mohalla and burning of cabins by the mob, the police coming and dispersing the mob by the police, and the mob vandalizing the houses and resorting to arson and stone throwing as well as the accused named in the examination- in-chief having instigated the mob; that upon the mob entering Shaikh Mohalla, on account of fear they had fled to the fields from where they could hear the cries for help, etc. A contradiction has been brought out that in his statement dated 6<sup>th</sup> March, 2002, the witness had stated that they had from the fields, from far, seen that the persons in the mob had firstly come to the corner of their vas and had set paan-bidi gallas on fire. A further contradiction has been brought out that in his statement dated 6<sup>th</sup> March, 2002, he had stated that he does not know any member of the mob. A contradiction has also been brought out that in his statement dated 6<sup>th</sup> March, 2002, the witness has not named Kanti Prabhudas, Upendra Manilal and Jagabhai Jivanbhai.

32.2 In the cross-examination of PW-110, the Investigating Officer (Police), the contradiction that in his statement dated 6<sup>th</sup> March, 2002, the witness had stated that he does not know any person in the mob, has been proved. The Investigating Officer has further admitted that in his statement dated 6<sup>th</sup> March, 2002, this witness had not named Kantibhai Prabhudas, Upendra Manilal and Jagabhai Jivanbhai.

32.3 The Investigating Officer (SIT) in his cross-examination has admitted that this witness in his statement dated 11<sup>th</sup> June, 2008 had not stated that he had gone to Shaikh Mohalla and had fled to the fields from Shaikh Mohalla and that he had witnessed the incident from Shaikh Mohalla. The Investigating Officer (SIT) has further admitted that this witness in his statement dated 11th June, 2008 stated that while running towards the field, he had seen the members of the mob.

32.4 Mr. Y. S. Lakhani, learned counsel for the appellants/accused pointed out that the witness, in his examination-in-chief, has deposed that when the mob entered Shaikh Mohalla, they were afraid and hence, with a view to save their lives, they had fled from the direction of Mahemoodmiya's house to the fields whereas his younger brother Sabir Shaikh had remained in the mohalla. It was submitted that this fact has been stated by this witness for the first time before the court. It was pointed out that the said witness has named three accused namely, Kantibhai Prabhudas, Upendra Manilal and Jagabhai Jivanbhai, whereas he has been able to identify only Kantibhai Prabhudas but has not been able to identify Jagabhai Jivanbhai and Upendra Manilal though they were present in the court. Referring to the cross-examination of the witness, it was

pointed out that it has been brought out that in his statement dated 6<sup>th</sup> March, 2002 and 11<sup>th</sup> June, 2008, he has not stated that on 1<sup>st</sup> March, 2002, as their house was isolated, they had gone to Shaikh Mohalla in the evening. Referring to the contents of paragraph 4 of the cross-examination, it was pointed out that all these facts are not stated in the statement of the said witness. It was submitted that, therefore, this witness has not given the correct facts before the court as regards the time and sequence of the facts of the main incident. It was submitted that though he has not named any of the accused in his first statement and has stated that he did not know anybody in the mob; subsequently, for the first time after six years, he has implicated them and has named all the three in the deposition but could not identify two of them. It was submitted that this witness has not witnessed the incident, and is, therefore, not an eye-witness, inasmuch as, before the incident took place, he had hidden in the fields and for some reason, after six years, he has attempted to show that he had seen the first part of the incident about the mob having come and seeing three of them in the mob.

**32.5 ANALYSIS:** This witness has deposed that he was residing with his brother Sabirmiya and his parents. On 1<sup>st</sup> March, 2002, their house being an isolated one, in the evening, they had gone to Shaikh Mohalla. He, like the rest of the witnesses, has deposed with regard to the incident of 9:30 where according to him, three cabins were set on fire and the police came and dispersed the crowd. The witness has stated that after the police went away, a mob came again and entered Shaikh Mohalla and resorted to vandalizing the properties, arson and stone throwing. While they were

entering, he had seen that Kantibhai Prabhudas, Upendra Manilal and Jagabhai Jivanbhai were instigating the mob by saying, kill the miyas, cut them, burn them. Upon seeing them entering the Mohalla, they were afraid and with a view to save their lives, they fled from the rear side behind Mahemoodmiya's house towards the fields. He has, inter alia, stated that his younger brother Sabir was left in the Mohalla. He has identified Kantibhai Prabhudas in the court. He has stated that Jagabhai Jivanbhai and Upendra Manilal were not present in the court despite the fact that they were so present. In the cross-examination of this witness, a contradiction is brought to the effect that in his statement dated 6<sup>th</sup> March, 2002; he had not named any accused and had categorically stated that he does not know any of the members of the mob. Having regard to the nature of the contradictions which have been brought on record, in the opinion of this court, it would be hazardous to rely upon the testimony of the said witness as there are all chances of false implication of the accused.

33. **PW-53 Kulsumbibi Kadarmiya Shaikh** has been examined at Exhibit-524. She has deposed that her family is comprised of five members, her husband Kadarmiya Alumiya, her sons Zakirmiya Kadarmiya and Sabirmiya Kadarmiya, and her daughter Farzanabibi Kadarmiya. She has further deposed that on the day of Bharat Bandh, their house being an isolated one, they were afraid and had, therefore, gone to Shaikh Mohalla in the evening. At around 9:30, a mob of Patels came from the side of Mahadev to the corner of Shaikh Mohalla shouting "kill the miyas, cut them, burn them" and burnt three gallas at the corner of Shaikh Mohalla, and upon the police coming, the mob had fled. After some time, the police went

away. Thereafter, after some time, the same mob came back and entered via the corner of Shaikh Mohalla and started vandalizing the houses and setting them on fire and at that time, in the mob, she had seen Kantibhai Prabhudas who was instigating the mob saying "kill everyone, cut them, burn them". Houses were burnt and vandalized and stone pelting was started. The members of the mob had sticks, dharia, pipes, kerosene and petrol cans in their hands and the mob came inside the Mohalla, due to which, and with a view to save their lives, they went into the fields from the rear side of Mahemoodmiya's house. Her younger son Sabir Shaikh remained in the Mohalla and from the fields, they could hear the shouts for help coming from Shaikh Mohalla; that the houses of Shaikh Mohalla were burning and they were watching from the fields. She has further deposed that upon the police coming to the Mohalla, they thought that the atmosphere had become calm, and hence, they came to the village and to the corner of Shaikh Mohalla and her son Sabir Shaikh told that the persons from the Mohalla have been burnt alive and killed. That those who were alive had sustained burn injuries and they had been sent to the Mehsana hospital and that they together with the Pathan brothers went in a police car to Savala.

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33.1 From the cross-examination of this witness, various omissions are brought out to the effect that she had not stated facts in her police statement dated 6<sup>th</sup> March, 2002 in the manner stated before the court. An omission in the nature of contradiction has been brought out to the effect that in her statement dated 6<sup>th</sup> March, 2002, she had not named any accused. The witness is also sought to be cross-examined in

respect of certain omissions in her statement dated 11<sup>th</sup> June, 2008 recorded by the SIT. In her cross- examination, a contradiction has been brought out to the effect that in her statement dated 6<sup>th</sup> March, 2002, she had stated that on that very night at around twelve o'clock mobs of these people collected again and were saying "burn the Muslims" due to which her husband took her and her children and fled towards the fields and from far, they had seen the members of the mob going towards their house and throwing stones. In her cross- examination, she has stated that at around 9:00 to 9:30 they had gone to Bachumiya Imammiya's house at Shaikhvas and were not sitting inside the house, but were outside on the verandah. At that time there was stone throwing and the police had come, which she had seen. At that time her husband, son and daughter were with her.

33.2 From the cross-examination of PW-110 the Investigating Officer (Police), a contradiction has been proved that this witness had not named any accused in her statement dated 6<sup>th</sup> March, 2002.

33.3 The learned counsel for the accused submitted that this witness has improved the story by saying that after they ran away towards the field and after the incident, her son Sabir informed that the incident had happened at Shaikh Mohalla and that the people have been burnt alive in Mahemoodmiya's house which she has never stated in her statement before the police and that the contradiction is proved on record. It was submitted that from the cross-examination of the Investigating Officer (SIT), it has come on record that in her statement dated 9<sup>th</sup> June, 2008, the witness has not stated facts as deposed

before the court. Referring to the testimony of this witness, it was submitted that:

- This witness has not given the names of any accused in her statement dated 6<sup>th</sup> March, 2002.
- That the sequence and time of the incident has been materially changed as a consistent improvement is made by all the witnesses deliberately.
- In her first version, the witness has stated that about 12:00 in the midnight before the incident had occurred, she had run away with her husband, sons and daughter and had witnessed the mob pelting stones from a distance.

It was submitted that when the witness had not named any accused in her statement before the police, she could not have given the name of Kantibhai Prabhudas before the court, which is nothing but a deliberate attempt to falsely involve the accused. Furthermore, she had named an accused who had died prior to the recording of her deposition so that she may not have to identify the accused. It was, accordingly, urged that the testimony of this witness is not credible and hence, no reliance can be placed on it.

**33.4 ANALYSIS:** This witness is the mother of PW-48 Sabirhussain Kadarmiya Shaikh, who lives in one of the scattered Shaikh houses opposite Kapurvas. In the cross-examination of this witness, it had been brought out that she had not named any accused in her statement dated 6<sup>th</sup> March, 2002. This witness has also not stated anything regarding lights having been directly connected on the electric pole

opposite their house, as stated by her son Sabirhussain Kadarmiya Shaikh. As per the testimony of this witness, since their house was an isolated one, on 1<sup>st</sup> March, 2002, they had gone to Shaikh Mohalla in the evening and when the mob entered the Shaikh Mohalla, armed with weapons, pipes, kerosene, petrol cans etc., with a view to save their lives, they went into the fields. The witness has deposed that her son Sabirhussain remained in the Mohalla. This witness has named Kantibhai Prabhudas in the mob as a person who was instigating the mob and saying kill them, cut them and burn them. However, from the cross-examination of this witness, it has been revealed that she has not named any accused in her statement dated 6<sup>th</sup> March, 2002. Moreover, accused Kantibhai Prabhudas has died during the pendency of the trial and hence, nothing much turns upon the testimony of this witness.

34. **PW-54 Sharifmiya Bhikumiya Shaikh** has been examined at Exhibit-527. He is the half-brother of Sabirhussain Kadarmiya namely, that they have the same mother but their fathers are different. This witness has deposed that he was residing at the corner of Pathan Mohalla at Sardarpura with his wife and children and used to run a paan-bidi cabin by the name of Sharif Paan Centre. On 1<sup>st</sup> March, 2002, at about 7.00 p.m., Amratbhai Somabhai Merwadia had fixed a halogen lamp on the electric pole and said that from that day, it would be fun to kill the bandiyas. He was afraid, and hence, at 5.00 p.m., he alongwith his family went to Bachumiya Imammiya's house. He has further deposed that at around 9 o'clock at night, a mob of Hindus came from the direction of Mahadev temple armed with weapons like dharias, pipes, swords and was screaming and shouting and burnt three cabins at the corner of Shaikh

Mohalla. After a while, the police vehicle came and the mob was dispersed. The police came and went away and thereafter the same mob returned to the corner of Shaikh Mohalla shouting "kill the miyas, burn them" and started pelting stones. At that time, Manubhai Painter's house was set ablaze and Akbarmiya Nathumiya's house was also set ablaze and vandalized, and at that time, he saw Ambalal Maganbhai with a dharia, Pashabhai Mohanbhai with a can, Ashwinbhai Baldevbhai with a can, Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Sureshbhai Ranchhodbhai with burning rags. At that time, as he was afraid, he alongwith his family ran away from the road on the rear side towards the field. From the field, they could hear the screams and shouts and could see flames of the fire and that at 2:30 at night, the atmosphere became peaceful and he and his family came from the field towards their house. The witness has stated that while returning from the field, he saw Bismillabibi Bhikhamiya lying on the garbage dump and upon seeing that, he went through the road of Kapur Mohalla to the corner of Shaikh Mohalla where the DSP had come, and informed him about the facts with regard to Bismillabibi Bhikhamiya. The DSP sent three persons with him and they brought Bismillabibi to the corner of Shaikh Mohalla and made her lie down on the verandah of Prahladbhai Varvabhai's house.

34.1 In his cross-examination, this witness has admitted that at the time of the Godhra carnage, it was hazardous to go to a Muslim Mohalla. The witness has voluntarily stated that as Bachumiya Imammiya was their relative, he had gone to his house. Their house being an isolated one, he was afraid and hence, he had gone to his house. He had seen the mob set

three gallas on fire. In his cross-examination, he has further stated at 9 o'clock, he had gone to Bachumiya's house but had not gone inside the house. Firstly, there was stone throwing in front of Manubhai's house and thereafter, the house was vandalized and set on fire. He has denied that at that time, the people of the mohalla had pelted stones on the mob. He had stated that upon two houses being set on fire, he had gone to the fields.

34.2 PW-110, the Investigating Officer (Police), in his cross-examination has stated that this witness in his statement dated 6<sup>th</sup> March, 2002 had not stated with regard to Amratbhai Somabhai Maherwadia putting a halogen lamp over the electric pole and saying that it would be fun to beat the bandiyas. The Investigating Officer has also admitted that this witness in his statement dated 6<sup>th</sup> March, 2002 has stated that he was afraid that these people would not spare them and the mob came towards their house shouting "kill them, cut them" and were pelting stones and hence, being frightened, in the darkness of the night, he took his wife and children and fled towards the field and at that time, from a distance, he saw from his village Patel Ambalal Maganlal with a dharia in his hand and Ashwinbhai Baldevbhai and Pashabhai Mohanbhai both with cans in their hands and Prahladbhai Jagabhai, Ashwinbhai Jagabhai and Sureshbhai Ranchhodbhai with burning rags. From the cross-examination of the Investigating Officer, it is further brought out that this witness in his statement dated 6<sup>th</sup> March, 2002, has not stated anything about Bismillabibi Bhikumiya being found on the garbage heap. From the cross-examination of the Investigating Officer (SIT), it is brought out that this witness in his statement dated 22<sup>nd</sup> May, 2008 had

not stated with regard to Bismillabibi Bhikhumiya being found on the garbage heap etc. as deposed before the court.

34.3 The learned counsel for the accused submitted that this witness for the first time has introduced the theory before the court with regard to Bismillabibi Bhikhumiya being found on the garbage dump. It was further submitted that it is not the case of the prosecution that after the incident inside the room, before the police came and opened the door of the room and got everyone out, anyone had come out of the room. So Bismillabibi being inside the room could not have come out on her own or otherwise, and hence, there was no question of lying on the garbage dump. It was submitted that just to probabilise his story that he was nearby, this witness has told this story for the first time before the court. It was also submitted that the DSP does not support this theory and that the names of the three persons who are stated to have accompanied him is not coming on record nor has any of the three persons been examined. Therefore, the very fact that such a story is created to support his version, apparently shows that this witness is hiding something and does not want to tell the truth before the court, which creates a doubt about his presence at the scene of incident and his having seen some of the accused with weapons and articles. Referring to the cross-examination of the witness, it was pointed out that neither the galla nor the house of the witness is found to have been ransacked and that the scattered houses in which the Shaikh family was residing are not damaged at all. Referring to the cross-examination of the witness, it was pointed out that the witness has admitted that in his affidavit dated 6<sup>th</sup> November, 2003 before the Supreme Court, the witness has

stated "*I was hiding in my home terrified but I told people in the neighbourhood what I had heard. At about 9.00 p.m. the attack started in full earnest. We got saved because we were quietly hiding inside our house*". It was submitted that if the facts as stated in the affidavit are true, the entire story put forth in the testimony gets falsified. It was submitted that this witness has made statements one after the other, which are contradictory to each other and hence, the testimony of this witness cannot be relied upon. It was pointed out that the witness has stated that he has not informed anyone with regard to Amratbhai Merwadia putting up the halogen lamp nor has he made any attempt to stop him. It was further pointed out that while this witness has stated that he had gone to Bachumiya Imammiya's house, the family of Bachumiya does not corroborate his say that he went to their house. Various contradictions that have been brought out in the cross-examination of the witness have been pointed out, to submit that this witness is not a truthful and reliable witness and that his testimony is required to be discarded.

34.3.1 Reference was made to paragraph 5 of the deposition of the witness wherein a contradiction has been brought out in the cross-examination of the witness to the effect that in his statement before the police, he had not made any reference to Amratbhai Somabhai Maherwadia putting up the halogen light on the electric pole. It was further pointed out that the witness in his statement dated 6<sup>th</sup> March, 2002 before the police had stated that on 1<sup>st</sup> March, 2002 at around 9:30 in the evening, a mob of around 1500 to 2000 persons belonging to the Hindu community had collected near the Vas and was shouting "kill the Muslims" and that he had shut his wife and

children inside the house and he and the other persons in the Mohalla had gone inside their own houses to see that the house as well as the people inside the house are not harmed.

**34.4 ANALYSIS:** This witness is the son of Kulumbibi and a half-brother of PW-48 Sabirmiya Kadarmiya Shaikh, inasmuch as, both have same mother but different fathers. This witness has deposed that on 1<sup>st</sup> March, 2002, at about 7.00 p.m., Amratbhai Somabhai Maherwadia had fixed a halogen lamp on the electric pole and said that it would be fun to kill the bandiyas. He was afraid and hence, at 5.00 p.m. he alongwith his family went to Bachumiya Imammiya's house. As regards the main incident, the witness has stated that after the police had gone away, the mob had returned and had started setting the houses ablaze and that he had seen Ambalal Maganbhai, Pashabhai Mohanbhai, Ashwinbhai Baldevbhai, Prahladbhai Jagabhai, Ashwinbhai Jagabhai and Sureshbhai Ranchhodbhai in the mob. That upon being afraid, he alongwith his family ran away from the road on the rear side towards the field. This witness has also stated that while returning from the field after the situation became calm, he saw Bismillabibi Bhikumiya lying on the garbage dump. The witness, in his examination-in-chief, has named Ambalal Maganbhai, Pashabhai Mohanbhai, Ashwinbhai Baldevbhai, Prahladbhai Jagabhai, Ashwinbhai Jagabhai and Sureshbhai Ranchhodbhai. Before the court, he has identified Ambalal Maganbhai, Prahladbhai Jagabhai and Ashwinbhai Baldevbhai. The witness has not been able to identify Sureshbhai Ranchhodbhai, Ashwinbhai Jagabhai and Pashabhai Mohanbhai, despite the fact that they were present in the court. In the cross-examination of this witness, a contradiction has been brought out to the effect that in his

statement dated 6<sup>th</sup> March, 2002, he had stated that upon being afraid that the people would not spare them and the mob was coming towards them pelting stones and shouting cut, kill and as he was afraid, in the darkness of the night he alongwith his wife and children had fled to the fields and at that time, he had seen the above referred accused from far. An omission has been brought out to the effect that in his previous statements before the police and the SIT, he had not stated that from the fields, they had heard shouts and screams and had seen balls of fire.

34.4.1 Insofar as reference by this witness to Bismillahbibi having been found lying on the garbage dump is concerned, the same appears to be in the nature of an exaggeration and having regard to the evidence which has come on record, the version given by the witness cannot be believed. However, to the extent of hearing shouts and screams and seeing the balls of fire from the fields is concerned, such omission cannot be said to be a contradiction, but merely an elaboration of the facts. It has come on record that the fields were on the rear side of Mahemoodmiya's house. The incident took place in the middle of the night on 1<sup>st</sup> March 2002, when it would still be slightly cold and hence, sounds would carry far. When the houses and the jeep were set on fire, it cannot be gainsaid that there would be huge flames which can be seen from a distance, and hence, to that extent, the testimony of the witness does not appear to be false. Insofar as having seen the accused is concerned, what has been changed in the testimony, is the place from where he had seen the accused, viz., in his statement before the police, he had stated that he had seen the accused from far, while in his deposition before

the court, he has improved the version and stated that he had seen the accused when the mob entered Shaikh Mohalla. It, therefore, appears that with a view to appear more credible, the witness might have stated that he had seen the accused when the mob came to Shaikh Mohalla. Nonetheless, in his first version, before the police he had named the above persons with the weapons and articles that they were carrying. However, considering the nature of his testimony, it would not be safe to rely completely on the testimony of this witness and one would have to look for corroboration to support his version. This witness has not sustained any injury nor is it his case that he had sustained any injury. The record of the case reveals that this witness, in his deposition before the court, has named the above referred six accused persons and also has referred to them in his deposition in connection with the main incident; however, he has identified only Ambalal Maganlal and Prahladbhai Jagabhai. The witness has identified Ashwinbhai Baldevbhai, however, it is not clear as to whether he has identified accused No.55 or accused No.6 of Sessions Case No.120 of 2008. Thus, the witness has properly identified only two out of six accused named by him.

35. **PW-49 Iqbalmiya Rasulmiya Shaikh** has been examined at Exhibit-500. He has deposed that he is a native of Sardarpura and was residing in Sardarpura in 2002. His family is comprised of his father Rasulmiya Nannumiya. His eldest brother is Ahmedmiya Rasulmiya who is residing at Ilol at Himatnagar. Sikandarmiya Rasulmiya is younger than Ahmedmiya and he (the witness) is younger than Sikandarmiya. Mustufamiya Rasulmiya is younger than him and Ayubmiya Rasulmiya is the youngest. They have a sister

named Zahirabibi who is married and resides at Bhalak. His brother Mustufamiya's wife's name is Shamimbanu and they have a son named Zahid who was four years' old. Except Ahmedmiya, all his brothers were residing at Shaikh Mohalla. He is not married. He has deposed that on 28<sup>th</sup> February, 2002, the incident of burning of the train took place at Godhra and there was a declaration of Bharat bandh which had been given by the Hindu Parishad, at which point of time, he was at home. On 1<sup>st</sup> March, 2002, at around 9 o'clock at night, a mob of Hindus came shouting that "kill them, cut them, burn them alive". They came to the corner of Shaikh Mohalla and burnt three cabins. Those cabins belonged to Rafiqmiya Muhammadmiya, Ibrahimiya Rasulmiya and one was his cabin. At that time, the police had come and the mob had dispersed. Once again at 11:30, the mob came back and started shouting that "cut them, kill them, burn them alive" and they started throwing stones at the corner of their Shaikh Mohalla. The mob advanced further pelting stones, looting and damaging property and burning houses. At that time, he had seen that Ramanbhai Ganeshbhai had a tin in his hand, Mathurbhai Trikambhai Wireman had a dharia in his hand, Rajeshbhai Punjabhai had a dharia in his hand, Chaturbhai Kanabhai with a pipe in his hand, Ashwinbhai Botham with a tin in his hand, Madhabhai Vitthalbhai with a pipe in his hand, Pawanbhai Marwadi with a pipe in his hand, Dahyabhai Kachrabhai with a pipe in his hand and Babubhai Gokalbhai was the leader of the mob. Babubhai Kanabhai and Rameshbhai Kachrabhai were leaders of the mob and were instigating them that no one of them should be left alive. At that time, he was injured on the head with a stone as well as on his right hand and Ibrahim Rasulmiya was also hurt on the

head with a stone and was bleeding, and with a view to save his (the witness's) life, he had gone towards the house of Ibrahim Rasulmiya and the mob was burning the houses one after another and was proceeding further. He had gone to the house of Ibrahim Rasulmiya and the mob had gone towards the house of Mahemoodmiya Hussainmiya and had surrounded it from all sides, and at that time, a window was broken and petrol and kerosene was poured and the women and children were burnt alive. At that time, their people were shouting and screaming and were shouting for help which he had heard. Thereafter, the police came and shouted that if anyone is alive, they should come out and hence, he had also come out and had gone towards Mahemoodmiya Hussainmiya's house. At that time, his brother Ayubmiya Rasulmiya was taken out of Mahemoodmiya Hussainmiya's house, and his wife Sahinbanu was also burnt and she was taken out, and many of the people had sustained burn injuries and were taken out. He saw that his nephew Zahid aged 4 years had died. Mustufa's wife Shamimbanu was also dead and about twenty-eight persons were dead and they were all taken to the Mehsana Civil Hospital in a police vehicle and were given treatment there. At around 6:00 in the evening, the police took them to Ilol where they stayed for about 5 to 6 days. Thereafter, they had gone to Panpur Relief Camp and on 10<sup>th</sup> March, 2002, the police had come and recorded his statement there. His second statement was recorded by the SIT team at Gandhinagar and third was recorded by the SIT team at Satnagar. He has further deposed that about three days prior to the incident, Naranbhai Lallubhai, who at that time was the MLA from Unjha, had come to the Mahadev temple at Sardarpura and had organised a meeting of the Patels and the Patels were saying on the mike

that Naranbhai Lallubhai would say two words. At that time, Naranbhai Lallubhai had said that the Government was theirs' and that they could do as they wish and that he had heard him say so. That he had a cabin at the corner of Shaikhvas and that he had heard this while he was there. He had sustained damages of around Rs.16,000/- on account of damage caused to his cabin and Rs.60,000/- on account of the damage caused to his house. He has stated that he can identify the persons whom he has named in his testimony. The witness has identified Madhabhai Vitthalbhai, Ramanbhai Ganeshbhai, Pawan Marwadi, Dahyabhai Kachrabhai, Mathurbhai Trikambhai, Babubhai Gokalbhai, Rameshbhai Kachrabhai, Rakeshbhai Punjabhai as Babubhai Kanabhai, Ashwinbhai Baldevbhai as Ashwinbhai Baldevbhai Botham and Babubhai Kanjibhai as Babubhai Kanabhai.

35.1 In the cross-examination of this witness, it has come out that the police came about two and a half hours after the incident. An omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he has not said that Babubhai Gokalbhai was leading the mob and that Babubhai Kanabhai and Rameshbhai Kachrabhai were leaders of the mob and were saying and instigating the mob that no one should escape. In his cross-examination, it has been brought out that in his statement before the police he had stated that on 1<sup>st</sup> March, 2002 at about 9:30 at night a Hindu mob of their village had indulged in rioting and burnt gallas and cabins in the village and upon the police coming and resorting to firing the mob had dispersed and thereafter there was peace in the village. A suggestion has been put to him that the second mob had come at 12 at night and had burnt three gallas at the

corner of Shaikh Mohalla. A contradiction has been brought out that in his statement dated 10<sup>th</sup> March, 2002, he had stated that at 12 O'clock at night mobs of Hindus of their village had gathered and burnt three gallas at the corner of their Shaikhvas. This witness, in his cross-examination has denied the suggestion that as he is handicapped, he cannot walk or run like normal person. He has stated that he can walk with the same speed as a normal person, but cannot run with the same speed. In his cross-examination, it has been further elicited that the mob came from the direction of Mahadev and consisted of approximately one thousand persons. He has stated that upon hearing the mob, he did not feel that there would be violence or that there was any threat to their lives. He has stated that despite the fact that riots had erupted all around, and on 28<sup>th</sup> February, 2002, there were incidents in their village, he did not feel afraid. In his cross-examination, the witness has stated that despite the incident of 9:30, he was standing in his mohalla and at that time he was not afraid as he had full faith that since the time of his forefathers, no such incident had taken place and therefore he was confident that no such incident would take place. He has stated that they were under the impression that they (the mob) would burn the cabins and go away. In his cross-examination, he has further come out that at 12:00 at night when the mob came he was roaming around in their mohalla next to Bachumiya Imammiya's house. It has been brought out that in his statement dated 10<sup>th</sup> May, 2002, he had said that Prajapati Ramanbhai Ganeshbhai was not a member of the mob. He has admitted that there are two persons by the name of Ashwinbhai Baldevbhai in their village and that he in his statement dated 10<sup>th</sup> March, 2002 has not stated that Patel

Ashwinbhai Baldevbhai Joitaram Gaadiwala was there and had a tin in his hand. The witness has also stated that he did not hide to save his life nor did he run away because he did not find it necessary. After the first incident he did not think it fit to take his family and go away to a safe place. He heard the mob when he was near Bachumiya Imammiya's house. The mob was pelting stones and they had also resorted to stone throwing. He has deposed that considering his physical condition he had not thought it fit to flee from the scene. He had hidden behind Bachumiya's jeep to save his life. Before the jeep was set on fire he had gone to Ibrahimmiya Rasulmiya's house. Ibrahimmiya's house's door had broken, but the house was not burnt. The witness has also been cross-examined as to his statements dated 12<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008 recorded by the Investigating Officer (SIT) and his application dated 11<sup>th</sup> April, 2005.

35.2 In the cross-examination of the Investigating Officer (Police), a contradiction is sought to be brought out to the effect that in his statement before the police, he has not referred to the following: "*that looting and vandalizing, they had gone ahead and at that time he had seen them ... Ashwinbhai Botham was present with a can in his hand, ... Babubhai Gokalbhai was the leader of the mob. Babubhai Kanabhai and Rameshbhai Kachrabhai were leaders of the mob were saying and instigating that not a single one should escape .... The mob went on burning and advanced further.*" The Investigating Officer has stated that the witness had stated that they were burning their houses and were shouting). A further omission has been brought out through the testimony of the Investigating Officer to the effect that in his statement

dated 10<sup>th</sup> March, 2002, the witness has not stated that this mob went towards Mahemoodmiya Hussainmiya's house and surrounded it on all four sides and at that time, a window was broken and petrol and kerosene was poured in and their women and children were burnt alive .... The police came and shouted that whoever is alive should come out and he came out and went towards the house of Mahemoodmiya Hussainmiya. The Investigating Officer has admitted that the witness in his statement dated 10<sup>th</sup> March, 2002 has stated that Patel Ashwinbhai Baldevbhai, Joitabhai Gaadiwala had a can in his hand.

35.3 From the cross-examination of the Investigating Officer (SIT), it has come out that in his statements dated 10<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008, this witness had not stated that "burning the houses, the mob went ahead ... The mob went towards Mahemoodmiya Hussainmiya's house and surrounded it from all four sides and at that time, the window was broken and petrol and kerosene was poured inside and the women and children were burnt alive... The police shouted that those who are alive come out and he also came out and went towards Mahemoodmiya Hussainmiya's house. At that time, his brother Ayubmiya Rasulmiya was taken out of the house of Mahemoodmiya Hussainmiya." From the cross-examination of the Investigating Officer (SIT), it is further revealed that in his statement dated 10<sup>th</sup> May, 2008, this witness had stated that Rameshbhai Ganeshbhai was not a member of the mob.

35.4 The learned counsel for the appellants submitted that this witness has deposed that at 9:30 p.m., the mob had come and had burnt three cabins at the corner of Shaikhvas.

Thereafter, upon the police coming, the mob had dispersed and the mob had thereafter returned at around 11:30 and that he had seen the accused persons. It was submitted that this witness has stated that he remained in Ibrahimmiya's house till the police came and that he came out after the police called out that those who are alive should come out. Referring to the cross-examination of the said witness, it was pointed out that the witness in his statements dated 10<sup>th</sup> March, 2002, 10<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008 has not stated that thereafter, the police came and shouted that those who are alive should come out and he also came out and went towards Mahemoodmiya Hussainmiya's house. It was submitted that this fact has been stated by the witness for the first time before the court with a view to show that he is a witness of the incident. Referring to the contents of paragraph 4 of the examination-in-chief of the witness wherein he has stated that three days prior to the incident, Naranbhai Lallubhai who was the MLA of Unjha at that time had come to the Mahadev temple at Sardarpura and had convened a meeting of Patels and the Patels had stated on the mike that Naranbhai Lallubhai would say two words and at that time, Naranbhai Lallubhai had said that it was their Government and that they may do as they please, it was submitted that the trial court has not believed this theory about Naranbhai Lallubhai having come to the Mahadev temple and having incited the Patels. It was submitted that right from the beginning of his deposition, this witness has started saying false things before the court. Referring to the cross-examination of the witness, it was pointed out that the witness has stated that at the Civil Hospital, at the scene of incident, at Ilol or at Panpur Patiya, they had not lodged any complaint with the police. That from 1<sup>st</sup> March, 2002 to 10<sup>th</sup>

March, 2002, he had not come forward to lodge any complaint with the police nor had he tried to get his statement recorded nor had made any application and on the contrary had stated that if the police had not come on 10<sup>th</sup> March, 2002, they would have given their statements when the police came. It was submitted that though the police were at the site from 1:45 a.m. and that this witness has not received any injury, he has not said anything to the police at that point of time. Moreover, he was at the hospital from 5:00 a.m. to 6:00 p.m., for about thirteen hours and though the police were there, he has not stated anything about the incident or the accused. It was submitted that the witnesses were accompanied by the police to Ilol and even at that time, he did not disclose anything. It was argued that the witness goes to the extent of saying that he would not give any statement till the police had come, therefore, this is not a case of only late recording of statement but also a case of late disclosure of the incident deliberately. Referring to the cross-examination of the said witness, it was pointed out that the witness has denied that after the cabins were burnt, the police had come and had resorted to firing. It was submitted that the witness in his statement dated 1<sup>st</sup> March, 2002 has stated that he has not stated that at around 9:30 at night, mobs of Hindus from their village had committed rioting and had burnt the cabins and gallas and the police had come and had resorted to firing and the mob had dispersed. It was submitted that this incident has been narrated by all the witnesses earlier as well as by the police officers; however, subsequently, the witnesses have changed their stand before the court and have stated that the police had not resorted to firing. Referring to the cross-examination of the witnesses, it was pointed out that the witness has stated that considering

his physical position, he had not thought it fit to run away and that he had hidden behind Bachumiya Imammiya's jeep to save his life. Bachumiya Imammiya's jeep was lying in their mohalla and that he had not gone in front of the mob. It was submitted that when the jeep is burning and the crowd was there in the entire mohalla, there was no question of the witness hiding behind the burning jeep, which is practically not possible. It was pointed out that all these and various other contradictions have been brought out in the cross-examination of this witness with regard to statements made in the statement recorded by the police. It was pointed out that it has been brought on record from the cross-examination of this witness that in his statements dated 10<sup>th</sup> March, 2002, 10<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008, he has not stated that the mob had advanced further pelting stones and had indulged in looting and vandalizing and were burning houses. It was submitted that the witness in his examination-in-chief has improved upon the role attributed to the three persons named by him. According to the learned counsel, this witness is not an eye-witness and that most of the facts which he has stated are stated for the first time before the court. It was pointed out that a contradiction has been brought out to the effect that in his statements dated 10<sup>th</sup> March, 2002, 10<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008, the witness had not stated that the mob went towards Mahemoodmiya Hussainmiya's house and surrounded it from all four sides and at that time, they broke the window and poured kerosene and petrol and burnt their women and children alive.

**35.4 ANALYSIS** - From the deposition of this witness, it is revealed that he is handicapped since birth. During the course

of stone pelting, he was injured on his head and right leg and Ibrahimmiya Rasulmiya was injured with a stone on his head and he was bleeding. He has deposed that with a view to save his life, he went towards the house of Ibrahim Rasulmiya. According to the witness, the mob was burning the houses and he had gone to Ibrahimmiya Rasulmiya's house. This witness has deposed that his brother Ayubmiya Rasulmiya was taken out of Mahemoodmiya's house. Ayubmiya's wife Sahinbanu had sustained burn injuries and was taken out and many of their persons had sustained burns and were taken out of the house. He had seen that his nephew Zahid, aged 4 had died in the incident. His brother Mustufa' wife Shamimbanu had also died in the incident. He has deposed that Naranbhai Lallubhai, who was then MLA of Unjha, had held a meeting at Mahadev temple, Sardarpura about three days prior to the incident and had incited the crowd. In his cross-examination, it has come out that the police came about two and a half hours after the incident. An omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had not stated that Babubhai Gokalbhai was leading the mob, Babubhai Kanabhai and Rameshbhai Kachrabhai were the leaders of the mob. In his cross-examination, it had been brought out that in his statement before the police, he had stated that on 1<sup>st</sup> March, 2002, at about 09:30 at night, a Hindu mob of the village had indulged in rioting and burning gallas and cabins in the village and upon the police coming and resorting to firing, the mob was dispersed and thereafter, there was peace at the village. A suggestion has been put to him that the second mob had come at 12 at night and had burnt three gallas at the corner of Shaikh Mohalla. A contradiction has been brought on record that in his statement dated 10<sup>th</sup> March, 2002, he had stated

that at 12 o'clock at night, the mobs of Hindus of their village had gathered and burnt three gallas at the corner of their Shaikhvas. In his cross-examination, the witness has stated that despite the incident of 09:30, he was standing in his mohalla and at that time, he was not afraid as he had full faith that since the time of his forefathers, no such incident had taken place and therefore, he was confident that no such incident would take place. He has stated that they were under the impression that the mob would burn the cabins and go away. In his cross-examination, it has further come out that at 12:00 at night, when the mob came, he was roaming around in their mohalla, next to Bachumiya Imammiya's house. He did not hide to save his life, nor did he run away because he did not find it necessary. After the incident, he did not think it fit to take his family and go away to a safe place. He heard the mob when he was near Bachumiya Imammiya's house. The mob was pelting stones and they had (witness and others) also resorted to stone throwing. He has deposed that considering his physical condition, he had not thought it fit to flee from the scene. He had hidden behind Bachumiya's jeep to save his life. Before the jeep was set on fire, he had gone to Imammiya Rasulmiya's house. Imammiya's house's door had been broken, but the house was not burnt. In his cross-examination, it has been elicited that in his statement dated 10<sup>th</sup> May, 2002, he had said that Prajapati Ramanbhai Ganeshbhai was not a member of the mob. The witness has admitted that there are two persons by the name of Ashwinbhai Baldevbhai in their village and that in his statement dated 10th March, 2002, he has stated that Patel Ashwinbhai Baldevbhai Joitaram Gadiwala was there and had a tin in his hand. It has been contended on behalf of the appellants/accused that when the jeep was

burning and the crowd was spread in the entire Mohalla, there was no question of the witness hiding behind the jeep; when the witness was inside Imammiya's house, he could not have witnessed where the mob had gone and in what manner, they committed any act. In this regard, it may be noticed that the witness in his cross-examination had stated that before the jeep was set on fire, he had gone to Ibrahimmiya's house. A perusal of the videography of the scene of incident shows that the door of Ibrahimmiya's house was broken from the front and the long gaping hole in the door was adequate for a person to witness what was going outside, at least to the extent as to which side the mob was going. In the cross-examination of this witness, it comes out that his conduct is natural and he has clearly stated that he had faith that no such incident would take place. This witness is a resident of Shaikh Mohalla and hence, his presence at the time of the incident is quite natural. Moreover, in his cross-examination, the witness has candidly stated that after the first incident, he was not afraid as he had full faith that since the time of his forefathers, no such incident had taken place and therefore, he was confident that no such incident would take place and that they were under the impression that the mob would burn the cabins and go away. This clearly explains the conduct of the witness in not leaving Shaikh Mohalla for a safer place. Moreover, the witness is physically handicapped and for this reason also, it is quite natural that he may not have thought it fit to flee from Shaikh Mohalla. From the evidence on record, it is clear that two members of his family had died in the incident, namely, his brother Mustufamiya's wife Shamimbanu and son Zahid and his brother Ayubmiya and his wife Sahinbanu were injured. In the opinion of this court, the testimony of this witness appears

to be natural, trustworthy and credible and despite the lengthy cross-examination, the defence has not succeeded in impeaching the credibility of this witness, though his testimony is not free from embellishment and improvements. However, the core of his testimony is consistent. Nonetheless, to the extent the witness has not named certain accused in the first statement recorded by the police and has subsequently named other accused before the Investigating Officer (SIT), the court would be cautious while considering the involvement of such accused in the offence in question. The trial court has accepted the submission of the learned advocate for the defence that this witness having taken shelter inside Ibrahimmiya's house could not have seen as to who had broken the window and poured kerosene or petrol, but has believed the presence of the witness at the scene of incident and has held that he had seen the incident till he went inside Ibrahimmiya's house.

36. **PW-51 Nazirmahammad Akbarmiya Shaikh** has been examined at Exhibit-507. This witness has deposed that he alongwith his parents and brothers and sisters and his wife and child was residing at Shaikh Mohalla in Sardarpura. His father's name is Akbarmiya Rasulmiya and his mother's name is Hamidabibi Akbarmiya. Of the four brothers, he is the eldest. Younger to him is Gulamali, thereafter Idrish and the youngest is Salim. His wife's name is Wahidabanu and his son's name is Ejazhussain. His wife and his brother Idrishhussain died in the incident. His son was one and a half years of age at the time of the incident. He was residing at Shaikh Mohalla together with his father. He was residing in a separate house; however, they shared a common kitchen. He has deposed that on 27<sup>th</sup> February, 2002, the Godhra carnage took place, in the context

of which, there was a call for Gujarat Bandh on 28<sup>th</sup> February, 2002 and on that day, in the neighbouring village of Ladol, two Muslim persons were murdered and hence, their father had not permitted them to venture outside their house and hence, they were in the mohalla. On 1<sup>st</sup> March, 2002, there was a call of Gujarat Bandh and on that day, the members of his family had not gone out of the house and were present at the mohalla. At around 9:00 to 9:30, the Patels of the village came in front of their mohalla, shouting and screaming, and burnt the cabins at the corner of the mohalla and upon the police coming, the mob had dispersed. Thereafter, after some time, the mob came again and entered their mohalla shouting and screaming that "today, the miyas should be killed, cut them, burn them" and started indiscriminately pelting stones on their mohalla. At that time, he saw in the mob, Rameshbhai Kantibhai with a dharia, Rameshbhai Ramabhai with a dharia, Dahyabhai Kachrabhai with a stone, Babubhai Kantibhai with a burning rag, Patel Tulsibhai Girdharbhai with a burning rag, Prajapati Ramanbhai Ganeshbhai with a can of kerosene, Patel Vishnubhai Prahladbhai with a dharia and Patel Joitabhai Ramabhai Gangawat. These persons attacked their mohalla and there were other persons with them. The mob was of around 1000 to 1500 people. These persons were vandalizing and burning the houses of Muslims. The mob went towards Mahemoodmiya Hussainmiya's house and the women and children of their mohalla, under the belief that they would be safe in Mahemoodmiya Hussainmiya's house, entered into that house. At that time, the mob had thrown a stone at him and he was injured on the elbow of his left hand and also on the left eye. At that time, he had hidden inside his old house and the mob had gone towards Mahemoodmiya's house and had broken the

window and poured kerosene and petrol and burnt the house. Thereafter, the mob dispersed at night and at around 2:30, the police had come and shouted that whoever is alive should come out. Out of fear, he did not come out of the house in which he was hiding, and after some time, upon finding that the atmosphere had become quiet in the mohalla, he came out and saw that the mohalla had been vandalized and set on fire and screams for help was coming from Mahemoodmiya's house. The police had opened the door and had taken out the corpses of the people of their mohalla and the injured persons were seated in police vehicle and taken to the Civil Hospital and were treated. The police had brought them at Ilol where they had stayed for three to four days and thereafter, they had gone to Panpur Patiya Relief Camp where they had stayed for more than three months where the police had recorded their statements on 10<sup>th</sup> March, 2002. The witness has stated that thereafter, they had made an affidavit and the SIT had subsequently recorded his statement. The first information report had been given by his paternal uncle – Ibrahim Rasulbhai. Other than him, his uncle's daughter Rukshanabu and Faridabibi Ashiqhussain had sustained injuries. He does not remember the names of others. He has deposed that twenty-eight persons were taken out of the room but he does not remember as to how many people were taken out alive. He has identified Babubhai Kantibhai, Ramanbhai Ganeshbhai Prajapati, Rameshbhai Kantibhai, Dahyabhai Kachrabhai, Joitabhai Ramabhai Gangawat, Madhabhai Vitthalbhai and Vishnubhai Prahladbhai as being part of the mob in the court.

36.1 In the cross-examination of this witness, certain omissions are sought to be brought out as to the averments

made in the affidavit made by him before the Supreme Court, which he has admitted. He has also admitted that in his statement dated 19<sup>th</sup> May, 2008 made before the SIT, he has stated that the fact that Prajapati Ramanbhai Ganeshbhai was a member of the mob is false. Prajapati Ramanbhai Ganeshbhai was not a member of the mob at that time. A contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had stated that at that time upon the police being informed, the police had immediately come to the spot and upon resorting to firing the members of the mob dispersed without indulging in violence and there was no loss of life on account of the firing. He has also admitted that when the police came at 2:30 at night he had not named the accused before the police and that even at the hospital he had not named any accused. He has stated that no statement of his was recorded on 2<sup>nd</sup> March, 2002. He has admitted that he has not sustained any burn injuries in the incident, nor was there any kerosene on his clothes and that his clothes were not burnt. In his cross- examination, it has been elicited that at the time of the 9 o'clock incident, he was in his mohalla in front of his house. His father's house and his house are adjoining each other. On one side of his house is Imammiya Rasulmiya's house and on the other side is Mustufamiya's house. He was standing in Mustufamiya's front yard near his house. He has admitted that the mob came from the side of Mahadev. He has stated that it did not happen that the mob came from the rear side of Mahemoodmiya's house. He has stated that when he heard the mob from the village, he did not feel that he should take his family members and go to a safer place. He has voluntarily stated that the Patels of their village had said that no violence would take place in their

village and hence they had not gone. They had not told him, but had told his father and uncle. In his cross-examination, it has further come out that from a distance of fifteen to twenty feet, he had seen the mob coming with dharias, sticks and pipes. He has admitted that they had faced (them) by also throwing stones. It has further come out in his cross-examination that at the time of stone throwing he was standing in front of Mustufamiya's house and had moved to the side and gone towards the rear side of the Patels' houses. He has stated that at that time he was worried about his family members, but they had gone inside Mahemoodbhai's house. At the time when there was stone throwing at 9:30, all the members of his family were at his uncle Ibrahimmiya Rasulmiya's house. He has stated that by the rear side of the Patels' house, he means the rear side of the houses of Sherumiya Rasulmiya, Bhikumiya Kalumiya, Valamiya and Abhumiya Rasulmiya of their mohalla. He has stated that he cannot say how much time it took between 9:30 till the incident took place at Mahemoodmiya's house. He says that he has no idea even approximately as to how long he was standing in the water course on the rear side of the Patel houses. He has stated that as he was frightened he was standing in the water course. He has admitted that the water course was so deep that a person outside cannot see. In his cross-examination, it has further come out that at the time of the incident, firstly the gallas were set on fire. A mob of 1000 to 1500 persons had come from the same direction. At that time, he was not in the water course but was in the front yard. He has further stated that from 9:30 till 2:30 he was not in the water course but was moving around and was watching the incident as it occurred. The witness has been cross-examined

as to the manner in which the affidavit had been prepared. The witness is also sought to be contradicted as to certain averments made in his affidavit dated 6<sup>th</sup> November, 2003. In his cross-examination, it is further elicited that the kabrastan falls on the rear side of the house where he was at the time of the incident. He has stated that he cannot say as to whether the members of the mob had entered the house in which he was hiding and has stated that the mob had not caused any damage to the house while he was inside. He has stated that that house was burnt and that in his presence the house was not ransacked. He has voluntarily stated that he had left the house and gone to his other house. When he went to the other house, the members of the mob were there and they had rags and weapons. He has stated that for going from his house to the other house he has to cross the road. He has stated that Bachumiya's house is situated next to the house on the opposite side where he went. He has stated that his house is the second house on the right side upon entering Shaikh Mohalla. When he went inside the house, it was vandalized but was not burning. He has stated that he had not taken Ibrahimmiya out of Mahemoodmiya's house. It has been clarified that the words Rukshanabibi Ibrahimbhai has to be read continuously.

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36.2 From the testimony of the Investigating Officer (Police), it has been brought on record that this witness in his statement dated 10<sup>th</sup> March, 2002 had stated that at that time upon the police being informed, they immediately reached the spot and resorted to firing and the members of the mob without rioting, dispersed and that on account of firing, there was no loss of life ..... He went inside his old house and hid

himself. A little while after the police came, he came out of the water course ... The persons in the mob had vandalized Mahemoodbhai's house and had sprinkled kerosene and set it on fire. Inside the house, since the members of the mohalla were there, those who were outside had taken them out and from them .... Ibrahimbhai was taken out alive in an injured condition.

36.3 In the cross-examination of the Investigating Officer (Police), it is brought out that he has recorded only one statement of Nazirmahammad dated 10<sup>th</sup> March, 2002. That during the course of his investigation, the fact regarding Patel Joitabhai Ramabhai Gangawat being present at the time of the incident has not been revealed. The Investigating Officer has admitted that in his statement dated 10<sup>th</sup> March, 2002, this witness has not named Patel Joitabhai Ramabhai Gangawat.

36.4 In the cross-examination of the Investigating Officer (SIT), it is revealed that this witness had stated that in his statement it has been recorded that Ramanbhai Ganeshbhai was a member of the mob which is incorrect. Patel Ramanbhai Ganeshbhai was not a member of the mob.

36.5 The learned counsel for the accused pointed out that the facts as deposed before the court have not been stated by the witness in his statement dated 6<sup>th</sup> November, 2003 filed before the Supreme Court. It was pointed out that the witness has admitted that the police had come at 2:30 at night. At that time, he had not given the names of the accused to the police. At the hospital, he had not given the names of the accused. That on 2<sup>nd</sup> March, 2002, his statement was not recorded. He

has also admitted that till 10<sup>th</sup> March, 2002, when the police came to him, he had not disclosed the names of the accused. It was pointed out that in his cross-examination, it has also come out that this witness has not sustained any burn injuries nor was there any kerosene on his clothes nor were his clothes burnt. It was pointed out that the witness has admitted that in his affidavit before the Supreme Court, he has not named Babubhai Kantibhai, Tulsibhai Girdharbhai, Vishnumbai Prahladbhai, Dahyabhai Kachrabhai and Rameshbhai Kantibhai. Referring to the cross-examination of the witness, it was pointed out that the witness has admitted that from the rear side of Mahemoodmiya's house in the mohalla, through Mahadev and the Kabrastan, there is a road to Ravalvas. That he had not gone to his house and was standing outside in the water course and till the police came, he was standing in the water course. That it had happened that he was hiding in his old house. It was submitted that a contradiction has been brought out in the cross-examination to the effect that in his statement dated 10<sup>th</sup> March, 2002 before the police, he had stated that he had hidden himself inside his old house. It was pointed out that the contradiction has been proved through the testimony of the Investigating Officer. It was submitted that the witness has stated that he had not gone for the burial ceremony and that he had sustained a fracture on his hand. Referring to the M.L.C. Certificate, it was pointed out that there is no reference to the witness having sustained any fracture. It was submitted that the witness has stated the facts incorrectly as he wants to show that he was a witness and received injuries in this incident. It was pointed out that the witness has admitted that in his affidavit dated 6<sup>th</sup> November, 2003 filed before the Supreme Court, he has not named Tulsibhai

Girdharbhai with a burning rag, Babubhai Kantibhai with a burning rag, Madhabhai Vitthalbhai with a pipe, Ramanbhai Ganeshbhai with a kerosene can and Vishnu Prahladbhai with a dharia.

**36.6 ANALYSIS:** As per the version of this witness, he had seen the mob when it entered Shaikh Mohalla and started pelting stones and had identified the accused at that time. He had been injured with a stone on the elbow and left eye. He had hidden inside his old house and the mob went towards Mustufamiya's house. This witness has made an affidavit for the purpose of submitting the same before the Supreme Court. In his cross-examination, he has stated that at the time of the 9 o'clock incident, he was present in front of his house. His house and his father's house are adjoining to each other. He has admitted that on one side of his house, is Ibrahimmiya Rasulmiya's house and on the other side, is Mahemoodmiya's house. In front of his house, there is a front yard of Mustufamiya's house and he was standing there. He is not in a position to say as to whether at that time anyone else was with him. He has admitted that the mob came from the direction of Mahadev and he has denied that the mob came from the rear side of Mahemoodmiya's house. The witness has stated that when he heard the shouts of the mob, he did not think it fit to take his family members and go to a safe place. He has voluntarily stated that the Patels of his village had said that there would not be any riots in the village and hence, they had not gone. In his cross-examination, it has come out that he had seen the members of the mob armed with weapons from a distance of 15 to 20 feet. At the time when there was stone throwing, he had moved to the side and had gone towards the

rear side of the Patels' houses. He was worried about his family members at that time, but they had gone to Mahemoodmiya's house. When the mob came at 09:30 and there was stone throwing, the members of his family were at his uncle Ibrahimmiya's house. Mustufamiya's house was closed, whereas Imammiya's house was open. In the entire cross-examination, no contradiction qua his statement recorded by the police has been brought on record.

36.7 In the opinion of this court, the testimony of this witness is natural and credible and has not been dented despite lengthy cross-examination at the instance of the learned counsel for the defence. There is no change in his version as is sought to be contended on behalf of the accused. The witness, in his examination-in-chief, has stated that he had taken shelter in his old house, whereas in his cross-examination, he has, in view of the suggestion put to him, elaborately stated as to where he was from the time of the first incident. From the testimony of this witness, he does not appear to have stated that he was in the water course throughout the incident, but has stated that he was roaming around. He was watching while the incident was happening. In his deposition, this witness has named Rameshbhai Kantibhai with a dharia, Rameshbhai Ramabhai with a dharia, Dahyabhai Kachrabhai with a stone, Babubhai Kantibhai with a burning rag, Patel Tulsibhai Girdharbhai with a burning rag, Prajapati Ramanbhai Ganeshbhai with a can of kerosene, Patel Vishnubhai Prahladbhai with a dharia and Patel Joitabhai Ramabhai Gangawat. The witness has identified seven persons, viz., Babubhai Kantibhai, Ramanbhai Ganeshbhai Prajapati, Rameshbhai Kantibhai, Dahyabhai Kachrabhai, Joitabhai

Ramabhai Gangawat, Madhabhai Vitthalbhai and Vishnubhai Prahladbhai as being part of the mob in the court. Out of these seven persons whom the witness has identified, he has not named Madhabhai Vitthalbhai in his deposition. Though this witness has been subjected to a detailed cross-examination, no contradiction has been brought out in respect of his statement dated 10<sup>th</sup> March, 2002, to the effect that he had not named the accused. The witness is sought to be contradicted with the contents of his affidavit to the effect that he had not stated the facts as deposed before the court and had not named Babubhai Kantibhai, Tulsibhai Girdharbhai, Vishnubhai Prahladbhai, Dahyabhai Kachrabhai and Rameshbhai Kantibhai in the affidavit. In the opinion of this court, the affidavit was not made for the purpose of investigation, but was filed after the investigation was over and charge-sheet had already been filed, and hence, when the witness has named the accused before the police and such names were recorded in his statement, whether or not he had named them in the affidavit, which was for a totally different purpose, would not impeach the credibility of the witness.

36.8 This witness is an injured witness who had taken treatment at Mehsana. As per the medico-legal certificate issued by the General Hospital, Mehsana, this witness had sustained an abrasion on the left side of his chest, an abrasion just above his eyebrow and DTS on the left elbow region on lateral aspect. The witness has lost his wife Wahida and brother Idrish in the incident. The dead bodies of both the said persons were taken out of the house of Mahemoodmiya's house. A contradiction has been brought out in the cross-examination of this witness to the effect that in his statement

dated 19<sup>th</sup> May, 2008, he had stated that the fact that Prajapati Ramanbhai Ganeshbhai was present in the mob as recorded in his statement is incorrect and that Prajapati Ramabhai Ganeshbhai was not present in the incident. He has admitted that the house in which he was at the time of the incident had the kabrastan on its rear side. He does not know whether the members of the mob had entered the house in which he was. He has stated that while he was in the house, in his presence, no destruction had taken place. He has said that the house was burnt and that in his presence, no looting had taken place. The witness has voluntarily stated that he had come out of the house and gone into another house. In the cross-examination of this witness, it has further come out that the members of the mob were armed with rags and weapons. He has stated that Bachumiya's house was situated next to the house in which he had gone, on the opposite side. He has further stated that upon entering Shaikh Mohalla, his house was the second house on the right and while he was there, the house was neither vandalized nor burnt.

36.9 On an overall consideration of the testimony of this witness, he comes across as a truthful witness, and except for certain minor discrepancies, by and large his testimony appears to be true. Out of the eight persons named by the witness in his statement dated 10<sup>th</sup> March, 2002, insofar as Prajapati Ramanbhai Ganeshbhai is concerned, the witness has subsequently before the SIT stated that this accused was not a member of the mob. Out of the remaining seven persons named by him, the witness has identified six persons. The witness has not identified Rameshbhai Ramabhai and Tulsibhai Girdharbhai before the court. Thus, the testimony of this

witness indicates the presence of Rameshbhai Kantibhai, Dahyabhai Kachrabhai, Babubhai Kantibhai, Vishnubhai Prahladbhai Patel and Patel Joitabhai Ramabhai Gangavat at the scene of offence.

**37. PW-52 Hizbulmiya Hussainmiya Shaikh** has been examined at Exhibit 513. In his examination-in-chief, he has inter alia deposed that he is married to Hussainabibi, daughter of Kesarmiya of Sardarpura. His native is Satnagar. That he was residing in Sardarpura from sixteen years prior to the incident. At Sardarpura, he was residing at Prahladbhai Varvabhai Prajapati's house, which was opposite the corner of Shaikh Mohalla next to which was Ishwarbhai Conductor's compound wall. Out of his wedlock with Hussainabibi, he had a daughter Saidabibi and son Rifakathussain. He was working at a brick kiln at Sardarpura which belonged to Prahladbhai Varvabhai and that in 2002, he was working there. He has deposed that on 27<sup>th</sup> February, 2002, the Godhra train incident took place. On 28<sup>th</sup> February, 2002, there was a call of Gujarat Bandh. On 1<sup>st</sup> March, 2002, there was a call of Bharat Bandh and on that day, all the shops and cabins in the village were closed and hence, they had not gone to the village. On 1<sup>st</sup> March, 2002 in the evening, he along with his family was sitting after having dinner. At around 9 to 9:30, a mob of Patels of the village gathered together and were creating a commotion by saying kill the Muslims, cut them and had also set the cabins on fire whereupon the police came and the members of the mob fled. The mob thereafter came back shouting "kill the Muslims, cut them" and was coming towards Shaikhvas. At the corner of Shaikhvas, they first resorted to stone pelting. The women and children of the Muslims went to

the house of Mahemoodmiya, which had a slab roof to save themselves from stone throwing and the members of the mob continued throwing stones. Ibrahimbhai was hurt with a stone and fell down and he hid in the partition of Akbarbhai's house. On account of fear, he was terror struck and the persons in the mob had burnt the cabins and were also burning their houses and going towards Mahemoodbhai's house. He saw that from his village, Patel Chaturbhai Kanabhai with a pipe, Baldevbhai Ranchhodbhai with a sword, Prahladbhai Jagabhai, Patel Ashwinbhai Jagabhai, Prajapati Gordhanbhai Revabhai, Prajapati Ramanbhai Ganeshbhai, Prajapati Ravikumar Amratbhai, Patel Jagabhai Jivanbhai with acid bottle, Patel Babubhai Kanabhai, Patel Sureshbhai Baldevbhai, Prajapati Prahladbhai Varvabhai were instigating the mob. Patel Dahyabhai Varvabhai with an iron pipe was leading the mob. When the mob was advancing, at that time, he sustained an injury with a stone which hit him forcefully on the wrist of his left hand. The members of the mob set the house at Shaikhvas on fire and he heard the cries of the women and children of Muslims from Mahemoodmiya's house. In the meanwhile, the police came and he and the other Muslims went towards Mahemoodbhai's house and from Mahemoodmiya's house, they took out Firozabanu, Farzanabanu, Rashidabanu, Basirabibi, three children of Bachumiya and others alive, and his wife Hussainabibi and son Rifakat who were hiding inside Mahemoodmiya's house were burnt to death. His daughter Saida also sustained injuries and twenty-eight persons died due to burn injuries in Mahemoodmiya's house and the other Muslims also sustained injuries in varying degrees. The police took the injured persons to the Civil Hospital and thereafter, they had also taken treatment at Civil. His brother-in-law

Abbasmiya Kesarmiya and his wife Rukshanabanu Abbasmiya and their daughter Sairabanu were also burnt and died in the incident. The police had recorded his statement at Panpur Camp and his second statement was recorded by the SIT at Gandhinagar and the third statement was recorded by the SIT at Satnagar and that he made an affidavit before the Supreme Court. The witness had identified Rajeshkumar Amratbhai as Ravikumar Amratbhai, Jagabhai Jivanbhai as Dhyabhai Varvabhai, Dhyabhai Varvabhai Prajapati, Jayeshbhai Jagabhai as Ashwinbhai Jagabhai, Mathurbhai Trikambhai as Prahadbhai Varvabhai, Prajapati Gordhanbhai Revabhai, Ramanbhai Ganeshbhai Prajapati and Prahadbhai Varvabhai Prajapati in the court. The witness has also identified certain weapons which were stated to be wielded by the accused persons.

37.1 In the cross-examination of this witness, a contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 recorded by the police, he has not named Jayeshbhai Jagabhai, Sureshbhai Baldevbhai, Prahadbhai Varvabhai and Prajapati Dhyabhai Varvabhai. The witness has also been cross-examined as to his previous statements dated 19<sup>th</sup> May, 2008, 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008 recorded by the SIT and his affidavit dated 6<sup>th</sup> November, 2003, to bring out certain omissions. As already discussed while analysing the testimony of PW-47 Ibrahimmiya Rasulmiya Shaikh, the subsequent statements recorded by the SIT are merely in the nature of further statements, and hence, non-mentioning of facts which are already mentioned in the initial statement recorded by the police, cannot be said to be an omission. It is only if any fact stated in these statements is contradictory to what is deposed before the court, that the witness can be

confronted with the same. Insofar as the contents of the affidavit are concerned, the affidavit which was made after the filing of the charge-sheet at a stage when the investigation was already concluded, was filed for a different purpose and hence, the contents thereof are not relevant for the purpose of establishing the guilt or otherwise of the accused and the same can be used only for the limited purpose of discrediting the witness as contemplated under clause (3) of section 155 of the Evidence Act. In the cross-examination of this witness, it has been brought out that in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT he had stated that "out of the persons present in the mob, he had not named Prajapati Gordhanbhai Revabhai, Rohitbhai Ramanbhai and Ravikumar Amrutbhai and that such names had been written by the police". He has admitted that in his statement dated 19<sup>th</sup> May, 2008 he had stated that the women, men and children of their mohalla had not gone inside Maheboobbhai's house but Mahemoodbhai's house. [In this regard, it may be noted that PW-69 Mahemoodmiya Hussainmiya Shaikh has deposed that he is known as Maheboobmiya as well as Mahemoodmiya.] He has also admitted that in his statement dated 19<sup>th</sup> May, 2008 before the SIT, he had stated that on 1<sup>st</sup> March, 2002 when he was working at the brick kiln, a mob from Sundarpur had gathered and was saying that wherever miyas are staying, burn them. In his cross-examination, the witness has admitted that in paragraph-12 of his affidavit, he has stated that he had talked with Teesta Setalvad on phone. It has further come out that pursuant to an advertisement in the newspapers, they had gone to Teesta Setalvad's office in the hope of getting justice. They had not met Teesta Setalvad, but had talked with her on the phone in the office. Jamalbhai Dosbhai had come with him

to Teesta Setalvad's office. Two – three persons from the mohalla were there with him when he made the affidavit. In his cross-examination, it has been elicited that at the time of stone pelting, he was standing under a neem tree in front of Akbarbhai's house in the mohalla. He has admitted that the mob was comprised of about 1000 to 1500 persons and that as the mob was on all four sides, it was not possible for them to flee. He has stated that there was a single mob which had come from the direction of Mahadev. He has stated that he had seen the mob from Sundarpur at Sundarpur. He has stated that while there was stone pelting they were moving from one place to another to save themselves. He has stated that upon the mob pelting stones, the police had come. He, however, has denied that the police had resorted to firing. He has deposed that he had seen the mob setting the gallas on fire. After they burnt the gallas, he had seen the mob set their houses on fire. He has stated that the persons in the mob were towards the kabrastan as well as on the rear side of Mahemoodbhai's house. He has stated that he was in the partition on the opposite side of the site where the jeep was burnt in front of Akbarbhai's house. He has stated that on the other side of Akbarbhai's house there is something like a choupal and he was there. He was on the choupal between the door of Akbarbhai's house and the verandah. He has stated that the mob was not towards his side, but was roaming on the side of the kabrastan. He has denied that he could not see the mob and has admitted that the mob was not in a position to see him. He has further stated that the mob was at a distance of two to five feet. He has admitted that none of his clothes were burnt nor was any kerosene thrown on him, nor had he sustained any burn injuries. He has stated that he had gone to

Mehsana Civil Hospital in a police vehicle, at that time along with the people of the mohalla there were two or three police personnel, at that time he had not named the persons who were in the mob before the police. Before the doctor, he had not given the names of the persons in the mob. At the time when they went from the Civil Hospital to Ilol also, the police were with them. At that time also he had not given the names of the persons who were in the mob. On 10<sup>th</sup> March, 2002, the police had come to them for recording their statements; he had not gone to the police. The witness has also been extensively cross-examined as regards the manner in which the affidavit dated 6<sup>th</sup> November, 2003 was prepared. In his cross-examination, certain facts not stated in the examination-in-chief are brought out and the witness is then sought to be contradicted in respect of such facts by the averments made in the affidavit. A contradiction has been brought out to the effect that he has not named Chaturbhai Kanabhai in his statement dated 10<sup>th</sup> March, 2002 recorded by the police or his statements dated 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008 recorded by the SIT. In his cross-examination, the witness has admitted that he has not named Sureshbhai Baldevbhai and Babubhai Kanabhai in his statement dated 10<sup>th</sup> March, 2002 before the police.

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37.2 In the cross-examination of the Investigating Officer (Police), it has been brought out that this witness in his statement dated 10<sup>th</sup> March, 2002 had not named Jagabhai Jivanbhai, Sureshbhai Baldevbhai, Prahladbhai Varvabhai and Prajapati Dahyabhai Varvabhai. A further omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, this witness had not stated that he had seen in

the mob Patel Jagabhai Jivanbhai with an acid bottle, Patel Babubhai Kanabhai, Patel Sureshbhai Baldevbhai, Prajapati Prahladbhai Varvabhai instigating the mob and Prajapati Dahyabhai Varvabhai with an iron pipe leading the mob. The Investigating Officer (Police) in his cross- examination has admitted that this witness has not named Ramabhai Ganeshbhai, Jagabhai Jivanbhai, Babubhai Kanabhai, Sureshbhai Baldevabhai, Prahladbhai Varvabhai and Dahyabhai Varvabhai in his statement dated 10<sup>th</sup> March, 2002. The investigating Officer, in his cross-examination has further admitted that this witness in his statement dated 10<sup>th</sup> March, 2002 has not named Ramanbhai Ganeshbhai.

37.3 From the cross-examination of the Investigating Officer (SIT), it is revealed that this witness in his statements dated 19<sup>th</sup> May, 2008, 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008 had not stated that Ibrahimmiya had fallen down as he was injured with a stone and that he had hidden in the partition of Shaikh Akbarbhai's house and that out of fear he was terror struck. It is further brought out that in the above referred statements, this witness had not stated that he had seen Baldevbhai Ranchhodbhai with a sword, Patel Prahladbhai Jagabhai and Patel Ashwinbhai Jagabhai from his village. From the cross-examination of the Investigating Officer (SIT), it has further come out that this witness in his statement dated 19<sup>th</sup> May, 2008 had stated that Prajapati Gordhanbhai Revabhai, Rohitbhai Ramanbhai and Ravikumar Amratbhai were not part of the mob and that police had written down the names.

37.4 The learned counsel for the appellant invited the attention of the court to the cross-examination of the said

witness to point out that the witness in his statements dated 19<sup>th</sup> May, 2008, 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008 before the SIT as well as in his affidavit before the Supreme Court has not stated that he had seen from his village Patel Chaturbhai Kanabhai with a pipe, Baldevbhai Ranchhodbhai with a sword, Patel Prahladbhai Jagabhai, Patel Ashwinbhai Jagabhai, Prajapati Gordhanbhai Revabhai and Ravikumar Amratbhai. It was pointed out that it has been brought out in the cross-examination of the witness that in his statement dated 10<sup>th</sup> March, 2002 before the police, he had not stated that he had seen in the mob Patel Jagabhai Jivanbhai with acid bottle, Patel Babubhai Kanabhai, Patel Sureshbhai Baldevbhai, Prajapati Prahladbhai Varvabhai inciting the mob and Patel Dahyabhai Varvabhai with a steel pipe was leading the mob. It was pointed out that it has been also brought out in the cross-examination that in none of his statements, the witness has named Prahladbhai Varvabhai and Dahyabhai Varvabhai. It was further pointed out that in the cross-examination of the witness, a contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 as well as statements before SIT dated 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008, the witness has not named Chaturbhai Kanabhai as an accused. It was further pointed out that the witness has also admitted that in his statement dated 10<sup>th</sup> March, 2002 before the police as well as statement dated 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008, he had not named Sureshbhai Baldevbhai and Babubhai Kanabhai. It was submitted that this witness was not staying in Shaikh Mohalla, and looking at the topography and its situation, it would be very difficult to accept the claim of this witness that he would prefer to go inside the mohalla and hide himself in the house of Akbarbhai. It was submitted that this

witness has materially improved upon the sequence of time and events from his original version. The witness is stated to have been injured, but was treated in OPD and the possibility of his having sustained injury elsewhere or in a different manner cannot be ruled out. It was further submitted that in his affidavit before the Supreme Court, this witness has not stated anywhere that he had witnessed the incident and that he refers to the mob gathering from Sundarpur, which probabilises the defence version pleaded before the court in the cross-examination of many witnesses. It was submitted that this witness has remained silent for nine days and has not disclosed anything about the incident and the accused, either at the place of incident or at the hospital or while going to the relief camp at Ilol or even thereafter till his statement was recorded on 10<sup>th</sup> March, 2002. It was urged that the witness has deliberately avoided referring to the fact of police firing though stated in his first statement before the police. It was contended that his evidence of hiding himself in the choupal is highly doubtful and it is not possible in the face of the situation which he himself has narrated, viz., that the crowd was everywhere and that the crowd was at a distance of two to five feet from him. Referring to the cross-examination of the witness, it was pointed out that it has come on record that all nine affidavits by different witnesses were made on the same date with continuous serial number before the Notary, which is suggestive of the fact that they are prepared at one place with the help of a legal mind and were got affirmed together with different stories and facts to implicate as many innocent persons as possible. It was submitted that the witness has claimed to have hidden himself by the side of Akbarmiya's house, which claim is highly doubtful in view of the evidence of

other witnesses who also claim to be eye-witnesses but do not notice the presence of each other. It was argued that the witness has changed the names of the accused at every stage, and surprisingly, the witness has named Prahladbhai Varvabhai with whom he was working, and in whose house, he stayed for ten years, for the first time in the court and has initially wrongly identified him as Mathurbhai Trikambhai and subsequently identified him correctly. It was submitted that the conduct of this witness is totally unnatural and, therefore, the witness is not a truthful witness and his evidence cannot be relied upon.

**37.5 ANALYSIS:** From the testimony of this witness, it emerges that he is not a resident of Shaikh Mohalla and was residing at Sardarpura in the house of Prajapati Prahladbhai Varvabhai, which was opposite the corner of Shaikh Mohalla. The witness has deposed that Ibrahimbhai was injured with a stone and fell down and that he (the witness) hid himself in the partition of Akbarmiya's house. This witness has deposed having seen Patel Chaturbhai Kanabhai, Baldevbhai Ranchhodhbhai, Prahladbhai Jagabhai, Patel Ashwinbhai Jagabhai, Prajapati Gordhanbhai Revabhai, Prajapati Ramanbhai Ganeshbhai, Prajapati Ravikumar Amratbhai, Patel Jagabhai Jivanbhai, Patel Babubhai Kanabhai, Patel Sureshbhai Baldevbhai, Prajapati Prahladbhai Varvabhai and Patel Dahyabhai Varvabhai as being part of the mob and having been involved in the commission of the main incident. This witness is an injured eyewitness and has sustained an injury on the wrist with a stone. His wife Hussainabibi and son Rifakathussain had died in the incident and his daughter Saida was injured. His brother-in-law Abbasmiya Kesarmiya and his

wife Rukshanabanu Abbasmiya and their daughter Sairabani also sustained burn injuries and died in the incident. This witness is one of the eight witnesses who had made affidavits for the purpose of submitting the same before the Supreme Court. Out of the persons named by the witness in his deposition, he has identified Rajeshkumar Amrutbhai as Ravikumar Amrutbhai, Jagabhai Jivanbhai as Dahyabhai Varvabhai. The witness has identified Dahyabhai Varvabhai Prajapati, Jayeshbhai Jagabhai as Ashwinbhai Jagabhai (who is not an accused), Mathurbhai Trikambhai as Prahladbhai Varvabhai, Prajapati Gordhanbhai Revabhai, Ramanbhai Ganeshbhai Prajapati, Prahladbhai Varvabhai Prajapati, whereas in respect of the other accused, there is misidentification. In the cross-examination of this witness, a contradiction has been brought out to the effect that he had not named Jagabhai Jivanbhai, Sureshbhai Baldevbhai, Prahladbhai Varvabhai and Prajapati Dahyabhai Varvabhai in his statement dated 10<sup>th</sup> March, 2002. It appears that such names have been subsequently introduced in the statements made before the SIT. Thus, out of the accused whom the witness had originally named in his testimony, the witness has named and identified only Prajapati Gordhanbhai Revabhai. In his cross-examination, the witness has admitted that in paragraph-12 of his affidavit, he has stated that he had talked with Teesta Setalvad on phone. It has further come out that pursuant to an advertisement in the newspapers, they had gone to Teesta Setalvad's office in the hope of getting justice. They had not met Teesta Setalvad, but had talked with her on the phone in the office. Jamalbhai Dosbhai had come with him to Teesta Setalvad's office. Two – three persons from the Mohalla were there with him when he made the affidavit.

37.6 In the cross-examination of this witness, it has come out that there were mobs on all sides and it was not possible for them to flee. There was only one mob which had come from the direction of Mahadev. The witness has stated that he had seen the mob from Sundarpur at Sundarpur. In his cross-examination, he has admitted that he had seen the mob setting the gallas on fire and thereafter, he had seen the mob setting the houses on fire. He has stated that he was hiding in the partition of Akbarmiya's house on the opposite side where the jeep was set on fire. He has stated that there is a choupal on the other side of Akbarmiya's house and he was there. He was on the choupal between the door of Akbarbhai's house and the verandah. He has admitted that he was alone in Akbarmiya's house.

37.7 From the testimony of this witness, it has come on record that he was residing opposite Shaikh Mohalla. His wife Hussainabibi and son Rifakat died inside the house of Mahemoodmiya. Hence, there is no reason to doubt the presence of this witness at Shaikh Mohalla. Since he does not have a house in Shaikh Mohalla, and his brother-in-law and his family who were residing in Shaikh Mohalla, were also inside Mahemoodmiya's house, it is natural for the witness to have taken shelter in one of the houses at Shaikh Mohalla. In his testimony, no contradiction has been brought out as to his previous statement recorded by the police regarding his having hidden in the partition of Akbarmiya's house. The witness is, therefore, consistent with regard to having taken shelter in the house of Akbarmiya. Insofar as the so-called improvements alleged to have been made are concerned,

those are not part of examination-in-chief, but are the details elicited during the course of cross-examination. The testimony of this witness is sought to be assailed on the ground that though the witness was working in the brick kiln of Prahladbhai Varvabhai and staying in the house of that accused, he has not been able to identify Prahladbhai Varvabhai and has identified Mathurbhai Trikambhai as Prahladbhai Varvabhai. It appears that while initially this witness has identified Mathurbhai Trikambhai as Prahladbhai Varvabhai, subsequently he has identified accused Prahladbhai Varvabhai Prajapati before the court. It has also been submitted that the witness has not been able to identify some of the other accused persons though he had sufficient time to identify the accused persons. In this regard, as discussed earlier, this witness was deposing before the court after a period of about eight years from the date of the incident. After the incident, the witness has left Sardarpura and was residing elsewhere. A period of eight years is a considerable period of time and not every person has a photographic or good memory, so as to remember people after such length of time. In these circumstances, merely because the witness has not been able to identify some of the accused persons named by him, the credibility of the witness would not stand impeached. Certain facts deposed by the witness are sought to be challenged on the ground that such facts had not been stated by him in his statements dated 19<sup>th</sup> May, 2008, 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008 and even in his affidavit dated 6<sup>th</sup> November, 2003. As discussed earlier, the first statement made by a witness before the police would be a detailed statement, setting out all facts and naming all accused. Subsequent statements would only be further statements in addition to the first statement. Therefore, it

would not be necessary for the witness to refer to the names of all the accused in each and every statement. Insofar as not naming the accused in the affidavit is concerned, as discussed earlier, the affidavit was made for the purpose of requesting the Supreme Court to transfer the trial outside State of Gujarat and was not for the purpose of investigation. Besides, the manner and the circumstances in which the affidavit was made, would lead one to believe that the same was not made for the purpose of investigation and hence, naming some accused and not naming the others in the affidavit is of no consequence and would have no relevance insofar as the evidence of the witness is concerned. The contents of the affidavit, as observed earlier, can only be used to impeach the credibility of the witness by contradicting him to the extent of any inconsistency therein with what is deposed before the court. However, while bringing out such inconsistency, one has to keep in mind the purpose behind making the affidavit and one would not expect the same to contain all the details which would be there in a statement recorded by the police under section 161 of the Code.

37.8 Another ground for assailing the testimony of this witness is that he has identified some of the muddamal and not others and has assigned the wrong muddamal to a different accused. Insofar as non-identification of the muddamal and incorrectly connecting the same with the accused is concerned, from the evidence on record, it is apparent that there is no allegation in the testimony of the witness to the effect that any of the weapons had, in fact, been used for the purpose of causing any injury to the witnesses. Under the circumstances, non-identification of the muddamal or misidentifying the muddamal

with a wrong accused would be of no relevance, more so, having regard to the length of time after which the testimony of the witness has been recorded. On an overall appreciation of the evidence of this witness, the court does not find any reason to disbelieve the same.

38. **PW-55 Ashiqhussain Bachumiya Shaikh** has been examined at Exhibit-530. This witness has deposed that he was residing at Sardarpura at Shaikhvas and his family was comprised of his wife Faridabanu (PW-73), his children Ashiyana, Sahina and Aftabhussein and his father Bachumiya Imammiya and his mother Sharifabibi and brother Mohammad Sattar (PW-59), sisters Firozabanu (PW-75), Farzanabanu. Four other sisters were married and residing elsewhere. He was engaged in the occupation of driving and was driving a jeep. The witness has deposed that on 27<sup>th</sup>, the incident of burning the train at Godhra had taken place and on 28<sup>th</sup> February, there was a call of Gujarat Bandh by the Vishwa Hindu Parishad, and at that time, his father had told them not to go out for the purpose of their work, and hence, he and his brother were present at home. On 1<sup>st</sup> March, 2002, he and his family were at home at night and at around 9:30, a mob of Hindus from the village came armed with weapons like sticks, dharias, swords, pipes, kerosene cans, petrol cans, burning rags, etc. from the side of Mahadev temple shouting and screaming "kill the Muslims, cut them, burn them". They came at the corner of Shaikhvas and vandalized three cabins and gallas, looted them and set them on fire. At that time, the police came and dispersed the mob and the police went away immediately. Thereafter, after a little while, the same mob came again towards Shaikhvas shouting and screaming. Upon

coming to Shaikhvas, they started vandalizing the houses and looting them and threw stones and mud-pieces and at that time, he had seen Patel Ashwinbhai Baldevbhai with a can, Patel Pashabhai Mohanbhai with a can, Chaturbhai Vitthalbhai, Rajeshbhai Karshanbhai, Madhabhai Vitthalbhai with pipes, Rameshbhai Prabhahai with a dharia, Jayantibhai Mangalbhai @ Bakabhai with a sword, and Kalabhai Bhikhabhai, Bhikhabhai Joitabhai, Mangalbhai Mathurbhai, Rameshbhai Kantibhai, Prahladbhai Somabhai, Jayantibhai Jivanbhai and Jayantibhai Ambalal throwing stones. He had also seen Bhavesh Kanubhai Patel, Shital Narayan Sindhi, Prajapati Dahanbhai Varvabhai, Prajapati Ramanbhai Ganeshbhai, Gordhanbhai Revabhai, Rajeshkumar Amratbhai, Ravikumar Amratbhai and Rohitkumar Ramanlal in the mob, wielding weapons. Thereafter his father told his wife (the witness's wife), his children and the other members of their family to go to the house of Mahemoodmiya Hussainmiya at the end of their mohalla which had a concrete slab and to hide there, whereupon he went and left his family members there. Thereafter, his jeep was set on fire. He had seen Patel Kachrabhai Tribhovandas, Ambalal Magan and Ramanbhai Ganeshbhai burning the jeep. The mob was coming towards Mahemoodmiya Hussainmiya's house and with a view to save his life, he ran away to Pathan Mohalla. Thereafter, the police had come. Upon the police arriving, he went towards his mohalla and saw that people in Mahemoodmiya's house had been burnt by Hindu persons and his daughter Ashiyanabanu was also burnt, but she was alive, and his wife and child had sustained burn injuries on their leg and his daughter Sahinabanu was injured with a stone on her right ear and other people had also sustained burn injuries. These persons were

taken in a police vehicle for treatment to Mehsana Civil Hospital and on the way, his daughter Ashiyanabanu passed away. His statement was recorded at Mehsana Civil Hospital. In the evening, they went in a police vehicle to Vijapur and from there, they went to the camp. From there, they went to Satnagar. The SIT had recorded his statement at Gandhinagar as well as at Satnagar camp. He had also made an affidavit for the purpose of submitting the same to the Supreme Court. At that stage, an objection was raised by the defence for exhibiting the affidavit, which came to be accepted and the court rejected the request to exhibit the affidavit. The witness has stated that he can identify the persons in the mob and has identified Jayantibhai Ambalal, Gordhanbhai Revabhai Prajapati as Ashwinbhai Baldevbhai, Dahyabhai Varvabhai Prajapati, Ramanbhai Ganeshbhai, Rajeshbhai Karshanbhai, Mangalbhai Mathurbhai, Bhikhabhai Joitabhai, Ambalal Maganbhai, Amratbhai Somabhai, Rameshbhai Kantibhai, Chaturbhai Kanjibhai, Kachrabhai Tribhovandas, Chaturbhai Vitthalbhai, Parsottambhai Mohanbhai, Rameshbhai Prabhudas, Prahladbhai Somabhai and Kalabhai Bhikhabhai. He has also identified some of the weapons which were being wielded by the accused.

38.1 In the cross-examination of this witness, it has come out that he had a talk with Teesta Setalvad on telephone. He had prepared the affidavit by himself. Various questions have been put to him with regard to the manner in which the affidavit was prepared. The witness has admitted that in his affidavit dated 6<sup>th</sup> November, 2003, he has stated that "*I have made this statement of my own free will and having fully understood the implications of this statement. I have made this statement*

upon detailed questioning on the telephone of a journalist/human rights activist, Teesta Setalvad and in the presence of Shri Raiskhan Azizkhan Pathan." The witness has denied that his statement was recorded on 10<sup>th</sup> March, 2002. He has further denied that when the SIT recorded his statement on 19<sup>th</sup> May, 2008, his statement dated 10<sup>th</sup> March, 2002 was read over to him. He has further denied that in his statement dated 10<sup>th</sup> March, 2002, he had stated that none of the Patels of his village were involved in the incident of 1<sup>st</sup> March, 2002. He has denied that he has given the names of persons from Sundarpur village. He has further denied that though he had given a statement dated 10<sup>th</sup> March, 2002, he was denying the same. He has admitted that his statement was recorded on 2<sup>nd</sup> March, 2002 at Mehsana Civil Hospital. A contradiction has been brought out to the effect that he had not named Chaturbhai Kanabhai, Amratbhai Somabhai and Jivanbhai Dwarkadas Patel (JD) in his statement dated 2<sup>nd</sup> March, 2002. In his cross-examination, he has admitted that at Pathan Mohalla, he had gone to Munsafkhan's house and that he had gone through the road from the rear side of Shaikhvas. He has further stated that he had seen the mob for the first time from the corner of Shaikhvas at a distance of about 20 to 25 feet. Upon seeing the mob and hearing their shouts, he slowly went and hid behind Tulsibhai's house. He was not afraid after seeing the mob and he had not fled from there. He had seen the mob from the wall near Akbarbhai's bathroom. The mob was comprised of about 1000 to 1500 people and the persons of the mob were looting and burning the cabins. He has denied that at that time, the police had come and resorted to firing. A contradiction has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002 recorded by the

police, he had stated that the police had come and resorted to firing. He has deposed that when the mob came inside Shaikhvas, he was at Shaikhvas. He does not know where his father and Mohammad Sattar had gone and that Mohammad Sattar was not him. When the incident of burning the houses in Shaikh Mohalla occurred, he was on the side of his house. Half of the mob came from the main gate and the other half came from the side of the wall of Kabrastan. In his cross-examination he has further stated that he had seen the persons of the mob go inside the houses and vandalizing and burning them. At that time, he was standing against the wall of his house and that both his houses were not set on fire by the mob. He has stated that he does not know that his brother Mohammad Sattar had hidden inside their house. In his cross-examination, it has further come out that he and his younger brother Mohammad Sattar had been residing at Sardarpura since their birth and most of the people in the village know him. A contradiction is sought to be brought out from his previous statement dated 2<sup>nd</sup> March, 2002 recorded by the police to the effect that he had stated therein that he and his brother Mohammad Sattar had hidden inside his house. Another contradiction is brought out as to his statement dated 2<sup>nd</sup> March, 2002 recorded by the police to the effect that he had stated before the police that at that time, he was going towards Harijanvas and from far, he had seen that his village's ... ... The contradiction is restricted to reference to Harijanvas and having seen from far. The witness is further sought to be contradicted as to his previous statement dated 19<sup>th</sup> May, 2008 recorded by the SIT to the effect that he had stated he had not named Patel Ashiwnbhai Baldevbhai who is known as Nagar (Botham), Sindhi Narva Shitalbhai, Prajapati Babubhai Lavjibhai, Prajapati Gordhanbhai

Revabhai, Prajapati Rajeshkumar Amratbhai, Prajapati Rameshbhai Bharatbhai, Prajapati Rohitkumar Ramanbhai, Prajapati Ravikumar Amratbhai, Prajapati Ramanbhai Ganeshbhai and that the police had written down the names. Another contradiction which has been brought out is to the effect that in his statement dated 2<sup>nd</sup> March, 2002, he has not named Rameshbhai Ganeshbhai. A further contradiction has been brought out to the effect that in his statement dated 19<sup>th</sup> May, 2008 recorded by SIT, he had stated that Ramanbhai Prajapati was not in the mob. Another contradiction has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002, he had not given the name of Ambalal Maganbhai Patel as the person burning the jeep. He has denied the suggestion that he had named Prajapati Ramanbhai as the person who had set the jeep on fire. He has denied the suggestion that at night he was at the house of Munsafkhan Pathan. He has stated that Pathanvas is known as Bada Mohalla. He has admitted that in his affidavit dated 6<sup>th</sup> November, 2003, he had stated that "*When I saw that my jeep was also burned in the attack, I ran off and made my escape to Bada Mohalla and did not come back at all. I stayed the whole night there*". The witness has stated that the fact stated in his affidavit dated 6<sup>th</sup> November, 2003 that he had gone to Pathan Mohalla and had stayed there throughout the night and had not gone back, is false.

38.2 PW-110 the Investigating Officer (Police) has deposed that he has not recorded any statement of this witness on 10<sup>th</sup> March, 2002. From the cross-examination of the Investigating Officer, it is revealed that in his statement dated 2<sup>nd</sup> March, 2002, this witness has not named Chaturbhai Kanabhai Patel

and Amratbhai Somabhai Patel but had named Jivanbhai Dwarkadas. From the cross-examination of the Investigating Officer, it is brought on record that this witness in his statement dated 2<sup>nd</sup> March, 2002 had stated that "he and his brother Mohammad Sattar had hidden inside their house .... At that time, he having gone towards Harijanvas, he had seen from a distance that from his village .... and houses were burnt" (the contradiction is restricted to Harijanvas and having seen from a distance). It has further come out that this witness had not named Rameshbhai Ganeshbhai in his statement dated 2<sup>nd</sup> March, 2002 and that he had also not named Ambalal Maganlal Patel as the person who set the jeep on fire. It has been further brought on record that this witness had not named Jayantibhai Ambalal and Kalabhai Bhikhabhai Patel in his statement dated 2<sup>nd</sup> March, 2002. An omission is sought to be brought out in the testimony of this witness as to his statement dated 2<sup>nd</sup> March, 2002 regarding the facts stated in his deposition, however, the contradiction is restricted to the same mob having come after some time and having seen these people from a distance from Harijanvas as well as a contradiction as regards the names of Jayantibhai Ambalal, Shital Narayan Sindhi and Kala Bhikha. An omission has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002, this witness has not stated that "after he went and left his family members in Mahemoodmiya's house, his jeep was set on fire .... His wife and child had sustained burn injuries on their legs and his daughter Sahinabanu was injured on the left ear with a stone".

38.3 From the cross-examination of PW-112 the Investigating Officer (SIT), it is brought out that this witness in his statement

dated 19<sup>th</sup> May, 2008, had stated that the names of Patel Ashwinbhai Baldevbhai who is Nagar (Botham), Sindhi Narva Shitalbhai, Prajapati Babubhai Lavjibhai, Prajapati Gordhanbhai Revabhai, Prajapati Rajeshkumar Amratbhai, Prajapati Rameshbhai Bharatbhai, Prajapati Rohitkumar Ramanbhai, Prajapati Ravikumar Amratbhai and Prajapati Ramanbhai Ganeshbhai had not been stated by him and that he believes that the police had written down the names ..... That Ramanbhai Prajapati was not part of the mob. From the cross-examination of the Investigating Officer (SIT), it is further revealed that this witness in his statements dated 11<sup>th</sup> June, 2008 and 19<sup>th</sup> June, 2008, had not stated that after he left his family members in the house of Mahemoodbhai, his jeep was set on fire (the fact regarding the jeep having been set on fire is stated). It has further come out that this witness in the above referred statements has not stated that his wife and child's legs were burnt and that his daughter Sahinabanu was injured on the left ear with a stone.

38.4 The learned counsel for the accused has submitted that the sequence of events has been changed by this witness which is in conformity with the statements made by the other witnesses, who have made improvements from their original statements. The witness says that until the jeep was set on fire, he was in Shaikh Mohalla and seeing the mob proceeding towards Mahemoodmiya's house, he ran away to Pathan Mohalla to save his life, which does not sound plausible. It was submitted that according to this witness, after the mob started ransacking the houses, committing loot and pelting stones, this witness put his wife, children and members of his family inside Mahemoodmiya's house, which also does not sound plausible.

It was pointed out that the witness's father Bachumiya, in his entire deposition, has not stated that he had told his son to put the family members in Mahemoodmiya's house and that on the contrary, his father Bachumiya is absolutely silent with regard to making any reference to his family members in his deposition. It was submitted that the claim of this witness that his wife, son Aftab and another daughter Sahina were inside Mahemoodmiya's house and got injured is far from the truth for the following reasons:

- looking to the nature of the incident and the place which is enclosed, it is not possible for anybody who was inside the house, either to remain alive or receive no injuries, inasmuch as, those who were inside the house remained there for more than an hour and since it was severely suffocating, the cause of death of majority of the deceased was asphyxia due to suffocation;
- the witness says that his son Aftab received burn injuries, however, no medical certificate has been produced and there is nothing to indicate that his son had sustained any injury, much less, burn injuries. It was submitted that Sahinabanu is also said to have been injured, however, she has not suffered from suffocation and that in these circumstances, it was not possible for a small child of five years to survive. Moreover, Faridabanu, the wife of the witness, does not support his claim about Sahinabanu being inside the house. It was submitted that as regards the presence of his sister Farzanabanu, no medical certificate regarding any treatment having been given to her has been produced nor has Farzanabanu received any injuries. It was submitted that no injury certificate of

the witness's son Aftab has also been produced. As regards his daughter Sahina, though CLW injury is shown in the medical certificate, her mother does not claim she was inside the house. Farzanabanu has not been examined and, therefore, the claim that all the family members were inside the room is far from the truth. Attention was invited to the MLC certificate of Faridabanu, wife of the witness, to point out that looking to the nature of her injury and considering the fact that it was not possible for anyone to survive inside the room, the possibility of her having received these injuries somewhere or in a manner different from that projected cannot be ruled out.

- Reference was made to the deposition of PW-1 Dr. Dhirajkumar Jivanlal Soni to point out the nature of the injuries sustained by Sahinabanu, daughter of the witness. It was pointed out that the witness in his cross-examination has admitted that if in one room, there are thirty-five to forty persons and there is smoke in the room and if the patient is inside the room, then there would be carbon particles inside the patient and he would have difficulty in breathing.

It was submitted that this witness in his statement dated 2<sup>nd</sup> March, 2002, said that his younger brother had hidden himself inside his home, whereas his brother Mohammad Sattar (PW-59) claims that he was in the house of Akbarmiya. It was further submitted that in his statement dated 2<sup>nd</sup> March, 2002, the witness has stated that he went towards Harijanvas, which is quite far and saw the accused from a distance, and, therefore, his claim of having seen anybody cannot be believed

because he himself says that from Harijanvas, neither the corner of Shaikhvas nor Mahemoodmiya's house can be seen. It was submitted that this witness has deliberately disowned the fact of police firing which he had already referred to in his statement dated 2<sup>nd</sup> March, 2002. Moreover, the witness has stated that the averments made in his affidavit that after the jeep was burnt, he ran away to Pathan Mohalla and did not come back and stayed there for the whole night, is false. It was submitted that therefore, the witness has admitted having made a false averment in the affidavit. Thus, it is proved that this witness has made a false averment on oath. It was further pointed out that this witness was present at the time of drawing of the inquest panchnama of his daughter Ashiyanabnu at 7:00 a.m. but he has not disclosed to the police officer who was present, about the incident or the accused. It was further submitted that this witness has not mentioned about the injuries to his wife, son and daughter in any of his statements dated 2<sup>nd</sup> March, 2002, 19<sup>th</sup> May, 2008 and 11<sup>th</sup> June, 2008. It was submitted that this witness keeps on changing his version every time and that the subsequent stories created by him cannot be believed. It was submitted that there are serious doubts about the averments made by this witness before the court, as to whether he is telling the truth and as such, no reliance can be placed upon the testimony of such a witness.

**38.5 ANALYSIS:** This witness is the son of Bachumiya Imammiya Shaikh. He is a resident of Shaikh Mohalla. According to this witness, when the mob came to Shaikhvas, he had seen the following accused persons, viz., Patel Ashwinbhai Baldevbhai with a can, Patel Pashabhai Mohanbhai

with a can, Chaturbhai Vitthalbhai, Rajeshbhai Karshanbhai, Madhabhai Vitthalbhai with pipes, Rameshbhai Prabhahai with a dharia, Jayantibhai Mangalbhai @ Bakabhai with a sword, Kalabhai Bhikhabhai, Bhikhabhai Joitabhai, Mangalbhai Mathurbhai, Rameshbhai Kantibhai, Prahladbhai Somabhai, Jayantibhai Jivanbhai and Jayantibhai Ambalal throwing stones. He had also seen Bhavesh Kanubhai Patel, Shital Narayan Sindhi, Prajapati Dahyabhai Varvabhai, Prajapati Ramanbhai Ganeshbhai, Gordhanbhai Revabhai, Rajeshkumar Amratbhai, Ravikumar Amratbhai, Rohitkumar Ramanlal in the mob wielding weapons. The witness has deposed that thereafter, his father told his wife, his children and members of their family to go to Mahemoodmiya's house at the end of their mohalla which had a concrete slab and to hide there, whereupon, he left his family members there. The witness has stated that subsequently, his jeep was set on fire and he had seen Patel Kachrabhai Tribhovandas, Ambalal Maganbhai and Ramanbhai Ganeshbhai burning the jeep. That the mob was coming towards Mahemoodmiya's house and with a view to save his life, he ran away to Pathan Mohalla. The witness has deposed that subsequently, after the police came to the scene of offence, he had gone to the mohalla and found that his daughter Ashiyanabanu was also burnt, but was alive and that his wife and child had sustained injuries on their legs and his daughter Sahinabanu was injured with a stone on her right ear and other people had also sustained burn injuries. This witness has also made an affidavit for the purpose of submitting the same before the Supreme Court. Out of the persons named by him, he has identified the following persons, viz., Jayantibhai Ambalal, Gordhanbhai Revabhai Prajapati as Ashwinbhai Baldevbhai, Dahyabhai Varvabhai Prajapati, Ramanbhai

Ganeshbhai, Rajeshbhai Karshanbhai, Mangalbhai Mathurbhai, Bhikhabhai Joitabhai, Ambalal Maganbhai, Amratbhai Somabhai, Rameshbhai Kantibhai, Chaturbhai Kanjibhai, Kachrabhai Tribhovandas, Chaturbhai Vitthalbhai, Parsottambhai Mohanbhai, Rameshbhai Prabhudas, Prahladbhai Somabhai and Kalabhai Bhikhabhai. Thus, from the testimony of this witness, it is apparent that he is a resident of Shaikh Mohalla; his daughter Ashiyanabanu died in the incident which took place inside Mehmoodmiya's house; and that his wife and children have also sustained injuries. In the cross-examination of this witness, he has stated that he had talked with Teesta Setalvad on the phone. That he had gone with Jamalbhai Dosbhai of his village to Ahmedabad for preparing the affidavit. He has admitted that in his affidavit, he had averred that, "*I have made this statement of my own free will and having fully understood the implications of this statement. I have made this statement upon detailed questioning on the telephone of a journalist/human rights activist, Teesta Setalvad and in the presence of Shri Rais Khan Aziz Khan Pathan.*" This witness has admitted that at Pathan Mohalla, he had gone to Munsafkhan's house and he had set out on the road at Shaikhvas and hiding himself he had gone there. In his cross-examination, it has further come out that for the first time he had seen the mob from the corner of Shaikh Mohalla from a distance of about 20 to 25 feet and that upon hearing the shouts, he went and hid behind Tulsibhai's house. He has stated that on seeing that he did not feel afraid. On seeing the mob, he did not run. He had seen the mob from near Akbarbhai's bathroom's wall. There were about 1000 to 1500 persons in the mob. He had seen the persons in the mob, looting and burning the cabins. He has denied that at that time

the police had come and resorted to firing. A contradiction is brought out that in his statement dated 2<sup>nd</sup> March, 2002 before the police, he had stated that the police had resorted to firing. He has stated that at the time when the incident of burning houses in the Shaikh Mohalla occurred, he was next to his house. Half of the persons in the mob were coming from the main gate and the other half were coming from the direction of the wall of the kabristan. He had seen the members of the mob entering Shaikhvas and looting and burning the houses. At that time, he was standing against the wall of his house. He has stated that his house and the house next to his house were not burnt. He has stated that next to his house, is Akbarmiya's house and next to that, is the house of Mustufamiya. He has stated that he and his younger brother Mohammad Sattar were residing at Sardarpura since their birth and most of the people in the village knew them. A contradiction has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002, he had stated that at that time, he having gone towards Harijanvas, from far he had seen from their village .... and the houses were set on fire. The contradiction is limited to the words "Harijanvas" and having seen from far. A further contradiction has been brought out to the effect that in his statement dated 19<sup>th</sup> May, 2008 before the SIT, the witness has stated that Patel Ashwinbhai Baldevbhai, who is known as Nagar (Botham), Sindhi Narva Shitalbhai, Prajapati Babubhai Lavjibhai, Prajapati Gordhanbhai Revabhai, Prajapati Rajeshkumar Amratbhai, Prajapati Rameshbhai Bharatbhai, Prajapati Rohitkumar Ramanbhai, Prajapati Ravikumar Amratbhai and Prajapati Ramanbhai Ganeshbhai were not named by him and that he believes that the police has written their names on their own. A further contradiction has been

brought out that the witness has not named Rameshbhai Ganeshbhai in his statement dated 2<sup>nd</sup> March, 2002. Thus, from the cross-examination of this witness, a contradiction has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002, he had not stated that after some time, the same mob had come and to the effect that at that time, he had seen the accused from a distance from the direction of Harijanvas.

38.6 This witness has also been sought to be cross-examined with regard to the contents of his affidavit and the other statements to bring out certain omissions. As recorded hereinabove, considering the fact that the subsequent statements were in the nature of further statements, having omitted to say something which was already stated in the previous statement, cannot be treated as an omission. The affidavit having been made for a totally different purpose, not having stated something in the affidavit cannot be treated as an omission. Besides, the affidavit being only in the nature of a former statement, the contents thereof can only be used for the purpose of impeaching the credibility of the witness.

38.7 From the testimony of this witness, it appears that at the relevant time when the incident started, he was at the mohalla. He had left his wife and children in Mahemoodmiya's house and thereafter, upon the mob having started burning the houses, he had fled from the rear side of the mohalla to Pathan Mohalla and had gone to Munsafkhan's house. Subsequently after the police having come, he appears to have returned to the mohalla and then gone along with his wife and children to the hospital. This fact is further fortified by the inquest panchnama of Ashiyanabanu, daughter of the witness,

which was carried out between 7 to 7:30 in the morning on 2<sup>nd</sup> March, 2002 and it was this witness Ashiqhussain Shaikh, who had identified the dead body of his daughter Ashiyanabanu. Therefore, the presence of this witness at the time of drawing the inquest panchnama is established. Accordingly, it cannot be disbelieved that after the incident this witness had accompanied his wife and children to the hospital. The testimony of this witness is sought to be assailed on the ground that while the witness has stated that his father told him to go and leave the family members at Mahemoodmiya's house, his father Bachumiya Imammiya, is silent in this regard in his deposition. In the opinion of this court, merely because Bachumiya Imammiya, the father of the witness has not stated certain facts in the same manner as stated by this witness, is no reason to disbelieve the testimony of this witness, inasmuch as, two persons would normally not depose identically unless they are tutored. The testimony of this witness has also been assailed on the ground that his claim that his wife, son and another daughter were inside Mahemoodmiya's house, cannot be considered, inasmuch as, considering the nature of the incident and Mahemoodmiya's house being enclosed, it is not possible for anybody who is inside, to remain alive or escape without any injury, for the reason that those who were inside the house remained there for more than an hour and that in view of the smoke caused as a result of the fire, it would be severely suffocating inside the room. It has been contended that the cause of death of majority of the deceased was asphyxia due to suffocation; therefore, it cannot be believed that the victims could have escaped without any injury or could have survived inside the house. It was also contended that Sahinabanu is a small child of only five years of age and had

she been inside the room, it would not have been possible for her to survive. Various other submissions have been made in respect of the testimony of the wife of this witness to doubt the presence of his wife, son and daughter in the room, which shall be discussed subsequently while considering the testimony of the witness's wife. Referring to the testimony of Dr. Dhirajkumar Soni (PW-1), it was submitted that the witness has stated that if in any one room there are thirty to forty persons and there is smoke in the room and if the patient is inside the room, then there would be carbon particles inside the room and he would have difficulty in breathing. Insofar as the contention with regard to the doubt raised by the learned counsel for the appellants as regards the presence of the wife of this witness together with his son and daughter inside the house of Mahemoodmiya's on the ground that having regard to the nature of the incident, they would not have been able to survive in the house is concerned, the same shall be discussed separately while considering the issue as to whether it was possible for anyone to have survived in Mahemoodmiya's house or to escape without any serious injuries.

38.8 From the testimony of this witness, it is clear that he is a resident of Sardarpura since his birth. He was residing in Shaikh Mohalla together with his father, his wife and other family members. His presence at the scene of incident, therefore, cannot be doubted. The witness has named certain accused as having been seen by him at the commencement of the incident, namely, when the houses at Shaikh Mohalla were burnt and has deposed that thereafter, he had fled to Pathan Mohalla. The main inconsistency in the testimony of this witness is as regards from where he had seen the accused. It

appears that in his statement dated 2<sup>nd</sup> March, 2002 before the police, the witness has stated that while fleeing from Shaikh Mohalla in the direction of Harijanvas, from a distance he had seen the accused persons, whereas in his deposition, he has stated that he has seen the accused while he was in the mohalla. In this regard, it is an admitted position that in his statement dated 2<sup>nd</sup> March, 2002, which was made at the earliest point of time, viz., on the date of the incident itself, the witness has named the accused persons. As held by the Supreme Court in a catena of decisions, a witness, would normally try to improve upon his testimony with a view to appear more credible. Therefore, merely because the witness has improved upon the original version by stating that he had seen the accused while he was in the mohalla instead of from a distance while he was fleeing from the mohalla, there is no reason to disbelieve the testimony of the witness. Besides, on a close reading of the testimony of the witness, it is evident that in his police statement, what he had stated is that he was towards Harijanvas and not at Harijanvas and had seen from a distance. However, it is not clear as to what was the distance from where he had seen the mob. No question has been put to the witness in his cross-examination to the effect that from the place where he had seen the accused, he could not have identified them. However, having regard to the fact that in his original statement, the witness had stated that he had seen the accused from a distance, the court would not place reliance solely on his testimony, but would also look for corroboration in the testimony of other witnesses or supporting witnesses.

39. **PW-59 Mohammad Sattar Bachumiya Shaikh** has been examined at Exhibit-557. This witness has stated that he is a resident of Sardarpura and is residing at Shaikhvas. His family is comprised of his parents, his two brothers and six sisters. His father's name is Bachumiya Imammiya Shaikh and his mother's name is Sharifabibi Bachumiya Shaikh. His brother whose name is Ashiqhussain Bachumiya is married and his wife's name is Faridabanu and he had three children Ashiyanabanu Ashiqhussain aged 10, Sahinabanu Ashiqhussain aged 5 and Aftabhussein Ashiqhussain aged 2. Four of his sisters are married and two sisters are residing with them at Shaikhvas. On 27<sup>th</sup> February, 2002, the incident of burning the train at Godhra took place. On 28<sup>th</sup> February, 2002, the Vishwa Hindu Parishad gave a call of Gujarat Bandh and his father had asked the family members not to go out of the house. In the evening, they had learnt that two Muslims had been burnt alive in the neighbouring village of Ladol and on 1<sup>st</sup> March, 2002, there was a call of Bharat Bandh. On that day, his father had told them not to go out of the house. In the evening, at about 9:30, a mob of Patels came from the direction of Mahadev shouting "burn, cut, kill" and came to the corner of Shaikhvas and vandalized three cabins, looted them and set them on fire and he had seen many people and identified Rajeshbhai Punjabhai, Maheshbhai Jivanbhai, Ramanbhai Jivanbhai and Chaturbhai Vitthalbhai. Upon the police coming, the mob had fled and the same mob came at 11:30 to 12:00 shouting and screaming "kill the Muslims, burn them alive and today, no Muslims should be left because the Muslims had burnt Hindu persons alive at Godhra and, therefore, burn them alive and kill them" and started throwing stones. They faced the stone throwing for a while. The stone throwing was very intense and

they were vandalizing their houses and setting them on fire and as they were all frightened, his father told that the members of the family be left at Mahemoodmiya's pucca house, his elder brother went and left the family members and upon the mob rushing in forcefully, out of fear, he hid in Akbarmiya Rasulmiya's house and shut off the light which was on and watched from the window. They set ablaze their jeep which was lying in front of their house, and in the light of the flames he saw Ambalal Maganlal with dharia, Rajeshkumar Punjabhai with stick, Chaturbhai Kanabhai with iron pipe, Rameshbhai Kantibhai with dharia, Jagabhai Davabhai, Raghubhai Revabhai, Mathurbhai Ramabhai, Dineshbhai Baldevbhai, Jayantibhai Ambalal, Jayantibhai Mangalbhai @ Bakabhai, Maheshbhai Jivanbhai, Chaturbhai Vitthalbhai, Ramanbhai Jivanbhai, Babubhai Kantibhai with mud pieces and stones, Kachrabhai Tribhovanbhai with glass (bottle), Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Kanubhai Revabhai, Natubhai Kachrabhai and Kanubhai Joitabhai. These people were burning their houses and went towards Mahemoodmiya's house and he went back to his house. There were cries for help coming from Mahemoodmiya's house and out of fear he kept hiding in his house. After some time, the mob said 'Bharat Mata Ki Jai' and went away and thereafter upon the police arriving, he and the other persons of the mohalla who were hiding nearby, went towards Mahemoodmiya's house and after opening Mahemoodmiya's house, they had taken out those who were alive, including his two sisters Firozabanu, Farzanabanu and his sister-in-law Faridabanu, his niece Ashiyanabanu, Ayubmiya Rasulmiya, his wife Sahinabibi, Basirabibi Bachumiya and her three children. His sister-in-law and niece had sustained burn injuries.

Amongst those who were dead were Manubhai Painter and his wife Johrabibi, Bismillabibi, Idrishmiya Rasulmiya, etc. in all, about twenty-eight persons had died inside. Those who were burnt were taken to Civil Hospital and his niece Ashiyanabanu died on the way to the Civil Hospital. He had not sustained any injuries in the incident. The police had recorded his statement at Mehsana Civil Hospital. The witness has further deposed that from Mehsana Civil Hospital, they went to Ladol where they stayed for six to seven days and from there, they went to Panpur Camp where they stayed for two and a half to three months. Then they went to Satnagar where houses were constructed for them. Thereafter, he made an affidavit before the Supreme Court. He has identified Ambalal Maganbhai, Amratbhai Somabhai, Rajeshbhai Punjabhai, Kanubhai Joitabhai, Kanubhai Revabhai, Natubhai Kachrabhai, Prahladbhai Jagabhai, Chaturbhai Vitthalbhai, Maheshbhai Jivanbhai, Mathurbhai Ramabhai, Ashwinbhai Jagabhai, Ramanbhai Jivanbhai, Chaturbhai Kanjibhai as Chaturbhai Kanabhai, Rameshbhai Kantibhai, Jagabhai Davabhai, Dineshbhai Baldevbhai, Kachrabhai Tribhovandas and Jayantibhai Ambalal as being in the mob. He has stated that Babubhai Kantibhai and Jayantibhai Mangalbhai were not seen in the court room. [Though in fact they were present in the court room].

39.1 This witness has been cross-examined as regards the manner in which the affidavit made by him before the Supreme Court was prepared. In his cross-examination, the witness has stated that he has one house in Shaikhvas and that his father's house and his house are one and the same. He and his father and brothers and sisters all reside in the same

house. On one side is Ibrahimbhai's house and on the other side is Akbarbhai's house. He has voluntarily stated that between his house and Ibrahimbhai's house, there is a gallery (strip of open land used as a water course). He has admitted that in his affidavit, he has not stated that there is a gallery between Ibrahimbhai's house and his house. He has denied that he has not stated these facts before the police. He has stated that his house is comprised of two rooms and one can go from one room to the other. He has stated that he had seen the mob from his house. He has denied that his entire house was set on fire. He has admitted that his house was vandalized. He has stated that when the members of the mob entered his house, there was no one inside. He has thereafter corrected himself to the effect that he does not know as to whether anyone was inside the house. He has stated that he had not seen the weapons being used by any of the people and that his father had not sustained any injury with a weapon. In his cross-examination, it has been elicited that he went to his house after the incident, after approximately one to one and a half hour. He has stated that Akbarmiya Rasulmiya's house was adjoining his house, that the mob had not entered the house in which he had hidden himself and that till he was in the house, it was not vandalized. The house in which he had hidden himself had two rooms and he had shut the lights of the room in which he had hidden himself. He does not remember as to whether the lights in Shaikhvas were on or not. The witness has admitted that if one wants to flee from Shaikhvas one can go from the front entrance or from the rear side of Mahemoodmiya's house. If one wants to flee from the rear side of the row of his house and Akbarmiya's house it is not possible. If one wants to go from his house to Akbarmiya's

house, one has to come out, one cannot go from inside. In his cross-examination, it has come out that vandalizing of their houses started from about 11:30 to 12:00. When the mob came for the second time it had damaged the houses. After the mob came for the second time, the incident lasted till about 2:30 to 3:00. From the time the mob came and the incident took place till 2:30 to 3:00, the mob was at Shaikhvas. He has seen the persons in the mob entering the line of houses opposite his house. He had seen the houses in the opposite row being set on fire. He has recognised the persons who were burning the houses and vandalizing them. In his cross-examination, he has also stated that when the mob went towards Mahemoodmiya's house, at that time he went from Akbarmiya's house to his own house. He has admitted that if one wants to flee from Shaikhvas, then one has to go from the entrance or rear side of Mahemoodmiya's house. That his house and Akbarmiya's house are in the same line and it is not possible to flee from the rear side. He has stated that the rear side of the Patels' houses is on the side of their house and that if one wants to come from Akbarmiya's house to his house, one has to come out and one cannot go from inside. In his cross-examination, he has further stated that he had seen the members of the mob in the row of houses opposite his house and he had seen them set the houses on the opposite side on fire. He says that he can identify the persons who are burning the houses and vandalizing them. When the mob went towards Mahemoodmiya's house, he went from Akbarmiya's house to his house. He has admitted that he had seen the members of the mob from the window of Akbarmiya Rasulmiya's house and not from inside his house. He has admitted that in his affidavit dated 6<sup>th</sup> November, 2003 submitted to the Supreme Court, he

had stated that he had hidden himself inside his house away from the family. He has admitted that he has not stated in his affidavit that he had hidden himself in Akbarmiya's house. He has also admitted that in his statement dated 19<sup>th</sup> May, 2008 before the SIT, he had not stated that he had hidden himself inside Akbarmiya Rasulmiya's house. He has denied the suggestion that at that time, he was with his paternal uncle's son Safiq. A contradiction is sought to be brought out to the effect that in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, wherein he was questioned with regard to item No.3 of the affidavit before the Supreme Court, he had stated that at that time, he and his paternal uncle's son Safiq were inside his house. The witness has also been sought to be contradicted as to the statements made by him in the affidavit made before the Supreme Court, to the effect that he has not stated the facts deposed before the court in his affidavit. A contradiction has been brought out to the effect that in his statement dated 19<sup>th</sup> May, 2008 recorded by SIT, he has stated that in his statement dated 2<sup>nd</sup> March, 2002, the police had written the names of the accused and that he had not named them. A contradiction has been brought out to the effect that in his statement dated 2<sup>nd</sup> March, 2002, he had not named Ambalal Maganbhai, Rameshbhai Punjabhai, Chaturbhai Kanabhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai, Rameshbhai Gangaram, Sureshbhai Baldevbhai, Jagabhai Davabhai, Raghubhai Revabhai, Vishnubhai Gopalbhai, Karshanbhai Tribhovandas, Jayantibhai Mangalbhai, Dineshkumar Baldevbhai, Kanubhai Karshanbhai, Jayantibhai Baldevbhai, Mathurbhai Ramdas, Amratbhai Somabhai, Babubhai Kantibhai and Kachrabhai Tribhovandas. A further contradiction has been brought out to the effect that in his affidavit dated 6<sup>th</sup>

November, 2003, statement recorded by the police dated 2<sup>nd</sup> March, 2002 and statement recorded by the SIT dated 19<sup>th</sup> May, 2008, he has not named Jayantibhai Ambalal, Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Kanubhai Revabhai, Natubhai Kachrabhai and Kanubhai Joitabhai. In the cross-examination of this witness, a contradiction has been brought out that in his statement dated 19<sup>th</sup> May, 2008, upon being asked as to where he was at the time of the incident, he had stated that on that day at 9:30, the mob of Patels had started throwing stones and he and Safiq who is his uncle Babumiya Motamiya's son, both were inside their house and were hiding inside his father Bachumiya Imammiya's house and from the window, they had seen members of the mob. [Thus, from the testimony of this witness, a contradiction is sought to be brought out that before the SIT, he had said that he had not named any of the accused and that the police had written down on their own. It has been further sought to be brought out that this witness has also not named certain persons before the SIT, however, nothing has been brought on record as to which names he had actually stated before the SIT.]

39.2 PW-110 the Investigating Officer (Police), in his cross-examination, has admitted that Mohammad Sattar Bachumiya Shaikh had stated that there is a gallery between his and Ibrahimbhai's house. From the cross-examination of the Investigating Officer, it has been brought on record that this witness in his statement dated 2<sup>nd</sup> March, 2002 had named Ambalal Maganbhai, Rameshbhai Punjabhai, Chaturbhai Kanabhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai, Rameshbhai Gangaram, Sureshbhai baldevbhai, Jagabhai Davabhai, Raghubhai Revabhai, Vishnubhai Gopalbhai,

Karshanbhai Tribhovandas, Jayantibhai Mangalbhai, Dineshkumar Baldevbhai, Kanubhai Karshanbhai, Jayantibhai Baldevbhai, Mathurbhai Ramdas, Amratbhai Somabhai, Babubhai Kantibhai and Kachrabhai Tribhovandas. From the cross-examination of the Investigating Officer, it has also been brought on record that in his statement dated 2<sup>nd</sup> March, 2002, this witness has not named Jayantibhai Ambalal, Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Kanubhai Revabhai, Natubhai Kachrabhai and Kanubhai Joitabhai. The Investigating Officer in his cross-examination has admitted that this witness in his statement dated 2<sup>nd</sup> March, 2002 has stated that the mob of Patels had come from the direction of Mahadev. From the cross-examination of the Investigating Officer, it is further revealed that this witness in his statement dated 2<sup>nd</sup> March, 2002 had not stated that at 9:30 at night, three cabins had been set on fire and the same mob had come once again.

39.3 From the cross-examination of PW-112, the Investigating Officer (SIT), it is revealed that this witness in his statement dated 19<sup>th</sup> May, 2008 had stated that on that day at 9:30 at night, the mobs of Patels had started pelting stones and hence, he and Safiq who is his uncle Babamiya Motamiya's son, both of them had hidden inside their own house, namely, his father Bachumiya Imammiya's house and had seen the members of the mob from the window. The Investigating Officer (SIT) has further admitted that in his statement dated 19<sup>th</sup> May, 2008 this witness has not stated that he had seen the members of the mob from Akbarmiya Rasulmiya's window. The Investigating Officer (SIT) in his cross-examination has admitted that this witness in his statement dated 19<sup>th</sup> May, 2008 has stated that the names recorded in the statement

dated 2<sup>nd</sup> March, 2002 have been written down by the police and that he has not given the names of those persons.

39.4 The learned counsel for the appellants/accused had submitted that:

- the assertion of this witness that he had hidden inside Akbarmiya's house, switched off the light and was hiding and was looking through the window, is found to be contradictory to what he had stated in his affidavit and this fact he did not mention even before the SIT. It was submitted that this witness has made a contradictory statement in his own deposition as to where he was at the time of the incident.
- After the mob started ransacking the houses and setting them on fire, his elder brother Ashiqhussain (PW-55) had gone to put the family members in Mahemoodmiya's house is not possible and probable.
- In his affidavit dated 6<sup>th</sup> November, 2003, the witness has stated that he had hidden himself in his house away from his family which is mutually destructive to his assertion of having witnessed the incident or identifying the accused from the window of Akbarmiya's house.
- The witness has improved the sequence of facts.
- The witness does not specifically say that from the house of Mahemoodmiya, Aftab, that is, the son of PW-55 and PW-73 was also rescued in an injured condition; and secondly, he is also silent about Sahina, the daughter of PW-55 and PW-73. It was submitted that the first informant Ibrahimbhai in the first information report has given a full description of twenty-eight persons who died and has specifically stated that three persons have come

out alive, therefore, there is no possibility that anyone else was there inside the house. It was submitted that these three persons who came out alive also died subsequently. Therefore, considering the nature of injury that a person inside would receive, including severe suffocation, it is difficult to believe that anyone who was inside for one and a half hours could escape death, much less, severe burns or inhalation injuries.

39.5 It was submitted that though this witness has asserted that his house was ransacked and damaged and articles looted, including ornaments and cash and that he was inside the house hiding himself, it is surprising that he did not get any injury whatsoever. It was further submitted that after having said so, the witness has improved upon his version that the mob did not enter the house where he was hiding himself. It was contended that even if the say of this witness that he was in Akbarmiya's house is taken at its face value, it has to be seen that Akbarmiya's house was also ransacked and the witness has come out without any injury. It was further submitted that with reference to his statement in the affidavit about he and his cousin Safiq (PW-61) being in his own house on being asked by SIT, he has stated in his statement dated 19<sup>th</sup> May, 2008 that after the stone-pelting started, they both had hidden themselves in his own house and from the window, he saw the mob. It was submitted that, therefore, before the SIT, the witness has given a different version and in the affidavit, he has given a different version. Therefore, it is difficult to believe what part of the testimony of this witness should not be accepted and what part should be accepted.

39.6 Next, it was submitted that to support the improved version of the sequence of events, the witness has denied the fact of police firing and thereby has disowned his immediate statement made before the police and has not given a correct account of the facts. Though denied, he has stated before SIT that all the names appearing in the statement dated 2<sup>nd</sup> March, 2002 were not given by him but the police had written down the names on their own. Thus, this witness has changed the names of the accused from stage to stage and has either added new names and/or has subtracted the names according to his convenience. In his affidavit before the Supreme Court, he has specifically stated that he can identify only four persons whereas in his deposition, he has referred to almost twenty names and this change on his part really creates a doubt about his reliability. It was urged that the circumstances in which the affidavit was affirmed, creates serious doubts about the genuineness of the circumstances in which it was affirmed. It was submitted that the contents thereof as well as the circumstances in which the same has been affirmed together and notarized together, shows the possibility of the affidavits having being drafted by somebody else and the signatures having been taken thereon. It was further pointed out that the witness does not corroborate the facts stated by other witness as regards the time of setting gallas on fire as well as all family members going inside Mahemoodmiya's house except his father Bachumiya.

**39.7 ANALYSIS:** This witness is the son of Bachumiya Imammiya Shaikh and brother of Ashiqhussain Bachumiya. He has deposed that the mob had come at around 11:30 to 12:00, shouting, burn the Muslims alive etc. That his father had said

that the family members should be taken to the house of Mahemoodmiya, hence, his elder brother had gone and left his family members there. That since the mob forcibly rushed in, out of fear, he had hidden inside the house of Akbarmiya Rasulmiya, which was next door and had put off the lights which were on and looked outside from the window. He had seen the jeep parked in front of the house being set ablaze by the mob and in the light of the burning jeep, he had seen and identified Ambalal Maganlal with a dharia, Rajeshkumar Punjabhai with a stick, Chaturbhai Kanabhai with an iron pipe, Rameshbhai Kantibhai with a dharia, Jagabhai Davabhai, Raghubhai Revabhai, Mathurbhai Ramabhai, Dineshbhai Baldevbhai, Jayantibhai Ambalal, Jayantibhai Mangalbhai alias Bakabhai, Maheshbhai Jivanbhai, Chaturbhai Vitthalbhai, Ramanbhai Jivanbhai, Babubhai Kantibhai with stones, Kachrabhai Tribhovanbhai with glass bottle, Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Kanubhai Revabhai, Natubhai Kachrabhai, Kanubhai Joitabhai in the mob. These persons had vandalized their houses and set them on fire and had gone towards Mahemoodmiya's house and he had gone back inside his house and could hear the shouts, screams for help from the direction of Mahemoodmiya's house and out of fear, he had hidden himself inside the house. He has stated that in the incident, he had not sustained any injuries. This witness had also made an affidavit for the purpose of submitting the same before the Supreme Court. Out of the persons named by him, the witness has identified Ambalal Maganbhai, Amratbhai Somabhai, Rajeshbhai Punjabhai, Kanubhai Joitabhai, Kanubhai Revabhai, Natubhai Kachrabhai, Prahladbhai Jagabhai, Chaturbhai Vitthalbhai, Maheshbhai Jivanbhai, Mathurbhai Ramabhai, Ashwinbhai Jagabhai, Ramanbhai Jivanbhai,

Chaturbhai Kanjibhai as Chaturbhai Kanabhai, Rameshbhai Kantibhai, Jagabhai Davabhai, Dineshbhai Baldevbhai, Kachrabhai Tribhovandas and Jayantibhai Ambalal before the court.

39.8 This witness has been cross-examined as regards the manner in which the affidavits came to be made. In his cross-examination, he has stated that after the incident, he had gone inside his house after about one and half hours. Akbarmiya Rasulmiya's house is adjoining their house and that the mob has not entered the house where he was hiding. While he was hiding in the house, no destruction has been caused to it. He has not seen the house in which he had hidden being vandalized. The house in which he was hiding had two rooms and he had shut off the lights. He does not remember as to whether the lights were on in Shaikhvas. In his cross-examination, it has further come out that he had seen the mob entering the row of houses opposite his house and he had seen the houses in the opposite row being set on fire. He had identified the persons who were burning the houses and vandalizing them. When the mob went towards Mahemoodmiya's house, he went from Akbarmiya's house to his own house. He has admitted that he had seen the mob from the window of Akbarmiya's house and not from his house. He has stated that when he was in Akbarmiya's house, he does not know as to how many persons were there. He has stated that no one was with him.

39.9 A contradiction has been brought out to the effect that in his affidavit dated 6<sup>th</sup> November, 2003 made before the Supreme Court, he has stated that far alone from his family, he

had hidden himself. He has admitted that he has not stated having hidden inside Akbarmiya's house in his affidavit. The witness has also been sought to be cross-examined with regard to the facts stated by him in his statement dated 19<sup>th</sup> May, 2008 in connection with the facts stated in the affidavit before the Supreme court. In the opinion of this court, the trial court was not justified in permitting such cross-examination, inasmuch as, a witness can be cross-examined either under section 145 or even clause (3) of section 155 of the Evidence Act, only in respect of the facts which are contrary to what is deposed by him. If a witness has not deposed to certain facts in his examination-in-chief, it is not permissible to put questions to him in the cross-examination and then, to seek to contradict such statements brought out in the cross-examination as to any previous statement made by him. This witness has also been sought to be cross-examined as to certain omissions in the affidavit filed before the Supreme Court. As discussed hereinabove, not stating certain facts in the affidavit made for the purpose of submitting the same before the Supreme Court in a totally different set of proceedings, would not amount to an omission within the meaning of such expression as envisaged under section 162 of the Code. One significant contradiction brought out in the cross-examination of this witness is that in his statement dated 19<sup>th</sup> May, 2008 made before the SIT, he had stated that the names of the accused in his statement dated 2<sup>nd</sup> March, 2002 had not been given by him and that the police have written them down on their own. It may be noted that this witness has been sought to be contradicted with regard to his previous statement dated 2<sup>nd</sup> March, 2002, affidavit dated 6<sup>th</sup> November, 2003 and statement dated 19<sup>th</sup> May, 2008 made before the

SIT, without bringing out as to exactly what the witness is sought to be contradicted with. From the cross-examination of this witness, it has come out that when the incident of 11:30 took place, at that time, he was not at home, but was in the mohalla and there was intense stone throwing. When the stone throwing took place, he was in front of his house. He has stated that he had seen Manubhai's house being set on fire while standing in front of his house. In his cross-examination, it has further come out that while he was inside Akbarmiya's house, the mob was at a distance of 15 to 20 feet. He has admitted that at that time, family members of Akbarmiya Rasulmiya had left the house open and had fled. In the cross-examination of this witness, it has come out that the mob was targeting one house after the other. The mob would first vandalize one house and thereafter, go to the next house. The mob had not entered Shaikh Mohalla at a time and destroyed it. The mob had started vandalizing the houses in the row opposite his house. He has stated that he had seen Ayubmiya's house being vandalized and thereafter, he had hidden himself. In his cross-examination, he has stated that he knows Rais Khan Aziz Khan Pathan, but does not know whether he is an advocate. He had met him at Ahmedabad Court. He had met Teesta Setalvad in her office. The witness is a resident of Sardarpura and has been residing at Shaikh Mohalla with his family members; therefore, his presence at the scene of incident cannot be doubted. While this witness has named and identified several accused, a major ground for assailing the testimony of this witness is the fact that before the SIT, in his statement dated 19<sup>th</sup> May, 2008, the witness is stated to have said that he had not named any person in his original statement recorded on 2<sup>nd</sup> March, 2002 and that the police had

written names on their own. On this basis, the learned counsel for the appellants – accused has sought to contend that therefore, this witness would be naming and identifying the accused for the first time before the court. From the cross-examination of the Investigating Officer who had recorded his statement dated 2<sup>nd</sup> March, 2002, it has been brought on record that this witness had, in fact, named all the accused persons. At the same time, from the cross-examination of PW-112 Investigating Officer, SIT, it has been brought on record that this witness had, in his statement recorded by him, stated that he had not named the accused in his statement dated 2<sup>nd</sup> March, 2002 and that the police had written them down on their own. Despite this position, as is evident, on a perusal of the testimony of this witness, he has named the accused whom he had named in his statement dated 2<sup>nd</sup> March, 2002 before the court and has identified many such accused persons. Be that as it may, the fact remains that the witness is not consistent in his version, inasmuch as, firstly he has named certain accused before the police and then before the SIT he has resiled from the earlier statement, and once again before the court he deposes in terms of his first statement. The conduct of the witness changing his stand from time to time as regards the presence of the accused named by him in his initial statement, therefore, creates a doubt regarding the veracity of the version given by the witness to the extent of the accused regarding whom he has stated before the SIT that he had not named them. While it is true that the version given before the court is the substantive evidence and the witness has named the accused before the court as well as in his initial statement before the police, which fact is borne out from the testimony of PW-110, the Investigating Officer, who had

recorded the statement dated 2<sup>nd</sup> March, 2002 and has admitted in his cross-examination that this witness had named all the accused persons in his statement dated 2<sup>nd</sup> March, 2002, it is equally true that before the Investigating Officer (SIT) the witness, in his statement dated 19<sup>th</sup> May, 2008, had stated that he had not named the accused in his statement before the police and that the police had written them down on their own, which contradiction is proved through the testimony of the Investigating Officer (SIT). In the opinion of this court, in these circumstances, it would be hazardous to place reliance on the testimony of this witness against these accused in respect of whom he has stated before the SIT that he had not named them in his statement recorded by the police.

39.10     Nonetheless, it may also be germane to notice the manner in which the SIT has recorded the statements of the witnesses. For the purpose of understanding the manner in which the Investigating Officer, SIT had recorded the statements of the witnesses, this court had undertaken the exercise of going through some of the statements recorded by PW-112 Investigating Officer (SIT). A general pattern found in the statements of majority of the witnesses was that they had stated that: (1) In their statements before the police, it is recorded that the police had resorted to firing, however, the police had not resorted to firing; (2) Another stock statement recorded is to the effect that the witness had not named the accused and the police had written them down on their own. Such statement is even recorded in the case of PW-80 Rukshanabanu Ibrahimmiya, who, in fact, has not even named any accused in her statement before the police. Therefore, the

manner in which the statements have been recorded by the Investigating Officer, SIT, leave a lot to be desired.

**40. PW-60 Bachumiya Imammiya Shaikh** has been examined at Exhibit-563. He has deposed that he was residing at Shaikh Mohalla in Sardarpur at the time of the incident and at that time, there were about twenty houses belonging to Shaikhs in the Shaikh Mohalla. Shaikhs who resided at Shaikh Mohalla were mostly engaged in casual labour and farm labour. In his family, he has two sons and six daughters, his wife, his son's wife and his three grand children. His wife's name is Sharifabibi. His elder son's name is Ashiqhussain and his younger son's name is Mahamamat Sattar. His elder son is married and his wife's name is Faridabibi. His elder son's daughter's name is Ashiyana who was about ten years old. She died in the incident. She was burnt. His elder son had another daughter named Sahinabanu, who was aged about seven years and younger to her was a son by the name of Altaf, who was four years old. His younger son was not married. The names of his daughters are Bilkisbanu, Firozabanu, Faridabanu, Rafikabanu, Raishabanu and Farzanabanu, out of whom, four are married. At the time of the incident, Firozabanu and Farzanabanu were residing with them. He had retired on 28<sup>th</sup> February, 1999 and after his retirement, he was running a jeep car bearing registration No.GJ-17-A-8775, which he had purchased for a sum of Rs.1,72,000/- from Hargovanbhai Parsottamdas Patel, resident of Mehsana. His elder son Ashiq used to run the jeep on hire. His younger son was also serving as a driver. There were approximately hundred houses of Muslims in Sardarpura. The witness had further deposed that on 27<sup>th</sup> February, 2002, a train was burnt at Godhra. On 27<sup>th</sup>

February, 2002, he was sitting under the banyan tree at the corner of their mohalla and thereafter, about three to four cars came from the market and went towards Mahadev. The cars belonged to Haresh Bhatt and leaders of the Bajrang Dal. The Patels had held a meeting inside Mahadev and had distributed trishuls and at that time, Haresh Bhatt was saying that this time, when there are riots, not a single Muslim should escape and if they needed weapons, they should tell him. Four days prior to 27<sup>th</sup> February, 2002, he was sitting at Rafiqbhai's galla, at that time, Raghubhai Revabhai came and told him to remove his cabin which was touching his house as he had filled fodder in his house and it would be burnt. On 28<sup>th</sup> February, 2002, there was a declaration of Gujarat Bandh and at that time, in the morning, at around 10 o'clock, while he was sitting at his galla, Patel Rajeshbhai Punjabhai, Rameshbhai Kantibhai, Maheshbhai Jivanbhai came and had said that, since there is a declaration of Gujarat Bandh, he should close his galla. Rameshbhai Kantibhai had caught hold of Rafiq by his waist and thereafter, those persons had gone towards Mahadev.

40.1 On 28<sup>th</sup> February, 2002, in the evening at around 5 o'clock, wireman Mathurbhai Trikambhai had directly started a light from the electric pole at the corner of their mohalla and Becharbhai Odhavbhai and Kanubhai Sarpanch were standing below. A focus light had been placed on the pole of their kabrastan wherfrom the light was falling over their mohalla. On 28<sup>th</sup> February, 2002, during night hours, cabins of Muslims and lower castes had been set on fire. On 1<sup>st</sup> March, 2002, there was a declaration of Bharat Bandh and all the members of Shaikh Mohalla were present at 09:30 at night, people from the village came from the direction of Mahadev shouting

"Bharat Mata Ki Jai" and had weapons and tins of something like petrol, kerosene in their hands and in the brightness of the light, he had seen the mob wherein Kachrabhai Tribhovanbhai, Ambalal Maganbhai, Kanubhai Joitabhai Sarpanch, Jivanbhai Davabhai, Rameshbhai Kantibhai, Jayantibhai Ambalal, Mangalbhai Mathurbhai, Ashwinbhai Baldevbhai Nagar and Rajeshbhai Punjabhai were present. At that time, three cabins at the corner of their mohalla had been vandalized and set on fire after pouring petrol, kerosene etc. Thereafter, the police had come and the mob had dispersed. The mob came again at around 11 o'clock and started pelting stones from the road. Firstly, Manumiya Alammiya alias Bhaimiya's house was set on fire; secondly, Akbarmiya Nathumiya's house was set on fire; thirdly, Bachumiya Nathumiya's house was set on fire; thereafter, Rasulmiya Nannumiya's house was set on fire, then Jamalbhai Dosabhai's house was set on fire. Thereafter, the members of the mob sprinkled kerosene over his jeep and set it on fire. At that time, Kachrabhai Tribhovandas and Ambalal Maganbhai had poured petrol and kerosene. Rajeshbhai Punjabhai had thrown a burning rag and there were huge flames. Thereafter, the same mob from the village went towards Mahemoodbhai's house and broke the window and poured kerosene and petrol inside and threw burning rags and burnt twenty-eight women, men and small children. Thereafter, at 02:30 hours, the DSP came and those people had left. Thereafter, the police had said that whoever is alive should come out and that they were the police. The DSP called for a car and the deceased persons were put in a hand-cart and those persons who had lesser and higher degree injuries were taken to the Mehsana Civil Hospital. The mob had looted around Rs.60,000/- to

Rs.70,000/- worth of goods from his house, which included his daughter's mangalsutra, his younger daughter's necklace, Faridabahu's chain and six rings belonging to him. About Rs.70,000/- in cash being the amount received from hiring the car was also looted. Thereafter, he had stayed at Vijapur at his in-law's house. Navalsinh, a constable at Vijapur Police Station told him that he would have to come with him to Sardarpura as the panchnama of the houses was to be carried out. There were four other policemen with him in the car, two in civil dresses. Upon going to Sardarpura, the police asked him as to which house belonged to whom, and he had pointed out the same to them and thereafter, they had come towards Vijapur. The police had recorded his statement on 3<sup>rd</sup> March, 2002 at Vijapur Police Station. He stayed at Vijapur for about fifteen days and thereafter, they went to the relief camp at Panpur Patiya, Himatnagar. They stayed there for approximately three months and thereafter, as they started constructing their house, they stayed in a tent at Satnagar. His second statement had been recorded by the SIT on 9<sup>th</sup> May, 2008. The witness has produced on record a copy of the written application which he had given at the time when his statement came to be recorded on 9<sup>th</sup> May, 2008. At this stage, the prosecution has sought permission to exhibit the application, which request was objected to by the learned counsel for the defence. The trial court turned down the request to exhibit the application on the ground that it could be said that it was made during the course of investigation. On 11<sup>th</sup> April, 2008, he along with other residents of Shaikh Mohalla had got together and addressed a letter to Shri Raghavan through registered A.D. A request was made by the prosecution to exhibit the letter, which was opposed by the defence. The trial court deferred the issue till

the time of deciding the trial. The witness has further stated that he would be in a position to identify the persons whom he has named in his deposition. He has identified Kachrabhai Tribhovanbhai, Ambalal Maganbhai, Mathurbhai Trikambhai [referred to in the context of putting up focus light] and Mangalbhai Mathurbhai from the witness box. The witness has thereafter got down from the witness box with the permission of the court and had gone near the accused and identified Kanubhai Joitaram. Thus, the witness had identified four accused in connection with the main incident and one witness, viz. Mathurbhai Trikambhai in the context of putting up focus light.

40.2 In the cross-examination of this witness, a contradiction has been brought out to the effect that in his statement before the police dated 3<sup>rd</sup> March, 2002, he had not named Ambalal Maganbhai Patel, Mathurbhai Trikambhai, Mangalbhai Mathurbhai and Kanubhai Joitaram. A contradiction has also been brought out to the effect that in his statement dated 3<sup>rd</sup> March, 2002, he had not stated any facts regarding Haresh Bhatt having come to their village and having distributed trishuls; or that Raghubhai Revabhai had come and told Rafiqbhai to remove his cabin as it was touching his house and hence, the fodder would get burnt. Further contradictions have been brought out to the effect that in his above statement, the witness has not stated the incident regarding Patel Rajeshbhai Punjabhai, Rameshbhai Kantibhai and Maheshbhai Jivanbhai having come and asked him to close down the galla or that Rameshbhai Kantibhai had caught him by his waist; that he has not stated about the incident regarding wireman Mathurbhai Trikambhai directly connecting the street-light of

the pole at the corner of Shaikh Mohalla and that Becharbhai Odhavbhai and Kanubhai Sarpanch were standing below; and that a focus light had been put on the pole of kabrastan so that the light falls on the mohalla. In his cross-examination, the witness has denied the suggestion that at 11:30, he had hidden himself beside his jeep; however, the witness is sought to be contradicted as to his statement dated 3<sup>rd</sup> March, 2002, wherein he has stated that since his jeep was lying in front of his house, and with a view to see that it is not damaged, he had hidden nearby. The witness had denied that at the time of the incident he had hidden inside his house. The witness is sought to be contradicted as to his statement dated 10<sup>th</sup> May, 2008 recorded by the SIT, wherein he has stated that at that time he was hiding inside his house. In his cross-examination, the witness has admitted that he has not named Rameshbhai Baldevbhai and Ramanbhai Ganeshbhai Prajapati before the police and that the police had written down the names on their own. A contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> May, 2008 recorded by the SIT, he had stated that Haresh Bhatt and the leaders of the Bajrang Dal had come fifteen days prior to the Godhra incident that had taken place on 27<sup>th</sup> February, 2002. In his cross-examination, it has also been elicited that he had not seen Haresh Bhatt coming with his own eyes but that Iqbalbhai had informed him about it.

40.3 From the cross-examination of PW-110 the Investigating Officer (Police), it has been proved that this witness in his statement dated 3<sup>rd</sup> March, 2002 had not named accused Ambalal Maganlal Patel, Mathurbhai Trikambhai, Mangalbhai Mathurbhai and Kanubhai Joitaram. From the cross-

examination of the Investigating Officer (Police), it has been brought on record that this witness had not stated that four days prior to 27<sup>th</sup> February, 2002, he was sitting at Rafiqbhai's galla, at that time, Raghubhai Revabhai had come and told him to remove his cabin which was touching his house as the fodder in his house would get burnt. An omission has been brought out through the testimony of the Investigating Officer to the effect that in his statement dated 3<sup>rd</sup> March, 2002, this witness had not stated with regard to the houses being burnt and thereafter, the mob having sprinkled kerosene. In the cross-examination of the Investigating Officer, it has also been brought out that this witness in his statement dated 3<sup>rd</sup> March, 2002 has stated that his jeep was lying in front and with a view to see that no damage is caused to it, he has hidden himself nearby and that upon his jeep being set on fire, he hid himself in somebody else's house and he, therefore, does not know what happened thereafter. The Investigating Officer has further admitted that this witness has, in his statement dated 3<sup>rd</sup> March, 2002 named six accused and that he has not named Ambalal Maganbhai, Kanubhai Sarpanch Joitaram, Jivanbhai Davabhai, Rameshbhai Kantibhai, Jayantibhai Ambalal, Mangalbhai Mathurbhai, Ashwinbhai Baldevbhai, Rajeshbhai Punjabhai and Maheshbhai Jivanbhai.

40.4 In the cross-examination of the Investigating Officer (SIT), it is brought out that this witness, in his statement dated 10<sup>th</sup> May, 2008, had stated that on 27<sup>th</sup> February, 2002, he was sitting below the banyan tree at the corner of the mohalla and three to four cars had come from the direction of the market and had gone towards Mahadev. Haresh Bhatt and Bajrang Dal leaders were there in the car. A meeting of Patels was

convened inside Mahadev and trishuls were distributed and at that time, Haresh Bhatt was saying that if this time there are riots, not a single Muslim should escape and that if they wanted weapons, they should come and ask from him. From the cross-examination of the Investigating Officer, it is further brought out that in his statement dated 10<sup>th</sup> May, 2008, this witness has stated that at that time, he had hidden himself inside his house. The Investigating Officer has further admitted that in his statement dated 10<sup>th</sup> May, 2008, this witness had stated that Haresh Bhatt and leaders of the Bajrang Dal had come fifteen days prior to the Godhra incident, which had taken place on 27<sup>th</sup> February, 2002.

40.5 The learned counsel for the appellants/accused referred to the deposition of this witness, to point out that the witness has come out with the theory that on 27<sup>th</sup> February, 2002, Haresh Bhatt and leaders of the Bajrang Dal had come to Mahadev temple and held a meeting and had distributed trishuls and Haresh Bhatt had stated that if there are riots, not a single Muslim should escape and that if they want weapons, they should ask him. It was further pointed out that this witness has also introduced another theory namely, that on 28<sup>th</sup> February, 2002 at around 5 o'clock, wireman Mathurbhai Trikambhai had directly started the street-light on the street-light pole at the corner of the mohalla and that Becharbhai Odhavbhai and Kanubhai Sarpanch were standing below. That a focus light had been put up on the electric pole of the kabrastan so that there was light over their mohalla. It was submitted that this witness has introduced four stories for the first time while deposing before the court namely, that (i) Haresh Bhatt had visited Sardarpura and had given a speech

instigating the Hindus at Mahadev temple; (ii) Raghubhai Revabhai had on 27<sup>th</sup> February, 2002 asked Rafiqbhai to remove his cabin as it was touching his house where there was fodder which could get burnt; (iii) on 28<sup>th</sup> February, 2002, when he was sitting at his galla, Rajeshbhai Punjabhai, Rameshbhai Kantibhai and Maheshbhai Jivanbhai had come and asked him to close down his galla and that Rameshbhai Kantibhai had caught him by the waist; and lastly, (iv) this witness has also introduced the theory of fixing focus light on a pole of the kabrastan as well as directly starting the street-light at the corner of Shaikh Mohalla. It was submitted that the sequence of events and the time of the incident has been materially changed and improved by this witness. The witness has disowned the statement made in his immediate version on 3<sup>rd</sup> March, 2002 regarding the time of incident as well as the fact of police firing. The witness has disowned his statement before the police about shutting all his family members in his house and then he himself and his son Ashiqhussain (PW-55) and all other neighbours having gone inside their respective houses because of the fire. More pertinently, this witness does not say a word about sending his family members to Mahemoodmiya's house. Therefore, the fact as stated by his sons Ashiqhussain (PW-55) and Mohammad Sattar (PW-59) and his daughter-in-law Faridabibi Ashiqhussain (PW-73), that he had asked Ashiqhussain to leave the family members in Mahemoodmiya's house does not get corroborated at all. It was submitted that though in his statement dated 3<sup>rd</sup> March, 2002, this witness has stated that with a view to protect the jeep, he had hidden himself nearby, he has denied and disowned such statement and on the contrary, as per his statement before the SIT, he had hidden himself in his own house. It was submitted that the

witness has stated that on 1<sup>st</sup> March, 2002, after his jeep was set on fire, out of fear he had hidden in another house and he does not know what had happened thereafter, but that fact has also been disowned by him and he had stated that he had hidden himself in Sherumiya Rasulmiya's house. Therefore, it is not clear as to where he was; how he had witnessed the incident; or how he had seen the accused. It was submitted that though the witness claims that during the entire period of the incident, he was either near the jeep, or in his own house, or in another house, or in the house of Sherumiya Rasulmiya and that there was intense stone pelting and ransacking of houses and the accused are said to be wielding weapons, surprisingly, the witness has not got any injury, which makes his say of being in Shaikh Mohalla improbable.

**40.6 ANALYSIS:** This witness is the father of PW-55 Ashiqhussain Bachumiya Shaikh and PW-59 Mohammad Sattar Bachumiya Shaikh. From the testimony of this witness, it emerges that the Shaikhs who were residing at Shaikh Mohalla were mostly engaged in casual labour and agricultural labour. He was working as a driver and had retired on 28<sup>th</sup> February, 1999 and had purchased a jeep bearing No.GJ-17-A-8775, which his son Ashiqhussain was driving on hire. His younger son was also serving as a driver. This witness has deposed regarding Haresh Bhatt and leaders of the Bajrang Dal having come to Sardarpura and having gone to Mahadev on 27<sup>th</sup> February, 2002 and convened a meeting of Patels where trishuls were distributed, and stated that if there are riots, no Muslims should be spared and if they want weapons, they should come to him. Another fact deposed by this witness is that four days prior to 27<sup>th</sup> February, 2002, he was sitting at

Rafiqbhai's galla and at that time, Raghubhai Revabhai had come and told him that his cabin was touching his house and that he should lift it from there as the fodder which was stored in his house would get burnt. He has also deposed with regard to Patel Rajeshbhai Punjabhai, Rameshbhai Kantibhai, Maheshbhai Jivanbhai having asked them to close down their gallas as there was a call of Gujarat Bandh and that Rameshbhai Kantibhai had caught Rafiqbhai from his waist and thereafter, they had gone towards Mahadev. This witness has also deposed regarding wireman Mathurbhai Trikamdas directly starting the light on the street light pole at the corner of their mohalla on 28<sup>th</sup> February, 2002 and having seen the accused in the mob at 09:30 in the brightness of the light. The witness has stated that the mob had come again at around 11 o'clock and had started pelting stones and has narrated the sequence in which the houses of Manumiya Alamiya alias Bhaimiya, Akbarmiya Nathumiya, Bachumiya Nathumiya, Rasulmiya Nannumiya and Jamalbhai Dosbhai were set on fire, whereafter the mob had set his jeep ablaze and Kachrabhai Tribhovandas and Ambalal Maganbhai had sprinkled kerosene and Rajeshbhai Punjabhai had thrown a burning rag on the jeep giving rise to were huge flames. Thereafter, the mob had gone towards Mahemoodmiya's house and broken the window, poured kerosene/petrol and thrown burning rags inside, and burnt twenty-eight persons to death. The witness has also identified some of the accused before the court. In the cross-examination of this witness, it has come out that in his statement dated 3<sup>rd</sup> March, 2002, he had not named Ambalal Maganbhai Patel, Mathurbhai Trikambhai, Mangalbhai Mathurbhai and Kanubhai Joitaram. Various contradictions have been brought on record regarding his not having stated

anything with regard to various incidents referred to in his examination-in-chief, which are stated to have occurred prior to the incident, in his statement dated 3<sup>rd</sup> March, 2002 recorded by the police. The witness has also admitted that he has not named Rameshbhai Baldevbhai and Ramanbhai Ganeshbhai Prajapati in his statement recorded by the police, and that their names had been written down by the police on their own. From the evidence on record, it emerges that at the time of drawing the panchnama of the scene of offence, this witness was present and had shown the houses in Shaikh Mohalla to the panch witnesses and pointed out as to who was the owner of each house. In relation to most of the questions put to him in his cross-examination, the witness has stated that he does not remember or does not know about the same. In his cross-examination, it has further come out that when the mob came at 11:30 and started pelting stones, he was in front of his house near the jeep. At that time, stone throwing was going on and hence, they had countered the same by resorting to stone throwing, but he had not been injured. The stone pelting went on till about half an hour. After the stone throwing, the act of setting the houses on fire was commenced. It is further elicited in his cross-examination that when three houses in Shaikh Mohalla were set ablaze, he was standing near his jeep and the mob was at a distance of ten feet from him. He has stated that the members of the houses which were burnt had hidden themselves with a view to save their lives and that he too had hidden himself. He has stated that he had not seen the members of the mob going inside the houses which were set on fire. He has further stated that thereafter, he had hidden inside Sherumiya Rasulmiya's house. He has also stated that the houses near Sherumiya

Rasulmiya's house were not damaged and at that time no damage had been caused to the houses in that line.

40.7 From the testimony of this witness, it is evident that there are various improvements in his testimony by way of incidents which are stated to have taken place prior to the incident having occurred. All these improvements are facts on which the prosecution has placed reliance for the purpose of establishing the theory of conspiracy and hence, the evidentiary value of these statements shall be considered while considering the theory of conspiracy put forth by the prosecution. Nevertheless, it is evident that there are exaggerations in the testimony of this witness as regards the incidents that have taken place prior to the occurrence of the main incident, which he had not stated at the first point of time when his statement came to be recorded by the police. However, insofar as the main incident is concerned, the core of the testimony of this witness is not shaken. The witness has deposed regarding having seen the members of the mob burning the houses at the time of the main incident and also having seen them setting the jeep on fire. Despite being subjected to a lengthy cross-examination, the core of his testimony is not shaken.

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40.8 From the evidence of this witness, it is evident that he has testified that initially, the mob resorted to stone throwing, which they resisted and that subsequently, the mob started burning the houses. It is the consistent case of several eye-witnesses that the mob started burning the houses one after another, and did not rush in at a time and burn all the houses together. According to this witness, he had seen the mob while

it was burning the first three houses as he was standing near his jeep. However, subsequently, the mob set his jeep on fire and thereafter, he took shelter in Sherumiya Rasulmiya's house. In the opinion of this court, if the witness was standing near the jeep and the mob was setting the houses on fire, it is quite possible that the witness could have seen and identified the known accused persons in the mob. Not having stated the manner in which the jeep was set on fire, would not amount to an omission in the nature of a contradiction, inasmuch as, it would be merely an elaboration of the facts already stated in his statement dated 3<sup>rd</sup> March, 2002. Insofar as his having taken shelter in the house of Sherumiya Rasulmiya is concerned, there is nothing on record to show that his house was damaged. While it is true that the panch witness has stated that all the houses on the row towards the rear side of the Patel houses were also burnt, as discussed earlier, the panchnama of the scene of offence was not read over to the witness and he had not affirmed the contents thereof, and hence, the contents thereof were not proved and in his testimony, the panch witness has made a general statement without describing the nature of damage caused to the houses in that row. Thus, while the panch witness has described the damage caused to the houses towards the side of the kabrastan in Shaikh Mohalla, he has made general statements with regard to the other side. It is for this reason that the court had perused the video recording of the scene of offence and it was found that insofar as the houses in the row on the rear side of the Patel houses are concerned, the damage caused to such houses appear to be on account of the intense stone pelting, due to which, the tiles of the roofs had broken and the sheet over the roofs had also fallen down. Insofar as

Sherumiya Rasulmiya's house is concerned, the same is totally intact and no damage is caused to it except for a few things having been vandalized outside. It appears that the mob had resorted to destroying and setting ablaze the houses in the row towards the side of kabrastan and not the houses which are towards the Patelvas out of fear that the same may cause damage to the houses of the Patels. Therefore, while some houses are found to be damaged, such damage appears to have been caused due to stone pelting and not due to burning. While some damage due to fire has been caused to the verandah and the front door of Bachumiya's house, it appears to be more on account of the jeep which was lying in front of the house being set on fire and not on account of the house itself being set ablaze by the mob. Therefore, the testimony of the witness to the effect that the houses opposite the row were set ablaze one by one as the mob went towards Mahemoodmiya's house appears to be credible and is supported by the evidence on record. In these circumstances, while to the extent of the exaggerations and the embellishments and subsequent improvements made by this witness in his examination-in-chief are concerned, the court may disregard them, however, the testimony of this witness qua the main incident cannot be totally disbelieved. Hence, to the extent the accused are named by this witness and identified before the court, the same can be taken into consideration while considering the culpability of the said accused. However, to be on the safer side, the court would look for corroboration from the evidence of other witnesses.

**41. PW-61 Safiqmiya Babumiya Shaikh** has been examined at Exhibit-570. This witness has deposed that he

was residing at Shaikhvas in Sardarpura along with his father Shaikh Babumiya Motamiya, his mother Barubibi Babumiya, his elder brother Shaikh Rafiqmiya Babumiya, his wife Shaikh Faridabanu Safiqmiya and his daughter Suhanabanu Shafiqmiya, aged 6 years.

41.1 The witness has further deposed that on 27<sup>th</sup> February, 2002, the incident of burning a train at Godhra had occurred. On 28<sup>th</sup> February, 2002, there was a declaration of Gujarat Bandh. On 1<sup>st</sup> March, 2002, there was a declaration of Bharat Bandh. On 1<sup>st</sup> March, 2002 at about 9:30 at night, a mob of Patels of the village came shouting and screaming kill the Miyabhais and burn them alive. There were three cabins at the entrance of Shaikh Mohalla which were vandalized and thereafter, set on fire. Upon the police coming, the mob had dispersed. At around 11:30 hours at night, again, the same mob came shouting kill the Miyabhais, cut them and burn them alive. Thereafter, there was intense stone pelting at Shaikh Mohalla during the course of which he had got injured on his right leg. The same mob came inside the Shaikh Mohalla burning house after house and he had seen and identified seven persons together with weapons, viz., Kachrabhai Tibhabhai, Patel Chaturbhai Kanabhai, Patel Ashwinbhai Pujabhai, Patel Ambalal Maganbhai, Patel Raghubhai Revabhai, Patel Pashabhai Mohanbhai and Patel Tulsibhai Gidhabhai. Thereafter, as he was afraid, he had hidden himself in Bachumiya Imammiya's naveli (water course). The mob started burning house after house and went towards Mahemoodmiya's house and upon reaching there, the members of the mob surrounded the house from all four sides and threw kerosene, petrol and burning rags and set it on fire. The people inside

were shouting loudly for help. At about 02:30 hours, the police vehicles came there and the police said that whoever was alive, should come out. He and the persons nearby who had hidden themselves came out and they all went towards Mahemoodmiya's house. They went there and saw that twenty-eight persons were burnt alive. His mother Shaikh Barubibi Babumiya had also died in that house, and his wife Faridabanu Safiqmiya, his daughter Suhanabanu Safiqmiya and other persons from the mohalla had also sustained burn injuries. They had taken out the persons who had got burnt and had gone to Mehsana Civil Hospital in a police vehicle. Upon reaching there, those who had sustained burn injuries had taken treatment. In the evening, at around 07:30 hours, they had gone to Ilol under police bandobast. On the next day of the incident, his daughter Suhanabanu Safiqmiya died at Ilol. Her burial ceremony was carried out at Ilol. However, her postmortem was not conducted. He has further deposed that they had stayed at Ilol for about four to five days and thereafter, had gone to Panpur Patiya Relief Camp where they stayed for approximately three months. The police had recorded his statement there. The SIT had also recorded his statement. He had written a letter informing about the death of his daughter and has put his thumb impression thereon. He has produced a panchnama of the burial and the death certificate at Exhibits 571 and 572. He has stated that he would be in a position to identify the persons whom he had seen in the mob and has identified Kachrabhai Tribhovandas, Raghubhai Revabhai, Ambalal Maganbai, Parsottambhai Mohanbai as Pashabhai Mohanbai, Tulsibhai Girdharbhai and Chaturbhai Kanjibhai. He has stated that Ashwinbhai Pujabhai is not present.

41.2 In the cross-examination of this witness, it has been brought out that in his statement dated 10<sup>th</sup> March, 2002, he had not stated that the same mob entered Shaikh Mohalla and were burning house after house and he had seen and identified Kachrabhai Tibhabhai, Patel Chaturbhai Kanabhai, Patel Ashwinbhai Pujabhai, Patel Ambalal Maganbhai, Patel Raghubhai Revabhai, Patel Pashabhai Mohanbhai, Patel Tulsibhai Gidhabhai together with weapons and that upon being afraid, he went and hid himself in Bachumiya Imammiya's water course. A further contradiction has been brought out as regards the time when the mob came again on 1<sup>st</sup> March, 2002 as well as the injury sustained by the witness. The witness has been sought to be contradicted as to his previous statement dated 10<sup>th</sup> March, 2002 to the effect that he had not stated that upon being afraid, he had hidden himself in Bachumiya Imammiya's water course. A contradiction has been brought out that in his statement dated 10<sup>th</sup> May, 2008 before the SIT, he had stated that he had not named Rameshbhai Baldev, Pawan Marwadi, Ashwinbhai Baldevbhai, Joita Gaadiwala and Dahyabhai Kachrabhai. An omission has been brought on record that in his statement dated 10<sup>th</sup> March, 2002, he had not stated that his wife and daughter Suhana had sustained burn injuries in the incident. An omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 recorded by the police and 10<sup>th</sup> May, 2008 recorded by the SIT, he had not stated that his daughter died during the communal riots. The witness has been confronted with his previous statement dated 10<sup>th</sup> March, 2002, wherein he had stated that both he and Bachumiya's son Mohammad Sattar, had hidden in the house next door, that is,

Akbarmiya's house. An omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, the witness has stated that the entire mohalla had caught fire due to which a police fire fighter had been brought which had extinguished the fire and the people who were alive were taken to Mehsana Civil Hospital in police vehicles. He has admitted that he has not taken treatment anywhere.

41.3 From the cross-examination of PW-110 the Investigating Officer (Police), it has further been brought out that this witness in his statement dated 10<sup>th</sup> March, 2002 has stated that both he and Bachumiya's son Mohammad Sattar had hidden themselves in Akbarmiya's house which is next to their house. .... The entire mohalla had caught fire due to which the police had come with a fire fighter and they had extinguished the fire and the survivors were taken in a police vehicle to Mehsana Civil Hospital. It is further brought out from the testimony of the Investigating Officer that in his statement dated 10<sup>th</sup> March, 2002, this witness had not stated that his wife Faridabanu had sustained burn injuries. The Investigating Officer has further admitted that this witness has not stated as to from where he had seen the incident. Through the cross-examination of the Investigating Officer, an omission has been brought on record to the effect that this witness in his statement dated 10<sup>th</sup> March, 2002 has not stated that "upon the same mob entering Shaikh Mohalla, burning houses after houses, he saw and identified, Kachrabhai Tibhabhai, Patel Chaturbhai Kanabhai, Patel Ashwinbhai Pujabhai, Patel Ambalal Maganbhai, Patel Raghubhai Revabhai, Patel Pashabhai Mohanbhai, Patel Tulsibhai Gidhabhai all seven with weapons. Thereafter, being afraid, he hid in Bachumiya Imammiya's

water course .... Again at around 11:30, the mob came shouting and screaming "kill the Miyas, cut them, burn them alive". Thereafter, they resorted to intense stone throwing at Shaikh Mohalla and he sustained an injury on his right leg with a stone. (The contradiction is with regard to the time viz. 11:30 and injury on the right leg).

41.4 The Investigating Officer (SIT), in his cross-examination, has admitted that this witness in his statement dated 10<sup>th</sup> May, 2008 has stated that he has not named Patel Rameshbhai Baldev, Pawan Marwadi, Ashwinbhai Baldevbhai, Joita Gaadiwala and Dahyabhai Kachrabhai in his statement recorded by the police. It has further come out that this witness in his statement dated 10<sup>th</sup> May, 2008 has not stated that Mahemoodmiya's house was surrounded by the mob.... his wife and his daughter Suhana sustained burns in the incident ... On the next day after the incident, his daughter Suhanabanu Safiqmiya had died and her burial ceremony was carried out at Ilol and that her post-mortem was not carried out... that upon the death of his daughter, he had informed the police by a letter. That his daughter had died on account of the communal riots and that his wife Faridabanu had also sustained burn injuries in the incident, etc.

41.5 The learned counsel for the appellants/accused invited the attention of the court to the injury certificate of the witness's daughter Suhanabanu, to point out that she had not sustained any burn injury. It was submitted that this witness claims that he received injury on his right leg only with a view to project that he was present there and that he is an eye-witness. However, in neither of his statements has he stated

that he had sustained any injury, nor has he been examined medically. No treatment certificate has been produced on record in support of his version and that he has mentioned this fact for the first time before the court. It was submitted that this witness further claims that when he was afraid, he had hidden himself in the *naveli* (water course) of Bachumiya Imammiya's house and after the incident, on the police asking them to come out, he came out along with others. It was submitted that this claim of the witness that he had hidden himself in Bachumiya's naveli has not been stated by him in any of his statements dated 10<sup>th</sup> March, 2002, 3<sup>rd</sup> May, 2002 and 10<sup>th</sup> May, 2008 and that this was stated by him for the first time before the court. It was further submitted that the witness further claims that his wife Faridabanu got injured by burns and his daughter Suhana also received burn injury, however, no medical certificate of his wife Faridabanu had come on record nor does the medical certificate of the treatment given to his daughter Suhana indicate that she had sustained any injury. It was submitted that Faridabanu has not been examined and the cause of death of Suhana, who died subsequently at Ilol on 3<sup>rd</sup> March, 2002 is not known as no post-mortem has been conducted. It was submitted that even this fact of burn injuries sustained by his wife and daughter is not stated in any of his statements dated 10<sup>th</sup> March, 2002, 3<sup>rd</sup> May, 2002 and 10<sup>th</sup> May, 2008 and he has stated this fact for the first time before the court. It was submitted that thus, the false claim as regards injuries to all three members of his family including himself, seriously affects the credibility of the witness. It was submitted that the witness has materially improved the sequence of events and time as tutored. It was submitted that the witness had mentioned about the incident

of 9:30 at the bus stand and the police resorting to firing in his first available statement recorded by the police, however, he has deliberately disowned the same while deposing before the court. It was submitted that the witness, in his statement dated 10<sup>th</sup> March, 2002 stated that he and Bachumiya's son, Mohammad Sattar had hidden themselves in the adjoining house of Akbarmiya though he has denied having said so. It was submitted that these facts run contrary to his own say and also to the say of his cousin Mohammad Sattar.

41.6 It was submitted that the claim of this witness that at 2:00 a.m. when the police came and told that whoever is alive may come out, he had come out with others, has not been stated by him in any of his statements before any of the investigating agencies. It was further submitted that this witness has affirmed an affidavit which apparently was prepared by somebody to create a story to falsely implicate innocent persons. It was, accordingly, submitted that the testimony of this witness lacks credibility and cannot be relied upon.

41.7 **ANALYSIS:** As per the testimony of this witness, when the mob came at around 11:30 at night, there was intense stone pelting and he got injured on his leg. The mob entered Shaikh Mohalla burning house after house and he had identified seven persons together with weapons namely, Kachrabhai Tibhabhai, Patel Chaturbhai Kanabhai, Patel Aswinbhai Pujabhai, Patel Ambalal Manganbhai, Patel Raghubhai Revabhai, Patel Pashabhai Mohanbhai and Patel Tulsibhai Gidhabhai. Thereafter, being afraid, he had hidden himself in Bachumiya Imammiya's water course (naveli). As

per the version given by this witness, the mob started burning house after house and went towards Mahemoodmiya's house and upon reaching there, surrounded the house from all four sides and threw kerosene, petrol and burning rags and set it on fire. According to this witness, his mother Shaikh Barubibi Babumiya died in the incident, his wife Faridabanu Safiqmiya sustained burns and his daughter Suhanabanu Safiqmiya also sustained burn injuries. On the next day after the incident, his daughter Suhana died at Ilol. The witness has identified Kachrabhai Tribhovandas, Raghubhai Revabhai, Ambalal Maganbhai, Parsottambhai Mohanbhai as Pashabhai Mohanbhai, Tulsibhai Girdharbhai and Chaturbhai Kanjibhai. The evidence on record reveals that this witness in his statement before the police had named Rajesh Punjabhai, Pawan Marwadi, Ramesh Baldevbhai, Ashwin Baldev, Joita Gaadiwala, Dahyabhai Kachrabhai and Mathurbhai Trikambhai. However, before the Investigating Officer (SIT) on 10<sup>th</sup> May, 2008, he had stated that he had not named the above persons before the police and that the police had not recorded the statement correctly and that in fact, Patel Chaturbhai Kanabhai, Patel Ashwinbhai Punjabhai, Patel Ambalal Maganbhai Kapur, Patel Raghubhai Revabhai, Tulsibhai Girdharbhai, Pashabhai Mohanbhai and Kachrabhai Tribhovanbhai were present in the mob. Thus, this witness has deposed in terms of the statement made by him before the SIT and named the accused, accordingly, and identified the above referred accused. In his cross-examination, a contradiction is brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 recorded by the police, he has not named the above referred accused whom he has named in his deposition. In his cross- examination, the witness has stated that he does

not remember as to whether, due to inadvertence, he had given wrong names in his statement dated 10<sup>th</sup> March, 2002 or whether the police had written down the names on their own. The witness has denied the suggestion that during the entire incident, he along with his brother Mohammad Sattar Bachumiya had hidden inside Akbarmiya Nathumiya's house. He has admitted that he and his wife had not availed of any treatment. The witness has denied the suggestion that he had not taken his wife and daughter to the Civil Hospital at Ahmedabad and that his daughter had not sustained any burn injury and that she had sustained stone injury. In his cross-examination, he has denied that he had hidden with his brother and has stated that at the time when Bachumiya's jeep was set on fire, he was hiding in the water course and prior thereto, he was roaming around in the mohalla. In his cross-examination, it has further come out that the entire row of houses towards the kabrastan was burning, and that the first house that was burnt was Painter's and the next was Akbarmiya Nathumiya's. When the houses were burnt in a row, at that time, he was hiding in the water course. In his cross-examination, he has further stated that the houses in the row opposite the kabrastan were not set on fire but were only vandalized. From the evidence of this witness, it emerges that he is a resident of Shaikhvas at Sardarpura and hence, his presence at the scene of offence is natural. The witness in his initial statement has named one set of accused and subsequently, in his statement recorded by the Investigating Officer (SIT), he has stated that he had not named the said accused and has given a different set of names. In his examination-in-chief, he has named the accused as stated in the statement made before the SIT. It has further come on

record that his mother Shaikh Barubibi Babumiya died in the incident inside Mahemoodmiya's house. According to this witness, his wife Faridabanu Safiqmiya and daughter Suhanabanu were also inside Mahemoodmiya's house and had sustained burn injuries. Insofar as the witness and his wife are concerned, there is no medical evidence in support of such version. However, insofar as his daughter Suhanabanu Safiqmiya is concerned, it may be germane to refer to the medical certificate issued by the General Hospital, Mehsana (Exhibit-179) which indicates that the witness's daughter Suhanabanu Safiqmiya Shaikh, aged about 8 months, was brought to the hospital on 2<sup>nd</sup> March, 2002 at 5:00 a.m. The certificate indicates that the patient was conscious and there was complaint of crying. The history given was assault by stones during riots. There was injury in the nature of abrasion 2.5 cm x 0.5 cm over occipital region. The certificate further indicates history of CO poisoning meaning thereby that she had suffered Carbon Monoxide poisoning. The patient was treated by a Paediatrician. Insofar as the injury namely, abrasion is concerned, the certificate says that it is possible with a hard and blunt substance and ... can recover within 5 to 7 days, if no complication occurs. The other medical case papers of Suhanabanu Safiqmiya at Exhibit-180 reveal that the patient had symptoms of vomiting, fever, was not taking food orally and was given various medicines to prevent vomiting and other medicines and was advised to take plenty of fluids. Thus, from the medical case papers, it appears that the patient was suffering from Carbon Monoxide poisoning and hence, the possibility of Suhanabanu being inside Mahemoodmiya's house cannot be ruled out. In the opinion of this court, the fact that the witness had not mentioned the fact regarding his wife and

daughter having sustained burn injuries in his statement dated 10<sup>th</sup> March, 2002, would not amount to an improvement and can be said to be an elaboration of the facts stated in the statement recorded by the police.

41.8 Having regard to the evidence which has come on record, there is no reason to disbelieve the fact that the witness was present at the time of the incident and that his wife Faridabani and his daughter Suhanaabani were also present there. However, as noticed earlier, the witness had initially named one set of accused before the police and has substituted such names with another set of accused in his statement recorded by the SIT. Therefore, the witness is not consistent as regards the accused who were involved in the commission of the offence. Therefore, the testimony of this witness would be required to be scrutinised with care and caution. In the opinion of this court, the evidence of this witness would be in the nature of a weak evidence, inasmuch as, the names of the accused have been stated by him subsequently in the year 2008, that is, six years after the incident whereas he has named other persons in his first statement dated 10<sup>th</sup> March, 2002. As to whether or not the evidence of the witness, naming the accused at a belated stage should be taken into consideration for the purpose of deciding the complicity of the accused, shall be discussed at a later stage.

42. **PW-73 Faridabibi Ashiqhussain Shaikh** has been examined at Exhibit-631. This witness has deposed that she along with her family namely, her father-in-law, mother-in-law, her husband and children were residing at Shaikh Mohalla. Her

father-in-law was a driver in the Vijapur S.T. Depot. Two years prior to the incident, he had retired. Her husband Ashiqhussain and her brother-in-law Mohammad Sattar were both running jeeps on hire. Her father-in-law had purchased a jeep after retirement, which her husband was running on hire. She had two daughters and a son. The eldest was a daughter Ashiyanabnu who was ten years old at the time of the incident, younger to her was Sahinabnu who was five years old, and the youngest was her son Altafhussain, who was around three years old at the time of the incident. She has further deposed that the incident took place about eight years prior thereto. Three days after the train was set on fire at Godhra, on the 1<sup>st</sup> at around 9:30, Patels of the village came from the direction of Mahadev shouting and screaming and burnt the gallas at Shaikh Mohalla. Upon the police coming, the mob dispersed. After some time at around 11:30 to 12:00, the same mob came shouting and screaming "kill the miyabhais bandias, burn them". Three houses at the corner of Shaikh Mohalla were set on fire and they advanced continuing to set fire. Her father-in-law said that their house was a kuccha house and hence, they should go to Mahemoodmiya's house. Therefore, she, her sisters-in-law Firozabnu Bachumiya Shaikh and Farzanabibi Bachumiya Shaikh, her daughter Ashiyanabnu Shaikh and her son Aftab had gone inside Mahemoodmiya's house. There were other people inside the house. She had seen kerosene, petrol and burning rags being thrown inside. Hence, they were shouting for help, however, no one came to their rescue. They, therefore, asked the Patels to let them go, however, those persons said that today they were going to burn them. She saw the people of their village pouring kerosene and petrol and they all started burning. She

sustained burn injuries on her legs and hands. Her son Aftab had also sustained burn injuries. Her daughter Ashiyanabanu had also sustained burn injuries and the police came and took them out and took them to the Mehsana Civil Hospital. There the police had taken their statement on the 2<sup>nd</sup>. Her daughter Ashiyanabanu died on the way to the Mehsana Civil Hospital. After performing her funeral rites, she had gone to her paternal home at Vijapur where she stayed for two months. The SIT had recorded her statement at Satnagar. She has deposed that burning rags, petrol and kerosene had been thrown inside Mahemoodmiya's house. She has further deposed that it was a long time since she had given the names to the police and that she would recognise people by their faces. The witness has identified Kachrabhai Tribhovandas as Kachrabhai Tribhabhai, Chaturbhai Vitthalbhai as Mathurbhai, Rameshbhai Baldevbhai. She has also identified Ashwinbhai Baldevbhai, however, she does not remember his name. She has also identified Dahyabhai Vanabhai but does not remember his name. She has identified Babubhai Kanjidas by his face but does not remember his name. She has also identified Dineshbhai Baldevbhai by face but does not remember his name. Similar is the case with Patel Rameshbhai Kanjibhai whom she has identified by face but does not remember his name. She has deposed that Ashiyana's burial ceremony was carried out at Mehsana. The jeep was burnt and her jewellery worth about Rs.25,000/- and cash of Rs.50,000/- was looted.

42.1 In the cross-examination of the witness, she has been contradicted as to her previous statements dated 2<sup>nd</sup> March, 2002 recorded by the police and 11<sup>th</sup> June, 2008 recorded by the SIT to the effect that in her cross-examination, she has

admitted that in her statement dated 2<sup>nd</sup> March, 2002 recorded by the police, she had stated that upon being afraid as their house was a kutcha house and Mahemoodmiya's house being a pucca house, they would be safe and with that intention, she alongwith her three children, her mother-in-law Sharifabibi and her sisters-in-law, hid themselves inside Mahemoodbhai's house. She then voluntarily stated that her mother-in-law was not with them. A contradiction has been brought out to the effect that the witness in her previous statements dated 2<sup>nd</sup> March, 2002 recorded by the police and 11<sup>th</sup> June, 2008 recorded by SIT, had not stated that she had seen them throwing petrol, kerosene and burning rags due to which, they started shouting for help but nobody came to their help, therefore, they asked the Patels to let them go, however, they said that today they were to be burnt alive and that she had seen the people of her village throwing kerosene, petrol inside and all of them started burning. A further contradiction has been brought out in the above referred previous statements to the effect that she has not stated that she had seen any of the accused persons. A further contradiction is sought to be brought out to the effect that in her statement dated 2<sup>nd</sup> March, 2002 recorded by the police, she had stated that they had come to Mahemoodbhai's house and they had closed the doors from inside and thereafter, the Patels of the village and other persons belonging to the Hindu community started shouting loudly that "sprinkle kerosene on the miyas and burn them" and had burnt their house due to which she had identified them from their voices; however, such contradiction is limited to the extent of identification by their voices. A further contradiction has been brought out that in her statements dated 2<sup>nd</sup> March, 2002 and 11<sup>th</sup> June, 2008, she has

not stated that she had seen the people of her village throw kerosene and petrol. In the cross-examination, it has come out that they had stayed inside Mahemoodmiya's house for two hours. Other than them, Rukshanabibi, Sairabanu, Sahinbanu, Faridabanu, Mumtazbibi, Mahemooda, Ayubbhai, etc. were inside Mahemoodmiya's house. It has also come out that during the incident there was stone throwing. At the time of stone throwing, they were at their house. She has denied the suggestion that after going to Mahemoodbhai's house, they had closed the doors and windows. She has stated that when they were inside Mahemoodbhai's house, there was smoke on account of the fire. She has also stated that she had not become unconscious inside Mahemoodbhai's house. She has stated that the doors of Mahemoodbhai's house were closed but not locked and the windows were open. At that time a mob of a thousand to one thousand five hundred people had surrounded Mahemoodbhai's house. The members of the mob had not entered Mahemoodbhai's house. She had not tried to close the doors and windows. She has denied the suggestion that she was stating that the windows were open only because she wants to identify the accused. She has admitted that in her statement dated 2<sup>nd</sup> March, 2002, she had stated that on the windows of the house which they had closed, stones were being pelted one after the other. She has admitted that no identification parade was carried out of the accused whom she had identified. A suggestion has been put to her that she was inside Nazir Muhammad's house where she has sustained burn injuries, which she has denied.

42.2 From the cross-examination of the Investigating Officer (Police), it has come on record that this witness, in her

statement dated 2<sup>nd</sup> March, 2002, had not stated that the mob came at around 11:30 to 12 at night. An omission has been brought out to the effect that this witness in her statement dated 2<sup>nd</sup> March, 2002 had not stated that she has seen everyone, they were throwing kerosene, petrol and burning rags, thereafter they started shouting "bachao bachao" but no one came to their aid. Therefore, they told the Patel people to spare them, however, they said that today, they were going to burn them. She had seen the village people pour kerosene and petrol and they all started burning. From the testimony of the Investigating Officer, it is further brought out that this witness has not stated anything regarding having identified any of the accused or having seen the accused from the house of Mahemoodmiya.

42.3 PW-110, the Investigating Officer (Police) has admitted that out of the names stated by this witness in her examination-in-chief, except Ashwinbhai Baldevbhai, she has not named anyone in her statement dated 2<sup>nd</sup> March, 2002. The Investigating Officer has further stated that in her statement dated 2<sup>nd</sup> March, 2002, this witness had stated that they had come inside Mahemoodmiya's house and they had closed all the doors from inside and after that, the Patels and other persons belonging to the Hindu community were shouting aloud that "sprinkle kerosene on the miyas and burn them and also burn their houses" due to which .... She identified from the voices (contradiction is to the extent of the voices). They had thrown petrol from the windows and burning rags and since they were speaking, she identified them from their voices (the contradiction is to the extent of voice). The

Investigating Officer has further admitted that before him, Faridabibi has not stated regarding having seen anyone.

42.4 From the cross-examination of PW-112, the Investigating Officer (SIT), it has come out that in her statement dated 11<sup>th</sup> June, 2008, this witness has not stated anything regarding having seen any of the accused.

42.5 The learned counsel for the appellants/accused has submitted that this witness has stated that it is on being asked by her father-in-law Bachumiya that this witness alongwith her two sisters-in-law Firozabanu and Farzanabanu, daughter Ashiyanabanu and son Aftab had gone inside the house of Mehmoodmiya, however, this claim is not true for the following reasons: -

1. that her father-in-law Bachumiya in his entire deposition does not support the version stated by this witness;
2. though she says that in this incident, she got burnt on her legs and hands inside Mahemoodmiya's house, there is no such history given to the doctor as to how she received such injuries;
3. her say about burn injuries sustained by Aftab is not supported by any medical evidence. Both her sisters-in-law were said to be inside the house of Mahemoodmiya, but there is no material to show that they had sustained any injuries nor are any medical certificates produced;
4. Though it has been stated that Sahinabanu, one of this witness's daughters had gone with her mother inside Mahemoodmiya's house, there is no explanation coming

- forth as to where she was after the incident and as to what happened to her;
5. the claim of this witness that she made a request to the people of the Patel community to let them go and in reply, they said that they are to be burnt alive is apparently got up and not stated by her in either of the statements dated 2nd March, 2002 or 11th June, 2008; and
  6. the possibility of this witness having received injuries at some other place and in some different manner cannot be ruled out.

42.6 It was submitted that when this witness tried to improve upon the sequence of events and time, there crept an apparent fallacy in narrating "three houses at the corner of Shaikh Mohalla" at the place of "three gallas at the corner of Shaikh Mohala" that the change in timing is apparently tutored to the witness. It was submitted that the witness does not name any accused except one and conveniently states that she can identify the accused by face. It was submitted that it would be hazardous to place reliance upon such identification as the witness has not named any accused in both her statements except for one, and hence, she can point out any accused present in the court and can avoid the exercise of identifying those who have been named and that too, after eight years. It was submitted that the statements proved to have been made by this witness before the investigating agencies are quite different from what is made before the court, whereby vital facts have been changed, including the fact of firing by the police. It was submitted that this witness for the first time has deposed before the court about her

having seen the accused from Mahemoodmiya's house, whereas the case of the prosecution otherwise is that the doors and windows were shut from inside.

**42.7 ANALYSIS:** Insofar as the testimony of this witness is concerned, it is the case of the witness that she was inside Mahemoodmiya's house at the time when it was set ablaze. The witness has sustained injuries during the course of the incident, which fact is supported by the medical certificate (Exhibit-189) which indicates that this witness had given history of "burn during riots". She has sustained I to II and III degree burns over both legs and knees and feet and partially over the face, about 15% of burns. The certificate further shows that the patient was admitted on 2<sup>nd</sup> March, 2002 at 8:00 a.m. and was seen and treated by FTS and was discharged against medical advice on 2<sup>nd</sup> March, 2002 at 6:30 p.m. Thus, the evidence on record reveals that this witness has sustained burn injuries over her legs, chest and partially over the face in varying degrees. The witness's daughter Ashiyana sustained serious burn injuries during the incident and died on account of injuries sustained by her. The witness in her testimony has referred to Ashiyanabanu and Aftab being with her, when they had gone inside Mahemoodmiya's house. Therefore, it has been vehemently contended by the learned counsel for the appellants – convicts that the witness has not referred to the presence of her other daughter Sahinabanu and, therefore, no explanation is coming forth as to where Sahinabanu was at the time of the incident. In this regard, PW 55 - Ashiqhussain Bachumiya Shaikh, who is the husband of this witness, has deposed that all the three children were with her at the time of the incident. This witness has not made any

categorical statement that Sahinabanu was not with her. It appears that while narrating the facts, she had forgotten to mention the presence of Sahinabanu in her examination-in-chief. In the cross-examination of this witness, she has admitted that in her statement dated 2<sup>nd</sup> March, 2002, she had stated that upon being afraid and their house being a kutcha house and the house of Mahemoodbhai who was residing in the mohalla, being a pucca house, with the intention to see that they would be safe, she and her three children, her mother-in-law Sharifabanu, and both her sisters-in-law, all of them had hidden themselves inside Mahemoodmiya's house. In the cross-examination of this witness, it has come out that they were inside Mahemoodmiya's house for about two hours. Other than them, Rukshanabibi, Sairabanu, Sahinbanu, Faridabanu, Mumtazbibi, Mahemuda, Ayubhai etc. were present. At the time of the incident, there was stone-throwing at which point of time they were at home. Thus, while the witness has forgotten to state the name of Sahinabanu in her examination-in-chief, the defence in her cross-examination has brought out an admission that she alongwith her three children was hiding inside Mahemoodmiya's house. However, this witness has not named any accused in her examination-in-chief and for the first time has identified several accused before the court without naming them. Therefore, the evidence of this witness would be in the nature of a weak piece of evidence. The learned counsel for the appellants/accused has challenged the very presence of this witness in Mahemoodmiya's house on the ground that in view of the fire, there was smoke and carbon particles and carbon monoxide would be likely to enter the respiratory tract and hence, it is not possible for anyone to come out alive. As to whether

anyone could have survived inside Mahemoodmiya's house will be discussed hereinafter while appreciating the totality of the evidence on record.

**43. PW-75 Firozabanu Bachumiya Shaikh** has been examined at Exhibit-637. This witness has deposed that she is a native of Sardarpura and at the time of the incident, she was residing with her parents. Her father was discharging duties as an ST driver and had retired prior to the incident. She has two brothers out of whom, Ashiqhussain is married and his wife's name is Faridabanu and he had two daughters, viz., Ashiyanabanu and Sainabanu and their son was Aftabhussein. At the time of the incident, her younger brother Mahommadsattar was a bachelor and they were residing together. They are six sisters and at the time of the incident, four of them were married and were staying at their matrimonial homes. At the time of the incident, she had divorced her husband and, therefore, since the last five years, she was staying at her father's house in Shaikhvas at Sardarpura. Her brother Ashiqhussain used to drive a jeep. Presently, she is married and is residing at Juhapura. She has deposed that there were approximately a hundred homes of Muslims in Sardarpura and in Shaikhvas, there were about twenty houses where Shaikhs were residing.

43.1 Eight years prior thereto, the incident of burning of a train at Godhra had taken place and on the next day, cabins were burnt in their village and on the third day, their mohalla was attacked. In the evening at 09:30, the cabins in their mohalla were burnt by the Patels of their village. Thereafter, the police came and the mob dispersed. She has further

deposed that after 11:00 to 11:30, once again about one thousand to one thousand five hundred persons came and first started burning the houses, thereafter vandalizing them and thereafter, started throwing stones. Her father said that Mahemoodmiya's house has a slab, the women and children should be shut inside, and hence, at the instance of her father, they had gone inside the pucca house. She, her sister Farzana, her sister-in-law Farida, her daughters Ashiyana, Saina and son Aftab had gone to Mahemoodmiya's house. While going, she had seen three people, viz., Raghu Reva, Dahya Varva and Gordhanbhai Ganeshbhai. After they were shut inside the room, Hindu people had broken the rods of the window and had poured kerosene and petrol inside and the people started burning inside the room and started screaming. Later on, at 2 o'clock, the police had come and taken them out. In the said incident, twenty-eight persons were burnt and others were injured out of whom, her sister-in-law Farida, her sister Farzana, Sahinbanu, Ayubmiya Rasulmiya, Bashirabibi Bachumiya, Faridabanu Safimohammad, Rukshanabanu, Ibrahimmiya had come out of the room safely. Her sister-in-law Farida had sustained burn injuries on her legs and Rukshanabanu had sustained a stone injury on her head. Basiranbibi Bachumiya was also injured and her sister Farzana was hurt on the leg with a stone, her nephew Aftab had sustained burns on his hands and elbow. The police who had come there, had opened the door and taken them out. When the police held the door, there was current from inside and the police had broken the wire with a rifle, which wire was coming from the house of Natu Pawar. Thereafter, the police had taken them to the Mehsana Civil Hospital and her niece Ashiyana died on the way. At Mehsana, they were taken to the Civil

Hospital. Thereafter, the police had told them that they would send them wherever they had their relatives and hence, they had gone to her paternal aunt's house at Vijapur. Her statement was recorded at Mehsana Civil on the 2<sup>nd</sup> day. She and her brother Sattar were safe and the others had sustained injuries. The police had asked her whether she had seen any of the assailants and she had given the names to the police. She has deposed that she had seen Ambaram Kapur, Kachra Tribha, Rohitkumar Ramanbhai and Raman Ganesh in the mob and that she was not aware of the others. When she came out of the house, their jeep, which was a Commander Jeep, had been set on fire, which she had seen. They were breaking it and had poured kerosene and lit a match-stick, at that time, she had seen four to five persons. Thereafter, while going, she had seen the above three persons. She had stayed at Vijapur for one month and from there, they had gone to Panpur at Himmatnagar camp. Thereafter, they had gone to Satnagar. She does not remember the date as to when the SIT had recorded her statement at Satnagar. She has further deposed that the twenty-eight persons who had died in the incident at Mahemoodmiya's house, were taken to the Mehsana Civil Hospital, where after performing their post-mortem, their burial was carried out and those who were injured, were given treatment. The witness has further stated that she can identify the persons whom she had seen in the mob and has identified Ambalal Magan Kapur and has misidentified Ravikumar Amratbhai as Rohitkumar Ramanlal Prajapati. She has also identified Ashwinbhai Jagabhai and Ramanbhai Ganeshbhai. She has identified Kachrabhai Tribhovanbhai as Kachra Tribha. She has identified Gordhanbhai Revabhai as Dahyabhai Varvabhai. Thus, the witness has identified all the three

persons named by her, viz., Ambalal Magan Kapur, Kachrabhai Tribhovanbhai and Ramanbhai Ganeshbhai.

43.2 In the cross-examination of this witness, it has come out that in her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she has not named Prajapati Ramanbhai Ganeshbhai. Certain omissions are brought out in her cross-examination as to her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008. A contradiction has been brought out that she has not stated that at the time when the jeep was burnt, she had seen Ambaram Kapur, Kachra Tribha, Rohitkumar Ramanbhai and Raman Ganesh in the mob. The witness has denied that in her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she had not named Kachra Tribha and that in her statement dated 2<sup>nd</sup> March, 2002, she had not named Ashwinbhai Jagabhai. In her cross-examination, it has come out that at the time when the incident of 11:30 took place, she was in her house and had heard the sounds of the mob. She has stated that upon hearing the sounds, they had not closed the doors of the house and gone inside. She had learnt that the mob of Hindus had come to kill them and that upon hearing the sounds of the mob, they had come out in the choupal to see as to who were the persons. She has stated that about one thousand to one thousand five hundred persons had come from the direction of Mahadev and the mob had firstly burnt the gallas. At the time when they set the gallas on fire, they did not try to go inside the house. They were afraid. She has stated that if they want to escape from the rear side of their house, it was not possible. She has stated that between her house and Mahemoodmiya's house, there are four to five houses and there is a dump-yard behind Mahemoodmiya's house and on the left side, there is a

kabristan. When the mob set the gallas on fire, they stood there for three minutes. The mob was at a distance of about 20 to 25 feet, at that time, they went to Mahemoodmiya's house. She had for the first time seen the mob at a distance of 20 to 25 feet when she was near the choupal of her house. At that time, the members of their family were told to quickly come out of their house. The nearby houses and the houses in the opposite row were all open. The people of the mob had seen her, but they did not run after her and did not catch her. Till the jeep was burnt, she was inside the house and she had seen the jeep being set on fire. At the time when the jeep was being set on fire, she was at a distance of 10 to 15 feet and at that time, when she was going to Mahemoodmiya's house, no one had caught her. The mob of one thousand to one thousand five hundred people had come from one direction, that is, from the direction of Mahadev and on all of four sides, the houses were burning, the smoke and flames were coming out. When she went inside Mahemoodmiya's house, there were around thirty to forty people. After going inside Mahemoodmiya's house, she had shut the doors and windows and they had stayed inside Mahemoodmiya's house for one to one and half hours. She has denied the suggestion that she was not inside Mahemoodmiya's house and that she was wrongly stating that she had seen the accused while going towards Mahemoodmiya's house. She has denied the suggestion that afterwards, with a view to implicate more accused, she has named more persons and that the say about the current was got up afterwards at the instance of their persons. A contradiction has been brought out to the effect that in her statement dated 2<sup>nd</sup> March, 2002, she had not named Kachra Tribha and that she had not named Rameshbhai Ganeshbhai in

her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008. In her cross-examination, it has come out that her elder brother Ashiqhussain, at the instance of her father, had left them at the house of Mahemoodbhai.

43.3 From the cross-examination of the Investigating Officer (Police), it has been brought on record that in her statement dated 2<sup>nd</sup> March, 2002, this witness has not named Prajapati Rameshbhai Ganeshbhai. An omission has been proved *inter alia* to the effect that in her statement dated 2<sup>nd</sup> March, 2002, this witness has not stated that, therefore, as her father had told them, they had gone to the pucca house. She, her sister Farzana, her sister-in-law Farida, her (Farida's) daughters Ashiyana, Saina and son Aftab had also gone inside Mahemoodbhai's house and while going, she saw three people out of whom she had seen Dahya Varva and Gordhanbhai Ganeshbhai. The Investigating Officer has admitted that in her statement before him, this witness had not named Gordhanbhai Ganeshbhai. A further omission has been proved through the cross-examination of the Investigating Officer that contrary to the facts deposed before the court, she had not stated that while the jeep was burning, she had seen Ambaram Kapur, Kachra Tribha, Rohitkumar Ramanbhai and Raman Ganesh in the mob. From the testimony of the Investigating Officer, it is further revealed that this witness has not named Kachrabhai Tribhovandas and Ashwinbhai Jagabhai before him.

43.4 From the cross-examination of the Investigating Officer (SIT) also, the above omissions and contradictions have been brought out in respect of her statement dated 22<sup>nd</sup> May, 2008 recorded by the SIT. The Investigating Officer (SIT) has further

admitted that the witness had stated that the time of the incident has been written as 11:30; however, she has not stated such time.

43.5 Mr. Y. S. Lakhani, learned counsel for the appellants/accused submitted that the witness claims that she was inside the house of Mahemoodmiya for about one and a half hours, but it appears that she has not taken any treatment and as such she had not sustained any injury. It was submitted that considering the deposition of the FSL Officer, which shows that the house in which the alleged incident took place was 16 feet by 11 feet, it is almost impossible for any person to have come out of the house alive, leave alone without any injury. It was submitted that this witness has named all the persons who had gone with them inside the house like Faridabibi, but has added the name of Saina, viz. the third child of Faridabibi and Ashiqhussain, whom Faridabibi herself has not referred to. Moreover, Saina is conspicuously absent as there is nothing to show that she was given any treatment and there is no reference of her whereabouts or movements coming on record. It was submitted that while the witness has named three accused in the examination-in-chief, she had not named them in either of her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008 and has stated so for the first time before the court. Moreover, though she has not named two of the accused in her examination-in-chief as having taken part in the offence, she has identified them before the court. Thus, this witness is not a truthful witness. Moreover, the witness has deposed that her sister Farzanabanu was inside the house of Mahemoodmiya along with her, however, Farzanabanu has not been examined by the prosecution nor does she appear to have been treated

by any doctor as no injury certificate has been produced on record. It was submitted that the claim of this witness that she had shut the doors and windows of Mahemoodmiya's house after going inside, runs contrary to the claim put forward by PW-73 Faridabibi. It was contended that this witness was not present in the mohalla, much less, inside the house in question as she has not sustained any injury, not even a scratch and is therefore, not a reliable witness.

**43.6 ANALYSIS:** This witness in her testimony has named Ambalal Kapur, Kachra Tribha, Rohitkumar Ramanbhai and Raman Ganesh and has identified all three of them. However, from the cross-examination of the witness, it appears that she had not named Prajapati Rameshbhai Ganeshbhai, Kachrabhai Tribhovanbhai in her statement recorded by the police. This witness is a witness to the main incident and as per her testimony, she was inside Mahemoodmiya's house at the time of the incident. Considering the fact that the witness is a resident of Shaikh Mohalla and all the female members of her family were also inside the house, there is no reason to disbelieve the presence of the witness inside the house. Therefore, to the extent the witness has named and identified accused Ambalal Kapur, the testimony of the witness can be accepted. Moreover, this witness has deposed to the presence of Saina, viz. the daughter of PW-73 Faridabibi in the house, which clearly shows that due to inadvertence, Faridabibi in her examination-in-chief had forgotten to mention the presence of Saina inside the house. While it is true that there are certain discrepancies in the testimony of this witness and she has tried to improve upon her earlier statements, to the extent her

testimony is consistent, there is no reason to discard the evidence of this witness.

**44. PW-56 Ayubmiya Rasulmiya Shaikh** has been examined at Exhibit-535. This witness has deposed that he is a native of Sardarpura. His family is comprised of his father Rasulmiya Nannumiya, his mother Sharifabibi Rasulmiya, his elder brother Ahmadmiya Rasulmiya, who at present is residing at Ilol. Younger than him is his brother Mustufamiya Rasulmiya whose family is comprised of his wife Samimbanu Mustufamiya, their sons Javedmiya was approximately three to four years old at the time of the incident and Shahrukhmiya Mustufamiya was the elder of the two. His other brothers were Sikandarmiya Rasulmiya, Iqbalmiya Rasulmiya, his sister Jarinabanu Rasulmiya and he was the youngest. His family is comprised of his wife Sahinbanu Ayubmiya, his daughter Hinabanu Ayubmiya. The witness has further deposed that he was residing with his parents at Shaikh Mohalla in Sardarpura. His brother Iqbalmiya had a kirana shop at the corner of Shaikhvas and he was doing his business from there. He (the witness) was engaged in casual labour and used to do colour work and agricultural labour.

44.1 The witness has further deposed that on 27<sup>th</sup> February, 2002, a train was burnt at Godhra. On 28<sup>th</sup> February, 2002, there was a call for Gujarat Bandh and on 1<sup>st</sup> March, 2002, there was a call for Bharat Bandh and he was with his family at home. In the evening at 5 o'clock, when he went towards Munsafkhan's house, Kanubhai Sarpanch had come and there was a meeting at Munsafkhan's house, wherein it was stated that forget the gallas which are burnt on the 27<sup>th</sup> and nothing

like that will happen. After sometime, he (Kanubhai Sarpanch) had said that now things are not in his control and that they should defend themselves. Thereafter, he had returned home. While returning home, he had seen that the halogen lights over the street lights had been turned towards their mohalla. Thereafter, he had asked Kanubhai Sarpanch regarding non-payment of the street lights bill and he had told him that the street lights bills were paid and that they would now enjoy beating the Muslims. Wireman Mathurbhai Trikambhai had climbed up and started the lights and thereafter, he had returned home.

44.2 The witness has further deposed that at 09:30 at night, a mob of Hindus came shouting and screaming, kill the Muslims, cut them, the Muslims have burnt the train at Godhra, hence, kill the Muslims, burn them and they burnt three cabins of their Shaikh Mohalla. Thereafter, the police came and the mob dispersed. Once again the same mob came shouting and screaming, burn the Muslims, cut them and started pelting stones at Shaikh Mohalla. Thereafter, they started ransacking and burning their houses. His maternal uncle Ibrahimmiya Rasulmiya had sustained a stone injury on his head. Upon seeing the mob, he had gone towards Ibrahimmiya Rasulmiya's house and his brother Iqbalmiya Rasulmiya, upon sustaining stone injury on his head and right leg, had gone towards Ibrahimmiya's house and thereafter, he had gone towards Mahemoodmiya's house. At that time, he had seen in the mob Ramanbhai Ganeshbhai, Mathurbhai Trikambhai, Rajeshbhai Punjabhai, Chaturbhai Kanabhai, Madhabhai Vitthalbhai, Ashwinbhai Baldevbhai Botham, Dahyabhai Kachrabhai, Kanubhai Sarpanch, Prahladbhai Jagabhai and Kachrabhai

Tribhovandas, who had come and told him that if they fold their hands, then they would leave them alive. They had folded their hands despite which, they did not spare them and set them ablaze. They had articles in their hands. Ramanbhai Ganeshbhai had a tin, Mathurbhai Trikambhai had a dharia, Rajeshbhai Punjabhai had a dharia, Madha Vitthal had a dharia, Chatur Kana had a pipe in his hand, Dahyabhai Kachrabhai had a pipe, Ashwin Baldev Botham had a can in his hand. Those persons had thrown the burning rags and set on fire by pouring petrol, kerosene and chemical inside the room. They were screaming "Bachao .... bachao". One chemical was such that if water touches it, there would be flames. After sometime, the police came and took them out of Mahemoodmiya's house. They had taken Firozabanu Bachumiya, Farzanabanu Bachumiya, his wife Sahinbanu, his daughter Hinabanu, his brother-in-law Manumiya Alammiya's daughter Khushbu and son Majidmiya alive out of the room. He was also burnt. His wife had also sustained burn injuries and he had sustained burn injuries on his shoulder and neck. After taking them out, they were taken in a police van to Mehsana Civil Hospital. Twenty-eight persons had died and they were taken in a vehicle to the Mehsana Civil Hospital. They had taken treatment and in the evening, they had gone to Ilol where they stayed for two to three days. Thereafter, they had come to Himmatnagar relief camp. Thereafter, the police had recorded his statement at Nazirabad camp. Thereafter, SIT had recorded his statement at Gandhinagar. He had made an affidavit in the Supreme Court.

44.3 The witness has stated that he cannot identify the weapons which were in the hands of the members of the mob.

He, however, has stated that he can identify the persons in the mob and has identified Kachrabhai Tribhovandas, Dahirabhai Kachrabhai, Kanubhai Joitabhai, Mathurbhai Trikambhai, Madhabhai Vitthalbhai and Rajeshbhai Punjabhai.

44.4 In his cross-examination, the witness has admitted that when he was admitted in the hospital, he had not named any of the persons whom he had named in the examination-in-chief before the doctor. He has further stated that he has not stated before the Medical Officer that he was inside Mahemoodmiya's house and had sustained burns. He has deposed that he was taken to the doctor at approximately 5 o'clock in the morning and is not in a position to say as to who were the other persons from the community who were with him at that time. He has stated that they had left the hospital in the evening. He has admitted that the police have not recorded his statement prior to 10<sup>th</sup> March, 2002. A contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 recorded by the police, he had not stated the fact of having gone to Munsafkhan's house, where Kanubhai Sarpanch had stated that the things were not within his control and that they should defend themselves. A further contradiction has been brought out to the effect that he had not stated before the police the facts regarding the halogen lights being focused towards their mohalla and the talk with Kanubhai Sarpanch with regard to the payment of street lights bill and that they would enjoy beating the Muslims and that the wireman Mathurbhai Trikambhai had climbed up and started the lights. The witness has admitted that in his affidavit dated 6<sup>th</sup> November, 2003, he had not named Kanubhai Sarpanch, Prahladbhai Jagabhai and Tribhovandas.

44.5 In the cross-examination of this witness, it has also come out that when he had heard the commotion in front of his house at the corner of Shaikh Mohalla, at that time, he had not gone inside the house and that he was afraid. He has stated that he was not in a position to state as to from what distance he had seen the mob. He had seen them setting the gallas on fire and has stated that at the time when the gallas were set on fire, there was no looting and no stone pelting had taken place. He had seen the police coming, but police had not resorted to firing. In his cross-examination, it has further come out that the second incident took place at approximately 11:30. Between 09:30 to 11:30, he was in the mohalla. During that period, he had not tried to shift his family to any other place. He has stated that when the police had come, he had not asked for protection and that he was not aware as to whether Munsafkhan had called them.

44.6 In his cross-examination, it has further been brought out that at the time when Ibrahimbhai was injured with a stone he was near his house and his brother was also near Ibrahimbhai's house. He had seen the mob come from the direction of Mahadev. He does not know how many houses were burnt but says that the houses towards the kabrastan were burnt. He had seen the houses being looted and set on fire and at that time he was standing in front of Ibrahimbhai's house. He saw the members of the mob entering the house next door and had also seen them entering the house opposite his house. He does not remember if the house opposite his house was set on fire. He has stated that during the entire incident he did not try to flee. The witness has voluntarily stated that he could not leave

his family members and run away. The mob came towards Bachumiya's house and hence, they went towards Mahemoodmiya's house. He did not see the use of sticks, dharias and pipes by the mob. There were about forty to fifty persons in Mahemoodmiya's house. His clothes were not burnt in the incident that took place inside Mahemoodmiya's house and he also did not become unconscious. He felt suffocated. He had stayed in the house for approximately 45 minutes. He has denied that he was not inside the house and did not sustain burns inside the house.

44.7 In the cross-examination of this witness, it has further been brought on record that he had in his statement before the police stated that at about 9:30 the mobs of Hindus of their village indulged in rioting and burnt gallas and cabins and upon the police coming and resorting to firing, the mob had dispersed and thereafter there was peace and at about 12:00 at night again mobs of Hindus of their village gathered and were shouting that Muslims have burnt Hindus alive at Godhra and hence cut the Bandiyas and burn them alive and after shouting thus, they started pelting stones at their houses, which fact he has not stated in his affidavit before the Supreme Court. He has also admitted that in his statement dated 10<sup>th</sup> March, 2002 before the police, he had stated that on account of stone throwing Ibrahimbhai Rasulbhai was injured on the head and blood was coming out, at that time the women and children of Shaikh Mohalla being inside Ibrahimbhai's house, they came out and with a view to save themselves had run to Mahemoodbhai's house and entered it and the mob of Hindus burnt three cabins at the entrance of Shaikh mohalla and started vandalizing the houses in Shaikh Mohalla and setting

them on fire and on account of stone throwing his brother Iqbal was injured on the head as well as on the right leg and with a view to save himself, he (his brother) went to Ibrahimbai's house and he went towards Mahemoodbhais house, where he saw in the mob Prajapati Ramanbhai Ganeshbhai with a tin, Mathurbhai Trikambhai Wireman and Rajeshbhai Punjabhai Patel with dharia, Chaturbhai Kanabhai Patel with pipe in his hand, Patel Ashwinbhai Baldevbhai Joitabhai Gaadivala with a tin in hand, Patel Madhabhai Vitthalbhai with a pipe, Dahyabhai Kachrabhai and Jivanbhai Dwarkadas with pipe in their hands and they came towards their house and were shouting, burn the miyas and he went inside Mahemoodmiya's house. He has admitted that he has not stated this fact in his affidavit dated 6<sup>th</sup> November, 2003. He has further admitted that in his statement dated 10<sup>th</sup> March, 2002, he has stated that the members of the mob had thrown something like kerosene, petrol and threw burning rags and ignited the same and they had all tried to extinguish the flames inside.

44.8 From the cross-examination of PW-110, the Investigating Officer (Police), an omission has been proved to the effect that this witness in his statement dated 10<sup>th</sup> March, 2002 had not stated with regard to Kanubhai Sarpanch coming to Munsafkhan's house and saying that they should forget that the gallas were burnt on 27<sup>th</sup> and that it would not happen again and that it was not within his means and that they should defend themselves on their own and that when he returned home, there were halogen lights on the street-lights and thereafter upon asking Kanubhai Sarpanch as to whether the street-light bills had been paid, wireman Mathurbhai had said that now it would be fun to kill the Muslims. This is the

limited extent to which the contradictions in the statement dated 10<sup>th</sup> March, 2002 of this witness have been proved.

44.9 From the cross-examination of PW-112, the Investigating Officer (SIT), it has been brought out that this witness in his statement dated 19<sup>th</sup> May, 2008 had stated that out of the persons named by him in his statement dated 10<sup>th</sup> March, 2002, Prajapati Ramanbhai Ganeshbhai and Patel Ashwinbhai Baldevbhai Joitabhai Gaadiwala were not present. It has further come out that as per item No.6, on 1<sup>st</sup> March, 2002, the Sarpanch had called a meeting of Hindus and Muslims and had said that they should forget what had happened on the previous night on 28<sup>th</sup> February, 2002, however, they would now have to defend themselves and that the matter is not within their control; Police Inspector Shri Parmar had informed the Vijapur Police Station about this meeting. At this time, they were asking the Sarpanch to protect them, however, the President of Bajrang Dal had gone from there to Mahadev temple from where the assault had commenced, which he had stated in his statement dated 19<sup>th</sup> May, 2008 that he did not know anything about the meeting. That he does not know whether Parmar Saheb was present in the meeting.

44.10 Mr. Lakhani, learned counsel for the appellants-accused has submitted that the witness claims to be inside the house of Mahemoodmiya in which 33 persons have lost their lives, however, the presence of this witness in the house of Mahemoodmiya at the time of the occurrence is highly doubtful and unbelievable. It was submitted that having regard to the size of the room and the fact that nearly 33 persons who were inside the room have died, it is not possible that this witness

could be inside the room and could have come out of the room unscathed. It was submitted that the first informant, who is also from the same mohalla, was present at the time when the police brought out the dead bodies from the house and that he has mentioned only three persons having been rescued alive from the house and that he has not named the present witness as having been taken out of the house of Mahemoodmiya. It was further submitted that considering the postmortem notes of the deceased, the lungs of all the deceased were congested and trachea contained soot particles. Looking to the evidence of PW-1 Dr. Dhirajkumar Jivanlal Soni, who has admitted that if a living person is inside the burning house, while respiration, he would consume carbon particles in his trachea. Therefore, assuming for the sake of argument that someone inside could survive, he would not escape without any flame burn injuries, whereas this witness who claims to be inside the house, has not sustained any burn injuries and that though the witness claims that he has sustained injuries on his shoulder and on the back, there is no evidence to show that he had taken any treatment in any hospital. It was submitted that therefore, the say of the witness that he was inside the room, cannot be believed. It was submitted that the witness, in his examination-in-chief, has specifically involved A-49 Kanubhai Sarpanch, A-40 Prahladbhai Jagabhai and A-14 Kachrabhai Tribhovandas as being part of the mob. However, in his cross-examination, he has admitted that in his statement dated 10<sup>th</sup> March, 2002, he has not named these three accused. It was pointed out that a further contradiction has been brought out in the previous statement of this witness recorded by the SIT wherein, he had stated that A-50 Ramanbhai Ganeshbhai Prajapati and A-55 Ashwinbhai Baldevbhai Joitabhai (Gaadiwala) were not there in

the mob. It was submitted that the witness has identified A-49 Kanubhai Sarpanch and A-14 Kachrabhai Tribhovandas, however, he has not named them in his statement dated 10<sup>th</sup> March, 2002. It was further submitted that the witness has identified all muddamal articles in the hands of Ramanbhai Ganeshbhai, Chaturbhai Kanabhai, Ashwinbhai Baldevbhai Botham and Prahladbhai Jagabhai, but has failed to identify them. It was submitted that therefore, it is evident that this witness has tried to falsely implicate innocent persons. It was further submitted that the witness has improved upon his original version by introducing the story with regard to halogen lights being directed towards Shaikh Mohalla and that he had asked A-49 Kanubhai Sarpanch regarding the street lights bill being not paid, etc. It was submitted that this witness is habituated to stating incorrect facts and hence, the evidence of this witness is required to be discarded in toto.

**44.11 ANALYSIS:** This witness has deposed that he was inside Mahemoodmiya's house at the time of the incident. Despite a lengthy cross-examination, the prosecution has not been able to bring out any contradiction in this regard. On the contrary, from the questions put to the witness in his cross-examination, an admission has been brought out that in his statement dated 10<sup>th</sup> March, 2002, he had inter alia stated that he had seen in the mob Prajapati Ramanbhai Ganeshbhai with a tin, Mathurbhai Trikambhai Wireman and Rajeshbhai Punjabhai Patel with dharia, Chaturbhai Kanabhai Patel with pipe in his hand, Patel Ashwinbhai Baldevbhai Joitabhai Gaadiwala with a tin in hand, Patel Madhabhai Vitthalbhai with a pipe, Dahyabhai Kachrabhai and Jivanbhai Dwarkadas with pipe in their hands and they came towards their house and

were shouting, burn the miyas and he went inside Mahemoodmiya's house. It has also been brought out by way of admission in his cross-examination that in his statement dated 10<sup>th</sup> March, 2002, he had stated that the members of the mob had thrown kerosene, petrol and burning rags and ignited a fire and that they were trying to douse the fire inside. Thus, the defence has elicited an admission from the witness that he indeed was inside the house at the time of the incident. This witness has named several persons as referred to hereinabove in his deposition, however, he has identified only Kachrabhai Tribhovandas, Dahyabhai Kachrabhai, Kanubhai Joitabhai, Mathurbhai Trikambhai, Madhabhai Vitthalbhai and Rajeshbhai Punjabhai. In the cross-examination of the witness, it has been brought out that he has not named Kanubhai Sarpanch, Prahladbhai Jagabhai and Tribhovandas in his statement dated 10<sup>th</sup> March, 2002 and from the cross-examination of the Investigating Officer (SIT), it has been brought on record that the witness had stated before him that though in his statement dated 10<sup>th</sup> March, 2002, Prajapati Ramanbhai Ganeshbhai and Patel Ashwinbhai Baldevbhai Joitabhai Gaadiwala had been named, they were not present at the time of the incident.

**44.12** In his entire testimony, the witness has stuck to his stand that he was inside Mahemoodmiya's house at the time of the incident and the defence has itself brought admissions in this regard on record. No major contradictions have been brought out in the testimony of this witness except to the effect that he had not named three of the accused in his statement dated 10<sup>th</sup> March, 2002 and in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that the two of the named accused were not present. However, to the

extent of the accused named by him in his deposition as well as in his previous statement dated 10<sup>th</sup> March, 2002, whom the witness has identified, there is no reason to disbelieve the testimony of this witness.

**45. PW-57 Mustufamiya Rasulmiya Shaikh** has been examined at Exhibit-546. This witness has stated that he is a native of Sardarpura and in his family, there are five brothers, viz., Ahmadmiya, Iqbalmiya, Sikandarmiya, he and Ayubmiya. His mother whose name was Barubibi, died during the riots. His other mother, viz., Sharifabibi had died prior to the riots. His father's name is Rasulmiya Nannumiya, who is alive. He (the witness) is married. His wife's name is Samimbanu and he has three children, viz., Javed, Shahrugh and he had a daughter who died prior thereto. Shahrugh is alive, whereas Javed and his wife Samimbanu both have died in the riots.

45.1 The witness has further deposed that on 27<sup>th</sup> February, 2002, the incident of burning of the train at Godhra had taken place, in the context of which, there was a call for Gujarat Bandh. On 28<sup>th</sup> February, 2002, there was a call for Gujarat Bandh by the Vishwa Hindu Parishad, and on that day, the atmosphere in their village was tense, and hence, they had not gone anywhere. On that day, three gallas in their village were burnt. On 1<sup>st</sup> March, 2002, there was a call for Bharat Bandh by the Vishwa Hindu Parishad. On that day, they were at home and in the morning at 09:30, he had gone to the house of Rameshbhai Dhulabhai Patel and he (Rameshbhai) had told him to water the fields and had said that nothing would happen in their village. He did not want to leave his family and go. On the same night, at 09:30, Rameshbhai Dhulabhai was in the

mob. The witness has deposed that on 1<sup>st</sup> March, 2002, the mob of Patels came shouting, screaming with weapons, with petrol and kerosene tins and started vandalizing and burning the cabins in their mohalla. Upon the police coming, the mob dispersed. Once again, the same mob came at 11:30 at night, shouting, screaming, kill the miyas, not a single miya should remain alive. They had come with weapons and kerosene cans and had vandalized the houses in the mohalla and set them on fire, at which point of time, their people had gone towards Mahemoodbhai's house. His wife and son Javedmiya had gone towards Mahemoodmiya's house. He had seen those persons, out of whom, Laxmanbhai Dhulabhai Patel, Rameshbhai Dhulabhai Patel, Madhabhai Vitthalbhai Patel, Jayantibhai Mangaldas alias Bako, Kachrabhai Tribhovandas, Ashwinbhai Baldevbhai Botham, Tulsibhai Girdharbhai Patel had gone towards Mahemoodmiya's house. Their people were burnt alive in Mahemoodmiya's house by throwing kerosene and petrol inside. At that time, he had hidden in the partition of Bachumiya Imammiya's house. His people were shouting for help which he had heard. At that time, in the riots, he was injured with a stone and had hidden himself. In the morning, upon the police arriving, he had gone towards Mahemoodmiya's house and their other people had also gone towards Mahemoodmiya's house, at that time, twenty-eight people had died wherein, his wife Samimbanu and son Javed had also died. The police took them to Mehsana Civil Hospital where he took treatment. Their other people were also injured. From there, in the evening, they had gone to Ilol where they stayed for four to five days and thereafter, came to Panpur camp, which is called Nazirabad and had stayed there for three months, where the police had recorded his statement after a

week. Thereafter, their houses were built and they had gone to stay at Satnagar.

45.2 The witness has stated that he had made an affidavit before the Supreme Court for transfer of the case outside the State of Gujarat. The witness has further deposed that the SIT has recorded his statement at Satnagar as well as at Gandhinagar. He has stated that he can identify the persons in the mob and has identified Jayantibhai Mangaldas alias Bako, Madhabhai Vitthalbhai, Kachrabhai Tribhovandas, Laxmanbhai Dhulabhai, Ashwinbhai Baldevbhai Nagarbhai as Ashwinbhai Baldevbhai Botham and Tulsibhai Girdharbhai. The witness has stated that since ten years have passed, he cannot identify his wife and son's clothes and he also cannot identify the weapons wielded by the persons in the mob.

45.3 In the cross-examination, it has come out that his father has not married Barubibi and that Barubibi had adopted him and that Barubibi was the wife of Babumiya Motumiya. He has stated that he has one sister and the others are his cousins. His sister's name is Zarinabanu, who is married and lives at Bhalak and is alive. He has stated that when he has referred to his sisters, he means his cousin sisters, who are his paternal uncle's daughters. The credibility of the witness is sought to be assailed on the ground that in his affidavit filed before the Supreme Court, he had stated that his mother had died in the incident whereas his mother had actually died prior to the incident and therefore, with a view to justify what was stated in the affidavit, the witness had stated that Barubibi was his mother. The witness has admitted that at the time of the incident, he used to reside with his wife Samimbanu and his

sons Javed and Shahrukh. Javed was four years old and Shahrukh was eight years old at the time of the incident. Certain contradictions are sought to be brought out in his cross-examination as to the statements made by him in his affidavit before the Supreme Court. A contradiction has been brought out in his cross-examination to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had not named Laxmanbhai Dhulabhai Patel, Rameshbhai Dhulabhai Patel, Madhabhai Vitthalbhai Patel, Jayantibhai Mangaldas alias Bako and Ashwinbhai Baldevbhai Botham.

45.4 In the cross-examination of the witness, it has come out that upon entering Shaikh Mohalla, his house is on the right side. Akbarmiya Nathumiya's house is opposite his house, thereafter comes Bachumiya Nathumiya's house and then Akbarmiya Rasulmiya's house. Akbarmiya Rasulmiya's house is adjoining his house. The reason for not going to his house when the mob came was because he had taken shelter anywhere to save himself. The witness has denied the suggestion that there was no partition in Bachumiya Imammiya's house. The witness has stated that he was referring to the choupal (verandah) as partition. The witness has further stated that there is open space adjoining Bachumiya's house. He has denied the suggestion that the choupal is at a distance of two feet from the road and has stated that it is four to five paces away. The witness has denied the suggestion that the mob had ransacked and set Bachumiya's house on fire. He has denied the suggestion that in his statement dated 10<sup>th</sup> March, 2002, he had said that as he was afraid, he had hidden in Akbarbhai's house. The witness has admitted that in his application dated 11<sup>th</sup> April, 2008

made to the SIT, no facts regarding the incident had been mentioned.

45.5 From the cross-examination of the Investigating Officer (Police), an omission in the nature of a contradiction has been brought out that in his statement dated 10<sup>th</sup> March, 2002, this witness has not named Laxmanbhai Dhulabhai Patel, Rameshbhai Dhulabhai Patel, Madhabhai Vitthalbhai Patel, Jayantibhai Mangaldas @ Bako and Ashwinbhai Baldevbhai Botham. A further omission has been brought out with regard to the witness having gone to Rameshbhai Dhulabhai's house in the morning and having seen him in the mob at 9:30 at night. An omission has also been brought out to the effect that this witness, in his statement dated 10<sup>th</sup> March, 2002, has not stated that he had seen Laxmanbhai Dhulabhai Patel, Rameshbhai Dhulabhai Patel, Jayantibhai Mangaldas @ Bako, Kachrabhai Tribhovandas, Ashwinbhai Baldevbhai Botham, Tulsibhai Girdharbhai Patel going towards Mahemoodmiya's house and their persons were burnt alive by throwing petrol and kerosene. At that time, he had hidden himself in the partition of Bachumiya Imammiya's house and he had heard their people shouting '*bachao bachao*'. The Investigating Officer has admitted that in his statement dated 10<sup>th</sup> March, 2002, this witness had stated that being afraid, he had hidden himself inside Akbarbhai's house.

45.6 Mr. Y. S. Lakhani, learned counsel for the appellants-accused submitted that the deposition of this witness contains many material improvements which are not stated in his statements dated 10<sup>th</sup> March, 2002, 19<sup>th</sup> May, 2008, 5<sup>th</sup> August, 2008, nor in his affidavit dated 6<sup>th</sup> November, 2003 filed before

the Supreme Court. It was submitted that it would be dangerous to rely upon such evidence of this witness who has failed to state these facts earlier, though there were several opportunities available to him. It was submitted that this witness for the first time, in his deposition before the court, has stated facts about his conversation with Rameshbhai Dhulabhai regarding having said that nothing was going to happen in the village, but was seen in the mob, despite the fact the said person is not even arraigned as an accused. Thus, he has created this story after a period of eight years. It was submitted that the sequence of events and facts has been materially changed by this witness and he has deliberately disowned all the facts about the sequence and time stated before the police at the first available opportunity. It was contended that the claim of this witness regarding having seen the accused in the mob and identified them when he had hidden himself by the side of Bachumiya Immamiya's house is incorrect for the reason that: the witness has never said so in his statements recorded by the investigating agencies; his version as on 10<sup>th</sup> March, 2002 was that he had hidden himself in Akbarmiya's house; and both the versions are mutually contradictory and are not supported by other witnesses. It was submitted that the witness had deposed before the court that the mob had assembled in the village and set on fire cabins in the village and the police resorted to firing whereupon, the mob had dispersed. It was submitted that this omission of the witness has been proved to be a contradiction. It was submitted that the witness has not been able to state various facts which were put to him in his cross-examination and that he does not know the names of the children of his fellow Muslim persons, but is able to give full names of the persons

present in the mob, which is suggestive of the fact that the witness is a tutored one and he is not giving the correct account of the incident. The witness has claimed that when the mob entered Shaikh Mohalla and started ransacking it, he hid himself by the side of Bachumiya Imammiya's house, which is on the right side of Shaikh Mohalla. The witness has further stated that he is referring to the courtyard as the side of the house and from the courtyard, the road of Shaikh Mohalla is four to five feet away. It was submitted that looking to the evidence of panch witnesses, the right hand side line of houses in Shaikh Mohalla is the worst affected and the houses were set on fire and ransacked. PW-60 Bachumiya Imammiya has deposed that his house was ransacked and there was loot from his house, which is suggestive of the fact that the mob entered even the courtyard of his house. Therefore, the claim of this witness that he was present in the courtyard in the house of Bachumiya Imammiya is not believable.

45.7 It was further submitted that the witness in his statement dated 10<sup>th</sup> March, 2002 had stated that he had hidden inside the house of Akbarmiya, whereas he has deposed to the contrary. It was submitted that though the witness has posed himself to be an eyewitness to the incident, his testimony is not credible and cannot be believed. It was submitted that the witness has not assigned any specific role to any accused nor has he stated as to which accused ransacked which house or set on fire which house. The witness has also not narrated the role of the accused in setting the house of Mahemoodmiya on fire which is suggestive of the fact that he is not an eyewitness at all. It is further submitted that while Ayubmiya Rasulmiya Shaikh, who is the real brother of

this witness, claimed in his deposition that he was brought out alive from the house of Mahemoodmiya along with his wife and daughter, this witness has claimed that after the occurrence and police came, he went towards the house of Mahemoodmiya wherein his wife and son have died, but has not deposed that PW-56 Ayubmiya Rasulmiya who is his real brother, was brought out alive from the house of Mahemoodmiya along with his wife and daughter. It was submitted that the witness has falsely stated in his affidavit filed before the Supreme Court that his mother had died during the riots and that therefore, now with a view to see that the contents of his affidavit are not construed to be false, he has deposed that Barubibi who died in the incident is his mother. It was pointed out that though this witness has identified Laxman Dhulabhai Patel, Rameshbhai Dhulabhai Patel (who is not an accused), Madhabhai Vitthalbhai, Jayantibhai Mangalbhai alias Bako, Ashwinbhai Baldevbhai Botham, he has not named these persons as accused in his first statement dated 10<sup>th</sup> March, 2002. It was submitted that in the statement dated 10<sup>th</sup> March, 2002, the witness had named Ashwinbhai Baldevbhai Joitabhai (Gaadiwala) and not Ashwinbhai Baldevbhai Botham. It was submitted that therefore, it is clear that this witness has given false names at different points of time and hence, his testimony cannot be believed.

**45.8 ANALYSIS:** From the testimony of this witness, it is apparent that he is a resident of Shaikh Mohalla in Sardarpura and that his wife Samimbanu and son Javed have died during the incident, and hence, there is no reason to disbelieve the presence of this witness at the time of the incident. Though certain discrepancies have been brought out in his

examination-in-chief as to his previous statement dated 10<sup>th</sup> March, 2002 recorded by the police, the discrepancies are not so material as to throw out the entire testimony of the witness. The main discrepancy is as regards the place from where he had seen the members of the mob. It appears that while in his statement dated 10<sup>th</sup> March, 2002, he had stated that he had hidden inside the house of Akbarmiya, in his deposition before the court, he had stated that he had hidden in the partition of Bachumiya Imammiya's house. The testimony of this witness is assailed on the ground that there was no partition in Bachumiya Imammiya's house and that since Bachumiya Imammiya's house was ransacked and set on fire, the witness could not have hidden in the choupal of Bachumiya Imammiya's house. In this regard, it may be noted that Bachumiya Imammiya's house is situated in the row which is towards the rear side of the Patels' houses and the said house has not been set ablaze by the mob. A perusal of the video of the scene of offence, indicates that Bachumiya Imammiya's house, in fact, has a choupal and that though the house has been damaged on account of stone throwing, the same does not appear to have been ransacked by the mob. Under the circumstances, there is no reason to disbelieve the testimony of this witness to the extent he says that he was hiding in the partition of Bachumiya Imammiya's house. The witness has named several accused in his examination-in-chief and has identified Jayantibhai Mangaldas alias Bako, Madhabhai Vitthalbhai, Kachrabhai Tribhovandas, Laxmanbhai Dhulabhai, Ashwinbhai Baldevbhai Nagarbhai as Ashwinbhai Baldevbhai Botham and Tulsibhai Girdharbhai. However, the witness has not named Laxmanbhai Dhulabhai Patel, Rameshbhai Dhulabhai Patel, Madhabhai Vitthalbhai Patel, Jayantibhai

Mangaldas alias Bako and Ashwinbhai Baldevbhai Botham in his statement dated 10<sup>th</sup> March, 2002. However, to the extent the testimony of this witness is consistent, viz. the witness has named the accused in his statement dated 10<sup>th</sup> March, 2002 and has also identified before the court, there is no reason to disbelieve the testimony of this witness.

**46. PW-62 Rafiqmiya Mahammadhussain Shaikh** has been examined at Exhibit-575. This witness has stated that he is a resident of Sardarpura and that he was residing at Shaikh Mohalla. There are twenty houses of Shaikhs in Shaikh Mohalla. They are four brothers and two sisters. Out of his brothers and sisters, the eldest is Yusufmiya, then he, the third is Imtiyazmiya Mahammadhussain, the fourth is Sahidmiya Mahammadhussain and his sisters are Zarinabnu Mahammadhussain, Salmabanu Mahammadhussain. Both of his sisters are married and residing elsewhere. He is married to Arifabibi, daughter of Rashidbhai Hajinbibax, of Ahmedabad. Prior to the incident, his parents had passed away. When the incident happened, he had a paan-bidi shop at the corner of Shaikh Mohalla. On 27<sup>th</sup> February, 2002, the incident of burning a train at Godhra took place, in connection with which, the Vishwa Hindu Parishad had given a call for Gujarat Bandh on 28<sup>th</sup> February, 2002. On 28<sup>th</sup> February, 2002, he was sitting in his cabin. In the morning at around 9 o'clock, when he was in his cabin, some persons belonging to the Patel community came and were getting the shops and cabins closed down and they came to his cabin and told him to shut the cabin and if he does not do so, they would burn it. He shut down his cabin whereupon, the Patels were hurling abuses and entered into a scuffle with him and therefore, the people from their mohalla

came there. Rameshbhai Kantibhai, Sureshbhai Baldevbhai and Rajeshbhai Punjabhai, all of them, had entered into a scuffle with him. Leaving the scuffle, he went to his house in the mohalla. At that time, the mob went towards Mahadev temple. In the evening, mobs of Patels gathered together and were talking with each other that not a single cabin or shop of Muslims should remain intact. On that night, cabins of Muslims were burnt in front of the Panchayat office.

46.1 The witness has further deposed that on 1<sup>st</sup> March, 2002, there was a call of Bharat Bandh. At that time, he was in the mohalla. During the entire day, the atmosphere was tense and in the evening, mobs of Patel had gathered. He heard the mob shouting that not a single Muslim should escape. At that time, with a view to ensure that his cabin or house is not damaged, he remained in the mohalla. At about 09:30 at night, a mob of Patels came from the direction of Mahadev. The mob was screaming and shouting, cut the Muslims, burn them. He has deposed that there are three cabins at the corner of their mohalla; one was his own cabin, the second cabin belonged to Iqbalmiya Rasulmiya and the third cabin belonged to Ibrahimmiya Rasulmiya. The persons in the mob had burnt these three cabins. Thereafter, the police came and the mob went away. Thereafter, the mob came at 11:30 at night, shouting and screaming, kill the Muslims, cut them and started pelting stones. Firstly, the house of Bhaimiya Alhammiya was vandalized and burnt; then the mob came towards the second house of Akbarmiya Nathumiya. At that time, in the mob, he saw the people of his village, viz., Ambalal Maganlal with dharia, Kalabhai Bhikhabhai, Jayantibhai Mangalbhai, Pashabhai Mohanbhai, Joitabhai Ramabhai with cans in their

hands, Ashwinbhai Jagabhai, Rajeshbhai Karshanbhai with sticks and pipes in their hands. Thereafter, Kachrabhai Tribhovandas, Govindbhai Mohanbhai and Rameshbhai Kantibhai were also there. One after the other, the houses were burnt. In order to save his life, he ran towards the house of Ibrahimmiya Rasulmiya. Upon seeing those persons coming, he entered in the house of Ibrahimmiya Rasulmiya with a view to save himself. Thereafter, those persons went towards the house of Mahemoodmiya Hussainmiya, where the women and children of their mohalla had taken shelter and they surrounded the house and set it on fire, and they could hear the shouts and screams. Thereafter, all these persons shouted, Bharat Mata Ki Jai and went away. Thereafter, at around 02:30 at night, the police came and stated that, whoever is alive should come out, whereupon, they came out and then, they had gone towards the house of Mahemoodmiya Hussainmiya and took out their people who had died inside the house and those who were injured were shifted to Mehsana Civil Hospital in police vehicles and those who had died, were also sent to Mehsana Civil Hospital in police vehicles. He himself had also gone to the Mehsana Civil Hospital in police vehicle. He sustained stone injury and therefore, he had also taken treatment there. The witness has deposed that their people who sustained injuries, had also availed treatment and those who had died, were sent to the Civil Hospital. Thereafter, three boys of his relatives were seriously injured and hence, as per the advice of the doctor, he along with his maternal uncle Makbulmiya Kesharmiya, his brother Imtiyaz Mahammadhusain, took them to the Civil Hospital, Ahmedabad. These three children were Firozmiya Makbulmiya, Rafiqmiya Bhaimiya and Abedabanu Bhaimiya, who were

admitted there, out of them, two children, Firozmiya Makbulmiya and Rafiqmiya Bhaimiya died, while Abedabanu Bhaimiya survived for two days. Thereafter, the doctor had told them to take them to their relatives. He had requested the doctor to provide an ambulance but the doctor refused to do so and told them to hire their own private vehicle and take them. They asked the doctor as to where they could go as the atmosphere all around was tense and it was not possible for them to go anywhere. He told the doctor that at present it was not possible to take the three, and asked him to find a way. Thereupon, the doctor told them to send them for postmortem, and hence, they were sent for postmortem. The witness has further deposed that two days thereafter, they had contacted their relatives and had taken all the three dead bodies to Juhapura and buried them in the graveyard. Thereafter, all the three of them had stayed at Juhapura camp and after six days, they had started for Himmatnagar and had gone to Panpur relief camp, where their relatives were staying. The police had recorded his statement on 10<sup>th</sup> May, 2002. Thereafter, they had gone to Satnagar, where they had got a house. Thereafter, the SIT had recorded his statement at Gandhinagar on 10<sup>th</sup> May, 2008. The SIT had asked him whether he wanted to make any correction or addition, and he had said that one correction was that the police had not resorted to firing, and another correction was that his wife Arifabanu's name was wrongly written as Wahida, and her correct name was Arifabibi; he has said that Mahemoodmiya is the correct name; and Rameshbhai Kantibhai and Sureshbhai Baldevbhai were instigating the mob to close down the cabins. The witness has stated that he can identify the persons in the mob and has identified Ambalal Maganlal, Kalabhai Bhikhabhai, Kachrabhai Tribhovandas,

Govindbhai Mohanbhai, Jayantibhai Mangalbhai, Ashwinbhai Jagabhai, Rajeshbhai Punjabhai, Rajeshbhai Karshanbhai, Mathurbhai Ramdas as Mathurbhai Ramabhai in the court.

46.2 In his cross-examination, the witness has admitted that while they had stayed for three days at the Civil Hospital, he had not availed of treatment. He has stated that he was in a position to move around a little and that he had sustained blunt injuries. He has stated that the injuries sustained by him were on account of stone pelting and that he had sustained injuries on the back, shoulders and hand, and that he had not taken treatment at Ahmedabad Civil Hospital. He has stated that Imtiyazbhai was also in a position to move around and he was also slightly injured. He has stated that his maternal uncle Makbulmiya was also in a position to move around and was slightly injured on his back on account of stone throwing. In his cross-examination, he has stated that at the Ahmedabad Civil Hospital, he had narrated the facts regarding the incident to the police. He has denied that the police have recorded his first statement on 2<sup>nd</sup> March, 2002 and has stated that for the first time, his statement was recorded at Panpur Patiya camp, though he does not remember the exact date on which his statement was recorded. He has stated that his statement was recorded about eight to nine days after the incident took place. Certain omissions as to his previous statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 have been brought out as regards his not having stated the facts regarding taking three children to the Civil Hospital, Ahmedabad. Certain omissions have been brought out as to his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 regarding his not having stated about the incident of 28<sup>th</sup> February, 2002, whereby, the mob had

asked him to close down his cabin. A contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had stated that at around 12:00 to 12:30, the mobs started gathering in the village and that on being afraid, he and his brother Imtiyaz both were near their house and both of them hid on the side. In his cross-examination, the witness has stated that the house in which he was hiding was on the right side, namely, that he was in Ibrahimiya Rasulmiya's house. He has stated that when he saw the mob, he was hiding inside Ibrahimiya Rasulmiya's house and the door was closed and was broken in the centre and that he had seen the members of the mob from the broken part of the door. He has remained inside the house of Ibrahimiya Rasulmiya for about one and half hours and had come out only after the police came. He has admitted that in his presence, no damage was caused to the house and that in his presence, the house was not set on fire. He has denied the suggestion that he was falsely stating that the members of the mob had broken part of the door of Ibrahimiya Rasulmiya's house. An omission is brought out to the effect that in his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008, he has not stated that one after the other, houses were being burnt and with a view to save his life, he had run towards Ibrahimiya Rasulmiya's house and upon seeing these persons entering, with a view to save his life, he had gone inside Ibrahimiya Rasulmiya's house. An omission in the nature of contradiction has been brought out to the effect that in his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008, he had not named Kalabhai Bhikhabhai, Jayantibhai Mangalbhai, Joitabhai Ramabhai and Govindbhai Mohanbhai. A further omission in the nature of contradiction has been brought out to the effect that in his

statement dated 10<sup>th</sup> March, 2002, he had not named Rameshbhai Kantibhai.

46.3 From the cross-examination of the Investigating Officer (Police), an omission has been brought out in the statement dated 10<sup>th</sup> March, 2002 of this witness to the effect that in his police statement, he had not stated that at around 9:00 to 9:30, a mob of Patels came from the direction of Mahadev shouting and screaming "cut the Muslims, burn them". They burnt three gallas at the corner of the mohalla, one being his own cabin, another being Iqbalmiya Rasulmiya's cabin and Ibrahimmiya Rasulmiya's cabin. In the mob Kalabhai Bhikhabhai, Jayantibhai Mangalbhai, Joitabhai Ramabhai with a can in his hand, Govindbhai Mohanbhai and Rameshbhai Kantibhai were all present. One after the other, the houses were being burnt. To save his life, he went towards the house of Ibrahimmiya Rasulmiya and hid inside his house.

46.4 Similar omissions have been brought out from the cross-examination of the Investigating Officer (SIT) also. Insofar as the facts stated in the statement made before the police and which are not stated in the statement before the SIT are concerned, as discussed earlier, in view of the fact that the statement recorded by the SIT is merely in furtherance of the statement recorded by the police, it was not necessary for the witness to repeat what was already stated in his earlier statement. However, an omission in the nature of contradiction has been proved from the cross-examination of the Investigating Officer (SIT) to the effect that the witness has not named Kalabhai Bhikhabhai, Jayantibhai Mangalbhai, Joitabhai Ramabhai and Govindbhai Mohanbhai in his statement dated

10<sup>th</sup> May, 2008. Thus, the names of these accused do not find place in both his previous statements.

46.5 Mr. Lakhani, learned counsel for the appellants/accused submitted that this witness has stated that on 28<sup>th</sup> February, 2002 in the morning at around 9 to 10 o'clock, he was at his cabin, when some persons belonging to the Patel community had come and were getting the shops and cabins shut and they had also come to his cabin and had told him to shut his cabin and that if he did not close his cabin, they would burn it. That he had shut his cabin and at the time when he was closing the cabin, the Patels were hurling abuses and had entered into a scuffle with him and that the members of his mohalla had come, and Rameshbhai Kantibhai, Sureshbhai Baldevbhai, Rajeshbhai Punjabhai had all entered into a scuffle with him and that he had left the scuffle and had gone to his house in the mohalla. That at that time, the mob had gone towards Mahadev temple. Referring to the cross-examination of the witness, it was pointed out that a contradiction is brought out and that this witness, in either of his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008, has not stated about this incident and is deposing such facts for the first time in the court after eight years. It was further submitted that the sequence of events and the time of the incident has been materially changed by the witness. It was contended that the claim of the witness that on seeing the mob coming inside and burning the houses, he had slipped into Ibrahimmiya Rasulmiya's house runs contrary to the evidence of Ibrahimmiya who has deposed that upon the door being broken, about twenty people who had taken shelter in his house had rushed from his house and gone inside

Mahemoodmiya's house. Moreover, this witness does not state the facts as stated by Ibrahimmiya. It was submitted that the version given by this witness that he was hit by a stone and sustained blunt injuries on his back, hand and shoulder is falsified on a perusal of the medical certificate (Exhibit-163) which shows that the witness has not sustained any external injury. It was further submitted that the witness has deposed that he had informed the police at Ahmedabad Hospital, however, no such information has come on record which appears to have been suppressed by the prosecution. It was argued that the witness had ample time and opportunity at the Ahmedabad Hospital to disclose the names of the accused, however, he failed to do so and named them only after nine days, that is, on 10<sup>th</sup> March, 2002. It was submitted that the entire story narrated in the examination-in-chief has not been stated by him in his earlier statements. It was contended that the claim of the witness that he saw the persons in the mob from inside Ibrahimmiya's house has not been stated by him in either of his previous statements. It was submitted that this witness is not a truthful witness and has stated new facts for the first time before the court, and as such is not a reliable witness.

**46.6 ANALYSIS:** In terms of the testimony of this witness, after the incident they were taken to the hospital at Mehsana and from there he and his maternal uncle and his brother had taken three critically injured children of their relatives to the Civil Hospital at Ahmedabad. This part of the version of this witness has not been challenged. Hence, the presence of the witness at the scene of offence cannot be doubted. The main challenge to the testimony of this witness is as regards the

spot from where he had seen the accused. It appears that in his earlier statement, he had stated that he had and his brother were near their house and both of them had hidden nearby. In this regard, a perusal of the map of the scene of offence shows that Ibrahimmiya's house is more or less opposite to the house of this witness, therefore, when the witness says that he took shelter nearby, the fact that he may have hidden himself in Ibrahimmiya's house cannot be ruled out. Insofar as PW 67, viz., his brother Imitiyaz is concerned, he has deposed that he had taken shelter in Sherumiya's house. Sherumiya's house is two houses after Ibrahimmiya's house in the same row. In a small mohalla like Shaikh Mohalla when the witness says that they hid nearby, their hiding in a house in the opposite row which is quite near their house cannot be taken to be a false statement. Insofar as having witnessed the incident from the broken part of Ibrahimmiya's door is concerned, a perusal of the video of the scene of offence shows that a part of the front door of Ibrahimmiya's house was broken on account of stone throwing, therefore, it was quite possible for this witness to have seen the accused from the broken part. In this factual background, there is no reason to disbelieve the say of the witness that he had seen the accused from Ibrahimmiya's house. Insofar as the contention that the witness has not got himself treated and hence, it cannot be believed that he was injured during the incident is concerned, in the opinion of this court, considering the nature of the injuries sustained by the witness and others together with the fact that they had accompanied three critically injured children to Ahmedabad, out of whom two had died, there is nothing strange about their not having availed of treatment in respect of injuries sustained by them which were not so serious in

nature. It is evident that the witness and others would be concerned about the death of the two children and the fact that the third child was also in a critical condition, who ultimately succumbed to the injuries, to worry about getting treatment in respect of the injuries which they had sustained. However, certain contradictions have been brought out in the testimony of this witness to the effect that he had not named Kalabhai Bhikhabhai, Jayantibhai Mangalbhai, Joitabhai Ramabhai and Govindbhai Mohanbhai in either of his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 and he had not named Rameshbhai Kantibhai in his statement dated 10<sup>th</sup> March, 2002. However, to the extent the witness has both named the accused in his original statement and has identified them, there is no reason to discard the testimony of this witness.

47. **PW-67 Imtiyazbhai Mahammadhussein Shaikh** has been examined at Exhibit-594. He has deposed that he had a paan-bidi cabin at the entrance of Shaikhvas in Sardarpura, which was run by his brother Rafiqmiya. On 27<sup>th</sup> February, 2002, a train was burnt during the Godhra incident. On 28<sup>th</sup> February, 2002, there was a declaration of Gujarat Bandh. On 1<sup>st</sup> March, 2002, when there was a declaration of Bharat Bandh, he was at home. A mob of Hindus came from towards Mahadev together with weapons at the entrance of Shaikh Mohalla at around 09:30 on 1<sup>st</sup> March, 2002. Three cabins were set on fire. Upon the police coming, the mob dispersed. The mob came back. Thereafter, they started pelting stones. The mob had burnt the houses of Manumiya Bhaimiya and Akbar Nathumiya. He was standing towards the house of Ayubmiya Rasulmiya when he had seen the persons. He had seen Tulsi

Girdhar, Pasha Mohan, Kachra Tribhovan, Raman Jivan, Dineshbhai Jivanbhai and Rajesh Punja. Thereafter, with a view to save his life, he had hidden inside the house of Sherumiya Rasulmiya. The Patels had set Mahemoodbhai's house on fire and thereafter, they had said "Bharat Mata Ki Jai" and went away. At 02:30 at night, the police had come and had taken them to Mehsana Civil Hospital. He had sustained a stone injury on his right hand and had availed of treatment there. There were three emergency cases and hence, in the morning at 8 o'clock, they had set off for Ahmedabad Civil Hospital. Out of them, Firozmiya Makbulmiya died. Rafiqmiya Manubhai also died. Abedabibi Manubhai was alive. She died on the next day and her postmortem was conducted at the Civil Hospital, Ahmedabad. Thereafter, they took them to the Juhapura Graveyard and carried out the burial rituals there. Thereafter, they were sent to the Juhapura camp where they had stayed for about four to five days and then, they left for Himmatnagar and came to Panpur camp. The police came to Panpur camp after one and a half month and recorded his statement. The SIT had recorded his statement at Satnagar. From Mehsana Civil Hospital, he along with his maternal uncle Makbul Kesarmiya, his brother Rafiq Mahammadhusain, all the three, had gone together. He has stated that he can identify the persons whom he has named and has identified Kachrabhai Tribhovandas, Tulsibhai Girdharbhai, Rajeshbhai Punjabhai in the court.

47.1 In the cross-examination of this witness, he has been sought to be contradicted by putting a suggestion that in his statements dated 17<sup>th</sup> April, 2002 and 22<sup>nd</sup> May, 2008 he has not named Tulsibhai Girdharbhai, Dinesh Jivan and Rajesh

Punja, which he has denied. He has denied the suggestion that he was hiding with his brother Rafiq inside some house and had seen the incident. In his cross-examination, he has stated that when the mob came, he was standing in front of Ayubmiya Rasulmiya's house which is one house after his house and that he was standing there as they were burning the cabins. He has deposed that when they were burning Manumiya's house, he was standing at a distance of four houses away. He has stated that the mob had not caught him and he had not seen anyone being assaulted with a dharia or stick. He has stated that the members of the mob had come after him and that it had not happened that somebody had caught him in Sherumiya's house. He has denied the suggestion that he was not at the scene of incident and that he had not sustained injury with the stones in the incident that occurred in front of the Panchayat. In his cross-examination, it has further come out that the mob had not come inside Sherumiya's house and that he had hidden inside Sherumiya Rasulmiya's house which was open. He has denied the suggestion that Sherumiya's house was burnt down and that the sheets and the walls had been broken and that the bicycle, cot and mattresses on the verandah had been burnt. He had denied the suggestion that the house was locked. He has denied the suggestion that he was falsely deposing that he had hidden inside Sherumiya Rasulmiya's house.

47.2 Mr. Y. S. Lakhani, learned counsel for the appellants-accused submitted that the statement of the witness was recorded on 17<sup>th</sup> April, 2002, that is, almost 46 days after the incident. It was submitted that this witness has stated that at 02:30 p.m., the police had dropped them at Civil Hospital,

Mehsana and that he had gone to Ahmedabad Civil Hospital because of three emergency cases. It was submitted that right from Mehsana Civil Hospital, Ahmedabad Hospital, Juhapura camp, Himmatnagar and then Panpur camp, there were ample opportunities for the witness to state with regard to the incident to the police, as also to his other colleagues in the relief camps, he however, did not state anything either to the police or to his colleagues for nearly 46 days. Therefore, this witness appears to be a got up witness and his deposition is not believable. It was submitted that the witness has deposed that he took shelter in Sherumiya's house, however, he has not stated these facts in his statement dated 17<sup>th</sup> April, 2002 recorded by the police after 46 days or in his statement dated 22<sup>nd</sup> May, 2008 recorded by the SIT after six years, and has stated these facts for the first time before the court. It was submitted that the witness has stated that he had hidden himself in Sherumiya Rasulmiya's house and hence, there was no question of his witnessing any incident, more particularly the incident of setting Mahemoodmiya's house on fire. It has also been submitted that Sherumiya's house is situated next to Mahemoodmiya's house and that the scene of panchnama reveals that the said house was extremely damaged due to the fire and it was not possible for him to enter and hide himself inside. Therefore, this witness is not a witness of the incident, and that he has not deposed that it was a Patel mob which had set the house of Mahemoodmiya on fire. It was submitted that out of the five persons named in his deposition, the witness has named two of them in either of his statements recorded by the police or by the SIT and hence, the identification of such accused before the court would be of no consequence. It was submitted that the witness has named one Dinesh Jivan who is

not an accused at all and has also named three accused, viz., Tulsibhai Girdharbhai, Pashabhai Mohanbhai and Ramanbhai Jivanbhai, but has failed to identify them in the court. It was submitted that when the witness has given the full names of the accused, it is suggestive of the fact that he knew the accused very well and therefore, could identify them at any point of time. However, the witness has failed to identify the aforesaid three accused which casts a shadow of doubt about the credibility of the witness. It was submitted that therefore, no reliance can be placed on the deposition of such witness, which is required to be discarded in toto.

**47.3 ANALYSIS:** From the testimony of this witness, it emerges that while he was standing near Ayubmiya Rasulmiya's house, he had seen Tulsi Girdhar, Pasha Mohan, Kachra Tribhovan, Raman Jivan, Dineshbhai Jivanbhai and Rajesh Punja, whereafter, with a view to save his life, he had hidden inside the house of Sherumiya Rasulmiya. Thus, while this witness may not have actually witnessed Mahemoodmiya's house being set on fire, prior thereto, he had seen the aforesaid persons in the mob. From the evidence of this witness, it is apparent that there were three emergency cases at Mehsana Civil Hospital and hence, he had gone along with those three persons to Ahmedabad Civil Hospital. Out of the three cases, Firoz and Rafiq had died. Abedabibi Manubhai was alive, but died on the next day at Civil Hospital whereafter, their burial ceremony was carried out at Juhapura kabrastan. Therefore, the presence of this witness at the scene of offence cannot be doubted, inasmuch as, he had taken the aforesaid three children to the Civil Hospital, Ahmedabad immediately after the incident. The witness has identified Kachrabhai

Tribhovandas, Tulsibhai Girdharbhai, Rajeshbhai Punjabhai in the court. However, it appears that the witness has not named Tulsibhai Girdharbhai and Rajeshbhai Punjabhai in either of his statements dated 17<sup>th</sup> April, 2002 and 22<sup>nd</sup> May, 2008. From the cross-examination of the witness, it has come out that the mob had not come inside Sherumiya Rasulmiya's house and that he had hidden inside Sherumiya Rasulmiya's house for two hours. He has denied the suggestion that the house was burnt and the sheets and walls had been broken. On behalf of the accused, the learned counsel has submitted that as per the scene of offence panchnama, this house has been damaged on account of fire, however, it may be noted that the panch of the scene of offence has not deposed anything with regard to the houses in this row, except for a bald statement that the houses were all burnt and damaged. The evidence of the panch witness shows that the panchnama of the scene of offence was not read over to him and hence, the contents thereof are not proved. In fact, even in the testimony of the Investigating Officer, no attempt has been made to prove the contents of the panchnama. As discussed earlier, the court has therefore, thought it fit to place reliance upon the video of the scene of offence, which shows that Sherumiya Rasulmiya's house had not been burnt down nor have the walls and the sheets been broken, though some damage has been caused on the outer side of the house namely the verandah and articles lying there. In these circumstances, though there are certain discrepancies in the testimony of this witness, there is no reason to disbelieve the testimony of this witness, to the extent he has stated that he was present at the scene of offence at the time of the incident and to the extent he has identified the accused

whom he has named in his initial statement recorded by the police.

**48. PW-63 Bhikumiya Kalumiya Shaikh** has been examined at Exhibit-580. This witness has deposed that he is a native of Sardarpura and was residing at Shaikh Mohalla. There are about twenty houses of Shaikhs in Shaikh Mohalla. At the time of the incident, his family was comprised of his sons Yusufbhai, Salimbhai, his wife Bismillabibi, two daughters, one being Johrabibi, who is married to Bhaimiya alias Manumiya Alammiya of Shaikhvas and another daughter Kausarbibi is married to someone at Pilvai. Johrabibi had one daughter by the name Abeda, and two sons by the name Rafiq and Arif. Arif was eight years old at the time of the incident, Rafiq was nine years old, and Abeda was six years old. His wife Bismillabibi, his son-in-law Bhaimiya Alammiya, his daughter Johrabibi, his grandchildren Arif, Rafiq and Abeda had died in the incident.

48.1 On 27<sup>th</sup> February, 2002, the train had been set on fire at Godhra. On 27<sup>th</sup> February, 2002, he had gone to do colour work at the house of Patel Kanubhai Varvabhai. On 28<sup>th</sup> February, 2002, the gallas were burnt in the market. Thereafter, they had come home and at 4 o'clock, had gone to the market, at that time, he had seen that Shankarbhai, whose shop was adjoining the house of Anifbhai Abdulbhai, was removing the goods from his shop, hence, he asked him as to why he was suddenly removing the goods. Whereupon, he had said that the shop was to be given on rent and that the goods were to be kept in the yard of the Mahakali Temple. Thereafter, they had come home.

48.2 On 1<sup>st</sup> March, 2002, at about 09:30 at night, the Patels of the village came to their mohalla and had burnt the gallas of their mohalla. The police came thereafter and those people had gone away and once again they had come at 11:30, and started throwing stones and had burnt their houses. He had seen Ambaram Magan, Kachrabhai Tribhabhai, Kanubhai Joitabhai, Mathurbhai Trikambhai and Rameshbhai Ramabhai. In the stone pelting, he had sustained injuries on the right side of his head and also on the left side of his body. Thereafter, he went and sat where Bachubhai's jeep was parked. Thereafter, the mob came. The mob was shouting, kill the *Bandiyas* and cut them. Thereafter, a burning rag was thrown on the jeep and the jeep was set on fire and there was a big blaze, and, therefore, he had entered Bachumiya's house. Thereafter, there was something like gas in the house and hence, he lifted the sheet (the tin sheet on the roof) and went into the gallery (open space on the side of the house). Thereafter, the mob came. Their women and children were in Mahemoodmiya Hussainmiya's house and were shouting for help and the mob was shouting "Jai" outside their mohalla. Thereafter, when he came out, Sabirmiya Kadarmiya told him that his wife was lying on the platform in the line of Abbasbhai's house and hence, he had gone there and she was lying in an unconscious condition and foam was coming out of her mouth and she was vomiting. Thereafter, Sabirbhai Kadarbhai and Akabarmiya Nathumiya lifted his wife and took her outside the mohalla and made her lie down on Patel Ishwarbhai Karsanbhai's verandah. Thereafter, he sat in the vehicle in which the corpses of those who had died in Mahemoodmiya Hussainmiya's house were kept together with his wife and at that time, she was alive. While going to Mehsana Civil Hospital, his wife died somewhere

near Vijapur. Thereafter, they were admitted in the Civil Hospital and the police had asked him as to where they wanted to go, and he had said that he wanted to go to Ilol village. At about 6:00 to 6:30 in the evening, they had gone to Ilol, and from there, they had come to Panpur Patiya. They had stayed at Ilol for ten to twelve days. The police had recorded his statement and he had made an application before the Himmatnagar Court, which application was given to the SIT and the SIT had recorded his statement. He has identified the clothes of his wife. He has stated that he would be able to identify the persons whom he had seen in the mob. He has identified Ambararam Kapur, Kachrabhai Tribhabhai, Kanubhai Joitabhai and Rameshbhai Ramabhai in the court.

48.3 In his cross-examination, the witness has stated that he was born in Sardarpura and knows the Patels of Sardarpura very well. He has admitted that on one side of Shaikhvas, there is a kabrastan and on the other side is the population of Patels. He knows the Patels of the village by name and that he can identify all the Patels of the village who are sitting in the court by name. In his cross-examination, an omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002 before the police, he had not stated that on 28<sup>th</sup> February, 2002, the gallas were burnt in the bazaar; thereafter, they came home and at 4 o'clock, they went to the market; Shankerbhai's shop was adjoining the shop of Anifbhai Abdulbhai and Shankerbhai was emptying the goods from his shop, and so he asked him as to why he was suddenly vacating the shop, to which he replied that he was to take a shop on rent at some other place and had kept the goods in the compound of the Mahakali temple, and thereafter, they had

come home. In his cross-examination, an omission in the nature of contradiction has been brought on record to the effect that in his previous statement dated 10<sup>th</sup> March, 2002 as well as the statement made before the SIT, he had not named Kanubhai Joitabhai, Mathurbhai Trikambhai and Rameshbhai Ramabhai. A further contradiction is brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had stated that Prajapati Ramanbhai Ganeshbhai had a can. The witness has admitted that in his statement dated 10<sup>th</sup> May, 2002 before the SIT, he had stated that the fact which was recorded to the effect that at that time Prajapati Ramanbhai Ganeshbhai in the mob had a can, was incorrect and that, in fact, Prajapati Ramanbhai Ganeshbhai was not in the mob. In his cross-examination, an omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had not stated that thereafter, he sat where there was a jeep of Bachubhai and that the mob came thereafter; the mob was shouting, kill the bandiyas and cut them; thereafter, a burning rag was thrown on the jeep; the jeep caught fire and there were huge flames and he entered into Bachubhai's house and thereafter, some gas was formed and he lifted the sheet and went out in the gallery and thereafter, the mob had come. In his cross-examination, a further omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, the witness has not stated that thereafter, he came out and Sabirmiya Kadarmiya told him that his wife was lying on the platform in the line of Abbasbhai's house due to which, he had gone there, where she was lying in an unconscious condition and foam was coming and she had vomited; thereafter, Sabarbhai Kadarbhai and Akbarmiya Nathumiya had lifted his wife and taken her outside the mohalla and put her down on

Patel Ishwarbhai Karsanbhai's platform; thereafter, he sat with his wife in the vehicle where the corpses which had got burnt in Mahemoodmiya's house, were kept, and at that time, she was alive; on the way, his wife passed away; thereafter, they were admitted in the Civil Hospital. He has admitted that the fact regarding his wife being administered acid was stated to him by Sabirmiya Kadarmiya and that he had not seen anyone doing so.

48.4 From the cross-examination of the Investigating Officer (Police), it has been brought out that this witness in his statement dated 10<sup>th</sup> March, 2002 has not referred to any incident about Shankarbhai vacating his shop and stating that he wanted to keep another shop on rent and had kept the stock in the compound of the Mahakali Mandir. From the cross-examination of the Investigating Officer, it is proved that in his statement dated 10<sup>th</sup> March, 2002, this witness has not named Kanubhai Joitabhai, Mathurbhai Trikambhai and Rameshbhai Ramabhai. A further omission has been proved to the effect that in his statement dated 10<sup>th</sup> March, 2002, this witness has not stated that thereafter, he sat behind Bachubhai's Jeep. Thereafter, the mob came. The mob was shouting "kill the bandiyas, cut them". Thereafter, a burning rag was thrown on the jeep. The jeep caught fire and there were huge flames due to which he entered Bachubhai's house and thereafter, there was formation of gas and thereafter, he lifted the sheets and went into the gallery. Thereafter, he came out when Sabirmiya Kadarmiya told him that his wife was lying on the platform in the line of Abbasbhai's house and when he went there, she was lying in an unconscious condition and foam was coming out of her mouth and she had vomited, etc.

48.5 In the cross-examination of the Investigating Officer (SIT), an omission in the nature of contradiction has been proved to the effect that the witness had named only Ambalal Maganbhai and Kachrabhai Tribhovandas in his statement dated 10th May, 2008 and had not named any other accused. It has been brought out that the witness had not named Kanubhai Joitabhai, Mathurbhai Trikambhai and Rameshbhai Ramabhai in his above referred statement.

48.6 Mr. Y. S. Lakhani, learned counsel for the appellants-accused submitted that this witness has stated that gallas were set on fire in the bazaar before noon on 28<sup>th</sup> February, 2002. However, this fact is not deposed to by anybody and runs counter to the evidence of all the other witnesses who have deposed regarding this fact. It was submitted that this witness has introduced a theory of Shankerbhai vacating his shop which was adjacent to the shop of Anipbhai and his conversation with him, but this fact is not stated by him in his statement dated 10<sup>th</sup> March, 2002 recorded by the police. It was submitted that despite the fact that at every stage this witness had the opportunity to disclose about the incident and name the accused, he preferred to remain silent till 10<sup>th</sup> March, 2002. Moreover, the witness has deliberately disowned the facts as narrated on 10<sup>th</sup> March, 2002 about cabins of Muslims near the Panchayat Office having been set on fire at night on 1<sup>st</sup> March, 2002 though consequent thereto police firing took place. It was submitted that out of five persons named in the deposition, three names were not given by him in either of his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008 as well as

in his application made to the SIT and he has named them for the first time before the court.

48.7 It was submitted that in his statement dated 10<sup>th</sup> March, 2002, the witness has named Ramanbhai Ganeshbhai Prajapati; however, before the SIT, he has stated that the fact that Ramanbhai Ganeshbhai was there in the mob with a can is false and that he in fact was not there. It was submitted that the witness has not named this accused in the court also and therefore, changes the names of the accused as per his convenience. It was submitted that the witness has stated that when the jeep was set on fire, he went inside Bachumiya's house, he then went into the gallery; however, Bachumiya, who claimed before the SIT that he was in the house, does not refer to this witness coming to his house, nor does he refer to his presence near the jeep. Thus, the presence of the witness in the mohalla is doubtful as he himself has not stated so in his statement dated 10<sup>th</sup> March, 2002. It was further submitted that the claim of the witness that after the incident, he was told by PW-48 Sabirmiya Kalumiya that his wife was lying on the platform in line of Akbarbhai's residence, does not find support from Sabbirmiya's evidence or from any other evidence. It was submitted that the version given by PW-54 and this witness are contrary to each other and in fact, the dead body of Bismillabibi was found from Mahemoodmiya's house and there is no evidence of her body having been found at any other place. It was submitted that before the SIT, this witness has come out with a new fact that his wife Bismillabibi was killed by administering acid to her which fact was told to him by Sabirmiya Kadarmiya. However, neither the medical evidence nor Sabirmiya support such fact. It was submitted

that the witness has stated that he had received a stone injury, however, when the shirt was bloodstained and he had sustained two CLW (scalp deep) on head, the possibility of such injuries having been sustained elsewhere in a different manner, cannot be ruled out. It was submitted that therefore, the testimony of this witness does not inspire confidence and cannot be relied upon.

**48.8 ANALYSIS:** From the testimony of this witness, to the extent he has deposed regarding his wife Bismillabibi lying at a place outside Mahemoodmiya's house and being made to lie down on Patel Ishwarbhai Karsanbhai's platform is concerned, appears to be in the nature of an exaggeration, inasmuch as, there is no material on record to indicate that any of the persons injured in Mahemoodmiya's house had come out and gone anywhere in the mohalla. The evidence indicates that all the injured and the dead bodies were taken to the Civil Hospital at Mehsana. The story regarding Shankerbhai vacating his shop also does not inspire confidence and appears to be the result of tutoring to further the prosecution theory of there being a conspiracy. However, despite the exaggerations and embellishments in this testimony, the presence of the witness at the scene of offence cannot be doubted, inasmuch as, he is a resident of Shaikh Mohalla, his wife Bismillabibi, son-in-law Bhaimiya Alammiya, daughter Johrabibi and three grandchildren Arif, Rafiq and Abeda have died in the incident. As per the testimony of this witness when the houses were set ablaze, he had seen the accused named by him and that he was injured in the stone throwing and sat down beside Bachumiya's jeep and upon the jeep being set on fire he had gone inside Bachumiya's house; however, there was something

like gas and hence he lifted the tin sheet and went out into the open space, which has been assailed by the learned counsel for the accused on the grounds referred to hereinabove. In the opinion of this court, the version given by the said witness appears to be quite possible, inasmuch as if he had entered Bachumiya's house after the jeep was set on fire, there are all possibilities of the fumes having entered Bachumiya's house which the witness has referred to as gas. A perusal of the video of the scene of offence shows that the sheets of the roof of Bachumiya's house have come apart and some have fallen down. Therefore, the version given by the witness that he lifted the tin sheet and went out also appears to be quite plausible. The fact that Bachumiya in his deposition has not mentioned the presence of this witness near the jeep or in his house is not of much relevance, having regard to the fact that the incident had taken place in the dead of night and the lights were not on, and hence it cannot be expected of all the witnesses to have noticed everyone around them. Besides, one cannot lose sight of the fact that the witnesses were deposing before the court after a period of eight years and hence, they cannot be expected to remember each and every small detail about the incident. By and large, when such an incident takes place, what would get embedded in the mind is the faces of the persons who committed the offence and the terror that had been created. However, when such an incident is going on, one does not expect the witnesses to look around and see as to who else is around, more so, considering the time of the night when the incident had taken place. Each person would be concerned about his own safety. While this witness has named five accused in his examination-in-chief and has identified Ambaram Kapur, Kachrabhai Tribhabhai, Kanubhai Joitabhai

and Rameshbhai Ramabhai in the court, it has been brought out through the cross-examination of the Investigating Officers that the witness had named only two accused in his statements recorded by the Police as well as by the SIT viz. Ambaram Kapur, Kachrabhai Tribhabhai. Having regard to the evidence of this witness, the court is of the view that to the extent the witness had named the accused in his original statement and has identified them in the court, his testimony deserves to be accepted.

49. **PW-64 Rafiqmiya Babumiya Shaikh** has been examined at Exhibit-583. He has deposed that at the time of the incident, his father Babumiya Motamiya, his mother Barubibi Babumiya, his younger brother Safiqmiya Babumiya, Safiqmiya's wife Faridabanu, Safikmiya's daughter Suhanabanu, aged five months, were present. His sister was married and prior to the incident, his father had gone to Modasa. About nine years prior to the date of his deposition, the Godhra train burning incident had taken place and on the next day, there was a declaration of Gujarat Bandh. On the third day, there was a declaration of Bharat Bandh. On the next day after the Godhra incident, the cabins near the Gram Panchayat in their village were burnt. On the next day thereafter, there was a declaration of Bharat Bandh and on that day, mobs of Hindus had gathered together and on that day, he along with his family was at home for the whole day. At 09:30 at night, a mob of Patels came from the direction of Mahadev towards their mohalla shouting, kill the Miyabhais, cut them. At the entrance of their mohalla, three cabins were burnt. Upon the police coming, the mob dispersed. After a little while, at about 11:30, the mob had come shouting, kill the

Miyabhais and cut them, and had started pelting stones at their mohalla and had burnt the houses and they had also opposed them. The people of their mohalla, women and children had hidden themselves in Mahemoodmiya's pucca house. He had seen them burning the houses and cabins, and that Kanubhai Joitabhai, Sarpanch of their village was instigating the mob. The members of the mob went towards Mahemoodmiya's house. All the other persons were pelting stones. When the members of the mob reached Mahemoodmiya's house, out of fear, he had fled to Ravaliyavas. The people of their mohalla were shouting for help, which he could hear and when he came back after some time, their houses had been burnt and Mahemoodmiya's house was burnt. They had taken out their people who were burnt in Mahemoodmiya's house, out of whom, about 28 persons had died. They had gone in the police vehicle along with the injured persons to the Civil Hospital, Mehsana. Throughout the day, they had stayed at the Civil Hospital. The people who died were buried and they had gone to Ilol village. The burial ceremony was performed at Mehsana. His mother Barubibi had sustained burn injuries and had died in the incident. His niece Suhanabanu sustained burns on the back of her head. From Ilol village, they had gone to Panpur Patiya Camp. On the second day, his niece had passed away and her burial ceremony was performed at Ilol. The witness has identified the clothes worn by his mother Barubibi and has further deposed that Dashrathbhai Ambalal, Mathurbhai Trikambhai, Vishnubhai Prahladbhai and Ambaram Kapur were in the mob. He has stated that he can identify those persons whom he has named and has identified Dashrathbhai Ambalal, Kanubhai Sarpanch,

Ambalalbhai, Parsottambhai Mohanbhai as Mathurbhai Trikambhai and Vishnubhai Prahladbhai.

49.1 In the cross-examination of the witness, certain omissions have been brought out to the effect that in his statement dated 27<sup>th</sup> March, 2002, he has not stated that on the next day after the Godhra incident, cabins had been burnt near the Gram Panchayat. An omission has been brought out to the effect that in either of his statements dated 27<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, he had not stated that his niece Suhanabani had sustained burn injuries on the back of her head and had passed away on the next day and her funeral rites were carried out at Ilol. An omission in the nature of contradiction has also been brought out to the effect that in both his statements, he has not named Ambalal Kapur as an accused. In his cross-examination, it has further come out that in the incident, he has not sustained any injuries and that no kerosene was found on his clothes and that he has not sustained any burn injuries. He has stated that when his niece was buried, he and his brother were at Ilol camp. He has denied that the police had come to Ilol. He has stated that he had stayed at his relative's place for two to four days. The witness has stated that since the atmosphere was tense, he has not informed the police about the incident and had not made any phone calls to the police. In his cross-examination, it has come out that he had not attempted to ascertain the position of his family members as he was trying to save his own life. It is further elicited in his cross-examination that at the time when the incident was going on, they were running from one place to the other in the mohalla and had not gone inside anyone's house and that he had not seen anyone

attacking with dharia and stick. The witness has admitted that for the purpose of going to Mahemoodmiya's house, one has to pass in front of Akabarmiya Nathumiya's house. He has also stated that before the mob came, there was stone pelting.

49.2 From the cross-examination of PW-110, the Investigating Officer (Police), it has been brought out that this witness in his statement dated 27<sup>th</sup> March, 2002 has not stated that on the next date, after the Godhra incident, cabins had been burnt near the Gram Panchayat of their village. The Investigating Officer, in his cross-examination, has admitted that this witness in his statement dated 27<sup>th</sup> March, 2002 has not stated the place from which he had seen the incident, and that he had not named Ambalal Kapur.

49.3 From the cross-examination of the Investigating Officer (SIT), it is further brought out that this witness had not stated that his niece Suhana had sustained burn injuries on the back of her head and had died on the next day and that burial ceremony was carried out at Ilol. The Investigating Officer (SIT) has admitted that this witness has not named Ambalal Kapur in the statement recorded by him and that this witness in his statement dated 22<sup>nd</sup> May, 2008 had stated that the fact that this incident had taken place at 9:30 at night had not been written down and instead it was recorded that the incident has taken place at 11:30 which is incorrect. It has further come out that before the Investigating Officer (SIT) the witness had stated that the version that during the incident, the police came and resorted to firing and had calmed the mob is incorrect. The police had come but it had gone away.

49.4 The learned counsel for the appellants-accused submitted that the time and sequence of events has been substantially improved by the witness. It was submitted that the witness has stated that when the mob went towards Mahemoodmiya's house, he ran away to Ravaliyavas because of fear and therefore, he is not a witness to the main incident. It was submitted that the witness claims to have come back after the incident and having gone with the police to the hospital and that he stayed at the hospital for the whole day and went to Ilol with others. However, though he had all the opportunity to disclose about the part of the incident and the accused, he did not do so for nearly 26 days till 27<sup>th</sup> March, 2002. It was submitted that though the witness was at the relief camps at Ilol and Panpur Patiya, he did not give his statement and is, therefore, apparently a got up witness to support the case of the prosecution. It was submitted that the witness has falsely claimed that his niece Suhanabnu received burn injuries on the back side of her head as no such injuries are found in the medical certificate. It was submitted that the witness does not refer to the starting point of the incident as 09:30 in both the statements dated 27<sup>th</sup> March, 2002 as well as 22<sup>nd</sup> May, 2008 and that in his statement dated 27<sup>th</sup> March, 2002, the witness states the time as 12:30 to 12:45, but before the SIT, he states that the time of the incident mentioned as 11:30 to 12:00 is false. Thus, vital and major improvements in the time have been made by the witness after a period of six years which is apparently deliberate. Moreover, the witness has intentionally avoided mentioning about the police firing by saying that he does not remember it. Furthermore, he has not stated in his statement dated 27<sup>th</sup> March, 2002 as to from where he had seen the

incident and that in neither of his statements, he has referred to Ambalal Kapur and has straightaway implicated him in the court for the first time. It was submitted that even otherwise, the fact that the witness has belatedly named the accused after 26 days when the statements of those who are residing together in the camps are recorded much prior thereto, the same loses its sanctity and gives way to implicate and name anybody as the witness wanted. It was urged that significantly, the witness has not received any injury whatsoever and has escaped from the incident unscathed, which would be a strong reason to approach the police and disclose the incident and the accused at the earliest opportunity.

**49.5 ANALYSIS:** This witness has inter alia deposed that at 11:30, the mob came again and he had seen them burning the house and cabin and that Kanubhai Joitabhai Sarpanch of the village was instigating the mob. The members of the mob went towards Mahemoodbhais house and other persons were pelting stones and that when the members of the mob reached Mahemoodmiya's house, out of fear, he fled to Ravalvas. The witness has also deposed that his mother Barubibi had sustained burn injuries and had died in the incident and his niece Suhanabanu had sustained burns on the back of her head and had passed away next day at Ilol where her burial ceremony was held. The witness has named Dashrathbhai Ambalal, Mathurbhai Trikambhai, Vishnubhai Prahladbhai and Ambaram Kapur being part of the mob and has identified Dashrathbhai Ambalal, Kanubhai Sarpanch, Ambalalbhai, Parsottambhai Mohanbhai as Mathurbhai Trikambhai and Vishnubhai Prahladbhai before the court. A contradiction has been proved to the effect that in both his statements recorded

by the police and the SIT, he has not named Ambalal Kapur. It has come out that the witness has not sustained any injuries. When cross-examined as regards not informing the police about the incident, the witness had stated that since the atmosphere was tense, he had not informed the police about the incident and had not made any phone calls to the police. He has further stated that he had not attempted to find out the position of his family members as he was trying to save his own life. In his cross-examination, it has further come out that at the time when the incident was going on, they were running from one place to the other in the mohalla and had not gone inside anyone's house and that he had not seen any one attacking with a dharia or stick. From the testimony of this witness, it emerges that he is a resident of Shaikh Mohalla of village Sardarpura and is residing there with his parents and his brother and his family. In the incident, his mother Barubibi has died and his family members have sustained injuries. The witness has deposed that he has seen Kanubhai Joitabhai Sarpanch inciting the mob and burning their houses. The witness has also named Dashrathbhai Ambalal, Mathurbhai Trikambhai, Vishnubhai Prahladbhai and Ambararam Kapur as being part of the mob. The witness has identified Dashrathbhai Ambalal, Kanubhai Sarpanch, Ambalalbhai and Vishnubhai Prahladbhai whereas he has wrongly identified Parsottambhai Mohanbhai as Mathurbhai Trikambhai. The testimony of this witness is assailed on the ground that he had gone up to Ravalvas and, therefore, could not have seen the main incident. However, the witness has stated that he ran to Ravaliyavas when the mob reached Mahemoodmiya's house. Therefore, he would have witnessed a major part of the incident, inasmuch as, the consistent version of all the

witnesses is that the mob commenced burning houses one after the other from the row on the side of the Kabrastan and then proceeded towards Mahemoodmiya's house. Till the mob reached Mahemoodmiya's house, the witness would have seen the incident and, therefore, would have been in a position to identify the accused. If the witness was a got up witness, there was no necessity of his saying that he had fled from the scene out of fear of the mob. Though the witness has been cross-examined at length, the core of his testimony has not been shaken. The witness appears to be a natural witness, inasmuch as, he admits that he was concerned about his own life and, therefore, had not tried to ascertain the condition of his family. The evidence of this witness also supports the version given by his brother PW-61 Safiqmiya Babumiya regarding Suhanabalu having sustained injuries during the course of the incident. In the opinion of this court, the presence of this witness at the scene of incident is natural. While there are some discrepancies in the testimony of the witness, the same are not of such a nature as would warrant discarding of his testimony. By and large the evidence of the witness appears to be creditworthy.

50. **PW-65 Akbarmiya Nathumiya Shaikh** has been examined at Exhibit-586. He has deposed that in his family, they are two brothers, viz., he and Bachumiya Nathumiya. Bachumiya is his elder brother. In this incident, Bachumiya Nathumiya was set on fire and had died. He has three sisters who are married. His wife's name is Badarunisha. He has a daughter by the name of Shabanabalu, aged 14 years and a son by the name of Nasir Hussain, who was 7 years old at the time of incident. The witness has deposed that on 27<sup>th</sup>

February, 2002, the incident regarding the burning of a train at Godhra had taken place and on 28<sup>th</sup> February, 2002, there was a declaration of Gujarat Bandh. The market in the village was closed. At night, the cabins were burnt in the market. On 28<sup>th</sup> February, 2002, in the evening between 4 to 5 o'clock, Mathurbhai Trikambhai Wireman, Kanubhai Sarpanch, Becharbhai Odhavbhai had put up a focus light on the street light pole. On 1<sup>st</sup> March, 2002, there was a declaration of Bharat Bandh and he along with his family was at home. At around 5 to 6 o'clock, Kanubhai Sarpanch, Becharbhai Odhavbhai and Mathurbhai Trikambhai had come to fix the light in front of their house. Thereafter, at 09:30 in the evening, a mob of Patels came from the direction of Mahadev temple, shouting, cut the miyabhais, kill them, burn them, and burnt his three cabins which were at the entrance of Shaikh Mohalla. He took his wife and his children and left them at his brother Bachumiya's house and went to the entrance of the mohalla in front of his house. Once again, the mob of Hindus came shouting, cut the miyabhais, kill them, burn them and started vandalizing the house of Painter Manubhai and set it on fire. From there, he saw that Rameshbhai Gangavat had a dharia in his hands, Madhabhai Viththalbhai had a stick in his hand, Jayantibhai Ambalal had a stick, Rajeshbhai Pujabhai had a stick, Ashwinbhai Baldevbhai Botham had a tin in his hand, Patel Ashwinbhai Jagabhai had a can in his hand, Prajapati Ramanbhai Ganeshbhai had a can, Patel Tulsibhai Girdharbhai had a burning rag, Pavan Murli Vasanvala was instigating them by saying kill the miyabhais and cut them. Thereafter, since he was afraid, he took his wife from Bachumiya Nathumiya's house and went from the side of Mahemoodmiya's house to Ravalvas and hid there. Thereafter, on account of fear, he went

and hid in the fields, but still felt afraid and hence, he went to Thakor Bhikhaji Somaji's house and hid there. There, he could hear people screaming for help from Mahemoodmiya's house. Upon the atmosphere becoming peaceful, he came through Kapur Mohalla to the entrance of Shaikh Mohalla where the police vehicle was there and he saw his people. He left his wife and the children at the entrance of Shaikh Mohalla and went inside the mohalla where he saw that somebody had made Bismilla, wife of Bhikhumiya consume acid and they, namely, Sabirmiya Kadarmiya, Bhikhumiya Kalumiya, Mahemoomiya Latifkhan Pathan and he, had lifted her and put her on Patel Ishwarbhai's verandah and he returned to Shaikh Mohalla. Twenty-eight persons were burnt in Mahemoodmiya's house. With the help of police, they took the persons out of the house, and took them to the Mehsana Civil Hospital. The burial ceremony was performed and with the help of police, whereafter, he had gone to Ilol where he stayed for about 5 to 6 days. From there, he had gone to the Relief Camp at Panpur Patiya, where he stayed for two and a half months and the police had recorded his statement there. He has deposed that he can identify the persons in the mob and has identified Mathurbhai Ramdas, Tulsibhai Girdharbhai, Rajeshbhai Pujabhai, Jayantibhai Ambalal and Madhabhai Viththalbhai. He has also identified Kanubhai Sarpanch, Rameshbhai Ramabhai Gangavat, Mathurbhai Trikambhai and Kacharabhai Tribhovandas. He has also identified Ambalal Maganlal, and has identified Ramanbhai Jivanbhai as Maheshbhai Jivanbhai.

50.1 In the cross-examination of this witness, certain omissions have been brought out as to his previous statement dated 10<sup>th</sup> March, 2002 to the effect that he had not stated

that on 28<sup>th</sup> February, 2002, at about 4 to 5 o'clock, focus lights were put up on the street light pole by Mathurbhai Trikambhai Wireman, Kanubhai Sarpanch and Becharbhai Odhavbhai. The witness has denied that on 1<sup>st</sup> March, 2002 at about 09:30 p.m., when the cabins were burnt near the bus stand, at that time, upon the police coming, they had resorted to tear gas and firing to disperse the mob due to which, the members of the mob had run helter skelter. He has denied the suggestion that since there was darkness at the time of the incident and there was no light, and there would a question of identification of the accused, he was intentionally deposing with regard to the existence of light. He has denied the suggestion that he had subsequently been tutored and hence, he was deposing with regard to light. He has admitted that he had not referred to the question of light in the meeting at Mahadev. He has admitted that the mob had not come from all the four sides, but had come from the direction of Mahadev. He has admitted that the mob had not come from outside, but had come from the side of Mahadev. Various questions have been put to the witness with regard to the application made by him to the SIT and the contents thereof. In his cross-examination, a contradiction has been brought out that in his statement dated 10<sup>th</sup> May, 2008 made before the SIT, he had stated that the fact recorded in his statement dated 10<sup>th</sup> March, 2002 that Prajapati Ramanbhai Ganeshbhai and Patel Rameshbhai Ramabhai Gangavat were present in the mob is not correct and that he had not seen them in the mob. He has admitted that he had named the persons whom he had seen in the mob in his statement dated 10<sup>th</sup> March, 2002 and he had not named the persons whom he had not seen in the mob in such statement. In the cross-examination of the witness, it has been

elicited that he had seen Bismillabibi in front of Mahemoodmiya's house and she was not taken out of his house. In his statement dated 10<sup>th</sup> May, 2008 recorded by the SIT, he has admitted that he had stated that corpses had been taken out by the police from Mahemoodmiya's house, out of whom Bismillabibi was alive and somebody had made her consume acid and she was shouting for water and they had made her lie down in Ishwarbhai's verandah. In his cross-examination, it has come out that he had not felt any anxiety about Mathurbhai Trikambhai and Kanubhai Sarpanch putting on the lights and going away and that he had not gathered the people of the mohalla. He has stated that after the incident he had told the police about the lights but the police had gone away and not done anything. He had told the police about the lights being put up when they had come to Ilol after the incident but the police did not do anything. He has also talked about it to others but nothing was done.

50.2 From the cross-examination of the Investigating Officer (Police), it has been further brought out that in his statement dated 10<sup>th</sup> March, 2002, this witness has not stated that he was standing at the corner of the mohalla and had seen the mob and had identified the accused. The Investigating Officer has admitted that the witness had admitted that the mob had come at 12:30 at night. The Investigating Officer has further admitted that this witness has not stated that at the time of the incident, he was standing in front of his house at the corner of the mohalla.

50.3 The Investigating Officer (SIT) in his cross-examination has admitted that this witness in his statement dated 10<sup>th</sup> May,

2008 before the SIT, had stated that the fact recorded in his previous statement to the effect that Prajapati Ramanbhai Ganeshbhai and Patel Ramabhai Gangawat were present in the mob is incorrect and that he had not seen them in the mob. The Investigating Officer (SIT) in his cross-examination has admitted that in his statement dated 9<sup>th</sup> May, 2008, the witness has stated that the incident had started at 11:30, however, in fact the incident had started after 10 o'clock at night. The Investigating Officer has further admitted that this witness had not stated that at the time of the incident, he was standing in front of his house at the corner of the mohalla.

50.4 Mr. Lakhani, learned counsel for the appellants-convicts submitted that the story of fixing focus lights on the street-light pole line on 28<sup>th</sup> February, 2002 in the evening by Mathur Trikamdas (Wireman), Kanubhai (Sarpanch) and Bechar Odhav was never told in his police statement dated 10<sup>th</sup> March, 2002 and has been introduced for the first time after six years to falsely implicate the accused. It was submitted that the story that the above three accused had fixed lights near his house and switched them on, is got up after six years and gets falsified by the facts proved on record, viz., that the street-light connection was already disconnected and not working on the date of incident. It was submitted that while making material improvements in the sequence and time of incident, the witness significantly does not speak of the arrival of police, dispersing of mob and the police going away, which almost all witnesses have deposed. It was submitted that the witness has stated that after the first part of the incident at 9:30, he has kept his wife and children at his brother Bachumiya Nathumiya's house and returned to the corner of the mohalla;

and that when the mob came again, he saw some of the accused and has named them with the weapons and therefore, he had taken his wife and he had hidden in Ravalvas and then moved to the fields and then hidden in Bhikhaji Somaji Thakore's house. He says that after the situation had calmed down, he put his wife and children at the corner of the mohalla and he found Bismillabibi having been administered acid. He along with others lifted her and made her lie down on Ishwar Patel's otla. All these facts are not stated by him in his first available statement dated 10<sup>th</sup> March, 2002. It was submitted that in the first version recorded on 10<sup>th</sup> March, 2002 regarding the incident happening near the bus stand and police firing and the incident occurring at 12:00 to 12:30 have been completely disowned by the witness and has been materially changed. It was submitted that the witness had remained silent for nine days without disclosing everything about the incident as well as the accused and has not rendered any explanation for late disclosure thereof. It was submitted that this witness has given names of some accused on 10<sup>th</sup> March, 2002; a few of them are not named in his application made to the SIT and thereafter in his statement before the SIT, he has stated that he had not named two persons whose names are reflected in the statement given by him on 10<sup>th</sup> March, 2002; the witness has identified some of the accused and has failed to identify some of them though he has named them in the deposition; and most surprisingly, though he has not named four accused in his deposition, he has identified three of them in the court and one has been identified as a wrong person. Thus, this witness has specifically changed the time of the incident before the SIT as against the time which he had earlier mentioned before the police, which shows that the witness has

consciously and deliberately made the change in such time, which is a vital improvement made by the witness affecting the core substratum of the incident in question. It was pointed out that the witness in his statement before the SIT on 10<sup>th</sup> May, 2008, has stated that dead bodies were taken out from Mahemoodmiya's house by the police and from amongst them Bismillabibi was found alive which indicates that the fact of Bismillabibi found lying on the heap of dung behind Mahemoodmiya's house as stated by PW-54 Sharifmiya gets contradicted. This fact is further contradicted by the version given by PW-63 Bhikumiya Kalumiya viz. Bismillabibi's husband that Sabirmiya Kadarmiya had informed him that his wife was lying on the platform in the line of Abbasmiya's house. It was pointed out that if Sabirmiya Kadarmiya's deposition is perused, he is completely silent about these facts. It was argued that thus, all these witnesses have sought to take the court for a ride and make contradictory statements which do not support each other. It was submitted that the say of this witness that since somebody administered acid to Bismillabibi and she was shouting for water, is also not corroborated by any other evidence, much less, the post-mortem note and cause of death of Bismillabibi. It was submitted that the conduct of this witness is also unnatural, inasmuch as, he does not know that his wife had gone to Savala and after the incident, it did not occur to him that he may inquire about his wife and son, as to where they have gone. It was submitted that therefore, the unnatural conduct of this witness makes him completely unreliable. It was pointed out that the witness has admitted that the fact regarding existence of lights at the scene of offence was disclosed by him in the year 2008 and that the witness has clearly been

tutored to say such facts in view of the fact that the incident had occurred in the darkness and there being no source of light, such fact has been falsely projected to justify that they could identify the accused. It was submitted that the witness has stated that he did not go inside the house from 09:30 to 1:00 and was not caught by the mob, nor was he injured by the mob, which sounds unnatural seeing the fact situation deposed by the witnesses; which means that either the events have not happened as deposed by the witnesses or in fact, the witnesses, were not there at all at the place of incident or in Shaikh Mohalla. It was submitted that there is a strong possibility of this witness running away with his wife and son to the fields prior to the incident in question. In conclusion, it was submitted that considering the deposition of this witness as a whole, it is very doubtful as to whether he was actually present there and had seen any part of the incident. It was submitted that moreover, there is a contradiction as regards from where and how he had seen the accused. It was submitted that in his cross-examination, the witness has admitted that upon the houses being burnt, there was smoke and at Ravalvas, he had gone to Dhanabhai Nathabhai Raval's place. He had gone to Ravalvas to take shelter. However, he (Dhanabhai) refused and said that even they would be killed and so, he had gone to the fields. Ravalvas is adjoining the field. From the cross-examination of the Investigating Officer, it has been brought on record that this witness in his statement dated 10<sup>th</sup> March, 2002 had not referred to the incident of Mathurbhai Trikambhai Wireman, Kanubhai Sarpanch and Becharbhai Odhavbhai putting the focus light on the street-light and starting it. Further omissions have been brought to the effect that in his statement dated 10<sup>th</sup> March, 2002 this witness had not stated

the facts as narrated before the Investigating Officer. From the cross-examination of the Investigating Officer, it has been brought on record that this witness in his statement dated 10<sup>th</sup> March, 2002 had stated that from there he saw accused Rameshbhai Gangawat with dharia, Madhabhai Vitthalbhai with stick, Jayanti Ambalal with stick in his hand, Rajeshbhai Punjabhai with stick in his hand, Ashwin Baldev Botham with a can in his hand, Patel Ashwinbhai Jagabhai with a can, Prajapati Ramanbhai Ganeshbhai with a can and Patel Tulsibhai Girdharbhai with a burning rag. Pawan Murli Vaasanwala was instigating and stating that "kill the miyas and cut them".

**50.5 ANALYSIS:** This witness is also a resident of Shaikh Mohalla of village Sardarpura and his house is situated on the row on the side of the Kabrastan. The testimony of this witness suffers from some embellishments namely, that Mathurbhai Trikambhai Wireman, Kanubhai Sarpanch and Becharbhai Odhavbhai had put focus lights on the street-lights at around 4:30 to 5:00 on 28<sup>th</sup> February, 2002. The witness, in his examination-in-chief, has named Rameshbhai Gangawat, Madhabhai Vitthalbhai, Jayanti Ambalal, Rajeshbhai Punjabhai, Ashwin Baldev Botham, Patel Ashwinbhai Jagabhai, Prajapati Ramanbhai Ganeshbhai, Patel Tulsibhai Girdharbhai and Pawan Murli (Vaasanwala). He has stated that the mob had entered Shaikh Mohalla and was burning one house after the other. The witness has stated that being afraid, he took his wife from Bachumiya Nathumiya's house and went from the front of Mahemoodmiya's house to Ravalvas and hid in the fields there. That on being afraid, he had taken shelter at the house of Thakore Bhikhaji Somaji. There is an improvement in the

testimony of this witness to the effect that he had stated that after the incident was over, he came back to Shaikh Mohalla and that at that time, somebody had administered acid to Bismilla - Bhikumiya's wife and that Sabirmiya Kadarmiya, Bhikumiya Kalumiya and Mahemoodmiya Latifkhan Pathan had lifted her and made her lie down on Patel Ishwarbhai's verandah and that he had returned to Shaikh Mohalla. This part of the testimony of this witness is a major improvement, which is not supported by the evidence on record. The evidence of the witness clearly reveals that Bismillabibi, wife of Bhikumiya was inside Mahemoodmiya's house and had succumbed to the injuries on the spot. Therefore, the question of Bismillabibi having been administered acid and being lifted and placed elsewhere would not arise. The witness has identified Mathurbhai Ramdas, Tulsibhai Girdharbhai, Rajeshbhai Punjabhai, Jayantibhai Ambalal, Madhabhai Vitthalbhai, Kanubhai Sarpanch, Rameshbhai Ramabhai Gangawat, Mathurbhai Trikambhai, Kachrabhai Tribhovandas and Ambalal Maganlal. The witness has wrongly identified Ramanbhai Jivanbhai as Maheshbhai Jivanbhai. However, the witness has not referred to Mathurbhai Ramabhai, Kachrabhai Tribhovanbhai, Ambalal Maganbhai and Maheshbhai Jivanbhai in his deposition. In his cross-examination, a contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he has not referred to the incident with regard to the focus lights being placed on the street-light poles. A further contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> May, 2008, he has stated that he has learnt that in his statement, the names of Prajapati Ramanbhai Ganeshbhai and Patel Ramesh Ramabhai Gangawat have been included, which is incorrect and that he had not seen them in

the mob. In his cross-examination, he has admitted that the mob had not come from all sides but had come from the direction of Mahadev.

50.6 From the testimony of this witness, it emerges that he is a resident of Shaikh Mohalla and, therefore, his presence at the scene of offence together with his wife is natural. The witness has deposed that he had seen the mob setting the houses on fire and has named them in his first statement before the police as well as before the court. He has identified some of the persons named by him in his deposition. The witness has stated that subsequently, he had fled from the scene on account of being afraid. However, the mere fact that the witness was not present throughout the incident does not give any reason to disbelieve the version of the witness that he had seen the accused entering Shaikh Mohalla and starting burning houses. As discussed earlier, the consistent version given by most of the witnesses is that the mob proceeded further burning house after house in the row on the side of the Kabrastan. Therefore, this witness would have been in a position to see and identify the persons in the mob and flee thereafter.

50.7 While it is true that the witness has brought in new facts in his deposition before the court, which appear to be more in the nature of tutoring, however, the core of his testimony remains unshaken. Therefore, there is no reason to disbelieve his testimony to the extent the same is consistent with the previous statements made by him. The testimony of this witness has also been challenged on the ground that he has not been able to identify the persons named by him. As

discussed earlier, the evidence of the witnesses has been recorded more than eight years after the incident. In such a long period, the appearances of people change and not everyone has a sharp memory that one can recognise persons with whom he is not in touch after a long period of time. In these circumstances, not identifying some of the accused is no reason to disregard the testimony of this witness.

51. **PW-77 Badrunisha Akbarmiya Shaikh** has been examined at Exhibit-639. She has deposed that she is a native of Sardarpura and is residing with her husband Akbarmiya Nathumiya and her children at Shaikhvas. Her husband is working in Pathan Himatkhan Sadumiya's flour-mill, which is situated opposite the masjid in their village. She has a daughter by the name of Sabanabanu and a son by the name of Nasir. Her brother-in-law Bachumiya Nathumiya (husband's elder brother) died in the incident. The witness has further deposed that on 27<sup>th</sup> February, 2002, she had heard about the incident of burning of a train at Godhra. On 28<sup>th</sup> February, 2002, she had heard about burning of cabins by Patels of their village in the bazaar of Sardarpura. She does not know how many cabins were set on fire. On 1<sup>st</sup> March, 2002, the atmosphere in the village was tense and at night, she was present with her family at home. At 09:30 at night, Patels of the village came from the direction of Mahadev shouting and screaming, burn the Muslims, cut them, kill them, and they came at the corner of Shaikhvas and burnt three cabins, gallas. Thereafter, upon the police coming, the mob dispersed. After sometime, the same mob came from the side of Mahadev, shouting and screaming, kill the Muslims, cut them and upon coming near Shaikh Mohalla, they started pelting stones. Her

husband left her at the house of Bachumiya Nathumiya. Thereafter, the mob of Patels came towards their house and started burning their houses and proceeded further burning the houses. They also burnt Bachumiya Nathumiya's jeep. At that time, she saw Ambalal Kapur, Rameshbhai Ganeshbhai, Churbhai Vitthalbhai, Churbhai Kanabhai, Pashabhai Mohanbhai, Kachrabhai Tribhovandas and Tulsi Girdharbhai. Thereafter, her husband took her to the fields from the rear side of Mahemoodmiya's house and from there, they could hear their people screaming for help and could see the flames of the fire. Thereafter, after saying Bharat Mata Ki Jay, the mob left. Upon the atmosphere becoming calm, they went towards the mohalla and found that there were about twenty-eight corpses in Mahemoodmiya's house and her house was burning and all the household articles were also burning inside the house. The trunks, articles, jewellery, and the money kept inside the house were taken away by the persons in the mob. They had sustained damages of rupees one lakh. Thereafter, the Pathan people had gone to Sevala. She and her son also went to Sevala. On 6<sup>th</sup> March, 2002, the police came to Sevala and recorded her statement and the SIT had recorded her statement at Satnagar. She has deposed that she could identify the persons in the mob and has identified Ambalal Kapur and Kachrabhai Tribhovandas, and has identified Churbhai Kanjibhai as Churbhai Vitthalbhai and Mathurbhai Ramdas as Pashabhai Mohanbhai.

51.1 In the cross-examination of this witness, an omission in the nature of contradiction has been brought out to the effect that in her statement dated 6<sup>th</sup> March, 2002, she had not named Kachrabhai Tribhovandas, Tulsibhai Girdharbhai and

Chaturbhai Kanabhai. A contradiction has also been brought out to the effect that in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she had stated that she felt that these people would actually kill her and they did not feel safe and upon her saying so, she, her husband and her son, all of them, closed their house and went away and on the way towards fields and at that time, she saw the incident. A contradiction has been brought out to the effect that in her statement dated 22<sup>nd</sup> May, 2008 recorded by the SIT, she has stated that she had named Patel Chaturbhai Vitthalbhai, but she does not know Patel Chaturbhai Vitthalbhai. In the cross-examination of this witness, a contradiction has been brought out to the effect that in her police statement, she had stated that upon the police coming and resorting to firing, the mob had dispersed and thereafter, there was a complete peace in the village. An omission is sought to be brought out to the effect that in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she had not stated the facts as deposed before the court. A further omission was brought out to the effect that in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she had not stated that upon Bachumiya's jeep being set on fire, she had seen the persons in the mob.

51.2 From the cross-examination of the Investigating Officer (Police), it has come out that this witness in her statement dated 6<sup>th</sup> March, 2002 has not named Kachrabhai Tribhovandas, Tulsibhai Girdharbhai and Chaturbhai Kanabhai. From the cross-examination of the Investigating Officer, it is further revealed that in her statement dated 6<sup>th</sup> March, 2002, she had not stated that her husband had dropped her at Bachumiya Nathumiya's house. This witness has also not

stated that she had seen Chaturbhai Kanabhai and Tulsi Girdharbhai. The Investigating Officer in his cross-examination has admitted that in her statement dated 6<sup>th</sup> March, 2002, this witness had stated that they felt that these people would actually kill them and they did not feel safe and hence, she and her husband and her son shut their house and for the purpose of saving themselves, went on the road towards the fields and at that time, she saw at around 9:30 at night and hence, all the women folk were confined by their husbands in their houses and the other men with a view to see that no damage is caused, were standing in front of their houses and in the meanwhile, the police came and resorted to firing and then the mob had dispersed. From the cross-examination of the Investigating Officer, it has come on record that in her statement dated 6<sup>th</sup> March, 2002, this witness has stated that at about 12:30 at night, once again, there was commotion in the village and her husband told her and her son that the Patels are now more enraged and are shouting "kill the Muslims, cut them" hence it appeared that these people would actually kill them and they did not appear to be safe, and upon his saying so, she, her husband and her son shut their house and with a view to save themselves, took the road to the agricultural fields and at that time, had seen from their village Patel Ambalal Kapur, Rameshbhai Ganeshbhai, Chaturbhai Vitthal das, Pashabhai Mohanbhai, etc. in a mob of 1500-2000 people. It is further brought out that in her statement dated 6<sup>th</sup> March, 2002, this witness has not stated that Bachumiya's jeep was set on fire, at that time, she had seen the members of the mob. From the cross-examination of the Investigating Officer, it has come out that in her statement dated 6<sup>th</sup> March, 2002, this

witness has stated that while they were going towards the field, at that time, she had seen the persons in the mob.

51.3 From the cross-examination of the Investigating Officer (SIT) it has come out that this witness had, in her statement dated 22<sup>nd</sup> May, 2008 stated that though she had given the name of Chaturbhai Vitthalbhai she did not know him.

51.4 The learned counsel for the appellants - accused has submitted that this witness has given totally different and materially improved sequence of facts with change in the timings as against what she has stated in her police statements. It was pointed out that the witness has further deposed that after the jeep was set on fire, her husband took her towards the fields behind Mahemoodmiya's house and even prior thereto, her husband had left her at Bachumiya Nathumiya's house. It was submitted that both the times, the witness has not referred to the fact that her son was also with her as claimed by her husband Akbarmiya. It was submitted that the witness does not refer to first going to Ravalvas, then to the fields and then, hiding in Bhikaji Somaji Thakore's house. Thus, the sequence of facts as to where were they, is not in conformity with what has been stated by her husband in his deposition. It was submitted that all relevant facts touching the core substratum of the incident and identification of the accused are materially improved and are in contradiction to her police statement. Such improvements and contradictions in the deposition of this witness and all other witnesses are so material, important and major that they cannot be discarded on the ground of the same being natural or negligible. It was submitted that the witness has deliberately disowned her say

before the police about the crowd/mob having gathered at the bazaar and police having resorted to firing. Besides, despite the fact that neither she nor her husband received any injury in the incident and had ample opportunities to disclose about the incident or name the accused whom they claim to have seen, both of them have remained silent up to 6<sup>th</sup> March, 2002 and 10<sup>th</sup> March, 2002 respectively. These facts clearly indicate that none of them were present in Shaikh Mohalla but had run away much prior to the incident and were not witnesses to any of the events that had taken place at Shaikh Mohalla and that they are got-up witnesses. It was submitted that even the claim of this witness in her police statement, though denied, that she has seen few of the accused when they had gone towards the field, it has already come in the evidence of other witnesses that there was darkness and that from the fields, nothing that was happening in Shaikh Mohalla could be seen. Thus, the contradictory statements made by this witness prove that she has not seen witnessed the incident in question. It was submitted that the witness has changed the names of accused that she had seen, from stage to stage, till the time of recording of her deposition as per her convenience, to falsely and wrongly implicate the persons in the manner she had been tutored. It was submitted that if the deposition of this witness and that of her husband, Akbarmiya Nathumiya (PW-65) are read in conjunction with the deposition of the complainant and the Raval witnesses, the claim of both of them of having run away towards Ravalvas from the side of Mahemoodmiya's house is not possible as not only was the mob said to have spread in the entire Mohalla, but that there was also a huge crowd on the rear side of the house. Thus, these witnesses apparently are not telling true facts before the court and are

lying. It was submitted that the claim of the witness that she had recognised the accused in the light of the burning jeep is also not correct, inasmuch as her husband, Akbarmiya Nathumiya has not stated anything about the jeep being set on fire. According to the learned counsel, since, from the commencement of stone pelting, her husband had taken the witness with him to the fields, this claim of the witness is apparently false and is contradictory to what has been stated by her husband. It was submitted that it seems that it is only with a view to show as to how she could recognise the accused, that the witness has improved upon these facts. It was submitted that this witness has deposed that on the date of incident at 09:30 p.m., a mob of village Patels came from Mahadev side and set on fire three cabins outside Shaikhvas, which facts do not find place in her statement dated 6<sup>th</sup> March, 2002. Thus, on material and vital facts, the witness has been contradicted. It was contended that if upon hearing the commotion, her husband dropped her at Bachumiya's house, there was no other opportunity for her to even see the mob setting on fire the three cabins at the corner of Shaikhvas. It was urged that thus, a parrot-like story has been told in court, which was not stated before the police at the earliest available opportunity. It was submitted that most importantly, the witness has claimed that Bachumiya's jeep was set on fire and she saw the accused, but this claim does not find place in either of her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008. Thus, there was no occasion for the witness to see and recognise the accused to name them in the court and that, such claim is put forth by her for the first time in the court, and therefore, no reliance can be placed on the evidence of this witness. It was submitted that this witness has also named a

person who is not an accused and has thereafter failed to identify such person who was present in the court and has even misidentified a named person and therefore, this witness is not believable.

**51.5 ANALYSIS:** This witness is the wife of PW-65 Akbarmiya Nathumiya Shaikh. As per the version given by this witness, her husband had left her at the house of Bachumiya Nathumiya and when the mob came towards their house and started burning them, the mob also burnt Bachumiya's jeep, at that time, she saw Ambalal Kapur, Rameshbhai Ganeshbhai, Chaturbhai Vitthalbhai, Chaturbhai Kanabhai, Pashabhai Mohanbhai, Kachrabhai Tribhovandas and Tulsi Girdharbhai. Subsequently, her husband took her to the fields from the rear side of Mahemoodmiya's house and they could hear people screaming and they could see flames. In her cross-examination, a contradiction has been brought out to the effect that she has not named Kachrabhai Tribhovandas, Tulsibhai Girdharbhai and Chaturbhai Kanabhai in her statement dated 6<sup>th</sup> March, 2002. A contradiction has also been brought out to the effect that in her earlier statements before the police as well as before the SIT, she had conveyed that it appeared that these people would actually kill them and they did not feel safe and that she, her husband and her son, all of them, closed their house and went away towards the fields and at that time, she saw the accused persons. A contradiction has been brought out to the effect that in her statements dated 10<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008, she has stated that upon her husband saying that it appears that these people would actually kill them and they did not appear to be safe, she, her husband and her son all of them closed their house and with a

view to save themselves, went on the road towards the fields and at that time, she had seen the accused persons. The testimony of this witness has been challenged on the ground that she has given a totally different and materially improved sequence of facts. It was pointed out that the witness has deposed that after the jeep was set on fire, her husband took her to the fields behind Mahemoodmiya's house and prior thereto, she was left in the house of Bachumiya Nathumiya. It was pointed out that the witness has not referred to her son who was also with her as claimed by her husband Akbarmiya. It was submitted that the relevant facts touching the core substratum of the incident and identification of the accused are materially improved and in contradiction to her police statement which cannot be discarded. It was submitted that from the testimony of this witness, it is evident that she was not present when the incident took place and that they had run away much prior to the incident and, therefore, had not witnessed the incident.

51.6 While it is true that there is an improvement in the testimony of this witness to the effect that she has stated that her husband had initially left her at the house of Bachumiya Nathumiya and subsequently had come to take her and that while going towards the fields, at that time, she had seen the mob burning the houses and setting Bachumiya's jeep on fire; however, to the extent she has deposed with regard to having seen the crowd and the accused is concerned, she had stated so in her statement recorded by the police. The improvement made in the deposition is only to the effect that she has seen the incident from the mohalla instead of on the way while going towards the fields. Thus, to the extent of her having seen

the accused participating in the commission of the offence is concerned, her stand is consistent. However, considering the nature of the testimony of this witness, namely, that she has seen the accused from a distance and having regard to the overall circumstances of the case, the testimony of this witness cannot be solely relied upon to base a conviction and one would have to look for corroborative material to support her evidence.

**52. PW-66 Akbarmiya Rasulmiya Shaikh** has been examined at Exhibit-591. He has deposed that his native is Sardarpura and that they were residing at Shaikh Mohalla in Sardarpura where there were about twenty houses. His family was comprised of him, his wife whose name he does not remember, his four sons, viz., Nazirmahammad, Gulamali, Idrish and Salim. He does not have any daughters. They are three brothers. He is the eldest. After him, Ibrahimmiya Rasulmiya who is the first informant and the third one is Sherumiya Rasulmiya. The families of all the three brothers were residing at Shaikh Mohalla. His son Nazirmahammad was residing in a separate house. In the incident, his son Idrish has died and Nazirmahammad's wife Vahida has also died in the incident. Shakkarbibi is his sister. Shakkarbibi has been married to Mahemoodmiya Hussainmiya's son at Shaikhvas. His brother Ibrahimmiya's wife Jayda, his daughters Raziya and Parveen had also died in the incident. In the incident, his brother Sherumiya, Sherumiya's wife Mahemudabibi, his daughter Mumtaj, and his son Yunus, have also died.

52.1 On 27<sup>th</sup> February, 2002, a train had been burnt at Godhra in connection with which, there was a declaration of Gujarat

Bandh on 28<sup>th</sup> February, 2002 and on the next day thereafter, that is on the 1<sup>st</sup> March, there was a declaration of Bharat Bandh. They were all at home. At around 09:30 on 28<sup>th</sup> February, 2002, the Patels of the village came shouting and screaming from the direction of Mahadev. The Patels of the village had burnt three cabins at the entrance of the Shaikhvas and they vandalized and set three cabins on fire. At that time, the police came and the mob fled. At 11:30 hours, the mob came again on 1<sup>st</sup> March, 2002. Thereafter, they were shouting, kill the miyabhais, cut them, burn them alive and had pelted stones and the Patels of their village had started burning houses. They (the witness and others) were also throwing stones in retaliation. He was hurt on the right leg with a stone. He also sustained stone injuries on his back and forehead as well as on the shank of the leg. At that time, he had hidden himself behind Bachumiya's vehicle. At that time, the Patels of the village were burning the houses and were proceeding towards Mahemoodmiya's house and had come near and hence, he ran towards the wall of the Kabrastan. Mahemoodmiya's house was surrounded and somebody had climbed on top of the house and was hammering it with an iron hammer and he could hear the sound. Thereafter, petrol and kerosene was poured and he was sitting next to the wall, when one Patel saw him and said that, look here is a Bandiyo and he ran after him and hence, he entered a vacant grave in the graveyard and pulled some thorns over the tomb, due to which, despite searching for him, they could not find him. Thereafter, the Patels threw a burning rag in the graveyard resulting in the dry grass being burnt and thereafter, they had gathered near Mahadev temple and shouted "Bharat Mata Ki Jay" and had gone away. Thereafter, the police car had come.

The police shouted, if anyone is alive, they should come out and that they are police. Hence, he jumped the wall and came to the mohalla. He had gone with the police to Mahemoodmiya's house where there were about twenty-eight corpses which had been burnt with petrol and kerosene by the Patels of the village. Those who had been injured, were taken to the Civil Hospital by the police in a vehicle. The twenty-eight corpses included Idrish, Wahida, Ibrahimmiya's wife Zayda, his two daughters, his brother Sherumiya, Mahemudabibi, Mumtajbibi and Yunus, who had been burnt. They had reached the Civil Hospital at 5 o'clock in the morning and had availed of treatment at Mehsana Civil Hospital. Throughout the day, they had stayed at the hospital and in the evening at 5 o'clock, they had been discharged and with the help of the police, they were taken to Ilol. They had stayed at Ilol for about 5 to 6 days and thereafter, had gone to the Panpur Patiya relief camp where they stayed for about two to two and half months. In the mob, he had seen Patels of his village, viz., Chaturbhai Vitthalbhai with a stone, Rajeshbhai Punjabhai with a stick, Kachrabhai Tribhovanbhai with a bottle and tin, Ambaram Maganbhai with a dharia, Bhikha Joita, Mangabhai Mathur, Jayanti Manga, Natu Prabha, Tulsibhai Girdharbhai, Pashabhai Mohanbhai, Mathurbhai Trikambhai, Rameshbhai Kantibhai, Kanubhai Joitabhai, Rameshbhai Ramabhai, Madhabhai Viththalbhai in the mob, with weapons. He has stated that he can identify these persons who were in the mob and has identified Ambalal Maganlal, Kachrabhai Tribhovandas, Bhikhabhai Joitabhai, Parsottam Mohanbhai as Pashabhai Mohanbhai, Rameshbhai Ramabhai, Chaturbhai Vitthalbhai and Jayantibhai Ambalal.

52.2 In his cross-examination, the witness has stated that six years after the incident, nobody had told him to make the application on 9<sup>th</sup> May, 2008. A contradiction has been brought out to the effect that before the SIT he had amended his earlier statement to the effect that the fact regarding Ramanbhai Ganeshbhai Prajapati Wireman having a can in his hand as recorded therein is not true and he had not seen him and that the fact that after he sustained injury he had hidden against Akbarmiya driver's house as recorded therein is also incorrect. He has denied the suggestion that when the police recorded his statement on 10<sup>th</sup> March, 2002, he named only six persons in the mob. He has stated that he does not remember that in his statement before the police recorded on 10<sup>th</sup> March, 2002, he had stated that he could not identify the other persons. An omission has been brought out to the effect that the names of Patel Kanubhai Joitabhai, Patel Rameshbhai Kantibhai Madhvala, Patel Jayantibhai Ambaram Wireman, Patel Natubhai Kachrabhai, Patel Mangabhai Mathurbhai, Patel Bakabhai Mangabhai Mathur, Patel Tulsibhai Girdharbhai, Patel Madhabhai Vitthalbhai, Patel Mathurbhai Trikambhai Wireman and Patel Rameshbhai Ramabhai Gangavat mentioned by him in his application dated 9<sup>th</sup> May, 2008 and in his statement before the SIT dated 9<sup>th</sup> May, 2008 were not mentioned in his statement recorded by the police on 10<sup>th</sup> March, 2002. A contradiction has been brought out to the effect that in his application dated 9<sup>th</sup> May, 2008 before the SIT and in his statement dated 10<sup>th</sup> March, 2002, he has not named Bhikha Joita and Natu Prabha. In his cross-examination, it has come out that reference was made by him to two of his houses being damaged out of which, one belonged to him and the other belonged to his elder son Najirmahammad. Najirmahammad

was residing separately with his family though the kitchen was common. Both the houses were situated opposite each other in Shaikhvas and all the household goods in both the houses had been burnt. It has also been brought out that when he saw the mob he was near Bachubhai's jeep which was in Shaikh Mohalla. He has also stated that when the mob was burning the houses, he was behind Bachubhai's jeep and when the mob went towards Mahemoodmiya's house he was near Mahemoodmiya's house. In his cross-examination, it has further come out that when the mob came, he was in the Mohalla and was on the road in front of Akbarmiya Nathumiya's house. The witness does not remember as to whether the members of the mob had assaulted him with the weapons and as to whether the mob had run after him when he saw it. He has stated that when they saw the mob, they had also thrown the stones. The witness has admitted that the fact regarding his having hidden behind Bachumiya's jeep and having seen and identified the accused was stated by him for the first time after eight years before the court. The witness has denied the suggestion that in his statement dated 9<sup>th</sup> May, 2008 before the SIT, he had not named Chaturbhai Vitthalbhai with stone, Rajeshbhai Punjabhai with stick, Kachrabhai Tribhovanbhai with bottles and cans, Ambaram Magan with dharia, Bhikha Joita, Mangabhai Mathur, Jayanti Manga, Natu Prabha, Tulsibhai Girdharbhai, Pashabhai Mohanbhai, Mathurbhai Trikambhai, Rameshbhai Kantibhai, Kanubhai Joitabhai, Rameshbhai Ramabhai, Madhabhai Vitthalbhai, all of his village, were in the mob armed with weapons and that he knew them. In his cross-examination, the witness has stated that he does not remember as to whether anyone had hidden inside Nazirmahammad's house and they were attacked. He

does not remember as to whether people were taken out of Nazirmohammad's house. He has stated that his sister was married to Mahemoodmiya and that at the time when the incident took place, Mahemoodmiya, Shakkarbibi, Farida - Mahemoodmiya's daughter, his sons Irfan and Tipu Sultan, who were residing in the house, had died in Mahemoodmiya's house. He has stated that he does not remember as to whether anyone was burnt inside his son Nazirmohammad's house. He has denied the suggestion that when the mob entered Shaikhvas, with a view to escape, people had hidden themselves in Nazirmohammad's house. A contradiction has been brought out from the statement recorded by the police on 10<sup>th</sup> March, 2002 wherein, he had stated that upon the members of the mob entering the mohalla, all of a sudden, stones were pelted at the people who were hiding inside Nazirmohammad's house and were attacked. The witness has been subjected to lengthy cross-examination and various omissions have been brought out in the deposition of the witness as compared to the statement recorded by the police. He has stated that the additional names which were taken down after 10<sup>th</sup> March, 2002 had been given by him.

52.3 From the cross-examination of PW-110, the Investigating Officer (Police), it has been brought out that in his statement dated 10<sup>th</sup> March, 2002, this witness has not named Patel Kanubhai Joitabhai, Patel Rameshbhai Kantibhai Madwala, Patel Jayantibhai Ambaram Wireman, Patel Natubhai Kachrabhai, Patel Mangabhai Mathurbhai, Patel Bakabhai Mangabhai Mathur, Patel Tulsibhai Girdharbhai, Patel Madhabhai Vitthalbhai, Patel Mathurbhai Trikambhai Wireman and Patel Rameshbhai Ramabhai Gangawat, Bhikha Joita and

Natu Prabha. The Investigating Officer in his cross-examination has admitted that this witness in his statement dated 10<sup>th</sup> March, 2002 had stated that upon the members of the mob entering inside the mohalla, all of a sudden they had resorted to pelting stones at the persons who had hidden inside Najirmahammad's house and had attacked it. An omission has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, this witness has not stated that thereafter, he hid behind Bachumiya's house; that the Patels of the village were burning houses and came towards Bachumiya's house and came near due to which he went running near the compound of the Kabrastan. Mahemoodmiya's house was surrounded. Upon climbing, they were striking with a big hammer and he could hear the sound. Thereafter, petrol, kerosene was poured. He was sitting next to the compound wall when a Patel saw him and said that there is a bandiya and ran after him whereupon he had entered an empty tomb in the Kabrastan and covered it with thorns and that they were searching for him but could not find him, etc.

52.4 The Investigating Officer (SIT) in his cross-examination has admitted that this witness in his statement dated 9<sup>th</sup> May, 2008 had stated that he was read over his statement dated 10<sup>th</sup> March, 2002 recorded by the police and had stated that he wants to make the following changes therein. The first correction is that it is incorrect that the police had resorted to firing... that Ramanbhai Ganeshbhai Prajapati Wireman had a can in his hand which fact is not correct as he had not seen him. From the cross-examination of the Investigating Officer (SIT), it is brought on record that in his statement dated 9<sup>th</sup> May, 2008, this witness had not stated that he had seen in the

mob Patel Chaturbhai Vitthalbhai with a stone, Rajeshbhai Punjabhai with a stick, Kachrabhai Tribhovanbhai with a bottle and a can, Ambalal Magan with a dharia, Bhikha Joita, Mangabhai Mathur, Jayanti Manga, Natu Prabha, Tulsibhai Girdharbhai, Pashabhai Mohanbhai, Mathurbhai Trikambhai, Rameshbhai Kantibai, Kanubhai Joitabhai, Rameshbhai Ramabhai, Madhabhai Vitthalbhai with weapons in their hands and that he knows them. The Investigating Officer has stated that the witness had named Kachrabhai Tribhovanbhai, Ambaram Magan, Mangabhai Mathurbhai, Tulsibhai Girdharbhai, Mathurbhai Trikambhai, Rameshbhai Kantibhai, Kanubhai Joitabhai, Rameshbhai Ramabhai and Madhabhai Vitthalbhai. The Investigating Officer (SIT) had also admitted that in his statement dated 9<sup>th</sup> May, 2008, this witness has not named Bhikhabhai Joitabhai and Natubhai Prabhahai.

52.5 The learned counsel for the appellants-accused has submitted that this witness has strangely narrated the incident of 09:30 p.m. by the Patels of the village of setting gallas at the corner of Shaikh Mohalla on fire like all other witnesses giving an improved version. However, the witness has stated that the date of this incident is 28<sup>th</sup> February, 2002. Therefore, whereas other witnesses have stated that the incident took place on 1<sup>st</sup> March, 2002, this witness, though he has given a similar version has given a different date which shows that he is also tutored like all others but has committed a mistake in giving the date. It was submitted that even these facts about cabins having been set on fire are not stated by him in either of his statements dated 10<sup>th</sup> March, 2002 and 9<sup>th</sup> May, 2008 and also in the application before the SIT dated 9<sup>th</sup> May, 2008 and thus, have been proved to be contradictions. Therefore,

the witness has narrated these facts for the first time in the court after eight years. It was contended that this witness has materially improved upon the facts on the issue of where he has hidden himself. He said he was hiding himself behind Bachumiya's jeep from where he saw the accused and recognised them, which again he says for the first time in court after eight years as admitted by him in para 12 of his deposition. It was submitted that according to this witness when the mob came, he was standing near Akbarmiya Rasulmiya's house near the electric pole in the mohalla and he saw the mob from a distance of 20 feet. He says that he was alone. He also says that the mob which comprised of persons armed with weapons neither chased him nor did it attack him, which does not sound believable. It was submitted that the claim of this witness of running away towards the kabrastan and having seen the incidents like the mob coming towards the house of Mahemoodmiya, the mob surrounding the said house, climbing the terrace of the house of Mahemoodmiya and striking the roof with a big iron hammer, throwing petrol/kerosene, hiding in a hollow tomb, the mob throwing burning rags in the kabrastan, assembling at the Mahadev temple etc., are the most material improvements made by the witness in his deposition which have been proved as contradictions. This clearly shows that he was not a witness to the incident and might have received the stone injury somewhere else. It was argued that the sequence of events has also been materially improved and the witness has deliberately disowned the facts stated in his statement recorded by the police regarding police firing. It was submitted that having regard to the fact that the witness is illiterate and knows only to put his signature, the circumstances in which

the application is prepared for being submitted to the SIT after six years, are sufficient to indicate that it is drafted by somebody else to improve the version and to implicate the accused. It was submitted that while going to the hospital, at the hospital, while going to Ilol and at Panpur Patiya Camp, the witness had ample opportunity to disclose about the incident and the names of the accused and almost at all the places, the police was present, but he gave his statement about the incident of 1<sup>st</sup> March, 2002 only on 10<sup>th</sup> March, 2002, and no explanation has come forth for the delayed disclosure of the facts which he claims to have witnessed. It was pointed out that the witness has made three important improvements before the SIT after six years with reference to his first statement dated 10<sup>th</sup> March, 2002, though the witness says he does not remember but such improvements are proved and therefore, it can be safely said that he was not a witness to any of the incidents that occurred at Shaikh Mohalla. It was submitted that the witness does not refer of having seen any other person of Shaikh Mohalla during the time when he saw the incident and the accused. This is mutually contradictory and not possible having regard to the evidence of many witnesses, who claim that they had hidden themselves and were moving from one place to the other in Shaikh Mohalla. It was pointed out that in his statement dated 10<sup>th</sup> March, 2002, the witness has stated that he had hidden himself by the side of house of Akbarmiya Driver and in his cross-examination, he says that there is no other person like Akbarmiya driver except himself. Therefore, all the facts cumulatively give reason to believe that the statement in the name of this witness is dictated by somebody else. It was submitted that this witness has kept on changing the names of accused from time to time

and from statement to statement till he gave his deposition and hence, it is not safe to rely upon the testimony of such witness to base a conviction.

**52.6 ANALYSIS:** This witness is the elder brother of the first informant – Ibrahimiya Rasulmiya Shaikh. His son Idrish and his son Nazirmahammad's wife Wahida have died in the incident. His sister Shakarbibi is Mahemoodmiya's wife and she and her children have died in the incident. His brother Ibrahimiya's wife and two daughters have died in the incident. His brother Sherumiya, his wife, his daughter and his son have all died in the incident. Thus, the presence of this witness at the scene of offence is natural as he along with his family members was residing at Shaikh Mohalla. The family of this witness has two houses and his son Nazirmahammad was residing in a separate house. This witness has deposed that during the course of stone-pelting when the mob came after 11:30, he had sustained stone injuries on his right leg as well as on his back and forehead and the shank of his leg and he had hidden behind Bachumiya's jeep. He had seen the Patels of the village burn the houses and proceed towards Mahemoodmiya's house and hence, he had run towards the kabrastan. He had stated that he was sitting next to the wall when a Patel saw him and ran after him and hence, he jumped into the kabrastan and into an empty tomb and hid there. This witness has named around fourteen persons as being part of the mob and has identified Ambalal Maganlal, Kachrabhai Tribhovandas, Bhikhabhai Joitabhai, Parsottam Mohanbai as Pashabhai Mohanbai, Rameshbhai Ramabhai, Chaturbhai Vitthalbhai and Jayantibhai Ambalal. In his cross-examination, a contradiction has been proved to the effect that before the

SIT, he had stated that he had not named Ramanbhai Ganeshbhai Prajapati Wireman in his earlier statement and that he had not seen him.

52.7 The testimony of this witness has been challenged on the ground that the witness had stated that he was hiding behind Bachumiya's jeep from where he saw the accused and recognised them, which he had stated for the first time in the court after eight years. It was submitted that it is difficult to believe that the witness was standing near the electric pole in the mohalla at a distance of twenty feet and that the mob did not chase him or attack him. It was submitted that the entire story put forth by the witness with regard to having to run away towards the kabrastan etc. do not inspire confidence. It was, accordingly, urged that it would not be safe to rely upon such witness to base a conviction.

52.8 From the testimony of this witness, it is evident that he is a resident of Shaikh Mohalla and hence, his presence at the scene of incident cannot be doubted. The only aspect which requires consideration is as to from where he had seen the mob and identified the members. From the evidence on record, it emerges that the witness did name the accused in his statement dated 10<sup>th</sup> March, 2002 and he has identified some of them before the court. The improvement in his evidence, according to the learned advocate for the appellants, is that for the first time, he has stated that he was hiding behind Bachumiya's jeep from where he saw the incident and identified the accused. In the opinion of this court, this would not be either in the nature of omission or improvement but an elaboration of the facts stated by the witness in his statement

before the police. In his police statement, the witness would have stated facts in answer to the queries put to him by the person recording his statement. Therefore, if no question had been put to him as to from where he had witnessed the incident, he may not have mentioned the same. Therefore, that by itself is no reason to disbelieve the testimony, which otherwise has a ring of truth in it. Besides, insofar as the core of the testimony of this witness is concerned, the same is consistent. There is no reason to disbelieve the testimony of this witness to the effect that he had seen the members of the mob named by him in his statement dated 10<sup>th</sup> March, 2002 and also identified by him before the court except those accused in respect of whom he had subsequently stated before the SIT that he had not named such persons.

53. **PW-68 Gulamali Akbarmiya Shaikh** has been examined at Exhibit-603. This witness has deposed that he is the native of Sardarpura and that he is residing at Shaikh Mohalla in Sardarpura, where there are about twenty houses of Shaikhs. He has deposed that they are four brothers, Nazirmahammad, then he, then Idrishhussain and the youngest was Salim. In this incident, his elder brother Nazirmahammad's wife Wahidabaru, had died. His father used to drive a jeep and he was engaged in the work of colour contract. His father has three brothers, viz., Ibrahimmiya Rasulmiya, Sherumiya Rasulmiya and Akbarmiya Rasulmiya. The first informant Ibrahimmiya Rasulmiya is his paternal uncle. His paternal uncle Ibrahimmiya Rasulmiya's wife - Jaydabibi Ibrahimmiya, their daughter Rajiyabaru Ibrahimmiya, younger daughter Parveenbaru Ibrahimmiya, his paternal uncle Sherumiya Rasulmiya himself and his wife Mahemudabibi

Sherumiya and their daughter Mumtajbanu Sherumiya and their son Yunushussain Sherumiya, died in the incident.

53.1 The witness has deposed that on 27<sup>th</sup> February, 2002, the incident of burning of the train at Godhra took place and on that day, his colour work at Jain Derasar, Sardarpur was going on. He was working outside the Derasar on the front side. On that day, in the evening at around 4 o'clock, Ambalal Maganlal Kapur, Becharbhai Odhavbhai passed from there and they were saying cut the bandiyas. On 28<sup>th</sup> February, 2002, there was a call for Gujarat Bandh and he was at home. On 28<sup>th</sup> February, 2002, in the evening, the cabins were burnt and the atmosphere in the village was tense. On 1<sup>st</sup> March, 2002, there was a call for Bharat Bandh. On that day, they were at home and the atmosphere in the village was tense. At around 02:30 in the afternoon, he had gone to see the gallas which were burnt in the village. At that time, mobs of Patel of the village had gathered and in the mob, he had seen Ambalal Magan, Rameshbhai Ramabhai Gangavat, Rameshbhai Kantibhai, Mathurbhai Trikambhai indulging in inciting talks. They were saying Bharat Mata Ki Jai and kill the bandiyas, cut them. Thereafter, he returned home. In the evening at around 05:00 to 05:30 hours, they were sitting at the corner of their mohalla, when Mustumiya Rasulmiya who had gone to the shop of Dahyabhai Vanabhai, returned and told him that Dahyabhai's son, Mukeshbhai Dahyabhai was telling him that today they may eat whatever they want. That upon his asking Mustufabhai, he had said that he did not know anything in this regard.

53.2 The witness has further deposed that on 1<sup>st</sup> March, 2002, in the evening at around 09:30 hours, mobs of Patels gathered at the Mahadev temple and after saying Bharat Mata Ki Jai, came towards their mohalla and burnt the cabins of Ibrahimmiya Rasulmiya, Rafiqmiya Mahammadmiya and Iqbal Rasulmiya at the corner of the mohalla. At that time, the police came and the mob fled. The police did not stop and went away due to which, the mob of Patels came again and burnt the already burnt cabins, more. Thereafter, they came to the mohalla. Firstly, they burnt Manubhai Painter's house and pelted stones. Burning the houses, they were coming inside, they were burning the house of Akbarmiya Nathumiya and stone throwing was going on with full force. They had countered the stone throwing, however, the mob being very huge comprising of about 1,000 to 1,500 people, they could not face the mob and they went on retreating inside. The mob of Patels carried on burning houses and came inside. Stone pelting was going on and he was injured on the knee of the left leg with a stick as well as on the back side of the left shoulder. Thereafter, the Patels came further inside whereafter, he went and stood in Bachumiya Imammiya's water-course and the mob of Patels came inside and he saw that Ambalal Magan was instigating the mob and had a dharia in his hand. Mathurbhai Trikambhai had stone in his hand, Rameshbhai Ramabhai had dharia in his hand, and Rameshbhai Kanjibhai, Rajeshbhai Karshanbhai Mukari, Sureshbhai Ranchhodbhai had come with burning rags. Tulsibhai Girdharbhai had a burning rag and that he had seen Rameshbhai Kantibhai, Pashabhai Mohanbhai, Kachra Tribhovan, Bhikhabhai Joitabhai, Jayantibhai Ambalal, Madhabhai Vitthalbhai, Mathurbhai Ramabhai, Maheshbhai Jivanbhai, Rajeshbhai Punjabhai, Kanubhai Joitabhai,

Baldevbhai Ranchhodhbhai, Kalabhai Bhikhabhai, Ashwin Baldev Botham, Rameshbhai Kanjibhai, Govindbhai Mohanbhai. He went slightly further inside the water-course and stood against Bachubhai's wall. The mob of Patels went forward burning towards Mahemoodmiya's house and surrounded it. He came out and saw that the mob was trying to break the door of Mahemoodmiya's house. He has deposed that their people had gone inside Mahemoodmiya's house. The mob of Patels went in that direction and climbed up, broke the window of the house and also tried to break the slab of the room; after breaking the window, they poured something like petrol or kerosene and threw burning rags inside the house. Their people were crying for help and though he was present, he could not save them. The mob of Patels was shouting, kill them, cut them, burn them. Their people were screaming and shouting.

53.3 The witness has further deposed that the mob of Patels was in front of and behind Mahemoodmiyas house. Kachrabhai Tribhovandas was saying that no one should escape. People inside were burnt. Thereafter, the mob of Patels said "Bharat Mata Ki Jai" and while going Kachrabhai Tribhovandas said that check inside the houses, no one should escape. Thereafter, they went away. Somebody shouted that police have come and therefore, the mob had fled. They were hiding. Thereafter, the police shouted that if anyone is alive, they should come out. Since they were afraid that when initially there were riots, the police had come but had not stopped, so out of fear they did not come out. Thereafter, he heard his father's voice that whoever is there come out as the police have come. The police took them all towards Mahemoodmiya's house. The police opened the door and the corpses were lying in a burnt

condition. Those who were alive were taken out and those who were injured were in a burnt condition and those persons were taken in police vehicles to Mehsana Hospital. He was also taken in a police vehicle to Mehsana Hospital. He was admitted for treatment in the Orthopaedic Department. On the next day, they had set out from the hospital and the police had asked them as to where they want to go and they had said Ilol where they went to a relative's house where they stayed for ten days. Thereafter, they went to Panpur Camp and on 10<sup>th</sup> March, 2002, the police recorded his statement. Thereafter, the SIT had recorded his statement and he had also given a written application. After the incident, he had gone to fill the debris at Sardarpura. While they were filling the debris, Kachrabhai Tribhovanbhai and others had come and had forcibly collected tax from him and as his paternal uncle had passed away, they also made him pay the house tax. The witness has stated that he cannot identify the muddamal weapon. He has identified the clothes of his sister-in-law Wahidabahu and his brother Idrish. He has stated that he can identify members in the mob and has identified Ambalal Maganbhai, Kachrabhai Tribhovandas, Mathurbhai Ramabhai, Rameshbhai Kanjibhai, Ramanbhai Jivanbhai, Sureshbhai Ranchhodbhai, Madhabhai Vitthalbhai, Rajeshbhai Punjabhai, Rajeshbhai Karshanbhai, Jayantibhai Ambalal, Kanubhai Joitabhai, Kalabhai Bhikhabhai, Ashwinbhai Baldevbhai Botham, Rameshbhai Ramabhai Gangawat, Rameshbhai Kantibhai, Dahyabhai Varvabhai Prajapati, Govindbhai Mohanbhai, Mathurbhai Trikambhai and Bhikhabhai Joitabhai. Out of the accused identified by the witness, the witness had not named Ramanbhai Jivanbhai and Dahyabhai Varvabhai in the deposition.

53.4 In the cross-examination, an omission in the nature of contradiction has been brought out as to his previous statement dated 10<sup>th</sup> March, 2002 to the effect that he had not named Rajeshbhai Karshanbhai, Rameshbhai Kantibhai, Pashabhai Mohanbhai, Kachrabhai Tribhovanbhai, Bhikhabhai Joitabhai, Jayantibhai Ambalal, Madhabhai Vitthalbhai, Mathurbhai Ramabhai, Maheshbhai Jivanbhai, Rajeshbhai Punjabhai, Kanubhai Joitabhai, Baldevbhai Ranchhodbhai, Kalabhai Bhikhabhai, Ashwinbhai Baldevbhai Botham and Govindbhai Mohanbhai before the police. Various omissions have been brought out as to his previous statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008, to the effect that he had not narrated the incident with regard to Ambalal Maganlal Kapur and Becharbhai Odhavbhai passing near the derasar and making the utterances as stated in the deposition. A further omission has been brought out to the effect that he has not stated in his police statement dated 10<sup>th</sup> March, 2002, in his statement before the SIT dated 10<sup>th</sup> May, 2008 and application, the fact regarding the presence of the accused named hereinabove when he went out to see the gallas which had been burnt at about 2:30. A further contradiction has been brought out to the effect that he had not made any reference in the above statements to the incident with regard to Mukesh Dahyabhai saying that "eat, whatever you want to eat". In the cross-examination of the witness, the witness is sought to be confronted with regard to that part of his deposition wherein he has referred to the fact regarding the incident in question before the police and before SIT. The witness has admitted that in his previous statement, he had not stated that he was admitted for treatment in the Orthopaedic Department at

Mehsana. A contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he has stated that in this manner, he had seen the persons from a distance and identified them and could not recognise the other persons in the mob. A further contradiction has been brought out as to his previous statement dated 10<sup>th</sup> March, 2002, to the effect that he had stated therein that they started damaging the houses of the Muslims, at that time, the women and children of the mohalla being afraid and Nazirmahammad's house being in the interior side of the mohalla and being safe, a lot of people of the mohalla, with a view to save their lives, entered inside and at that time, he thought that the houses of Muslims which were situated on the rear side of the Patels' houses would not be burnt, so he went and hid himself in the house falling on the side behind the Patels' houses. The witness has denied the suggestion that he is for the first time deposing before the court that he had seen the entire incident of 9:30 from Bachumiya Imammiya's water-course and had identified the accused. The witness has further denied that the incident had taken place at 11:30. Various queries were also put to the witness with regard to the facts stated in his application dated 11<sup>th</sup> April, 2005. The witness has also stated that except for the statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008, no other statement of his has been recorded. The witness has further denied that the fact regarding his having seen the incident from Bachumiya Imammiya's water course has been got up as he could not see anything from inside the house. He has denied the suggestion that after looking at the map, Raiskhan Pathan and Teesta Setalvad had guided them and asked them to state such facts. A contradiction has been brought out to the effect that in his previous statement dated

10<sup>th</sup> March, 2002, he had stated that as he was afraid that he would be burnt alive, he had not come out, and after one and a half hour, upon the mob dispersing and it becoming peaceful, he had come out. A further contradiction has been brought out to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had stated that from the side of Nazirmahammad's house, screams of 'bachao bachao' were coming and the persons in the mob were damaging Nazirmahammad's house and had sprinkled kerosene and set it on fire and since the persons of the mohalla were inside the house, those who were outside, had taken them out. A further contradiction has been brought out as to his previous statement dated 10<sup>th</sup> March, 2002 to the effect that he has stated therein that the mob had damaged Mahemoodmiya's house and set it on fire and since the persons of the mohalla were inside the house, those outside had taken them out. An omission in the nature of contradiction is brought out to the effect that in his previous statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008, the witness has not named Rameshbhai Kantibhai, Pashabhai Mohanbhai, Kachrabhai Tribhovanbhai, Baldevbhai Joitabhai, Jayantibhai Ambalal, Madhabhai Vitthalbhai, Maheshbhai Jivanbhai, Kanubhai Joitabhai, Baldevbhai Ranchhodbhai, Govindbhai Mohanbhai, Mathrubhai Ramabhai, Rajeshbhai Punjabhai, Kalabhai Bhikhabhai and Ashwinbhai Baldevbhai Botham. The witness has denied that the mob had vandalized Nazirmahammad's house and had sprinkled kerosene and set it on fire and since the persons from the mohalla were inside the house, those outside had taken them out and from them Shaikh Rafiqbhai Manubhai, Shaikh Firojmiya Makbulmiya, Shaikh Yasinabanu Asifhussain, Shaikh Faridabibi Yasikmiya, Shaikh Abedabanu Manubhai and Shaikh Ruksanabibi

Ibrahimbhai had sustained injuries and were taken out alive. [Note: in the police statement dated 10<sup>th</sup> March, a note has been made that the name of Nazirmahammad has been struck out and substituted by the name Mahemoondmiya.]

53.5 From the cross-examination of the Investigating Officer (Police), it has been proved that in his statement dated 10<sup>th</sup> March, 2002, this witness has not named Rameshbhai Kantibhai, Rajeshbhai Karshanbhai Mukri, Rameshbhai Kantibhai, Pashabhai Mohanbhai, Kachra Tribhovan, Bhikhabhai Joitabhai, Jayantibhai Ambalal, Madhabhai Vitthalbhai, Mathurbhai Ramabhai, Maheshbhai Jivanbhai, Kanubhai Joitabhai, Baldevbhai Ranchhoddbhai, Kalabhai Bhikhabhai, Ashwin Baldev Botham, Govindbhai Mohanbhai, Ramanbhai. Jivanbhai. It is further brought out that this witness in his statement dated 10<sup>th</sup> March, 2002 has not stated with regard to colour work being in progress at the derasar and that he was working outside in front of the derasar and on that day at about 4 o'clock in the evening, Ambalal Maganlal Kapur and Becharbhai Odhavbhai had passed by and were saying that "cut the bandiyas". From the cross-examination of the Investigating Officer, it has further been brought out that this witness has not stated having seen anyone from Bachumiya Imammiya's water-course and that in his statement dated 10<sup>th</sup> March, 2002, this witness has inter alia stated that at that time, the women and children of their mohalla were afraid and Nazirmahammad's house which was on the interior side being safe, many persons there, with a view to save their lives, entered inside ... he was under the impression that those houses which were on the rear side of the Patel mohalla would not be burnt, he went and hid in the houses towards the rear

side of the Patel houses. The Investigating Officer has admitted that this witness has not stated that he had seen the entire incident of 9:30 from Bachumiya Imammiya's water-course. From the cross-examination of the Investigating Officer, it has been brought out that there were shouts of 'bachao bachao' coming from the side of Nazirmahammad's house and the mob had vandalized Nazirmahammad's house and sprinkled kerosene and set it on fire and the mohalla people being inside, those of them who were outside took them out (the name of Nazirmahammad has been scored out and Mahemoodmiya has been written). The Investigating Officer has, in his cross-examination, also admitted that in his statement dated 10<sup>th</sup> March, 2002, this witness has stated that the members of the mob had vandalized the house of Mahemoodmiya and had burnt it and that the mohalla people were inside the house and those who were outside had taken them out.

53.6 The learned advocate for the appellants – accused submitted that:

(i) This witness in both his statements and applications has not stated almost all the vital, important and relevant facts, which are coming before the court for the first time. This is one of the examples to point out to the court that all witnesses have come forward with stereo-type parrot like stories, the main facts of which, were either not stated to the police or stated differently. It was urged that attempts are made by the witnesses to secure conviction of large number of accused, who the witnesses very well know are not involved in the incident and are innocent, but it is as a part of a counter-conspiracy to get the named accused convicted, that stories

are created, falsely deposed to, false averments are made in the affidavit and vital, important and very relevant facts are told in an apparently improved form in all such depositions, which must be thrown out by the court as completely unreliable and untrustworthy deserving total rejection of their evidence.

(ii) The story of the conversation between two persons (one of whom is not an accused) being heard by this witness on 27<sup>th</sup> February, 2002 at about 4:00 pm, a talk among the named accused on 1<sup>st</sup> March, 2002 at about 02:30 p.m. being heard by this witness and Mustufamiya informing this witness about his conversation with Mukesh Dahya at about 05:00 to 05:30 p.m., are all a false creation of this witness before the court as none of these stories were not even stated before the police on 10<sup>th</sup> March, 2002 or SIT on 10<sup>th</sup> May, 2008 nor were they even stated in the applications written by them. It was contended that the evidence of a witness of such quality must be rejected as a whole as being unreliable.

(iii) It was further submitted that this witness, apart from above submissions, has kept on changing names of the accused as per his whims and is improving upon his evidence which is completely contradictory to his own earlier versions, therefore, it would be very hazardous to rely on such witness, inasmuch as, if the nature of evidence led is believed, anybody can be roped in and the innocent can be implicated at the caprice of a witness.

(iv) It was submitted that though this witness had ample opportunity to disclose about the incident and name the

accused before the police, apart from the fact that he remained silent for nine days, the witness has disowned his own statement before the police about the police resorting to firing and has come out with a new and improved sequence of facts.

(v) In his first statement dated 10<sup>th</sup> March, 2002, the witness has stated that as the mob entered Shaikh Mohalla and started ransacking the houses, the women and children immediately took shelter in the house of Nazirmahammad, which is in the interior, which he has subsequently disowned. The witness has said that at that time, he had hidden himself in the houses situated behind the houses of the Patels. He also said that because of fear that he also would be burnt alive, he did not come out and he came out after one and a half hours on finding that the mob had dispersed and the situation had calmed down. It was submitted that before the court, the witness has improved upon his original version by stating that he stood at Bachumiya Imammiya's naveli (water course) and after he saw the named accused, he went a little inside and pushed himself against Bachubhai's wall. Thus, his say before the court runs counter to what he said on 10<sup>th</sup> March, 2002 and even this improved version is not corroborated by any other witnesses, who too, have said that they were at or nearby Bachumiya Imammiya's house.

(vi) The learned counsel further submitted that in the above fact situation, the claim of this witness that he had seen the mob breaking the window, making an attempt to break the slab, throwing kerosene, petrol and burning rags etc. inside, is not at all believable and even otherwise, the versions

regarding breaking of windows and the slab, is not corroborated by the panchnama of scene of offence.

(vii) It was pointed out that what is stated before the court as regards the utterances put in the mouth of Kachrabhai Tribhovabhai, was not stated by the witness in either of his statements before the police or the SIT nor is stated in his application dated 12<sup>th</sup> April, 2008. Thus, the witness has come out with new facts before the court to falsely involve more persons.

(viii) It was argued that while the witness claims to be at Bachumiya Imammiya's naveli, in his entire deposition, there is not even a whisper about Bachumiya's jeep having been set on fire. This important fact which other witnesses have deposed could not have gone unnoticed by him. This clearly shows that he was not present at Shaikh Mohalla at the time of the incident nor has he seen anything, including the accused at the time of the incident.

(ix) It was also submitted that the witness claims to have received injuries at the time when the mob pelted stones and that he was taken to civil hospital, Mehsana on that day itself and he also took treatment. However, the witness has not named the accused before the doctor who recorded his history nor has he stated that a mob of Patels of Sardarpura was involved.

(x) It was submitted that when the statement of this witness was recorded on 10<sup>th</sup> March, 2002, he had stated that the first information report lodged by his uncle is true and correct,

which means that he was aware that the first information report has already been lodged by his uncle and also about its contents; whereas, before the court, the witness has completely disowned this statement and said that he did not know about the first information report having been lodged by his uncle. Thus, the conduct of this witness is also doubtful.

(xi) It was submitted that it clearly appears that the witness is not the author of the application given to the SIT in 2008 and some external agency has got it prepared in the name of this witness to create evidences and implicate innocent persons after six years.

(xii) It was pointed out that while the witness has named four of the accused, he is unable to identify them. It was submitted that the witness has identified thirteen accused but has not named them in both his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 and that he has not even named them in application dated 9<sup>th</sup> May, 2008 made to the SIT. Thus, such identification after eight years has no value. Moreover, as to how and from where the witness could see the accused is also contradictory and not believable.

**53.7 ANALYSIS:** This witness is the son of Akbarmiya Rasulmiya Shaikh and is a brother of PW-51 Nazirmahammad. The witness has deposed that on 27<sup>th</sup> February, 2002 the incident of burning of train at Godhra took place and in the evening Ambalal Maganlal Kapur and Becharbhai Odhavbhai were passing by and were talking about cutting the bandiyas. This witness had improved upon his original statement and come out with a new story with regard to the conversation

between Mustufamiya and Mukesh Dahya. In his statement dated 10<sup>th</sup> March, 2002, the witness had stated that the mob, after resorting to intense stone pelting had stormed into Shaikh Mohalla and he had seen that Patel Ambalal Maganbhai was leading the mob and instigating it. He has also seen Prajapati Rameshbhai Ganeshbhai had a kerosene filled can in his hand, Patel Mathurbhai Trikambhai wireman with stones, Pawan Marwadi Vaasanwala was instigating the mob, Patel Rameshbhai Ramabhai Gangavat with dharia, Rameshbhai Punjabhai Patel, Dahyabhai Varvabhai Prajapati with stones, Dahyabhai Kachrabhai with stones, Patel Rameshbhai Kanjibhai, Patel Sureshbhai Ranchhodhbhai, Patel Tulsibhai Girdharbhai all three with burning rags, from a distance and identified them and could not recognise the other members of the mob. They had suddenly attacked their mohalla and started vandalizing the houses. He had thought that the mob would not damage the houses of Muslims with houses of Patels on the rear side and had hidden in such house and at that time, the persons in the mob pelted stones at him and he was injured and fearing that the mob would kill him, he remained in hiding and did not come out. The inconsistency in the version stated before the court is to the effect that in his statement before the police, he had stated that he had seen the persons named by him from a distance after the mob entered Shaikh Mohalla; whereas in his testimony, he has said that when the mob came inside burning houses and pelting stones, he was standing in Bachumiya's naveli and had seen the accused with the weapons and that he moved further into the naveli and saw the mob going towards Mahemoodmiya's house, breaking open the window, pouring kerosene and setting it on fire with burning rags. However, this inconsistency is not a very

material one, inasmuch as, from the testimony of the witness, it is apparent that he was at Shaikh Mohalla throughout the incident. Even as per his police statement, he has stated that he had recognised the accused from a distance after they had entered the mohalla. Therefore, even as per the version given before the police, it is not as if he has seen the mob from the fields or the road but from the mohalla itself, before he went and hid himself in some house. Thus, the inconsistency is only qua the exact place from where he saw the accused. However, from either version, it cannot be said that he could not have seen and identified the accused. Moreover, this witness is an injured witness, which fact is duly established through the testimony of PW-1 Dr. Dhirajkumar Jivanlal Soni, who has deposed that he had treated the witness who at the relevant time was twenty-four years of age and he had given history to the effect that he was injured by a stone during the attack. The doctor has stated that the patient had sustained three injuries which were simple in nature and could be caused by a stone. The testimony of the doctor is supported by the Certificate dated 4<sup>th</sup> March, 2002 issued by the General Hospital, Mehsana - Exhibit 182. The presence of the witness at the scene of offence, therefore, cannot be doubted. In these circumstances, to the extent the witness has named the accused in his police statement which was recorded first in point of time after the incident, there is no reason to discard the testimony of the witness. However, that part of his testimony whereby he has stated that the mob went towards Mahemoodmiya's house and broke open the window and poured kerosene and set it on fire and the conduct of the mob thereafter, cannot be believed. Therefore, to the extent he has named and identified the accused, the testimony of the witness appears to be

acceptable; however, the facts regarding the witness having witnessed Mahemoodmiya's house being set ablaze and the subsequent events, appear to be in the nature of improvements to make his testimony more credible or a result of tutoring. Therefore, to the extent the testimony of this witness is consistent with his original statement, the same can be accepted.

53.8 This witness has named twenty-two accused in his deposition, out of whom he had named only Ambalal Magan, Mathurbhai Trikambhai, Rameshbhai Ramabhai, Rameshbhai Kanjibhai, Sureshbhai Ranchhodbhai and Tulsibhai Girdharbhai in his statement dated 10<sup>th</sup> March, 2002 and he has also identified them before the court. Out of the persons named by him in his deposition, the witness has not identified Pashabhai Mohanbhai, Maheshbhai Jivanbhai and Baldev Ranchhod and has identified two persons viz. Ramanbhai Jivanbhai and Dahyabhai Varvabhai, whom he had not named in the deposition. Thus, the witness has named several other persons for the first time before the court, whom he had not named in his previous statements. Therefore, to the extent the witness has named persons for the first time before the court, it would be hazardous to rely upon the testimony of this witness inasmuch as false implication at a later stage cannot be ruled out.

53.9 Insofar as the contention that the fact that the witness has not referred to Bachumiya's jeep being burnt clearly shows that the witness was not present at the time of the incident, is concerned, as noticed earlier, the witness has improved upon his original version while deposing before the court, with a

view to establish that he had witnessed the entire incident till Mahemoodmiya's house was set on fire. However, since the witness appears to have hidden after the mob entered Shaikh Mohalla, he must not have witnessed the jeep being set on fire and therefore did not depose about the same.

53.10 Upon an overall appreciation of the evidence of this witness, the court is of the view that while the witness has improved upon his original version and has sought to implicate other accused, his testimony cannot be thrown out in toto and to the extent his testimony is consistent with the original version, the same deserves to be accepted.

54. **PW-76 Hamidabibi Akbarmiya Shaikh** had been examined at Exhibit-638. This witness is the wife of PW-66 Akbarmiya Rasulmiya Shaikh. She has deposed that she has four sons, Arif Najirmahammad, Gulamnabi, Idrish and Salim. Idrish died in the incident. This witness has stated that eight years ago, the incident of burning the train at Godhra had taken place. On the next day, cabins in the bazaar of the village were set on fire. On the third day, a mob of Patels from Sardarpura came from the side of Mahadev temple. The mob came at 9 o'clock at night. The mob came and burnt three cabins at the corner of Shaikh Mohalla. In the meanwhile, the police came and hence, the mob had dispersed. After some time, the police went away, the mob came again and started pelting stones and resorted to arson. They were frightened and had hidden in Ibrahimhai Rasulbhai's house and she had seen the mob from Ibrahim Rasulmiya's house. Thereafter, the mob went towards Mahemoodmiya's house. Her son was in Mahemoodbhai's house and Nazirmahammad's wife

Wahidabahu was also there. The Patels had burnt them alive and were shouting "cut the bandiyas and kill them". She had heard the shouts of the mob. Thereafter, the police came and the dead bodies were removed and taken to Mehsana. Those who were injured were taken to Mehsana Civil Hospital and were given treatment there. Post-mortem of those who had died was performed and their burial was carried out at Mehsana. Thereafter, they went to Ilol. After staying for five days at Ilol, they had gone to Panpur Camp and are at present staying at Satnagar. She had been injured on the knee of her left leg as well as on the right side of her head. The witness has stated that she does not remember as to where the police had recorded her statement. In the said incident, her son and Nazir's wife Wahidabahu had died. She has deposed that she is not in a position to identify people in the mob. She, however, has identified Ambaram Magan, Jagabhai Jivanbhai, Bhikhhabhai Joitabhai and Rameshbhai Ramabhai.

54.1 In the cross-examination of this witness, she has denied that in her statement before the police, she has not named the persons whom she has named in her examination-in-chief, and was initially saying that she had not given a statement before the police. She has denied the suggestion that at the time of the incident, she has fled to the Harijanvas. She has admitted that the facts which she had stated in her examination-in-chief were stated by her for the first time before the court and except for this, she had not stated such facts anywhere. She has denied the suggestion that the persons named by her after eight years had been named at the instance of other persons. In her cross-examination, various omissions have been brought out as to her previous statements dated 21<sup>st</sup> June, 2002 and

22<sup>nd</sup> May, 2008 inter alia to the effect that she had not stated that since they were afraid, they had hidden inside the house of Ibrahimbhai Rasulbhai and had seen the members of the mob from Ibrahim Rasulmiya's house and thereafter, the mob had gone towards Mahemoodmiya's house and the Patels had burnt them alive and were shouting "cut the bandiyas, kill them" and that she had heard the shouts of the mob. A contradiction has been brought out to the effect that in her statement dated 21<sup>st</sup> June, 2002, she had stated that an attack had been made on the house of her son Nazirmahammad and hence, out of fear, they were going towards the Mahemoodbhai's pucca in Shaikhvas. At that time, since the houses in the mohalla were burning, she tried to flee and had sustained burns.

54.2 Mr. Y. S. Lakhani, learned counsel for the appellants submitted that:

(1) Pertinently, this witness had gone with the police to the Civil Hospital, Mahesana and also with the police to Ilol camp and also to Panpur Patia camp, where various statements of witnesses were recorded. However, the statement of this witness was recorded for the first time on 21<sup>st</sup> June, 2002, that is, after more than three and a half months. It was submitted that the statement of the witness was also recorded by the SIT on 22<sup>nd</sup> May, 2008, despite which, she has stated that her statement has never been recorded by police. Even though the witness has stated that she was interrogated by the police at the Civil Hospital, Mahesana (presumably on 2<sup>nd</sup> March, 2002), no such statement or the facts stated by her to the police have come on record. Thus, the witness has come before the court with falsehood and even if it is believed that

she gave her statement on 21<sup>st</sup> June, 2002, there is no explanation as to why she disclosed facts regarding the incident so late, that is, after more than 110 days.

(2) The witness has admitted that whatever she has stated in her examination-in-chief is stated for the first time in court and that she has not disclosed it at any other place, which clearly means that her entire version before the court after eight years is a total improvement of facts which were never stated before anyone. Her testimony, therefore, has to be rejected outright.

(3) It was submitted that the sequence of facts narrated by this witness is in tune with the statements of other witnesses viz.: at 9:00 p.m. Patels of Sardarpura came from Mahadev, set on fire three cabins at the corner of Shaikh Mohalla, the police arrived and dispersed the mob; after sometime the mob came once again, pelting stones, setting houses on fire, went to Mahemoodmiya's house, set it on fire, etc., though these facts, sequence and time of arrival have not been stated by the witness or a different account of facts had been given. Thus, the evidence of all such witnesses should be kept out of consideration by the court.

(4) It was pointed out that the witness has claimed that she had hidden inside Ibrahim Rasulmiya's house when the mob came for the second time and that she saw the incident from inside the house. It was contended that such a claim is false for two reasons: (i) that Ibrahimmiya's evidence runs contrary to the say of this witness as Ibrahimmiya says that about twenty persons had hidden in his house and that when the mob broke his door, all the persons ran towards Mahemoodmiya's house. Thus, the evidence of this witness does not match with the evidence of other witnesses; (ii) as per the statement dated

21<sup>st</sup> June, 2002 recorded by the police, the witness went to Harijanvas because of fear; she has not stated that she had hidden in Ibrahimmiya's house and that Harijanvas is quite far from Shaikh Mohalla as per the evidence on record. Thus, the witness has not come before the court with true facts and is totally unreliable.

(5) It was emphatically argued that the witness in her statement dated 21<sup>st</sup> June, 2002 has stated that her son Nazirmahammad's house was attacked and therefore, while she was proceeding towards Mahemoodmiya's house, she got burnt as the houses of mohalla were burning which is completely contrary to the evidence on record. It was submitted that this version about her going towards Mahemoodmiya's house runs counter to the version deposed by her before the court namely, that she had hidden inside Ibrahimhai's house and also the version given before police, viz. that she went to Harijanvas. Furthermore, as per the medical certificate Ex-185/186, the witness has not sustained any burn injuries, and she was treated in the OPD and had sustained abrasions only. Thus, her entire claim of having sustained burn injuries while going towards Mahemoodmiya's house is totally false.

(6) Lastly, it was submitted that though in paragraph 2 of her deposition, the witness has stated that she cannot identify the persons of mob, she had identified two persons present in the court out of whom one accused has been misidentified and the other accused was the member of the panchayat. Besides, when the witness has stated that her statement was never recorded by the police, even if it is assumed that her first statement is recorded after 110 days and thereafter after six

years, such identification before the court has no evidentiary value.

**54.3 ANALYSIS:** This witness is the wife of Akbarmiya Rasulmiya (PW-66). She is a resident of Shaikh Mohalla and has sustained injuries on her left knee and on the right side of her head, therefore, her presence at the scene of offence is natural. She has lost a son Idrish and daughter-in-law Wahidabani, both of whom were in Mahemoodmiya's house during the incident. She has deposed that as they were afraid they had hidden inside Ibrahimmiya's house and had seen the mob from Ibrahimmiya's house, which appears quite improbable in view of the fact that Ibrahimmiya's house does not have any window on the front side. Significantly, while on the one hand, the witness has stated that she cannot identify any person from the mob, immediately thereafter, she has, in fact, identified Ambaram Magan and has identified Jagabhai Jivanbhai as Bhikhabhai Joitabhai. It may be noted that while the learned counsel has contended that according to her statement dated 21<sup>st</sup> June, 2002, the witness had gone to Harijanvas out of fear, no such contradiction qua her previous statement has been brought out during the course of the cross-examination of the witness. She, however, has admitted that the facts stated by her in the examination-in-chief have been stated by her for the first time before the court and she has not stated so anywhere else. Therefore, what has been stated by this witness is for the first time before the court. Besides, she has not named any accused in her examination-in-chief and has categorically stated that at present, she cannot identify any person in the mob and has thereafter proceeded to identify two of the accused and incorrectly

identified one accused before the court. On an overall appreciation of the testimony of this witness, this court is of the view that the same does not appear to be reliable or credible. Under the circumstances, no reliance can be placed upon her evidence while considering the culpability or otherwise of the accused.

**55. PW-74 Sikandarmiya Rasulmiya Shaikh** has been examined at Exhibit-632. This witness is not a witness of the main incident and his deposition is relevant only to the extent that he has stated that on the 27<sup>th</sup>, he had gone for labour work in the agricultural field of Patel Baldevbhai Vanzara. While returning from the agricultural field, Kanubhai Joitabhai was sitting at Ishwarbhai Gopalbhai's galla and had told him that he would not get Kuber (a pan masala), their people had burnt the train at Godhra and hence, he would not get Kuber. Thereafter, upon coming home, he had talked about the same, however, nobody had paid any attention. The witness has further deposed that on 28<sup>th</sup> February, 2002, at about 8 o'clock, he and Faridabibi Bachumiya, Samimbanu Mustufamiya, Mahemudabibi Sherumiya, Aminabanu Sharifmiya, Mumtajbanu Sherumiya had all gone to work at Baldevbhai Vanzara's agricultural field. In the afternoon at 11 o'clock, Baldevbhai Vanzara brought tea and came there and told them that for two days, they should go away as there was going to be trouble. Thereafter, he had given the witness Rs.500/- towards two days' labour work. After taking Rs.500/-, they went to Bachumiya's bore where he was working as an Operator and washed their feet and went home. Thereafter, he set off on foot to go to his sister's house at Bhalak where he reached at 7 o'clock. At Bhalak, he stayed at his sister Zarina's

house and read in the newspaper that 28 persons had died. The witness has identified Kanubhai Joitabhai in the court.

55.1 The learned counsel for the appellants-accused submitted that this witness has not been projected as an eye-witness of any of the events that occurred on 1<sup>st</sup> March, 2002. His statement was also not recorded by the police for six years. However, he volunteered to give an application to the SIT for the first time after six years and pursuant thereto, his statement came to be recorded on 22<sup>nd</sup> May, 2008. It was contended that the witness has created a story of "refusal to give Kuber" as persons of his community had set the train on fire at Godhra by Kanubhai Joitabhai (Sarpanch), who was said to be sitting at Ishwarbhai Gopalbhai's galla. It was pointed out that the witness has admitted that he has not stated in his application to the SIT that Kanubhai Joitabhai was sitting there and said that he will not get Kuber. It was submitted that though the witness has denied it, in his application, he has written that it was Ishwarbhai himself, who told this witness that he would not get Kuber. Thus, it is very clear that to create evidence and thereby to implicate the Sarpanch of the village, that is, Kanubhai Joitabhai, this witness was made an instrument by those who wanted to seek conviction of many innocent persons.

55.2 **ANALYSIS:** This witness is a brother of Iqbalmiya Rasulmiya, Mustufamiya Rasulmiya and Ayubmiya Rasulmiya and was a resident of Shaikh Mohalla at the relevant time. However, he has deposed that on 27<sup>th</sup> February, 2002, when he went to Ishwarbhai Gopalbhai's galla on his way back from the fields, Kanubhai Joitabhai told him that he would not get Kuber

(paan masala) as their persons had burnt the train at Godhra. This witness was not present at the time of the incident and had gone away to his sister's house at Bhalak. Nothing turns upon the testimony of the witness except that the prosecution has placed reliance upon the testimony of this witness to establish that there was a criminal conspiracy. In the opinion of this court, even if the facts as deposed by the witness were true, that at best, can be said to be a natural reaction to the incident that had occurred on that day, having regard to the sentiments prevailing at the relevant time. Therefore, even if Kanubhai Joitabhai had in fact stated that he would not get Kuber, the same would not give any reason to believe that there was a criminal conspiracy. Nothing much turns upon the testimony of this witness.

56. **PW-69 Mahemoodmiya Hussainmiya Shaikh** has been examined at Exhibit-606. The witness has stated that he is known as Maheboobmiya as well as Mahemoodmiya. This witness has deposed that his native place was Sardarpura. At Sardarpura, he was living in Shaikh Mohalla and that his house was situated at the end of Shaikh Mohalla. There are two rows of houses in Shaikh Mohalla and his house is in the middle of both the rows and has a concrete slab. The witness has deposed that he had constructed the house under the Government Relief Scheme in the year 2000. He has also deposed that both his legs are amputated and that at the time of the incident, he had one leg and one leg was amputated. His family was comprised of his wife Shakkarbibi and two sons and two daughters namely, sons Mohammad Irfan aged 15 years and Mohammad Sultan aged 7 years and daughters Faridabanu aged 25 years and Samimbanu aged 20 years. In

the incident, four members of his family were burnt. His wife Shakkarbibi, son Irfan, daughter Faridabanu and son Mohammad Sultan were burnt and died in the incident. On 27<sup>th</sup> February, 2002, the Muslims had burnt Hindus at Godhra due to which the sentiments of the Hindu population were running high and a bandh had been declared. On 28<sup>th</sup> February, 2002, there was a declaration of Gujarat Bandh and in the evening between 7:00 to 7:30, three gallas had been burnt by the Patels of the village in front of the Panchayat. Thereafter, on 1<sup>st</sup> March, 2002, there was a call for Gujarat Bandh. On that day, he was at home and no one in his mohalla had gone out for work. At 9:30 at night, suddenly a mob of 1500 Patels came towards Shaikh Mohalla shouting "burn them, cut them". The mob set two gallas on fire which were at the corner of Shaikh Mohalla. Thereafter, the police vehicle came whereafter, the mob dispersed and the atmosphere became peaceful and they were all sitting at home peacefully. Thereafter, suddenly at around 11:30, a mob came and started pelting stones at Shaikh Mohalla and burning houses. Thereafter, the police vehicle came at 11:30 and went away. Thereafter, the persons in the mob burnt the houses. Firstly, Manubhai's house was set on fire. Thereafter, they started burning the houses in that line. Their people started running helter-skelter with a view to escape. He was watching everything. To save themselves, the persons from Shaikh Mohalla entered his house. Approximately, forty persons had entered his house. The mob which came to their mohalla was comprised of Ambaram Kapur with a dharia in his hand, Pashabhai Mohanbai with a kerosene can in his hand, Ashwinbhai Baldevbhai with a kerosene can in his hand, Prahladbhai Jagabhai, Ashwinbhai Jagabhai and Sureshbhai Ranchhodbhai, all three had burning

rags with them. With the burning rags, they came towards his house and the mob started coming after that. Six persons in the mob started kicking the door and breaking it. They were shouting "kill them, cut them, burn them" and their persons inside the room were shouting for help and were screaming and he was listening. He was hiding under the tin sheets of Bababhai's house and was watching everything. Thereafter, the Patels climbed on the terrace of his house and started breaking it. Rajesh Punja was trying to break the roof with a big hammer. These persons had continued burning by throwing burning rags. Thereafter, the police vehicle came. Before that, Kachrabhai Tribhovandas said "Bharat Mata Ki Jai" and upon the police car coming, these people went away. He was taken in a police vehicle to Savala where they stayed at the Madrasa. They stayed for twenty days at Savala village and thereafter, they went to his nephew's house at Ilol. In his family, Shakkarbibi, Irfanhussain, Mohammad Sultan and Faridabibi had been burnt by these people. The corpses were taken to Mehsana and their post-mortem was performed. Thereafter, their burial ceremony was carried out. At present, he was residing at Himmatnagar. The police had recorded his statement at Savala. The SIT had not recorded his statement. The witness has stated that he could identify the persons named in his deposition and has identified Kachrabhai Tribhovandas, Ashwinbhai Jagabhai, Prahladbhai Jagabhai Ambaram Kapur and Ashwinbhai Baldevbhai. The witness has stated that he cannot identify two persons present in the court room, viz., Pashabhai Mohanbhai and Rajeshbhai Punjabhai.

56.1 In the cross-examination of this witness, it has come out that he was born at Sardarpura and at the time of the incident,

he was not doing anything. He did not roam about in the village. He used to go around the mohalla. If there was some work or if necessary, he would go to the house of relatives, otherwise he would sit in the mohalla. His house work was done by his children and his wife. On account of the problem with his leg, he did not go out as he had trouble in walking. With one leg, he could walk in the mohalla but he could not walk a long distance. In his cross-examination, it has further come out that before he constructed a pucca house, it was an open plot. When one comes out of Shaikh Mohalla, on the right side is the road going towards Mahadev and on the left side, one can go towards the bazaar. There is a buffalo shed opposite Shaikhvas and Kumbharvas. There were approximately twenty houses in Shaikhvas. If one goes from Shaikh Mohalla towards his house, the house in which he had hidden himself is towards the right. The sheets under which he had hidden himself were full sheets. The sheets were at a height of seven feet. He did not hang on to the sheets. He was sitting against the wall. The inside of the house was locked; however, the choupal (verandah) was open. The witness has stated that the members of the mob could not see the verandah. The mob was comprised of 1500-2000 persons, who were coming on foot. He had seen the persons in the mob at a distance of 25 feet but he did not try to run away upon seeing them. When the mob came he was under the sheets of Babamiya's house. In his cross-examination, it has been brought on record that in his statement dated 6<sup>th</sup> March, 2002, he had stated that as they were afraid and he was also afraid and Babamiya Motamiya's house being next to his house and having sheets, he had hidden himself under the sheets (the contradiction is to the extent of his hiding under the sheets).

The witness has further stated that the sheets under which he had hidden, had walls on the left and right side and there was a half parapet on the front side. There was a space of four feet for going into the verandah. Babamiya was not present at that time and he does not know where he had gone. He had not seen Babamiya since about two to three days prior to the incident. An omission has been brought out to the effect that in his statement dated 6<sup>th</sup> March, 2002, he had not stated with regard to three gallas being burnt by the Patels in front of the Panchayat at around 7:00-7:30 in the evening. An omission in the nature of contradiction has also been brought out to the effect that in his statement dated 6<sup>th</sup> March, 2002, he has not named Kachrabhai Tribhovanbhai and Rajeshbhai Punjabhai.

56.2 From the cross-examination of the Investigating Officer (Police), it has been brought out that on 6<sup>th</sup> March, 2002, this witness had stated that they were afraid and, therefore, he was also worried and Babamiya Motamiya's house being next to his house and it being covered with sheets, he went and hid in the sheets (contradiction to the extent of hiding under the sheets). The members of the mob came towards the mohalla. Thereafter, the police came and resorted to firing (contradiction to the extent of firing). From the cross-examination of the Investigating Officer, it has been proved that this witness has not named Kachrabhai Tribhovandas and Rajeshbhai Punjabhai in his statement dated 6<sup>th</sup> March, 2002. The Investigating Officer (SIT) has admitted that in his statement dated 22<sup>nd</sup> May, 2008, this witness had not stated that he had not seen the incident.

56.3 The learned counsel for the appellants/accused submitted that this witness was disabled in one leg at the time of the incident. It is this witness in whose house the incident in question occurred. This witness has stated that from his house, the entrance of Shaikh Mohalla cannot be seen. Therefor the claim put forward by him that he had seen two gallas being set on fire by the mob at 09:30 p.m. and that at that time he was sitting near his house, is an impossible claim. It was submitted that this witness does not say as to how and when he had gone to Bababhai's courtyard. It was argued that the witness on the one hand says that till 11:30 p.m., all of them were inside their houses, and yet he claims that he has seen the mob pelting stones and setting the houses on fire. It was submitted that surprisingly, this witness says that a police car came again (once after 09:30 the second time after 11:30) and went away, which no other witness has deposed. It was submitted that this witness then says that some forty people rushed inside his house and then six named accused started kicking the door of his house to break it which no other witness has deposed and further says that he was watching this from Bababhai's roof. The witness further attributes a role to one accused who climbed the terrace and started breaking the slab with a hammer and attributes a role to another accused who is stated to have said "Bharat mata ki jai". However, the above facts have not been stated by the witness in his statement dated 6<sup>th</sup> March, 2002 and says that no other statement of his has been recorded by anybody and has clarified that the SIT has not recorded his statement. Thus, these vital and material facts are stated for the first time in the court after a period of eight years which cannot be believed.

56.4 It was submitted that the claim of this witness that all throughout he was covering himself by the roof of Bababhai in the courtyard and the door of his house was locked, is again not believable inasmuch as, if the witness who is physically handicapped was visible to the mob of 1500-2000 persons as he says, he would not have been spared. It was submitted that this witness has not sustained any injury and that the witness himself has stated that he did not know for a week that his family members were taken to Mehsana Civil Hospital. Thus, the conduct of this witness is unnatural and not that of a prudent person. It was further submitted that the witness has stated that the mob which came to Shaikh Mohalla at 11:30 p.m. remained there until the police came at 02:30 a.m. and it was when police came that the persons of the mob went away. It was contended that if it was a huge crowd and was ransacking and burning houses, the mob obviously came there to injure and kill persons belonging to the Muslim community, in which case, nobody would have been left alive during the period of more than two hours, but nothing of the sort has happened. It was argued that no other person, including this witness, who claims to be present at Shaikh Mohalla and have hidden themselves either at the courtyard or inside the house or behind the jeep or at the naveli or against the wall – would have escaped alive, much less, without sustaining life-threatening injuries by the weapons allegedly wielded by the persons in the mob and on the contrary, there is no evidence on record that the persons in the mob named or not named, have caused any injury to anybody during the entire incident by any weapon. In fact, this is a case of complete non-use of any deadly weapon like sword, pipe, stick, dharia, etc., at any point of time by any of the accused to assault any of the

victims and that all injuries sustained by the injured are either burn injuries or stone injuries. It was contended that the injuries sustained by the injured persons are such as could have been sustained at some other place or in a manner different than what is projected by the prosecution. Thus, the evidence of this witness is not only contradictory but is also unbelievable.

56.5 It was contended that this witness had ample time to run away towards the field like a few of the other witnesses, but this witness though he is handicapped, has chosen to come forward towards the entry point to hide himself below the tin sheets of Babamiya's house. According to the learned counsel, this part of the say of this witness is not credible. Moreover, his house was a pucca constructed house wherein forty people from the mohalla, including his own family members, took shelter. In that eventuality, it is difficult to believe that he would prefer to go to Babamiya's house, where the door was locked and would just prefer to remain under a kachha construction covered with a tin sheet. It was submitted that as per the defence version, Babamiya's family was out of the village for three days prior to the incident for the marriage of his son and this witness had also accompanied them to attend the marriage as suggested by the defence, which has been denied by the witness, but the case put forth by the defence is more probable than the version stated by the witness before the court. It was further submitted that though four members of his family had died in the incident, the witness has preferred to remain silent till 6<sup>th</sup> March, 2002 and has neither disclosed what he had witnessed at the time of the incident nor has he made any inquiries about his family members who died during

the incident. Therefore, this witness is not a reliable witness and no reliance can be placed upon his testimony.

56.6 It was also contended that though the witness has stated that he knew Babamiya in whose house he took shelter since his childhood, he has still pleaded ignorance about the names of Babamiya's sons or sons' wives. Thus, on the one hand, the witness does not even know the names of the family members of his close neighbour whom he knew since his childhood, whereas on the other hand, he gives the names of the Patels whom he said he has seen in that atmosphere of haste and hurry, which makes it clear that the witness has not given the true version before the court on oath but has given a tutored version. It was submitted that despite the fact that the SIT had recorded the statement of this witness, he has gone to the extent of saying that his statement had not been recorded by the SIT. Thus, the witness wants to conceal something from the court due to which he has deposed contrary to record. It was accordingly urged that the witness has named three of the accused and has assigned weapons/articles to them and has also attributed specific roles to them, but has failed to identify them before the court. Out of the three accused, the witness has not named two of them in his statement dated 6<sup>th</sup> March, 2002, therefore, it would be dangerous to rely upon the testimony of such witness who tends to falsely rope in the innocent. It was also submitted that a contradiction has been proved through the testimony of the Investigating Officer to the effect that the facts stated by the witness regarding cabins having been set on fire on 28<sup>th</sup> February, 2002 at 07:00 to 07:30 p.m. and two cabins having been set on fire on 1<sup>st</sup>

March, 2002 at 09:30 p.m. at the entrance of Shaikh Mohalla, were not stated by him in his statement dated 6<sup>th</sup> March, 2002.

### **ANALYSIS :**

56.7 The incident wherein twenty-eight persons were burnt to death and others were injured has taken place in the house of this witness. From the testimony of the witness, it appears that at the time of the incident he had one leg as the other leg was amputated and after the incident his second leg was also required to be amputated. The witness has lost his wife Shakkarbibi and his two sons Mohammad Irfan and Mohammad Sultan in the incident. The witness is a resident of Sardarpura and on account of his disability he used to move only within the mohalla and did not normally venture outside. Considering the disability of the witness, there is no reason to disbelieve his presence at Shaikh Mohalla at the time of the incident. The sequence of events narrated by this witness is a little different from that stated by the other witnesses, inasmuch as, he refers to an incident of 9:30 when the gallas were burnt and the police came and the crowd dispersed and there was peace and then says that thereafter suddenly the mob came again at 11:30 and resorted to stone throwing and burning houses and a police vehicle came at 11:30 and went away whereafter the members of the mob started burning houses and firstly, set Manubhai's house on fire and thereafter started burning that line of houses. Therefore, there is some discrepancy in the testimony of this witness and the version given by the other witnesses who have stated that the police came only once during the 9:30 incident. However, in the opinion of this court, much significance cannot be attached to such discrepancy,

inasmuch as, considering the lapse of time between the incident and the recording of evidence of the witness, there are bound to be minor discrepancies in the testimonies of the witnesses. The witness has named Ambaram Kapur with a dharia in his hand, Pashabhai Mohanbhai with a can of kerosene in his hand, Ashwinbhai Baldevbhai with a kerosene can in his hand, Prahladbhai Jagabhai, Ashwinbhai Jagabhai, Sureshbhai Ranchhodhbhai all three with burning rags in the mob. He has deposed that they were coming with burning rags towards his house and six persons in the mob started kicking the door and were shouting "kill them, cut them, burn them" and their people were screaming for help which he could hear. He was hiding under the sheets of Bababhai's house. [It may be noted that Bababhai's house has a covered verandah with a sheet roof and what the witness means is that he was hiding there under the sheets]. The witness has further stated that the Patels had climbed on his terrace and had started breaking it and that Rajesh Punja with a huge hammer was breaking the terrace. The people had continued the burning by throwing rags and thereafter the police came and Patel Kachrabhai Tribhovandas said "Bharat Mata Ki Jai" and upon the police vehicle coming, they went away. After the incident, the police took him away to Savala. He has identified Kachrabhai Tribhovandas, Ashwinbhai Jagabhai, Prahladbhai Jagabhai, Ambaram Kapur and Ashwinbhai Baldevbhai before the court but he has stated that he cannot identify Rajesh Punja and Pashabhai Mohanbhai, though both of them were present in the court. It also appears that the witness has not identified Sureshbhai Ranchhodhbhai. The witness has been extensively cross-examined as regards where he was when the incident occurred and he has stuck to his version that he was in the

verandah of Babamiya Motamiya's house which is at a distance of about ten feet from his house. On a perusal of the video recording of the scene of offence together with the map of the scene of offence, it emerges that on the side towards the rear side of the Patel houses, after Mahemoodmiya's house, there is an open plot, whereafter, firstly, there is Sherumiya Rasulmiya's house, then Bhikhumiya Kalumiya's house and the third house is Babamiya's. This house has a covered verandah which has full height walls on both sides and in front also except for an open entrance and has a sheet roof and has not been damaged by the mob, and hence the testimony of the witness finds support in the video recording of the scene of incident which shows the description given by him about the place where he was hiding, to be accurate. Thus, the version of this witness that he was hiding under the sheets of Babamiya's house appears to be credible as the house is situated quite near his house and the mob does not appear to have vandalized the house and hence no one appears to have seen him considering the late hours when the incident took place. A contradiction is sought to be brought out as to his previous statement dated 6<sup>th</sup> March, 2002, to the effect that he had stated therein that as he was afraid and worried, Babamiya Motamiya's house being situated next to their house and it having sheets, he had hidden in those sheets. The contradiction is limited to the words "he had hidden in those sheets". In the opinion of this court, there is no material contradiction in the version stated before the court and the same thing merely appears to have been expressed in a different manner. The witness has therefore remained consistent about the place from where he had seen the incident and considering the topography of such place, he

would have been in a position to witness the whole incident. The testimony of this witness being trustworthy and credible, can be relied upon.

57. **PW-78 Basirabibi Bachumiya Shaikh** has been examined at Exhibit-642. She has deposed that she is a native of Sardarpura and was residing at Shaikh Mohalla at Sardarpura. Her husband's name is Bachumiya Nathumiya. She has three children, the eldest is Maiyuddinmiya Bachumiya, younger to him is Nazirmiya Bachumiya, and the youngest is Illyasmiya Bachumiya. Her husband used to operate the bore and also engage in agricultural work. He used to work at Jayantibhai Ambaram's bore. Her paternal home was also at Sardarpura in Shaikh Mohalla. Her husband Bachumiya Nathumiya, her elder brother Abbasmiya Kesharmiya, her sister-in-law Ruksanabibi Abbasmiya, her younger sister-in-law Mumtaj Makbulmiya, her niece Saherabibi Abbasmiya and nephew Firozmiya Makbulmiya had died in the incident. On 27<sup>th</sup> February, 2002, the train had been burnt at Godhra. On 28<sup>th</sup>, there was a call for Gujarat Bandh. On 1<sup>st</sup> March, 2002, there was a call for Bharat Bandh. On the 28<sup>th</sup> in the evening, Jayantibhai Ambarambhai had come and had taken away the account register of the bore from her husband at their house. On the 1<sup>st</sup>, in the evening at 5 o'clock, she had gone to purchase gram flour at Dahyabhai Vanabhai's shop. Dahyabhai Vanabhai had asked her as to what she would do with the flour and she had told him that she wanted to make bhajiyas. Dahyabhai Vanabhai had told her that today was the last day, they may eat the bhajiyas, tomorrow if they live, they would eat. On the same day at 9:30, a mob of Patels came from the side of Mahadev and were shouting "kill the miyas, cut them,

not a single one should remain alive" and vandalized and burnt three cabins at the corner of Shaikh Mohalla. Thereafter, the police came and the mob dispersed. The mob came back after some time and started pelting stones. They started burning houses and looting them. Manubhai Painter's house was set on fire. Secondly, Akbarmiya Nathumiya's house was set on fire. Thereafter, the third house of Bachumiya Nathumiya was set on fire. The fourth house to be burnt was Iqbal Rasulmiya's house. Burning the houses, they came inside. At that time, her husband was hurt with stones. She has seen these people with her own eyes and upon being afraid, with a view to save their lives, they, namely, she, her husband, her brother, her sister-in-law, her younger sister-in-law, her niece and her three sons had gone inside Mahemoodmiya Hussainmiya's house. The persons in the mob had surrounded Mahemoodmiya's house. They broke the window and from inside, she saw that they were pouring kerosene, petrol and had thrown burning rags. She had seen Rajeshbhai Punjabhai, Pashabhai Mohanbhai, Dahyabhai Vanabhai, Babubhai Vanabhai, Kanubhai Revabhai, Jayantibhai Ambaram, Mangabhai Mathurbhai, Jayantibhai Mangabhai, Kantibhai Parbhudasbhai, Kachrabhai Tribhovanbhai and Babubhai Kanjibhai with her own eyes. Their population was screaming and shouting. There were screams of 'Bachao Bachao'. They all folded their hands and also told them "bhai saheb, please save us" but those people did what they wanted to do and went away. Thereafter, the police came. Kachrabhai Tribhovanbhai shouted that not one should remain alive. Thereafter, after burning, everyone left and after everything was over, Kachrabhai Tribhovandas said "Jai Bharat Ki Jai" and thereafter, the police came. The police shouted that those who are alive should come out and that

they were the police, whereupon they came out. After coming out, she saw that her elder brother Abbasmiya Kesharmiya, her sister-in-law Ruksanabibi Abbasmiya, her sister-in-law Mumtajbibi Makbulmiya, her niece Saherabibi Abbasmiya and her husband, had died. Thereafter, the police came and took them in a box. At Mehsana, they were given treatment. She had sustained burn injuries on both her legs and her face. Her younger son Illyas had also sustained burn injuries on the left ear and on the left leg. From Mehsana, they came in the police vehicle to Ilol. At Ilol, she stayed with her niece for her Iddat and after one month and ten days, she went to Panpur Patiya. At Panpur Patiya, her statement was recorded, whereafter, she came to Satnagar where her statement was recorded. The SIT people had recorded her statement three times. The witness has stated that she can identify the persons in the mob and has identified Kachrabhai Tribhovandas, Jayantibhai Mangabhai, Dahyabhai Vanabhai, Mangalbhai Mathurbhai, Babubhai Vanabhai, Jayantibhai Ambaram, Kanubhai Revabhai and Rajeshbhai Punjabhai.

57.1 In her cross-examination, an omission has been brought out to the effect that in her previous statement, she has not stated that Jayantibhai Ambaram had come and taken away the account books of the bore from her husband. In her statements dated 17<sup>th</sup> April, 2002 and 11<sup>th</sup> June, 2008, she has not mentioned the bhajiya incident. An omission in the nature of contradiction has been brought out to the effect that in her statement dated 17<sup>th</sup> April, 2002, she has not named Rajeshbhai Punjabhai, Pashabhai Mohanbhai, Dahyabhai Vanabhai, Babubhai Vanabhai, Kanubhai Revabhai, Mangabhai Mathurbhai, Kantibhai Prabhudas and Babubhai Kanjibhai. In

her cross-examination, the witness has denied the suggestion that they had closed both the doors and windows from inside Mahemoodmiya's house and has further stated that Maiyuddin was with her and Nazir, Illyas and her husband were also with her and that they were on the front side of the house and the window was open. The witness has stated that she does not remember as to what part of the window was broken and had stated that the window on the rear side was broken. She has denied the suggestion that she was falsely deposing that the members of the mob had thrown burning rags, petrol and kerosene from the window. She has admitted that her house is the first house in the mohalla and that it is entirely burnt. An omission has been brought out that in her previous statements dated 17<sup>th</sup> April, 2002, 22<sup>nd</sup> May, 2008 and 11<sup>th</sup> June, 2008, she has not stated that at Ilol she had stayed for the purpose of Iddat at her niece's place and had gone to Panpur Patia after one month and ten days. She has denied that because her statement was recorded late, with a view to give an explanation, she had stated the above fact.

57.2 PW-91 Mahendrasinh Lalsinh Rathod, who at the relevant time was discharging duties as a P.S.I. at Vijapur Police Station, was re-examined, whereupon he had stated that he had inter alia recorded the statement of Basirabibi Bachumiya Shaikh. In the cross examination of this witness a contradiction has been proved namely that Basirabibi, in her statement dated 17<sup>th</sup> April, 2002, had not stated that Jayantibhai Ambararam had taken the account books of the borewell from her husband at their house in the evening of 28<sup>th</sup>. A further contradiction is proved to the effect that Basirabibi had not stated the anything regarding the incident of her having gone to purchase gram

flour from Dahyabhai Vanabhai and he having asked her as to what she wanted to do with the flour; that she had informed him that for the purpose of making bhajiyas, whereupon he had told her that today was their last day, they may eat bhajiyas, tomorrow they would eat if they remain alive, in her above statement. A further contradiction is brought out to the effect that Basirabibi, in her statement dated 17<sup>th</sup> April, 2002 had neither stated that the window of Mahemoodmiya's house was broken, nor had she named Rajeshbhai Punjabhai, Pashabhai Mohanbhai, Dahyabhai Vanabhai, Babubhai Vanabhai, Kanubhai Revabhai, Mangabhai Mathurbhai, Kantibhai Prabhudas and Babubhai Kanjibhai. Yet another contradiction has been proved to the effect that Basirabibi, in her above statement had not stated anything about Kacharabhai Tribhovandas having shouted that not one should remain alive.

57.3 Mr. Y. S. Lakhani, learned counsel for the appellants/accused submitted that this witness has created two stories. Firstly, that Jayantibhai Ambaram took the account book of the borewell from her husband on 28<sup>th</sup> February, 2002, which fact she has stated for the first time before the court as she had not referred to that incident in any of her statements dated 17<sup>th</sup> April, 2002, 22<sup>nd</sup> May, 2008 or 11<sup>th</sup> June, 2008; and secondly, that on 1<sup>st</sup> March, 2002 at 5:00 p.m. she had gone to purchase gram flour (besan) at the shop at Dahyabhai Vanabhai, and on being asked by Dahyabhai as to what shall she do with that, she replied that she will prepare "Bhajiya". Dahyabhai then told to her to eat "Bhajiya" today and they will not be able to have it next day as they will not be alive, which fact has not been stated by her in her statements dated 17<sup>th</sup>

April, 2002 and 11<sup>th</sup> June, 2008. It is pointed out that this fact is mentioned in the complainant's (PW-48) affidavit dated 6<sup>th</sup> November, 2003 before the Supreme Court, which apparently was drafted by some legal mind and to support that fact and with a view to show that the events of the incident were preplanned and pre-conspired, these words are put in the mouth of Basirabibi. It was contended that both these stories are got up ones and the very fact that the witnesses are, for the first time, coming up with such created stories after so many years leads to the inevitable conclusion that they all were specifically tutored as to what they are supposed to depose before the court, either in the line of their belated preconceived statements or for the first time before the court. According to the learned counsel, for this reason alone, the testimonies of such witnesses should be rejected as unbelievable and unreliable.

57.4 The learned counsel further submitted that the witness has claimed that she herself, her husband and her three sons were in Mahemoodmiya's house, along with other family members and that five persons from her family have died in this incident. It was submitted that the witness's say that she was inside the house with her three children cannot be believed for the reason that having regard to the fact situation and the nature of burn and inhalation injuries sustained by all those who have died inside the room, it is not possible that this witness with her three minor children could come out alive or without serious injuries to all of them; the witness has stated that her son Illyas had sustained burns on left ear and left leg; however, no medical certificate has been produced in support of her say that Illyas was treated at Mehsana Hospital; the

witness has not stated as to what had happened to her other two sons Maiyuddin and Nazir and nothing has been brought on record to show as to whether or not they had sustained any injuries. It was submitted that as per the version given by the first informant, along with the twenty-eight persons who died in the room, three others who had sustained severe injuries were also taken out, all of whom died subsequently. Therefore, looking to the nature of suffocation which those inside the enclosed room must have suffered for more than an hour or two, the version given by this witness cannot be believed

57.5 It was further submitted that this witness has sustained some burns, which are not serious or life-threatening and that the witness even got herself discharged from the hospital against medical advice on the same day at 6:30 p.m. and has not been found to have sustained any inhalation injury. Thus, the possibility of her having sustained the injury elsewhere or in a manner different than as projected by her cannot be ruled out in view of the evidence that has come on record, which shows that several houses were set on fire at Shaikh Mohalla and other properties even outside of the mohalla were set on fire. It was contended that looking to the size of the room, it is not possible that with the usual household articles found inside, more than fifty persons could be accommodated inside and that about twenty persons can come out alive, and most of them, without any injury whatsoever. Thus, the story that this witness was inside Mahemoodmiya's house with her three minor children is not at all believable.

57.6 It was next submitted that such claims of this witness that she was inside the house and that they had come out

upon the police asking them to do so, are also falsified for the reason that the evidence of the police officers does indicate that on being informed by two injured persons in Shaikh Mohalla (whose identity has not been established) the police has reached Mahemoodmiya's house and forced open the door through the handle and those inside were brought out. Thus, nobody came out on his/her own upon hearing the voice of police by opening the door from the inside the house. It was submitted that the witness has stated that after she came out of the house, she has seen that few of her family members have died. It is submitted that there would not be any occasion for the witness to say so if she was inside the house, as she would have known this fact inside the house itself. It was argued that the claim of the witness that she has seen the accused from inside the house also falls to the ground inasmuch as, the windows and doors of the house were closed from inside as per the say of the other witness and it was not possible to see what was happening outside. It was submitted that the witness has improved upon the version given by her that she has folded her hands and requested the mob to spare them but they did what they had decided to do and that when she found that it would be falsified she said that they were talking *inter se*, which in itself is out of context and unbelievable. It was pointed out that again these facts are not stated in any of her three statements.

57.7 It was submitted that the silence maintained by the witness for forty-six days and thereafter giving her statement on 17<sup>th</sup> April, 2002 is eloquent. According to the learned counsel, if the witness had sustained injuries inside the house and had taken treatment and thereafter gone to Ilol with the

police, it is most unlikely that she would not narrate the incident to them, more so, when her husband and four other members of her family had died in the incident. It was submitted that the explanation offered by her for the first time in the court that she went to the house of her niece to observe Iddat does not find place in any of her statements dated 17<sup>th</sup> April, 2002, 22<sup>nd</sup> May, 2008 or 11<sup>th</sup> June, 2008, therefore, apparently a false explanation has been offered as a reason for giving the statement late. It was submitted that, the witness, in none of her three statements had stated that the window of Mahemoodmiya's house was broken and has stated so for the first time before the court. The witness has admitted that there was a lot of smoke inside the house and has further deposed that no electric wires were seen in the house, there was a kerosene lamp and that there was no light in the house. It was pointed out that the witness has named three accused whom she has claimed to have seen and recognized, however, the names of such accused were not mentioned in her statement dated 17<sup>th</sup> April, 2002 nor could she identify them in the court. Though she has identified four other accused, she did not name them in her first statement dated 17<sup>th</sup> April, 2002. Thus, the identification of those accused, does not inspire confidence. Moreover, though the witness has named six other accused in her statement before the SIT, she has not named them in the court. Thus, this witness at her sweet will, adds and subtracts the names of the accused and has not given the correct and true version before the court. It was urged that the omissions, contradictions and improvements in the testimony of this witness which have been proved on record are all major, vital and going to the root and hence the whole of the evidence of this witness must be kept out of consideration.

57.8 **ANALYSIS:** This witness is the wife of Bachumiya Nathumiya, who died in the incident inside Mahemoodmiya's house and is the sister of Abbasmiya Kesharmiya who also died in the incident along with his wife and daughter. The witness has deposed regarding Jayantibhai Ambaram having come to take the account register of the bore and has also deposed regarding the bhajiya incident. As per the version given by the witness, the mob was burning house after house and pelting stones and when they set the fourth house of Iqbalmiya Rasulmiya on fire, her husband sustained injuries with stones and they took shelter in Mahemoodmiya Hussainmiya's house. She has stated that she, along with her husband, three sons, her brother, two sisters-in-law and her niece had gone inside the house.

57.9 This witness is an injured eye witness and has sustained burn injuries on both her legs and her face, therefore, her presence at the scene of offence cannot be doubted. The testimony of this witness suffers from embellishments, however, that by itself is no reason to disregard her testimony. As per the version given by this witness, she had identified the accused from the window of Mahemoodmiya's house which was broken by the mob. The witness has slightly exaggerated upon the version given in her statement dated 17<sup>th</sup> April, 2002, to the effect that they had folded their hands and beseeched the mob and asked them to spare them but they did what they wanted to and went. However, a small embellishment or exaggeration of this nature would not impeach the credibility of the witness, since the core of her testimony is consistent with her police statement. In her deposition, she has stated

that after the incident she had gone to Ilol to her niece's house for her iddat and had stayed there for one month and ten days after which she came to Panpur Patia, whereas before the police she had said that she had gone to Ilol to her niece's house and had returned two days ago. Thus, there is no material inconsistency in the evidence of this witness in this regard. The witness has named Rajeshbhai Punjabhai, Pashabhai Mohanbhai, Dahyabhai Vanabhai, Babubhai Vanabhai, Kanubhai Revabhai, Jayantibhai Ambaram, Mangabhai Mathurbhai, Jayantibhai Mangabhai, Kantibhai Parbhudasbhai, Kachrabhai Tribhovanbhai and Babubhai Kanjibhai in her deposition and has identified Kachrabhai Tribhovandas, Jayantibhai Mangabhai, Dahyabhai Vanabhai, Mangalbhai Mathurbhai, Babubhai Vanabhai, Jayantibhai Ambaram, Kanubhai Revabhai and Rajeshbhai Punjabhai before the court. A contradiction has been brought out in her cross-examination that she had not named Rajeshbhai Punjabhai, Pashabhai Mohanbhai, Dahyabhai Vanabhai, Babubhai Vanabhai, Kanubhai Revabhai, Mangabhai Mathurbhai, Kantibhai Prabhudas and Babubhai Kanjibhai in her statement dated 17<sup>th</sup> April, 2002. Therefore, to the extent of the persons who were not named in the previous statement dated 17<sup>th</sup> April, 2002, there is a possibility of false implication or tutoring. However, insofar as the accused who have been named by her in the first statement and in her deposition before the court and whom she has also identified, there is no reason not to believe the testimony of the witness. From the testimonies of the witnesses read with the scene of offence panchnama and the testimony of the Scientific Officer, Forensic Science Laboratory, it appears that a window of Mahemoodmiya's house was in fact broken by the mob,

therefore, it is quite possible for the witness to have seen and identified the persons in the mob. The witness has been sought to be contradicted with her previous statement recorded by the SIT to the effect that she had not named the accused in those statements. As discussed earlier in the context of other witnesses, the statements recorded after 17<sup>th</sup> April, 2002 were in the nature of further statements and, therefore, there was no necessity of repeating what was already stated in the first statement.

57.10 The witness has stated that they were on the front side of the house and the window was open but she does not remember which part of the window was broken but says that the rear side window was broken. The testimony of this witness has inter alia been challenged on the ground that it was recorded very belatedly on 17<sup>th</sup> April, 2002. She has stated facts regarding incidents that allegedly took place prior to the main incident on 1<sup>st</sup> March which are in the nature of improvements. It has also been contended that as per the version given by the witness, she along with her three children was inside the house, however, there is no evidence that any of her three sons sustained any injury and that it was not possible for anyone to be inside the house and escape unscathed. In this regard, it may be noted that Bachumiya Nathumiya, the husband of the witness has sustained severe injuries and has died in the incident. The post-mortem report of Bachumiya at Exhibit-326 shows that he had sustained 1st degree to 2nd degree to 3rd degree burns on back of his right hand. Fracture at lower ends of right radius and ulna bones. 1st degree to 2nd degree to 3rd degree burns on left forearm and left fingers, fracture of left index finger and fracture at

vertex of the skull, and the cause of death as per the opinion of the doctor was shock due to burns and head injuries. The post-mortem report which has been duly proved by PW-16 Dr. Vijaykumar Vitthalbhai Oza, supports the version given by the witness that her husband had sustained injuries due to stone throwing. The witness herself has sustained burns injuries of 1st, 2nd and 3rd degree and the medical case papers reveal that she had complained of burning sensation in her throat, which fact is supported by the testimony of Dr. Dhirajkumar Soni, who has deposed that she had complained of pain in the throat. In these circumstances, the presence of the witness inside Mahemoodmiya's house cannot be doubted. Besides, one of the witness's brothers, two of her sister-in-laws and her niece have also died in the incident. Therefore, it is but natural that her sons would also have been with them in the house. The witness has deposed that her son Illyas had sustained burn injuries and was treated at the Mehsana Civil Hospital, however, no evidence in this regard has been produced. In the opinion of this court, when the parents were in the house, it is but natural that the children must also have been with them. The non-production of any evidence regarding the injuries sustained by Illyas would still not detract from the fact that the witness was in the room. This court is of the view that the testimony of this witness is reliable to the extent indicated hereinabove.

58. **PW-79 Samimbanu Mahemoodmiya Shaikh** has been examined at Exhibit-647. This witness has stated that her father's name is Mahemoodmiya Hussainmiya and her mother's name is Shakkarbibi. She has a sister named

Faridabanu and two brothers named Irfan and Tipu Sultan. Her father is handicapped. At the time of the incident, they were residing at Shaikh Mohalla in Sardarpura. In the mohalla, there were two rows of houses and their house was in the middle at the end of the mohalla. Their house had a concrete slab and she was residing there with her parents, brothers and sister. On the third day after the train was burnt at Godhra, the incident had taken place. From the side of Mahadev temple, a mob of Patels came screaming "cut the miyabhais and kill them". The mob came at 9:30 at night. They came and they burnt three cabins, the police came and went away. Again the same mob returned and resorted to pelting stones. The mob came at 12 o'clock. Thereafter, Manubhai Painter's house was burnt, Akbarbhai Nathubhai's house was burnt. They went on burning houses and entered the mohalla. She was at her Abhu mama's (maternal uncle Ibrahimmiya's) house. Thereafter, her Abhu mama had come and told that these people had come burning houses and there is no window to go out, hence, he would open the door and they should hide and run away. Her maternal uncle opened the door and all the women of the mohalla, with a view to save themselves, went inside their pucca house. She was also inside her house. The Patel people surrounded the house from all four sides. They poured kerosene, threw rags, threw petrol and set them all on fire. They broke the roof. She saw it with her own eyes. She recognised them by their faces but she does not know their names. The witness has identified Prahladbhai Somabhai, Dashrathbhai Ambalal and Kachrabhai Tribhovanbhai by face. She has also identified Tulsibhai Girdharbhai, Chaturbhai Vitthalbhai and Kanubhai Joitaram. She has stated that these people had thrown rags soaked with kerosene and petrol inside

the house. She had seen her mother, her two brothers Irfanbhai and Tipu Sultan and her sister Faridabanu being burnt with her own eyes. Thereafter, at 4 o'clock, the police came and took her out of the house and took her to Savala. Twenty-five to thirty persons came out of the house. Someone had sustained burns on the hands, someone was injured. At Savala, they were taken care of. They stayed there for fifteen to twenty days. From Savala, they went to Ilol where they were residing with their relatives. Thereafter, she got married and is now residing at Himmatnagar. The police had recorded her statement at Savala. No other statement of hers has been recorded.

58.1 In her cross-examination, the witness has admitted that in her statement dated 6<sup>th</sup> March, 2002, she had named the persons in the mob. However, she does not remember whom she has named. She has deposed that she does not remember how many persons she had named; however, she has not named them at anyone's instance. At the time when the statement was recorded on 6<sup>th</sup> March, 2002, she remembered the persons in the mob by their faces as well as by their names as she knew these people since ten years. She has admitted that she knew the persons whom she had named in her statement by name and could recognise those persons, however, she cannot give the names of the persons whom she had named. She does not remember that when her statement was recorded on 22<sup>nd</sup> May, 2008, she had named persons in the mob. She has admitted that after the incident, for the first time, she was identifying the persons whom she had seen at the time of the incident in the court. In her cross-examination, it has been brought out that in her statement dated 6<sup>th</sup> March,

2002, she has named Rameshbhai Gangaram, Madhabhai Vitthalbhai, Dineshkumar Baldevbhai and Lakhwara Naranbhai Shitalmali. She has denied the suggestion that in her statement dated 22<sup>nd</sup> May, 2008, she has named Dashrathbhai Ambalal, Ashwin Baldevbhai Nagar, Patel Parsottam Mohanbhai, Patel Chaturbhai Kanabhai and Patel Bakabhai Mangalbhai.

58.2 From the testimony of the Investigating Officer (Police), it has been brought on record that in her statement dated 6<sup>th</sup> March, 2002, this witness has not stated that she could recognise the persons in the mob by their faces. The Investigating Officer, in his cross-examination has admitted that in her statement dated 10<sup>th</sup> March, 2002, this witness has named Ambalal Maganbhai, Rameshbhai Gangawat, Baldevbhai, Ranchhodbhai, Bakabhai Mangalbhai, Ashwinbhai Jaganbhai and Sureshbhai Ranchhodbhai.

58.3 The learned counsel for the appellants/accused submitted that this witness claims to be inside her father's house where the incident took place. It was submitted that as pointed out in respect of those witnesses who also falsely claimed that they were inside the house, it is not possible to believe that this witness was also inside the house, inasmuch as, she has not sustained any injury whatsoever nor had she taken any treatment nor was she medically examined. It was submitted that in this fact situation it is not possible to believe that the witness could come out of the house unscathed whereas twenty-eight persons have died and three persons who were found alive with severe injuries, also succumbed to death within a short span of time. It was further submitted that this

witness maintained silence for nearly five days after the incident which creates a doubt about her presence at Shaikh Mohalla, as she did not disclose anything to police whom she has many occasions to meet to.

58.4 It was contended that there is no clear evidence as to where the witness was when the sequence of events started and that the witness has improved her versions as far as the sequence of events and the time of the incident is concerned. It was submitted that the witness has admitted that she has stated in her statement dated 6<sup>th</sup> March, 2002 that the mob came at 12 to 12:30 at midnight and set on fire three cabins at the corner of Shaikh Mohalla, but thereafter, she has very consciously and deliberately improved her version by stating before the court that a mob of Patels came at 9:30 p.m. and set three cabins on fire, etc. It was pointed out that like the other witnesses, this witness has also disowned her initial version about the police having resorted to firing. It was submitted that all the important set of facts narrated by the witness before the court regarding the sequence of events are proved to be in the nature of improvements and the contradiction is proved on record.

58.5 It was submitted that the witness has deposed that she was in her Abhumama's house and has also referred to Abhumama's talk with her and the consequential step whereby all the female folk of the mohalla entered Mahemoodmiya's house, however, these facts have not been stated by her in either of her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008. Thus, an omission of vital and material facts has been proved on record. It was further submitted that the claim of the

witness that the terrace of the house was broken is not supported by any evidence including the panchnama or scene of offence. This witness in her cross-examination, has stated that the mob was comprised of fifty persons which came at 12 o'clock at midnight; however, rest of the witnesses speak of a mob of 700 persons to 1000 and upto 1500 persons. Thus, it becomes clear that she was not a witness to the incident nor was she inside the house in question.

58.6 It was further submitted that in her first statement, which was given on 6<sup>th</sup> March, 2002, the witness had named four accused; however, subsequently on 22<sup>nd</sup> May, 2008, before the SIT, the witness named five other accused and later on, before the court, the witness has stated that she is not in a position to name any of the accused but can identify them by their faces. Thus it clearly appears that all those different names given after an interval of six years, were given at the instance of somebody and she did not know anybody as she was not an eyewitness. According to the learned counsel, such identification in court without naming the accused whose names were already stated by her in her statements, that too, of different persons cannot be believed, as in the absence of any Test Identification Parade, it would be very dangerous and hazardous to rely upon such identification. It was also submitted that as per the say of this witness the mob came at 12 o'clock at midnight and she was afraid and hence, she went running inside her house and that her father was also inside the house. However, thereafter, curiously, the witness does not say as to where her father had gone and her father, though he was handicapped, was not found in the house. It was submitted that the evidence of her father Mahemoodmiya runs

counter to the evidence of this witness. It was accordingly, urged that the witness is not stating the correct facts before the court and as such her testimony cannot be believed.

**58.7 ANALYSIS:** This witness is Mahemoodmiya's daughter and was residing in the house where the incident has taken place. Insofar as the version given by the witness that she was inside the room at the time of the incident is concerned, there is no reason to disbelieve her, inasmuch as, when women and children from the mohalla had taken shelter in her house, it is but natural that the witness would also have taken shelter in her own house. Insofar as the quality of the evidence of this witness is concerned, she has named four persons in her statement dated 6<sup>th</sup> March, 2002 and thereafter named a different set of persons in her statement dated 2<sup>nd</sup> May, 2008, whereas before the court, she has not named anybody and has stated that she can recognise the accused by their faces and has identified Prahladbhai Somabhai, Dashrathbhai Ambalal, Kachrabhai Tribhovanbhai, Tulsibhai Girdharbhai, Chaturbhai Vitthalbhai and Kanubhai Joitaram by their faces.

58.8 On an overall appreciation of the testimony of this witness, it appears that due to lapse of time between the incident and the recording of evidence, during which time she was married and settled elsewhere, the memory of this witness appears to have faded. Considering the fact that she has not named anyone in her deposition, though she has named several accused in her statements before the police and the SIT, it would be hazardous to place reliance upon the testimony of the witness qua the accused whom she has identified in the court without naming them. In this case, no

test identification parade has been carried out. The settled legal position is that in case where the accused is a known person, it is not necessary to carry out a TI Parade and identification before the court would suffice but in case where the accused are not named, it would be necessary to hold a TI Parade to establish the identity of the accused.

58.9 The testimony of this witness has been assailed on the ground that in her earlier statements, she has not stated with regard to the fact that she was in her Abhumama's house and her talk with him and the consequential step of all female folk of mohalla entering Mahemoodmiya's house, which contention is clearly not borne out from the record, inasmuch as, in her statement dated 6<sup>th</sup> March, 2002, the witness had clearly stated that she was in Ibrahimmiya's house and had subsequently gone to her house along with the others. Though the version given in her deposition is more elaborate, it is not inconsistent with her police statement. The testimony of this witness supports the version given by PW-47 - Ibrahimmiya Rasulmiya to the effect that the members of his family and others had taken shelter in his house and had subsequently gone into Mahemoodmiya's house.

59. **PW-80 Rukshanabanu Ibrahimmiya Shaikh** has been examined at Exhibit-650. This witness has deposed that her native place is Sardarpura and the first informant – Ibrahimhai is her father. At the time of the incident, she was residing at Sardarpura with her father. Her mother's name was Sharifabibi and she had died thirteen years prior to the incident. Her father had then married Zaydabanu. Zaydabanu was present at the time of the incident and died in the

incident. She had a brother named Raish. At the time of the incident, they were four sisters – she, Raziabanu, Parveenbanu and Farzanabanu. In the incident, her sister Raziabanu and Parveenbanu had died. Her father's elder brother is Akbarmiya Rasulmiya Shaikh. Her father's younger brother is Sherumiya Rasulmiya Shaikh. Sherumiya Rasulmiya's entire family died in the incident. At the time of the incident, she was not married. At present, she is married and residing at Vijapur. This witness has deposed that on 27<sup>th</sup> February, 2002, the incident of burning the train at Godhra had occurred and on the next day on 28<sup>th</sup> February, 2002, there was a call of Gujarat Bandh. On 1<sup>st</sup> March, 2002, there was a call of Bharat Bandh. At about 9 to 9:30 on 1<sup>st</sup> March, 2002, a mob of persons from the village came at the corner of their mohalla where they burnt three cabins. The cabins belonged to Ibrahimmiya Rasulmiya, Iqbalbhai and Rafiqbhai. After burning the gallas, the people from the village were saying that "kill these miyabhais, cut them, burn them". Upon the police coming, the mob dispersed. After half an hour, the mob came again and entered their mohalla shouting "cut the Muslims" and started looting their houses and throwing rags and resorted to arson and stone throwing. She was injured with a stone on the side of her right eye as well as on her knee. To save their lives, out of fear, they entered inside Mahemoodbhai's pucca house. Mahemoodbhai is her uncle (father's sister's husband). Thereafter, the people of the village surrounded them from all four sides. They sprinkled kerosene and petrol inside the house and burnt them. They were shouting inside, however, no one came to save them and the village people said "Jai" and went away. Thereafter, the police came and took them out. They took treatment at Mehsana Civil. After that, they went to Ilol where

they stayed for two days. Thereafter, they went to Panpur Patia Camp. The police had recorded their statements. Around ten to fifteen persons had been brought to Mehsana Civil. Inside Mahemoodbhai's house approximately, twenty to thirty-five people were there. In Mahemoodbhai's house, approximately thirty to thirty-one people were burnt to death. Out of the persons who had died in the incident were members of her family viz., her mother Zaydabibi, her younger sister Raziabunu, her third sister Parveenbanu; members of her uncle's family, viz., her uncle Sherumiya Rasulmiya Shaikh, her aunt whose name she does not remember at present, her uncle's daughter and his son whose name she does not remember; members of her uncle Akbarmiya Rasulmiya's family, viz., one brother Idrish and one sister-in-law named Wahida. Thus, members of the three families were burnt in the room and had died. Those from the mohalla who were inside the house had also died. She had stated that she can identify the people in the mob by their faces and has identified Patel Bhavesh Kanubhai, Dahyabhai Ambalal, Prahladbhai Somabhai, Mangalbhai Mathurbhai, Chaturbhai Kanjibhai, Dahyabhai Kachrabhai, Dahyabhai Vanabhai, Prajapati Dahyabhai Varvabhai and Govindbhai Mohanbhai.

59.1 In her cross-examination, the witness has stated that she has seen that persons in the mohalla have been injured. She does not remember as to how many people who were inside the house had been injured. She has stated that the houses in the mohalla towards the side of the Patel houses were safe and all the other houses were burnt. In the houses which were burnt, she had not learnt that anyone had sustained burn injuries. It has further come out that the witness was born in

Sardarpura and that prior to the incident, she used to roam about in the village for her daily work and for her livelihood and that she used to work as a labourer in the fields of the village. On one side of the mohalla, there was a kabrastan and on the rear side were the Patel houses. In her cross-examination, it has also come out that in her presence, the members of the mob had not injured anyone with weapons and that she had not sustained any injury with weapons. It has further come out that Mahemoodbhais house is made up of bricks, cement and plaster. They had gone inside Mahemoodbhais house and after that, there was an attack on his house. At that time, none of them had tried to come out of the house. They had not tried to come out of the doors and windows on the rear side. The witness has voluntarily stated that they were surrounded from all four sides and there was no possibility of coming out. The witness has further stated that she does not remember as to whether the doors were opened and has stated that the windows and doors were not broken but the windows on the rear side were broken. In her cross-examination, it has also been elicited that the doors and windows of the room were shut but they were not latched. Thereafter, she has stated that there were so many people inside, she is not aware as to whether anyone had latched them. She has admitted that even if the doors and windows of Mahemoodbhais house are opened, one cannot see the cabins at the corner of Shaikh Mohalla from there. The witness is not in a position to say as to approximately how much kerosene and petrol had been poured inside and has stated that kerosene had fallen on her clothes but her clothes were not burnt and that though she had sustained burn injuries on her back but her clothes were not burnt. She has stated that she

had sustained burn injuries due to the steam. In her cross-examination, it has also been brought out that in her statement dated 10<sup>th</sup> March, 2002, she has named Ambaram Maganlal, Rameshbhai Gangawat, Baldevbhai Ranchhodbhai, Bakabhai Mangalbhai, Ashwinbhai Jagabhai and Sureshbhai Ranchhodbhai, which she, however, has denied. She has denied that in her statement dated 10<sup>th</sup> March, 2002, she has named six persons at the instance of persons belonging to her community. She has admitted that she could identify the persons whom she had seen at the time of the incident for the first time by their faces in the court. She has denied the suggestion that the attack on Shaikh Mohalla was by a mob from Sundarpur. She has denied the suggestion that as she was not in a position to identify the persons in the mob, she had stated before the SIT that she can identify them by their faces. She has stated that she had not given names of the persons in the mob before the SIT. She has denied that at 9:30 when the police came, there was firing and the mob had dispersed. In her cross-examination, it has been brought out that in her statement dated 10<sup>th</sup> March, 2002, she had stated that as Mahemoodbhai's house was a pucca house and safe, they had entered the house and had closed the doors on both the sides. At that time, the persons in the mob had entered the mohalla and had burnt the cabins at the corner of their mohalla and had started vandalizing and burning. In the house in which they were hiding, the members of the mob had come and at that time, she had seen them.

59.2 From the cross-examination of the Investigating Officer (Police), it has been brought on record that this witness had not stated before him that she could identify the members of

the mob by their faces. The Investigating Officer has further admitted that in her statement dated 10<sup>th</sup> March, 2002, this witness had named six persons of the village as being members of the mob. The Investigating Officer (SIT) has admitted that in her statement dated 22<sup>nd</sup> May, 2008 before the SIT, this witness had got her previous statement regarding firing by the police at 9 o'clock corrected.

59.3 Mr. Y.S. Lakhani, learned counsel for the appellants/accused submitted that this witness also claims to be inside the house of Mahemoodmiya. It was submitted that considering her deposition as a whole and the manner in which she has made improvements in her versions including identification of accused, it cannot be believed that the witness was inside the house with others, almost all of whom have died. It was submitted that many witnesses have made false claims of being inside the house at the time of the incident, and that this witness, despite the fact that she has named several persons who died in the incident, has not named a single person who escaped and is alive. Thus, she is not telling the truth before the court. It was pointed out that neither this witness who claims that she was inside the house nor any other witness like her, have given any description about the situation of the room, viz., how the people inside kept themselves, what did they do inside the room at the time of the incident, what attempts did they make to save themselves and how did they react to the situation? etc., which nobody would forget to say when they disclosed the incident to the investigation agency. It was submitted that according to the witness, she had sustained an injury on her right eye and also on her knee, and she has stated that she sustained injuries on

her back because of the steam but her clothes did not get burnt though kerosene – petrol fell on her clothes. It was submitted that considering the nature of injuries sustained by the witness (Exhibit-195), there is almost no possibility that she could have sustained such minor injuries inside the house, wherein a large number of persons had sustained severe burn injuries and had suffocated to death. Moreover, the witness has not given any history to the doctor about the incident nor has she named the accused, and on the contrary, she has got herself discharged from the hospital against medical advice on the same day at 6:30 p.m. like almost all the other injured persons who were admitted there. Thus, her evidence does not inspire any confidence.

59.4 The learned counsel further submitted that though the witness has named six persons in her statement dated 10<sup>th</sup> March, 2002, which was recorded nine days after the incident, she has not named them in her deposition nor has she identified them in the court, whereas she has identified nine of the accused before the court without naming them in her deposition or in either of her statements dated 10<sup>th</sup> March, 2002 and 22nd May, 2008. Thus, very conveniently, the witness has just identified a few accused to make them liable for a very serious crime, though they are neither named in the statements nor named in her deposition. It was argued that this witness had never put forward a claim that she could recognize the accused by their faces, else a Test Identification Parade could have been arranged. It was submitted that the six names which the witness had given in her statement dated 10<sup>th</sup> March, 2002, are said to be not given by her. Thus,

identification of a few accused by this witness in the above backdrop, does not inspire any confidence.

59.5 It was also submitted that the witness has stated that the mob had broken the window on the rear side of Mahemoodmiya's house, which fact is not supported by any other evidence, including panchnama of the scene of the offence. The witness, like all other witnesses, has also changed the time and the sequence of event in the manner in which she was tutored, which raises doubts about any veracity of her version. It was submitted that like the other witnesses, this witness has also deliberately disowned her initial version regarding police firing and that even the core facts of the incident which she has deposed before the court have not been stated in either of her statements dated 10<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008. It was also submitted that before the SIT, the witness has corrected her earlier statement as regards the time of 9:30 and police firing. This correction of both these facts is also stereo-type for all witnesses. It was contended that it is most unlikely that all the witnesses would commit the same mistake, when the police recorded their statements at the first point of time.

59.6 **ANALYSIS:** This witness is the daughter of the first informant, Ibrahimmiya Rasulmiya Shaikh. She has deposed that she was inside Mahemoodmiya's house at the time of the incident and that her mother Jayda and her two sisters Rajiabanu and Parveenbanu, as well as her uncle Sherumiya and his entire family, have died in the incident. The witness has sustained burn injuries during the incident, which fact is supported by the testimony of PW-1 – Dr. Dhirajkumar Jivanlal

Soni, the Medical Officer who treated her as well as the medical certificate (Exhibit-195) issued by him which reveals that the witness has given history of "injury by stone and lathi and burn during riot" and has sustained a CLW on her right eyebrow region, an abrasion on mid frontal region and 2nd degree burns over the face. The evidence on record reveals that most of the members of her family were inside the house and Mahemoodmiya's wife was her paternal aunt. In these circumstances, when her mother and sisters were inside Mahemoodmiya's house at the time of the incident and the witness has sustained burn injuries, there is no reason to doubt her presence in the house. As to whether any person could have survived inside the house shall be discussed hereinafter as a common issue as the same arises in case of all the witnesses who were inside the house and survived. This witness has not named any accused in her deposition and has identified several accused in the court. She has also not named any accused in the statement dated 10<sup>th</sup> March, 2002 despite which in her statement dated 22<sup>nd</sup> May, 2008 before the SIT, she has stated that at the relevant time, names of persons in the mob were given which the police had written down on their own. She has stated that she can identify the members of the mob but at the relevant time she had not named them. In her police statement, the witness has not stated any facts at all about how the incident happened and where she was at the relevant time. Whatever she has stated in her deposition has been stated by her for the first time before the court. It appears that at the time when the police recorded her statement, the witness must have been suffering from the shock of losing so many family members and being displaced from her home and village, and hence, she has hardly stated

anything. Considering the overall facts and keeping in mind the mental trauma that a girl of her age would have gone through at the time when her statement came to be recorded on 10<sup>th</sup> March, 2002, the court does not find it difficult to believe the version given by the witness, though it has come on record for the first time before the court. As to what evidentiary value should be attached to the identification of the accused by this witness who has identified them for the first time before the court shall be discussed later.

60. **PW-81 Dilawarkhan Abbasmiya Shaikh** has been examined at Exhibit-651. The witness has stated that at present, he is studying F.Y. B.B.A. at Ashram Road at Ahmedabad. At the time of the incident, he was twelve years' old. His original native place is Sardarpura, taluka Vijapur. At the time of the incident, they were residing at Sardarpura at Shaikhvas. He was residing with his father Shaikh Abbasmiya Kesharmiya, his mother Rukshanabanu Abbasmiya, his elder sister Shaikh Sairabanu Abbasmiya and younger sister Shaikh Salmabanu Abbasmiya. On 1<sup>st</sup> March, 2002, in the context of the Railways, there was a call of Bharat Bandh when they were all present at home. In the meanwhile, a mob of Patels and Hindus had attacked the houses of the Muslims at Shaikhvas with weapons at around 10:00 to 10:30 and about fifty persons from Shaikhvas had hidden themselves in Mahemoodmiya Hussainmiya's house. In the meanwhile, the persons in the mob had closed the doors of the house and broken the window and poured petrol, kerosene and chemicals and set Mahemoodmiya Hussainmiya's house on fire. Therefore, Mahemoodmiya Hussainmiya's house having caught fire, twenty-nine persons inside were burnt to death. He and his

younger sister escaped. His younger sister had sustained burns on both her legs. About three hours after the incident, the police came and took them out of the house and the injured were taken to Mehsana Civil Hospital. Thereafter, they had stayed at their relatives at Ilol. A week thereafter, they went to Panpur Relief Camp where they stayed for three months. Thereafter, a business man named Rajakbhai Allarakha took him and his sister to Viramgam for the purpose of education. From there, he went to Ekra Hostel at Chitrawad village of Junagadh district for further studies. The witness has deposed that he can identify the persons of the mob. He has also stated that his younger sister was kept at Sariyat Hostel at Dhrol in taluka Jamnagar and presently, she was seventeen years of age. He has deposed that he has come to Satnagar for the vacations where the SIT had recorded his statement. He has identified Prajapati Rajeshkumar Amratbhai, Rameshbhai Baldevbhai, Prajapati Ravikumar Amratbhai, Parsottambhai Mohanbhai, Sureshbhai Ranchhodbhai, Kanubhai Revabhai, Babubhai Kanjibhai, Jivanbhai Dwarkadas, Rameshbhai Kachrabhai and Tulsibhai Girdharbhai by their faces.

60.1 In his cross-examination, the witness has denied that it is not true that about fifty persons had hidden themselves in Mahemoodbhai's house to save their life. He has denied the suggestion that he has falsely stated that the persons in the mob had shut the doors and windows and had broken the windows and had poured kerosene, petrol and chemicals. The witness has stated that they had tried to open the door from inside; however, he does not remember as to whether they had tried to open the door by banging it with force. He does not remember as to whether it was closed or whether it was

locked. He has deposed that people inside had not tried to break the door. He has stated that he was in the corner of Mahemoodmiya's house and at that time, he had seen them break the window and that he knows what the window was like. He does not remember as to whether there were rods on the window and there were shutters for closing it. He says that they were open windows. He has deposed that to kill the people inside, attempt had been made to break the windows and that he had seen them break the window on the front side. The witness has further stated that the petrol, kerosene or chemical had not fallen on him. He has admitted that when the mob came inside Shaikh Mohalla, he had not sustained any injury. He has denied the suggestion that he and his sister were not inside the house. He has denied that he was falsely stating that his sister had sustained burn injuries on her legs. He has admitted that at the Civil Hospital, he had not stated that he can identify the persons in the mob by face.

60.2 In the cross-examination of the Investigating Officer (SIT) it has come out that this witness in his statement recorded on 22<sup>nd</sup> May, 2008 had not stated that on 1<sup>st</sup> March, 2002, mobs of Patels of their village had attacked their houses and that the witness had stated that mobs of Hindus had attacked their houses.

60.3 The learned counsel for the appellants/accused submitted that this witness was twelve years of age at the time of incident and was studying at Sundarpur. He used to go to school on foot and at that age, he could read and write English and Gujarati. As per his say, though he was taken to Mehsana Civil Hospital, his statement was not recorded. The witness

claims that his statement was recorded by the SIT on 22<sup>nd</sup> May, 2008 and has admitted that he has stated before the SIT that he was read over his above further statement, which means that his previous statement must have been recorded but that is not supplied to the accused. It was submitted that assuming for the sake of argument that the SIT had recorded his statement for the first time, even then though the witness claims to have been inside Mahemoodmiya's house, he has remained completely silent for six years without disclosing anything to anybody about the incident or the accused. It was contended that the witness has very cleverly not deposed as to how and when they had gone inside Mahemoodmiya's house. That the witness says that after three hours of the incident, the police had taken them out and taken them to the hospital at Mehsana and that he and his sister were saved whereas his father, mother and his elder sister died in the incident. The witness also says that his younger sister sustained burn injuries on both her legs, but surprisingly, neither this witness nor his younger sister who he says has sustained burn injuries on both her legs, have been medically examined and no certificate evidencing such injuries has been produced on record by the prosecution to corroborate the say of this witness. It was contended that looking to the fact situation, it is not possible for this witness to have come out of the room unscathed after three hours of the incident. Moreover, neither the witness nor his younger sister has sustained any inhalation injury which clearly means that the statement of this witness is a result of tutoring and that he is a got up witness who cannot be relied upon.

60.4 It was further submitted that this witness, contrary to the evidence on record, has deposed that the front side window was broken by the mob and from that broken window, they have sprinkled petrol, kerosene and chemical and set the house on fire, which is contrary to the evidence of other witnesses and is not supported by the panchnama of the scene of offence. It was contended that when the witness says that petrol, kerosene and a chemical were sprinkled inside the room, the clothes of all or some witnesses who claim to have come out alive (with or without injuries) must have been stained with such substances, however, no such evidence has either been found or adduced by the prosecution to support and corroborate the theory of all such witnesses being there inside Mahemoodmiya's house.

60.5 It was also submitted that having regard to the fact that the witness has stated that he has not spoken about the incident to anybody; at the time when his statement was recorded by the SIT after a period of six years, the witness has not named any accused nor given any description of any of the accused nor has he made any attempt to find out the names of the persons whom he says he had seen during the commission of the offence, no reliance can be placed upon the identification of the accused by this witness by their faces before the court, inasmuch as, any such witness can identify all the accused who are in the dock. Such identification of the accused cannot be accepted as an admissible piece of evidence. It was urged that, therefore, the entire deposition of the witness should not only be taken out of consideration but should be viewed seriously to come to the conclusion that the witnesses were strongly tutored to bring home a conviction of

all those who were arrested and wrongly put to trial. It was submitted that this witness is the last witness in the line of witnesses who claim to be inside Mahemoodmiya's house at the time of the incident. It was submitted that in all, there are seven such witnesses who have falsely deposed before the court, claiming that they were present inside the house. However, whether such witnesses were inside the house along with their family members who are alive and said to be either injured or not, may kindly be tested on the touchstone of possibilities and probabilities having regard to the facts of the case.

**60.6 ANALYSIS:** This witness was about twelve years of age at the time of the incident and his statement was not recorded at the relevant time. He has lost both his parents and his elder sister Sairabanu in the incident, while he and his younger sister have survived. He is the son of Abbasmiya Kesharmiya Shaikh. The statement of this witness was recorded for the first time on 22<sup>nd</sup> May, 2008 by the Investigating Officer (SIT). At the time of deposing, he was studying in a BBA course. In the cross-examination of this witness, it has been elicited that he was in the rear corner of Mahemoodmiya's house and that he had seen the window being broken. He has deposed that the window was open and that he had seen the front window being broken. He has stated that the petrol, kerosene or chemical had not fallen on him. He has stated that Basirabibi, who is the wife of Bachumiya Nathumiya, is his paternal aunt. Having regard to the fact that this witness was twelve years of age at the time of the incident, when his parents and his elder sister were inside Mahemoodmiya's house at the time of the incident, it is quite natural that he and his sister would also be with

them. When faced with such danger, it is not likely that the parents would take shelter in a place they thought was safe and leave behind their minor children. Therefore, there is no reason to disbelieve the presence of this witness in Mahemoodmiya's house at the time of the incident. The witness has not named any accused in his deposition and for the first time has identified them by their faces before the court. The fact that the witness has not named anyone is not surprising for the reason that he being a child at the time of the incident may not be knowing them by name.

61. **PW-46 Sabirmiya Akumiya Pathan** has been examined at Exhibit-475. This witness has deposed that he is a native of Sardarpura and they are three brothers. The eldest – Basirmiya Akumiya Pathan is serving as an S.T. Conductor. He is younger than him and was working as a peon with the Gram Panchayat at the time of recording of his testimony. In the year 2002, he was working as a Bore Operator with the Gram Panchayat. His wife's name is Nafishabibi and he has two children, a son and a daughter. The third brother's name is Zakirhussain Akumiya Pathan who is a casual labourer. He was residing opposite Shaikhvas Mohalla and opposite his house was his uncle Shakumiya Nannamiya's flour mill. He was present at the time of the incident.

61.1 The witness has further deposed that in 2002, about twenty to twenty-five days prior to the incident at Shaikhvas, Haresh Bhatt, leader of the Vishwa Hindu Parishad had come to the village and had held a meeting of the youth belonging to the Patel community at Mahadev temple. At that time, he was working at the water works and when Hareshbhai came, there

was a crowd of Patel youth at the temple. He was standing there and waiting and Hareshbhai in vitriolic language was giving a speech that these Muslims are a burden upon Hindustan and they have no right to live in Hindustan. This time if they get a chance and there are riots, not a single Muslim should remain alive. Thereafter, Haresh Bhatt had distributed trishuls. While he was standing there, trishuls were distributed to five persons namely, Sureshbhai Baldevbhai Patel, Madhabhai Vitthalbhai, Vanabhai Ishwarbhai, Rajeshbhai Govindbhai and Ambarambhai Maganbhai. Thereafter, he went to the water works. He has identified Madhabhai Vitthalbhai, Sureshbhai Baldevbhai and Ambarambhai Maganbhai in the court room and has stated that Rajeshbhai Govindbhai and Vanabhai Ishwarbhai are not present in the court. The witness has further deposed that on 27<sup>th</sup> February, 2002, the Godhra incident had happened and in protest, on 28<sup>th</sup> February, 2002, through the Vishwa Hindu Parishad, a Gujarat bandh had been declared at their village. At that time, in the morning at around 8 o'clock, he was going to start the water works. Madhabhai Vitthalbhai's shop is situated opposite the water works and he had seen a mob of around eight to ten persons and upon seeing him those persons had shouted "cut the bandiyas and kill them". Amongst those who were shouting, he had recognised Sureshbhai Baldevbhai, Madhabhai Vitthalbhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai and Jagabhai Vitthalbhai. The witness has identified Madhabhai Vitthalbhai, Sureshbhai Baldevbhai, Baldevbhai Ranchhodbhai, Rameshbhai Kantibhai in the court and has stated that Patel Jagabhai Vitthalbhai is not present. The witness has further deposed that after starting the water works, he had gone home and thereafter, he had gone to the market, at which point of

time, there was a mob of about fifty to sixty persons in the market who were getting the market shut down. In the mob, he had seen Mathurbhai Trikambhai Patel, Dahyabhai Kachrabhai Patel, Mathurbhai Govindbhai Patel, Bhaveshbhai Kanubhai Patel, Kanubhai Joitaram Patel, Rajeshbhai Maganbhai Patel, Sureshbhai Baldevbhai Patel, Rakeshbhai Baldevbhai Patel, Madhabhai Vitthalbhai Patel, Chaturbhai Vitthalbhai Patel, Bechabhai Odhavdas Patel, Baldevbhai Ranchhodbhai Patel, Govindbhai Mohanbhai Patel, Rajeshbhai Govindbhai Patel, Babubhai Kanjibhai Patel, Maheshbhai Jivanbhai Patel, Ramanbhai Jivanbhai Patel, Bakabhai Mangalbhai Patel, Jayantibhai Ambalal Patel, Sanjaykumar Ambalal Patel, Ambalal Maganlal Patel and Kalabhai Bhikhabhai Patel. The mob had got the market as well as the gallas at Shaikhvas shut down and thereafter had gathered at Mahadev. By that time, he had returned from the water works, whereafter the crowd had dispersed from the temple. Thereafter, he had come home and after having lunch, returned and gone to the water works and in the evening at about 5 to 6 o'clock, when the lights went off, he closed the water works and returned home and thereafter at around 6:00, he took his children from his house and went to his father's old house, whereafter, at around 8.30 at night, the mob belonging to the Patel community burnt the cabins belonging to the lower community in front of the Panchayat and Gujarati school and had created an atmosphere of fear in the village where the gallas of the lower communities viz. Raval community, Muslim community and Nai community were situated. Thereafter, on 1<sup>st</sup> March, 2002, the Vishwa Hindu Parishad declared a Bharat bandh and on that day, he was at his father's house. In connection with the burning of gallas on the night of 28<sup>th</sup>, on 1<sup>st</sup>

March, 2002, those whose gallas were burnt had gathered together at the house of Munsafkhan Yasinkhan Pathan for the purpose of discussion. They had gathered together to discuss as to what they should do in view of their gallas having been burnt down and were thinking of lodging a complaint; however, since the traffic was shut down, they could not go for lodging a complaint. Among those who had gathered at the house of Munsafkhan were Shankarbhai Someshwarbhai Pandya, Keshabhai Mohanbhai Raval, Mafatbhai Sunderbhai Chauhan, Janmahammad Ismailbhai Memon, Kadarbhai Ismailbhai Memon, Nisarahmed Gulamnabi Mansuri, Pathan Kalekhan Aladkhan and Bachumiya Bapumiya Pathan. Thereafter, since it was Friday and it was time for their namaaz, they had dispersed and decided that they would gather together after namaaz. However, when they gathered together after namaaz, Shri Parmar, PSI of Vijapur had come and they had represented to him that it appeared that there would be riots in the village on that day and asked him for police bandobust and also asked him to call the leaders of the Patel community of the village and make arrangements to ensure that no other incident takes place. PSI Parmar and they had called all the leaders of the Patel community, however, no one turned up. Two persons of Patel community namely, the then Sarpanch Kanubhai Joitabhai and Dashrathbhai Kachrabhai had come but had gone thereafter. Thereafter, another PSI Shri Rathod had come and they had told him also to make arrangement for police. Thereafter, PSI Rathod and Parmar had gone for making rounds in the village. Thereafter, at around 8 o'clock, Bechabhai Odhavdas Patel had come to take the key of the water works from him and he had not given the key and hence, he had left. Thereafter, at around 8:30, he had come again and

said that the Sarpanch was asking for key and took the key away from him. Thereafter, at around 9:00 to 9:15, the attack on Shaikhvas commenced and thereafter at 2:30 at night, DSP Gehlot had come and had gone to Shaikhvas and had sent four to five policemen to their mohallas. The policemen had come and said that the DSP had called them to lift the corpses, hence, they had gone to Shaikhvas. Amongst those who had gone were him, Kalekhan Aladankhan Pathan, Mahemudkhan Latifkhan Pathan and Kamaalkhan Umarkhan Pathan. At Shaikhvas, the police took them to Mahemoodbhais Ismailbhais (sic.) room where the incident had taken place and the DSP was standing there and the door of the room was open. The DSP went to the window of Mahemoodbhais room and immediately felt a current and said that there was current whereupon the other policemen separated the wires with a stick. The said wires appeared to have been connected with the electric pole in front of Natwarbhai Pababhai's house. The wires had been tied to the rods on the window and had been put inside. Thereafter, they had entered the room where there was a pile of corpses. They had taken out the corpses one by one and had put the same in the 407 whose driver Prahladbhai Raval was from their village and that he does not know who was the owner of the vehicle. After filling the corpses in the vehicle, they had returned to the mohalla. Thereafter, the DSP had come to their mohalla and had called for two cars and they were seated in the cars and taken to Savala village which is in Visnagar taluka and they had stayed there. He has deposed that till date, the police has not recorded his statement. Thereafter, the SIT was constituted and the SIT people had given notices in the newspaper that if anyone wanted to say anything about the incident, they should either come in person

or send by Registered A.D. and hence, he had sent his application by Registered A.D. to Geeta Johri. A cover is shown to him from the police papers and he has stated that it is his Registered A.D. application which he had sent to Geeta Johri and that the same is in his own handwriting and bears his signature. At this stage, the learned advocate for the accused had raised an objection that the application was a typed one, whereupon the witness had voluntarily explained that he had got the application typed on a computer at Vijapur and had put the application number, inward number and page number in the margin and had signed and put the date. Thereafter, he had been called by the SIT at Gandhinagar and his statement was recorded and that whatever was recorded in his statement had been written by him in his application. He has further deposed that he had seen about fifty to sixty persons in the mob and can identify them. The witness has identified Jayantibhai Mangalbhai as Bakabhai Mangalbhai, Chaturbhai Vitthalbhai, Bhavesh Kanubhai, Sureshbhai Baldevbhai, Ramanbhai Jivanbhai, Rameshbhai Kantibhai, Madhabhai Vitthalbhai, Baldevbhai Ranchhodbhai, Ambaram Maganbhai, Jayantibhai Ambaram Patel, Kanubhai Joitaram Patel, Mathurbhai Trikambhai Patel, Dahyabhai Kachrabhai Patel, Babubhai Kanjibhai Patel, Govindbhai Mohanbhai Patel, Kalabhai Bhikhabhai Patel, Sanjaykumar Ambalal Patel and Maheshbhai Jivanbhai Patel in the court room.

61.2 In the cross-examination of this witness, he has stated that after the incident, for the first time, he had declared about the incident by a letter dated 6<sup>th</sup> May, 2008 to the SIT. He has denied the suggestion that he had made the representation voluntarily but has stated that because it had come in the

newspaper, he had made it. He has admitted that if it had not come in the newspaper, he would not have made any representation. A contradiction has been brought out as regards his previous statement dated 20<sup>th</sup> May, 2008 made before the SIT to the effect that he had stated that, however, as to what discussion had taken place and what speech had been given, he does not know as he had not gone for the meeting. In his cross-examination, an omission has been brought out that in his statement dated 20<sup>th</sup> May, 2008 before the SIT, he had not stated that at that time, he went to start the water works in the morning at around 8 o'clock. Madhabhai Vitthalbhai's shop is situated opposite water works and a mob of eight to ten people was present and upon seeing him those people shouted "cut the bandiyas and kill them". That among the people who were shouting, he knows Sureshbhai Baldevbhai, Madhabhai Vitthalbhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai and Jagabhai Vitthalbhai. A further omission has been brought out as to his statement dated 20<sup>th</sup> May, 2008 that he had not stated with regard to a mob of fifty to sixty persons going around and getting the shops in the market closed wherein the persons named were part of the mob. A further omission has been brought out to the effect that in his statement dated 20<sup>th</sup> May, 2008, he has not stated that after getting the bazaar shut down and the gallas at Shaikhvas closed, the mob gathered at Mahadev and at that time, he had gone to the water works and thereafter, the mob had dispersed, etc. In his cross-examination, a further omission has been brought out to the effect that in his statement dated 20<sup>th</sup> May, 2008 made before the SIT, he had not stated that it being a Friday, it was time for namaaz and hence they had dispersed and had decided to come back after namaaz. After

namaaz, they had gathered together and during that time, PSI of Vijapur – Shri Parmar had come and they had made a representation that it appears that there would be trouble in the village on that day and asked for police bandobust and to call the leaders of the Patels in the village so as to ensure that no such incident takes place in the village again. The witness has admitted that the meeting kept in the evening at Munsafkhan's house on 1<sup>st</sup> March, 2002 was for the purpose of maintaining peace in the village. Various other omissions have also been brought out as regards his previous statement dated 20<sup>th</sup> May, 2008. In his cross-examination, he has admitted that on 1<sup>st</sup> March, 2002, at 6 o'clock in the evening, fifty to sixty persons from Sundarpur had come to their mohalla and they were given shelter in their mohalla.

61.3 From the cross-examination of the Investigating Officer (SIT), it has been brought out that this witness in his statement dated 20<sup>th</sup> May, 2008 had stated that a meeting of Patel youth had been convened at the Mahadev temple. It is further elicited that this witness in his statement dated 20<sup>th</sup> May, 2008 had not stated anything regarding Haresh Bhatt having made utterances in vitriolic language or having distributed trishuls to the persons named by the witness. It has further come out that the witness had stated that however as to what was discussed and what speech was given he does not know as he had not gone to the meeting. Various other omissions have also been brought out as to the previous statement dated 20<sup>th</sup> May, 2008 of this witness.

61.4 Mr. Y.S. Lakhani, learned counsel for the appellants/accused submitted that this witness was serving as

a peon and in the year 2001, he was serving as a bore operator. He was staying in a house situated just opposite Shaikh Mohalla. At the time of incident, he was neither present in his house nor was he present at Shaikh Mohalla. He is, therefore, not a witness of the main incident. Since he has witnessed nothing, his statement was not recorded at the relevant time nor did he volunteer to give a statement to any authority until he sent an application to the SIT on 6<sup>th</sup> May, 2008. Thus, whatever the witness has deposed before the court, was not disclosed to anybody for six years. Moreover, the contents of his deposition do not have any semblance of truth. It was argued that after a period of eight years, the witness was narrating the whole story before the court and sequence of all the facts that he is concerned with, were not stated by him even in his statement recorded by the SIT and all the contradictions and omissions of all important and vital facts are proved through the Investigating Officer (SIT). Thus, his testimony deserves to be rejected as a whole.

61.5 The learned counsel submitted that the witness has created different stories to prejudice the court against the accused. The witness has narrated the story of Haresh Bhatt, a leader of the Vishwa Hindu Parishad coming to the village and delivering a hate speech and also distributing trishuls, twenty to twenty-five days prior to the incident. The witness has also narrated an incident of 28<sup>th</sup> February, 2002 of cabins and gallas being set on fire by a mob of people belonging to the Patel community, for which no charge has been framed nor are the allegations subject matter of the present trial. It was further submitted that the witness has narrated story of the second meeting (peace meeting) wherein the sarpanch Kanubhai

Joitabhai and Dashrathbhai Kachrabhai were said to be present. However, this witness does not attribute the utterances of words spoken by the sarpanch as other witnesses allege. It was submitted that though the witness has narrated the fact of the first meeting (regarding the gallas/cabins having been set on fire on the earlier day), he has not stated facts regarding both the meetings in his statement dated 20<sup>th</sup> May, 2008 before the SIT. It was pointed out that the witness has also created a story of Becharbhai Odhavdas (who is not an accused) coming to him and asking for the key of the waterworks and that upon his refusing to give it, he went away and again came back at 8:30 p.m. and said that the sarpanch had asked for the key and thus, has taken it away and thereafter, the attack started on Shaikhvas at about 9:00 to 9:30 p.m. According to the learned counsel, this story is a fanciful creation of the witness with a view to prejudice the court against the Sarpanch and to show that the attack was preplanned.

61.6 It was further submitted that the witness has created a story that he along with others was called from his mohalla to lift the dead bodies and when he and three others named had gone there at the place of incident, the DSP went towards the window of the room and felt the electric current and that a police officer then separated wires with a stick. The witness also says that an iron rod was inserted from the window of house which was tied with a wire taken from the pole near Natvar Prabha's house. It was argued that all these fanciful stories do not get any support from any other evidence and this witness also has not disclosed the same for years together. It was submitted that all the material omissions and

contradictions in this regard have been proved and therefore, the entire testimony of this witness is required to be kept out of consideration. Moreover, considering the circumstances in which the witness wrote the application dated 6<sup>th</sup> May, 2008 to the SIT as well as the contents thereof, it clearly appears that this witness has been made an instrument by an NGO called "Citizens for justice and peace" led by Teesta Setalvad and that at the instance of these agencies, the witness has even tried to implicate some persons who are not even arraigned as accused in this case. It was submitted that the persons named by this witness were in the context of the incident of 28<sup>th</sup> February, 2002 and thus, cannot be linked with the incident of 1<sup>st</sup> March, 2002. It was, accordingly, urged that the evidence of this witness is full of proved contradictions and embellishments and is liable to be rejected in toto.

**61.7 ANALYSIS:** The statement of this witness was not recorded by the police at the relevant time. This witness is also not a witness of the main incident. His testimony is relevant only for the purpose of deciding as to whether the charge of conspiracy is proved. The witness was not a resident of Shaikh Mohalla but was residing opposite it. He is a Pathan and not a Shaikh. He has deposed about Haresh Bhatt having come twenty to twenty-five days prior to the incident and having distributed trishuls, etc. In this regard, there is a slight discrepancy in the testimony of the witnesses, inasmuch as, while this witness says Haresh Bhatt came twenty to twenty-five days prior to incident, PW-60 Bachumiya Imammiya Shaikh says he came to the Mahadev Temple at Sardarpura on 27<sup>th</sup> February, 2002. The witness has further deposed regarding burning of cabins on 28<sup>th</sup> February, 2002 and has also deposed

regarding the meetings held at the house of Munsafkhan Pathan in connection with the burning of cabins. Out of the persons named by him who had remained present in the meeting, the prosecution has examined Janmahammad Ismail Memon and Munsafkhan Pathan and also PSI Parmar, all of whom have corroborated the fact regarding holding of meeting on that day. He has deposed regarding the police coming to call them to lift the corpses and having gone to Shaikh Mohalla for this purpose, therefore, he is not a witness of the main incident. He has deposed regarding the DSP feeling the current when he went near the window of Mahemoodmiya's house. He has also deposed regarding Becharbhai Odhavdas coming and taking away the keys of the water works. He has deposed regarding Prahladbhai Raval being the driver of the 407 vehicle in which they had put the corpses. This fact finds support in the testimony of Prahladbhai Raval, who says that he had gone to Shaikh Mohalla with a 407 vehicle and taken the corpses to Mehsana Civil Hospital. This witness's statement was not recorded by the police and the SIT had recorded his statement pursuant to an application made by him in response to the public notice issued by the SIT. He has named persons in the mob and identified them. However, since he is not a witness of the main incident, no reliance can be placed upon his testimony for the purpose of identification of the accused who were involved in the main incident. His testimony is important only for the purpose of deciding the charge of conspiracy, which shall be discussed hereinafter.

**62. PW - 70 Munsafkhan Yasinkhan Pathan** has been examined at Exhibit 609. This witness has deposed that he resides at Pathanvas. At the time of the incident, there were

sixty-six houses of Muslims in Sardarpura, out of which thirty-three were of Pathans, twenty of Shaikhs, seven of Memons, five of Mansuris and one of Nagoris and that at present there are twenty houses of Pathans, one of Memons, one of Mansuris and one of Nagoris. The other Shaikhs are at Satnagar, Memons and Mansuris at Himmatnagar and the remaining Pathans are staying at Savala, Taluka Visnagar. He has deposed that at the time of the incident, he was serving at the Kalol Police Station as Police Constable. He has joined the police department on 29<sup>th</sup> November, 1969 and has retired on 30<sup>th</sup> June, 2009. At the time of the incident as he was on sick leave, he was at his village Sardarpura.

62.1 The witness has further deposed that the Godhra incident took place on 27<sup>th</sup> February, 2002 and on 28<sup>th</sup> February, 2002, the rioting Patel mob had burnt the cabins of Muslims and other communities in the bazaar near the Primary School and the Panchayat Office, Kadarmiya Alumiya's tea stall, Dilshadmiya Latifmiya's cabin, Ilyasmiya Bashirmiya's cabin, his own cabin, Jamalbhai Noormohammad Mansuri's cabin, Raval Prahladbhai's cabin, Raval Mangabhai Rambhai's cabin, Raval Balabhai Ramabhai's cabin, Nai Mangaldas's cabin, Parmar Kantibhai Khemabhai's cabin, Parmar Haribhai Maganbhai's cabin, Motibhai Maganbhai's cabin, Mafatbhai Sunderlal's cabin, Alikhan Umerkhan's cabin were burnt. On that day he was in his fields which are at a distance of 4 kilometres from the village and he had seen the flames and hence he came to the village and the Muslims of his village were awake. They were awake till late night and went to sleep at 5 in the morning. On the next day, that is, on 1<sup>st</sup> March, 2002, when he was at home in the morning, those persons

whose cabins were burnt had come to his residence and were discussing the question of filing a complaint against the riotous Patels who had burnt their cabins. Amongst those gathered were Motibhai Maganbhai, Haribhai Maganbhai, Mangabhai Ramabhai, Iliyaskhan Bashirmiya, Dilshadmiya and other persons of his mohalla. There Haribhai Maganbhai narrated the incident as seen and asked to file complaint and he had accordingly drafted the complaint. There was a call for Bharat Bandh on that day. The vehicular traffic was closed and therefore, it was not possible to go to Vijapur. Upon making a telephone call to the Vijapur Police Station and informing about the burning of cabins, from the Police Station it was told that PSI Parmar is coming to Sardarpura for patrolling. It was a Friday and as it was almost time for namaaz, all of them dispersed and decided to meet again in the afternoon. While he was at home after namaaz, PSI Shri Parmar had come and so also all the persons who had gathered in the morning. At that time, Haribhai Maganbhai's written complaint was handed over to PSI Parmar. Thereafter, as it appeared that mobs of Patel would gather and riot, with a view to see that there is no unrest and the atmosphere of the night is forgotten and there is peace, there was discussion for calling leaders of the village and in the presence of PSI Parmar, Patel leaders of the village were informed on telephone calls and PSI Shri Parmar also personally went to the leaders of the Patel community and was accompanied by the persons of the other communities namely Someshwar Shankerlal Pandya, Mafatlal Sunderlal Chauhan, Motibhai Maganbhai Parmar, Keshabhai Mohanbhai Raval, Mangalbhai Ramabhai Raval, Pathan Bachumiya Bapumiya, Memon Janhammad Ismailbhai, Kadarbhai Ismailbhai, Prajapati Revabhai Shankarbhai, Prajapati Revabhai

Methabhai, etc. However, from the Patel community the former Sarpanch Dashrathbhai Kachrabhai, had come to his house and was sitting and the then Sarpanch Patel Kanubhai Joitabhai had come and through him, an attempt was made to call the Patel leaders to ensure that there are no riots in the village, at which point of time he had said that it was not within his means and had left. Patel Dashrathbhai was sitting at his house till 8 at night, during that time Prajapati Revabhai Shankarbhai had come and told him that it appeared that there might be riots so call for additional police. Whereupon, he told him to personally talk to Shri Parmar who was present there and Revabhai had talked to Shri Parmar and Shri Parmar had, accordingly, informed the Vijapur Police Station. The witness has further deposed that in the meanwhile, he received a telephone call from Himmatkhan Tajkhan, his sister's brother-in-law from Sundarpur, asking him to take them from Sundarpur as it appeared that there would be riots and hence, he informed Shri Parmar and asked him to bring them whereupon Shri Parmar had gone to Sundarpur and brought all the ladies from there. Other male members stayed back whereas others came on foot from Sundarpur to Sardarpura.

62.2 The witness has also deposed that thereafter, later on PSI Shri ML Rathod had come. He also stayed at his place with Shri Parmar for half an hour and they had left on receiving a call from PI Shri Vaghela, at which time, he had requested them not to leave the village and requested them to remain present as otherwise there would be riots, and they had told him that they would return after patrolling and left. Thereafter, he left his new house and went to his old house in the same mohalla. The new house was on the outside of the mohalla and

if there were riots and if the mob surrounded the house, then he would not be safe. At around, 9.00 to 9.30, the mob of Patels of the village while shouting "Kill the miyas, burn them" passed behind his old house to the corner of Shaikh Mohalla. In the meantime, a police vehicle arrived and the mob dispersed. On the police vehicle leaving, the mob reassembled and started pelting stones towards his old house and in the mob he had seen Patel Rajeshbhai Punjabhai, Prahladbhai Jagabhai, Mathurbhai Ramabhai, Ragabhai Revabhai, Pashabhai Mohanbhai, Ambalal Maganbhai, Amrutbhai Somabhai, Jayantibhai Ambaram, Kachrabhai Tribhovanbhai, Vanabhai Ishwarbhai, Sureshbhai Baldevbhai, Jagabhai Davabhai, Chaturbhai Vitthalbhai, Kanubhai Joitabhai, Rameshbhai Ramabhai Gangavat, Babubhai Kantibhai, etc., who were present. Prahladbhai Patel had a burning rag, Mathur Ramabhai and Raghubhai Revabhai were with stones, Kachrabhai Tribhovanbhai had a bottle, Pashabhai Mohanbhai had a can, Rajeshbhai Punjabhai a stick and he had also seen Rameshbhai Ramabhai with a dharia. These persons had pelted stones at his house and they had also faced the stones, thereafter Shaikh Mohalla had been attacked and the houses had been burnt. Thereafter, late at night, Ashiqmiya Bachumiya Driver's son had come to the mohalla and told him that the mob of Patels had burnt his house and jeep and the persons who had gone into Shaikh Mehmoodmiya's house to escape, were also burnt and killed and asked him to come and help him, whereupon he had told him that the mob is very big and that if they go there the mob would kill them both also, that he should stay back in the mohalla because if they go out, then the people of this mohalla would also be burnt, whereupon he stayed back. In the meanwhile, at 2.00-2.30 at

night, DSP Shri Gehlot came at the corner of Shaikh Mohalla and Shri Parmar PSI came to call him at the corner of the mohalla and therefore he met the DSP and on his asking him about the place of the incident he took the DSP to the corner of Shaikh Mohalla. He dropped him at the corner of Shaikh Mohalla and then returned to his mohalla. Thereafter, he came to know that twenty-eight persons were burnt alive in Shaikh Mohalla. One policeman came from Shaikh Mohalla to get people from their mohalla to remove dead bodies from the room and people from their mohalla had gone. Thereafter on being told by the police to get a private vehicle, Sattarbhai Memonbhai's vehicle which was lying at Sundarpur was fetched by Raval Prahladbhai Nathabhai. The corpses were shifted to Mehsana Civil Hospital in these vehicles and the injured were also taken to Mehsana Civil Hospital. Later on, the DSP informed that there are riots all around and there is lack of police force and therefore he could get those who want to shift to be shifted to wherever they want to, through the police and upon the people of the mohalla agreeing to leave the village, two big police vans were called and they were shifted to Savala and he too had gone to Savala village and had stayed there for twelve months, during which period he used to keep coming to his bore however, the atmosphere in the village not being good he could not go there. When he was at Savala PI Shri Vaghela had come on 6<sup>th</sup> March, 2002 to record his statement which he had given. Since Shri Vaghela had not made any inquiry as regards the burning of cabins on 28<sup>th</sup> February, 2002, upon his informing him, Shri Vaghela had informed him that a separate offence had been registered in connection therewith as Vijapur I C.R. No. 45/2002. The witness has deposed that he was shown the complaint and the date

shown was 1<sup>st</sup> March, 2002 and time 22:00 and around and the time of registration of the offence was 1<sup>st</sup> March, 2002 at 23:50; whereas actually, the incident did not take place on 1<sup>st</sup> March, 2002 but on 28<sup>th</sup> February, 2002 and the panchnama was also made on 2<sup>nd</sup> March, 2002 and, therefore, he had said that it was wrong, hence, Haribhai Maganbhai's complaint was lodged at Vijapur Police Station on 6<sup>th</sup> March, 2002 wherein the date of incident was shown as 28<sup>th</sup> February, 2002 and the offence was registered as No. 51/2002.

62.3 The witness has further stated that he was being harassed under the pretext that he was helping the Shaikh community and he was dismissed from service. He has further deposed that he had made an affidavit on 30<sup>th</sup> March, 2004 before the Supreme Court and was reinstated in service thereafter. The Human Rights Commission had made an application to handover the investigation to the CBI and as a result the SIT was appointed. The SIT had recorded his statements on 11<sup>th</sup> June, 2008 and 14<sup>th</sup> July, 2008 as narrated by him. The witness was shown a Xerox copy of his affidavit filed before the Supreme Court and he has admitted the same. At this stage, the prosecution requested that the affidavit be exhibited, which was opposed by the defence on various grounds. The trial court, after considering the submissions advanced on behalf of the respective parties, turned down such request. The witness had deposed that he was thereafter posted at Mansa Police Station, and from there at Mahudi and then at Dahegam, where he retired on 30<sup>th</sup> June, 2009.

62.4 The witness has stated that the houses in the line opposite to the houses on the rear side of the Patel houses

were all burnt behind which is the kabrastan. Three cabins were burnt at the corner and a jeep and a scooter were also burnt. The witness has further deposed that he can identify the accused who were present in the mob and has identified Ambalal Patel, Kachrabhai Tribhovandas, Raghubhai Revabhai, Mathurbhai Ramanbhai, Sureshbhai Baldevbhai, Chaturbhai Vitthalbhai, Babubhai Kantibhai, Amrutbhai Somabhai, Rajeshbhai Punjabhai, Jagabhai Parmarbhais, Jayantibhai Ambalal, Kanubhai Joitabhai, Prahladbhai Jagabhai, Rameshbhai Ramabhai Gangavat. The witness has further stated that Vanabhai Ishwarbhai is not present in court. He has also stated that he cannot identify the weapons which were in the hands of the accused.

62.5 In the cross-examination of this witness, it has come out that he had joined service in the Police Department on 29<sup>th</sup> November, 1969 and had discharged duties till 30<sup>th</sup> June, 2009, during that time for the period from about 1985-86 he was suspended and till the dismissal period in 2004-05 he used to carry out agricultural activities at home. He had been dismissed twice, once in 1985-86 and then in 2004. Except for the dismissal period he had discharged duties as a police constable at different police stations in Mehsana district and later on also at Gandhinagar district. The witness has been cross-examined to bring out various omissions as regards the statements made by him in the affidavit filed before the Supreme Court. In his cross-examination, it has come out that after the incident he had not gone inside Shaikh Mohalla. Prior to the incident, he had not gone to Shaikh Mohalla on 1<sup>st</sup> March, 2002. From the time the incident took place till his statement as recorded on 6<sup>th</sup> March, 2002, he had not informed

the police about the incident. He has voluntarily stated that on account of this incident the Muslims were so frightened that they thought their lives would be in danger if they ventured outside Savala village. The witness has stated that he had prepared the English affidavit at Ahmedabad and had not gone to file it in the Supreme Court, but had handed it to Raiskhan Pathan who was working for Citizens for Justice and Peace. He has admitted that on the affidavit, the words Supreme Court of India and the petition number have not been written. The witness has also been cross-examined as regards statements made by him against certain M.P.s, M.L.A.s, ministers, etc. for the purpose of showing that the incident at Sardarpura was part of a conspiracy, despite the fact that he has not stated any such facts in his examination-in-chief. As noted earlier, a witness can be cross-examined as to his previous statement to bring out any contradiction in his examination-in-chief and not to bring on record facts stated in such previous statements.

62.6 In his cross-examination, the witness has admitted that he had not lodged any complaint about the incident of 28<sup>th</sup> February, 2002, when the gallas had been burnt in the bazaar of their village in front of the Primary School, Panchayat and that he has not lodged any complaint regarding his galla being burnt. The witness has deposed that he was thoroughly satisfied with the work carried out by Shri Gehlot at the scene of incident and that till those persons were present at the scene of offence, he had not informed them in writing as to who had participated in the offence. In his cross-examination, it has further come out that the Muslims who had come from Sundarpur had stayed with their relatives and were distributed within two three houses; his house, Ahmedmiya Jivamiya and

Pathan Kalekhan Aladkhan. He has deposed that when PSI Parmar sent the Muslims to Sardarpura, he was at his mohalla and PSI Parmar had come with the last vehicle. In his cross-examination, it has further come out that Imtiaz Hussainmiya of Sundarpur had also ferried people from Sundarpur to Sardarpura in his jeep. He has deposed that Shri Parmar came along with the Muslims from Sundarpur and stayed till about 8:00 to 8:30 in the evening. A contradiction has been brought out as to his previous statement dated 6<sup>th</sup> March, 2002, wherein he had stated that Shri Parmar had gone from their village to Sundarpur and had brought the Muslims to their mohalla at Sardarpura and there was peace in the village and in the meanwhile at about 9:30 in the night PSI Shri Parmar had called the Sarpanch of their village Patel Kanubhai and D.K. Patel etc. to his house. In his cross-examination it has come out that there was a road which was approximately eighteen feet wide between his new house and Pathan Mohalla's wall. His new house was at a distance of about 50 to 60 paces from his old house. In front of his house in Pathan Mohalla there is a chowk (open space) and there in front of the door there are cross roads. One road goes to the mohalla, one towards the masjid and one towards Shaikh Mohalla. In his cross-examination. it has further come out that Pathan Mohalla is surrounded by rear sides of houses. It has further come out that the road to Pathan Mohalla does not have a gate and since the road is open, anyone can go in and if a mob wants to come inside Pathanvas, it can come in through that road. He has admitted that his new house is at the entrance of Pathan Mohalla and his old house is the last house in the mohalla. He has further stated that if one sits in the chowk, one can see the persons on the road and that from the corner of his new house

one can see persons sitting in the chowk. The rear side of his old house falls towards the Ramji temple. In his cross-examination, it has further come out that at the time of the incident, the street lights were disconnected.

62.7 From the cross-examination of the Investigating Officer (Police), various omissions have been brought out as to his previous statement dated 6<sup>th</sup> March, 2002. In the cross-examination of the Investigating Officer, it has been brought out that this witness in his statement dated 6<sup>th</sup> March, 2002 had stated that thereafter everyone dispersed and Shri Parmar was patrolling in the village and he had learnt that in the meanwhile at about 9:30 gallas had been burnt in the bazaar. Shri Parmar was patrolling with the police and after a little while at about 10:00 to 10:15 they heard sounds of police firing. A contradiction has been brought out to the effect that the witness had not stated the names of Ambalal Magan, Jayantibhai Ambaram, Vanabhai Ishwarbhai, Sureshbhai Baldevbhai and Kanubhai Joitabhai in his statement dated 6<sup>th</sup> March, 2002. The Investigating Officer has admitted that this witness in his statement dated 6<sup>th</sup> March, 2002 has stated that “the incident took place at about 12:00 to 2:00 at night ..... Hindus were murdered in Godhra.... To take revenge the Hindus from their village and outside had attacked the houses of the Muslims”.

62.8 The Investigating Officer (SIT) has also been cross-examined as to the previous statements of this witness dated 11<sup>th</sup> June, 2008 and 14<sup>th</sup> July, 2008 recorded by the SIT and also as to the contents of the affidavit dated 31<sup>st</sup> March, 2004 filed before the Supreme Court. Having regard to the fact that the

affidavit has been prepared by the witness himself and the Investigating Officer (SIT) had no role in preparation thereof, one fails to understand as to how and why the Investigating Officer has been cross-examined in respect of the same.

62.9 Mr. Y. S. Lakhani, learned counsel for the appellants/accused submitted that this witness was serving in the police department and was twice dismissed from service. From his cross-examination it is clear that there were several cases filed against him and he too had filed several cases. It was submitted that the fact that the witness was suspended from service and police cases had been filed against him, reflects on his nature and character as a witness. It was submitted that as per the defence case, this witness has engineered the present case against the accused who are from village Sardarpura.

62.10 **ANALYSIS:** From the testimony of this witness, it is apparent that he does not reside at Shaikh Mohalla and was not a witness to the main incident that occurred on the night of 1<sup>st</sup> March, 2002. As per the version given by this witness himself, when Ashiqmiya, Bachumiya's son came to his house late at night asking for help as people of his mohalla who had taken shelter in Mahemoodmiya's house had been burnt, he had told him that the mob was too big and if they went they would kill them also and also burn the people of his mohalla. Evidently, therefore, this witness has not seen the incident that took place at Shaikh Mohalla. It appears that even after the incident, the witness did not enter Shaikh Mohalla, and as per the version given by him, he had taken the D.S.P. to the entrance of Shaikh Mohalla and had returned to his mohalla. As per the version given by this witness the accused named by

him had pelted stones at his house and they too had resisted with stones and hence they had attacked Shaikh Mohalla and set the houses on fire. However, no details have been stated as to when and how the houses were set on fire. Therefore, it is doubtful as to whether this witness has seen the mob which had taken part in the main offence at Shaikh Mohalla. The persons named by him are those who had thrown stones at his old house. On the one hand the witness has stated that because they resisted the stone throwing by throwing stones, the accused had set the houses at Shaikhvas on fire, and on the other hand says that late at night Ashiqmiya Bachumiya had come and told him that the mob of Patels had burnt his house and his jeep and Mahemoodmiya's house and had asked for his help. The overall testimony of this witness does not inspire any confidence, insofar as the main incident that took place at Shaikhvas is concerned. The testimony of this witness supports the prosecution case that a peace meeting was held in the house of this witness which was also attended by the then Sarpanch Patel Kanubhai Joitabhai and the former Sarpanch Patel Dashrathbhai Kachrabhai and that the Sarpanch had told them that it was not within his means to do anything and that they should defend themselves. The testimony of this witness also shows the presence of PW-71 Mangalbhai Ramabhai and PW-39 Memon Janmammad Ismailbhai.

63. **PW-58 Sabirhussain Imamshah Fakir** has been examined at Exhibit-553. This witness has deposed that he is a resident of Sardarpura and was residing near Dharoi Colony. His family is comprised of his six daughters, two sons and his wife. His father had passed away prior to the incident. On 27<sup>th</sup>

February, 2002, the incident of burning a train at Godhra had occurred and on 28<sup>th</sup> February, 2002 there was a call of Gujarat Bandh. On 1<sup>st</sup> March, 2002, there was a call for Bharat Bandh and hence he was at home throughout the day. On 1<sup>st</sup> March, 2002 at about 8:30 at night he was at home, when he heard shouts and screams whereupon he came out of his house and saw that a mob of Patels of their village was standing near Dharoi Colony and were shouting "kill the miyas, cut them, burn them alive". All of them had weapons in their hands like dharias, sticks, pipes and swords. Saying so, they started coming towards his house and he recognised Ambalal Maganbhai, Kachrabhai Tribhovandas, Mangalbhai Mathurbhai, Kanubhai Joitabhai, Mathurbhai Trikambhai Wireman, Joitabhai Ramabhai and Rameshbhai Ramabhai in the mob. Thereafter he had gone to the fields near his house and those persons had vandalized and set his house on fire. In the light of the flames, he saw and identified the above referred people. Thereafter, as he was afraid, he took his family and went hiding from field to field and went to Harijanvas and there he had taken shelter at the house of Pravinbhai Khemabhai and on the next day in the morning at 10 o'clock the police had taken them to Shankhpur where they stayed for one day and one night and then went to the Vijapur Relief Camp where they stayed for twenty to twenty five days and the police had recorded his statement there and his other statement was recorded by the SIT about four to five years ago. He had sustained damages of rupees sixty thousand on account of vandalizing of his house and setting it on fire. He has stated that he can identify the persons in the mob and has identified Kachrabhai Tribhovandas, Mangalbhai Mathurbhai, Ambalal Maganbhai, Mathurbhai Trikambhai, Kanubhai Joitabhai and

has stated that Joitabhai Ramabhai and Rameshbhai Ramabhai are not present, though they were actually present in the court room.

63.1 In the cross-examination of this witness, he has been contradicted as to his previous statement dated 3<sup>rd</sup> March, 2002 with regard to the timing of the incident which is stated to have occurred at 8:30 in the evening on 1<sup>st</sup> March, 2002. An omission has been brought on record to the effect that in his statement dated 3<sup>rd</sup> March, 2002, he has not named Kachrabhai Tribhovanbhai, Kanubhai Joitabhai, Mathurbhai Trikambhai Wireman and Joitabhai Ramabhai. A further omission has been brought out to the effect that in his statement dated 3<sup>rd</sup> March, 2002, he had not stated that at night at 8 o'clock, the members of the mob had vandalized his house and burnt it. A further omission has been brought out to the effect that in his statement dated 3<sup>rd</sup> March, 2002, he had not stated that out of fear, he went hiding from one field to the other together with his family and had gone to Harijanvas of their village and there they had taken shelter at Pravinbhai Khemabhai's house and on the next day at 10:30, the police had taken them to Shankhpur where they had stayed for one day and the next day, the police had taken them to Vijapur Relief Camp where they stayed for twenty to twenty five days and the police had recorded his statement there.

63.2 From the cross-examination of the Investigating Officer (Police), it has been brought on record that this witness in his statement dated 3<sup>rd</sup> March, 2002 had stated that he had seen the mob at 2:30. It has been further brought out that this witness in his statement dated 3<sup>rd</sup> March, 2002 had not named

Kachrabhai Tribhovanbhai, Kanubhai Joitabhai, Mathurbhai Trikambhai Wireman and Joitabhai Ramabhai. It has also been brought out that in his statement dated 3<sup>rd</sup> March, 2002, this witness had stated that all the members of the family went hiding into the fields and went on foot to Shankhpur village where his brother was residing. From the cross-examination of the Investigating Officer, it is further proved that out of the twelve names given by this witness on 3<sup>rd</sup> March, 2002, Kanubhai Joitaram and Kachrabhai Tribhovandas was not named.

63.3 From the cross-examination of the Investigating Officer (SIT), it is proved that this witness in his statement dated 22<sup>nd</sup> May, 2008 had not named Mathurbhai Trikambhai Wireman and Joitabhai Ramabhai.

63.4 The learned counsel for the appellants/accused submitted that while the witness has deposed that the mob had come at 8:30 p.m. and he had recognised the persons named by him, in his statement dated 3<sup>rd</sup> March, 2002, he had stated that the mob had come at 2:30 a.m. It was submitted that this improvement in the time has been proved on record. It was contended that this witness had never stated that the incident had occurred at 8:30 p.m. and it is for the first time before the court that he has stated so and has thereby suitably changed the time of the incident including the incident of his home being set on fire. It was submitted that though the witness claims to have recognised the accused in the light of the flames of his burning house, he had not stated so in his earliest statement, therefore, the witness has improved upon his version with a view to support the prosecution case. It was

pointed out that this witness has named seven persons in his deposition, whereas he has named twelve persons in his statement dated 3<sup>rd</sup> March, 2002. Besides, two of the persons named in his deposition were not named in his previous statement and out of those two persons, he has been able to identify only one person, though the other person was also present in the court room. It was submitted that this witness who goes on adding and subtracting the names of the accused is not a reliable witness.

63.5 It was further submitted that though the witness has stated that they had taken shelter in the house of Pravinbhai Khemabhai, he had not stated so in his statement dated 3<sup>rd</sup> March, 2002. Besides, as per the original version given by the witness, he had seen the mob at 2:30 a.m. whereas Pravinbhai says that this witness and his family had come at 9:00 p.m., therefore, the statement of the witness is clearly false. It was further submitted that PSI Parmar (PW-90) has deposed that no incident took place till 22:00 hours, which evidence of the police officer is unchallenged, which also falsifies the version given by this witness. It was contended that the evidence of PSI Parmar has to be appreciated in the light of the admitted overwriting in the statement dated 3<sup>rd</sup> March, 2002 of this witness, whereby the word Sundarpur has been corrected to Sardarpura, which makes it amply clear that the prosecution and the interested witnesses have sought to falsely implicate people belonging to the Patel community of Sardarpura.

63.6 **ANALYSIS:** This witness is a Fakir and not a Shaikh and is not a resident of Shaikhvas. He has deposed that on 1<sup>st</sup> March, 2002, there was a declaration of Bharat Bandh and he

had remained at home the whole day. On 1<sup>st</sup> March, 2002 at about 8:30 at night he was at home when he heard sounds of shouting and screaming and came out of his house and saw a mob of Patels of their village standing near Dharoi colony and was shouting "kill the miyas, cut them and burn them alive". They were all armed with weapons like dharia, sticks, pipes and swords. Uttering those words, they came towards their house and he identified Ambalal Magan, Kachrabhai Tribhovandas, Mangalbhai Mathurbhai, Kanubhai Joitabhai, Mathurbhai Trikambhai Wireman, Joitabhai Ramabhai and Rameshbhai Ramabhai and he went away to the fields near his house and thereafter he had seen these people vandalize his house and lit it with embers. In the light of the embers, he had seen and identified the above referred persons. Thereafter as he was afraid, he went from field to field hiding with his family to Harijanvas where they took shelter at the house of Pravinbhai Khemabhai. This witness's statement was recorded on 3<sup>rd</sup> March, 2002, viz. at the relevant time. Nonetheless, he is not a witness of the main incident which occurred at Shaikh Mohalla. The fact regarding the witness having gone to Harijanvas and taken shelter at the house of Pravinbhai Khemabhai finds support in the testimony of the said person.

64. **PW-82 Sabirabibi Sabirhussain Fakir** has been examined at Exhibit-655. This witness has deposed that the mob came at around 8:00 in the evening and burnt their houses and in the light she had seen those persons burning their houses. To save themselves, they had gone to the house of Pravinbhai Khemabhai. She says that the persons whom she had seen in the brightness/light are the accused named therein. This witness is not a witness to the main incident. She

has deposed with regard to the persons who had set their houses on fire. However, this witness was residing at Dharoi Colony and not at Shaikh Mohalla. Therefore, though this witness has identified certain persons, who are alleged to have set their houses on fire, nothing much turns upon the testimony of this witness as she is not a witness to the main incident that had occurred at Shaikh Mohalla.

65. **PW-83 Sharifabanu Sabirhussain Fakir** has been examined at Exhibit-656. Akin to PW-82 who is her mother, this witness is also not a witness to the main incident. She had stated that in the moonlight, she had seen the house being burnt and that in the moonlight as well as from the light caused on account of the house being set on fire, she had seen and identified some of the persons namely, Kachrabhai Tribhabhai, Mangabhai Mathurbhai, Kanubhai Joitabhai, Mathur Trikam Wireman, Ambalal Maganbai Kapur and Prajapati Prahladbhai Varvabhai. This witness has identified Mangabhai Mathurbhai and Mathurbhai Trikambhai in the court.

65.1 In her cross-examination, an omission has been brought out to the effect that in her statement dated 3<sup>rd</sup> March, 2002, she has not named Mangabhai Mathurbhai, Kanubhai Joitabhai, Mathurbhai Trikambhai, Ambalal Magan Kapur and Prahladbhai Varvabhai. Therefore, what has been witnessed by this witness is the burning of the house at Dharoi Colony and not at Shaikh Mohalla. Therefore, this witness not being a witness to the main incident, nothing much turns upon her testimony.

65.2 From the cross-examination of the Investigating Officer, it has been brought on record that this witness had stated that

she had recognised from a distance in the moonlight and by the voices. Through the cross-examination of the Investigating Officer, it has been brought out that in her statement dated 3<sup>rd</sup> March, 2002, this witness has not named Manga Mathur, Kanu Joita Sarpanch, Kachrabhai Trikam, Ramesh Rama, Prahlad Varva Kumbhar and Ambaram Kapur. The Investigating Officer has admitted that in her statement dated 3<sup>rd</sup> March, 2002, this witness has named Ambalal Maganbhai, Rameshbhai Kantibhai, Ashwinbhai Baldevbhai, Lakhvara Narayanbhai Shitalmal, Dahyabhai Varvabhai, Babubhai Lavjibhai Prajapati, Gordhanbhai Revabhai, Prajapati Rajeshkumar Amratbhai, Mathurbhai Ramdas, Jayantibhai Baldevbhai, Kanubhai Karshanbhai, Rameshbhai Gangaram Patel and Prahladbhai Jagabhai.

65.3 The Investigating Officer (SIT), in his cross-examination, has admitted that the witness Sabirabibi, in her statement dated 22<sup>nd</sup> May, 2008 has deposed that the other names stated by her in her statement are the names which the village people had told her afterwards as being present in the mob.

65.4 Mr. Y. S. Lakhani, learned counsel for the appellants-accused submitted that this witness is the daughter of PW-58 and PW-82 and has deposed almost in the same line as her parents with almost identical improvements and omissions, which are proved on record. It was submitted that in her statement dated 3<sup>rd</sup> March, 2002, before the police she had stated the time of the incident to be 2:30 a.m. but has subsequently, by making major and vital improvements changed the time to 8:00 p.m. in conformity with the depositions of her parents. It was contended that the specific

admission on the part of the witness that she had not seen the incident and that prior to the incident, she had gone into the fields with her family is sufficient to reject the testimonies of all the three witnesses, who are close family members. It was further submitted that though the witness has not named any accused in either of her statements, she has named them before the court but could not identify them, which indicates that the witness has named the accused on somebody else's instructions and not on her own.

**65.5 ANALYSIS:** The evidence of this witness is significant to the extent she states that in the moonlight and in the flames of the burning house some persons could be identified and has named the accused. This part of the testimony of the witness has been challenged only to the extent she has stated having identified accused in the light of the flames, however, to the extent she had stated that she had identified the accused in the moonlight, her testimony is consistent with her previous statement and has not been challenged in her cross-examination. She too is not a witness to the main incident.

**66. PW-85 Pravinkumar Khemabhai Parmar** has been examined at Exhibit-662. This witness has deposed that the incident had taken place eight years ago on the 1<sup>st</sup>. That he knows Fakir Sabirhussain Imamshah of his village. Fifteen days prior to the incident, he had done the colour work at his younger brother's place. That at 9 o'clock at night, Fakir Sabirhussain of his village with his wife and son and daughter had come. They had come crying through the agricultural fields. There was a hubbub. At night, they had stayed at his house. In the morning at 10 or 11, they were seated in a police

vehicle. There were screams coming from Shaikhvas but they were at home.

66.1 In the cross-examination of the witness, it has come out that he had not asked Sabirhussain as to why they had come to his place. He had asked them as to why they had come and they had said there was a disturbance and hence out of fear, they had come. He has admitted that though these persons had stayed at his house for the entire night, there was no conversation between them

66.2 **ANALYSIS:** This witness has supported the version given by the above three Fakir witnesses to the extent they have stated that they had taken shelter in his house on the night of 1<sup>st</sup> March. This witness is an independent witness and is not a Muslim, therefore, there is no reason to disbelieve him.

67. **PW-71 Mangabhai Ramabhal Raval** has been examined at Exhibit-627. This witness has deposed that on 28<sup>th</sup> February, 2002, there was a call of Gujarat Bandh and they were at home. Late at night, on the 28<sup>th</sup>, they learnt that cabins had been burnt. There were mobs of Patels and they could not go to the bazaar. On the next day in the morning, that is, on the 1<sup>st</sup> at 10 o'clock, they went to the bazaar where the cabins were burnt - his own, Balabhai Ramabhai's, Prahladbhai Ganatbhai's, Nai Mangaldas Gulabchand's, Hansar Muslim's cabin, Munsafkhan's, Jamal Dilshadmiya's, Motibhai Maganbhai Parmar's, Haribhai Maganbhai Parmar's, Girish Mafatlal's, Kantibhai Khemabhai's, etc. cabins had been burnt. Haribhai Maganbhai and all those whose cabins had been burnt in the market had gathered together in the market. They

decided that something should be done with regard to the cabins being burnt and had gone to Munsafkhan's house. They told Munsafkhan that their cabins had been burnt. Haribhai Maganbhai had dictated the complaint to Munsafkhan. Munsafkhan had written down the complaint as per the names given by Haribhai Maganbhai. Since there was a call of bandh, transportation was totally shut down. It was not possible to go to the police station and hence, a phone call had been made by Munsafkhan. The police officer told that the mobile van was coming. Thereafter, it being a Friday, it was time for namaaz for Munsafkhan, hence they had all separated and he had gone home. On that day, late at night at around 9 o'clock, a tractor was parked on the road next to Ramabhai Mohanbhai Patel's house wherein there were 2-3-4 barrels of kerosene and a barrel of petrol. Thereafter, he saw Natubhai Kachrabhai Patel, Jayantibhai Ambaram Patel, Kalabhai Bhikhabhai Patel, Bakabhai Mangalbhai Patel, Kantibhai Prabhudas, Jitendrakumar Kantilal, Bhikhabhai Joitabhai passing on the road in front of his house. They went towards Kantibhai Prabhudas's house at Kapurvas. He saw them taking cans of kerosene. When they passed in front of his house, the smell was emanating and hence, he came to know. There are two windows for going from Kantibhai Prabhudas's house to go to Kapurvas and from there, through Mahadev, they had gone to Shaikh Mohalla. Thereafter, late at night, mobs of Patels were seen. The focus lights were on due to which they could see them. There were mobs of Patels. After some time, there were fires and flames at Shaikh Mohalla and towards the house of Mahemood, there were flames. They could see that the persons in Shaikh Mohalla were shouting and screaming 'bachao bachao'. The mob was huge and hence, they could not

go there. They were standing in front of the house at the corner of the mohalla. At that time, Rasulmiya Nannamiya came to them shouting 'bachao bachao'. At that time, a mob of Patels came and threatened them that if they save the miyas, they would also burn them.

67.1 Thereafter, late at night at around 2 o'clock, they had got the news that twenty-five, thirty, twenty-eight persons at Shaikh Mohalla had died. The police came at around 2:30 and took the corpses. On account of fear of the Patels, they left the mohalla and went off to their relatives' houses. Of the two, three, four persons, he, Ganabhai Nathabhai, Bhikhabhai Nathabhai and Govindbhai Mohanbhai had stayed. Thereafter they had read in the newspaper that if anybody wants to give a statement, they may come and hence, he along with Prahladbhai Nathabhai took the paper and went to a typist at Vijapur and got an application drafted and forwarded it by Registered A.D. Thereafter, his statement was recorded by the SIT at Gandhinagar. He has deposed that he could identify the persons whom he has named in his examination-in-chief. He has identified Bhikhabhai Joitabhai, Jayantibhai Mangalbhai as Bakabhai Mangalbhai, Jayantibhai Ambalal and Natubhai Kachrabhai in the court.

67.2 In his cross-examination, the witness has stated that he is residing at Sardarpura since birth. Three years prior to the incident, he had a tea stall and prior thereto he was working as a casual labourer. He used to work as an agricultural labourer in their village. He was residing in Ravalvas since twenty-five years. Ravalvas is at a distance of about fifty feet from Shaikh Mohalla. Shaikh Mohalla can be seen from Ravalvas. If

something is happening in Ravalvas, one would know. If something happens on all four sides of Shaikhvas, they would know. They cannot see the front side of Shaikhvas. From their place, they can see the kabrastan. It has further come out in his cross-examination that he had seen the incident that took place on the 1<sup>st</sup>. He had seen the mob that had ignited the fire. There were mobs of Patels near the kabrastan which he had seen from a distance of a hundred feet. At that time, the focus light was on. He had seen the mob on the side of Mahadev. He had seen the Patel mob on the Patels' road opposite their mohalla. There was a mob of about five hundred to seven hundred persons on the side of the kabrastan and another mob of about two hundred to three hundred people on the Patels' road. When the mob came towards Ravalvas, it was comprised of one thousand to one thousand five hundred persons. He had seen the mob which came from the side of Ravalvas from a distance of twenty-five feet. When the Patels threatened him, there was a mob of about five hundred Patels. The threat was given at a distance of about twenty feet. At that time, there were three to four persons with him namely, Govind Mohan, Bhikha Natha, Gana Natha and they too were threatened. The mob had come to beat Rasulmiya. The persons in the mob had threatened them but had not beaten them. In his cross-examination, it has also come out that he had stated about the incident for the first time in the year 2008. That he does not know how to read. An omission has been brought about as to his previous statement dated 20<sup>th</sup> May, 2008 recorded by the SIT to the effect that he had not stated the facts regarding the incident of 28<sup>th</sup> February, 2002 before the SIT. A further omission in the nature of contradiction has been brought out to the effect that out of the persons

named as accused in his examination-in-chief, in his statement dated 20<sup>th</sup> May, 2008, recorded by the SIT the witness had named only Ramabhai Mohanbhai and Kantibhai Prabhudas. It may be noted that Ramabhai Mohanbhai has not been arraigned as an accused in the charge-sheet and Kantibhai Prabhudas has expired during the pendency of the trial.

67.3 The Investigating Officer (SIT) in his cross-examination has admitted that this witness in his statement dated 20<sup>th</sup> May, 2008 has not named any other Patel except Patel Ramabhai Mohanbhai and Kantibhai Prabhudas. He has further admitted that in his statement dated 20<sup>th</sup> May, 2008, this witness had stated that he does not know the name of any other Patels who were in the mob.

67.4 The learned counsel for the appellants-accused submitted that this witness has deposed regarding their cabins being burnt on 28<sup>th</sup> February, 2002 and has named the persons whose cabins had been burnt. He has deposed regarding a meeting having been held at the house of Munsafkhan on 1<sup>st</sup> March, 2002 of persons whose cabins were set on fire on the 28<sup>th</sup> of February. Referring to the testimony of the witness, it was pointed out that the witness has deposed with regard to the incident in paragraph 2, however, a contradiction has been brought out in paragraph 8 of his testimony that the entire portion has not been stated by him. It was submitted that the local police agency has not recorded the statement of this witness nor has he volunteered to say anything. After the SIT came to be constituted, an application came to be made in 2008 and in pursuance thereto, his statement came to be recorded in May, 2008 wherein he has not stated such facts.

Therefore, he is deposing about the incident for the first time before the court.

**67.5 ANALYSIS:** This witness is not a witness of the main incident, however, strong reliance has been placed by the prosecution on the testimony of this witness for the purpose of proving the charge of conspiracy. This witness has deposed that on 1<sup>st</sup> March, 2002 at around 9 o'clock, Ramabhai Mohanbai Patel had parked a tractor on the side of his house wherein, there were two, three, four barrels of kerosene and one barrel of petrol. Thereafter, he had seen Natubhai Kachrabhai Patel, Jayantibhai Ambaram Patel, Kalabhai Bhikhabhai Patel, Bakabhai Mangalbhai Patel, Kantibhai Prabhudas, Jitendrakumar Kantilal, Bhikhabhai Joitabhai, passing through the road in front of his house. They had gone towards the house of Kantibhai Prabhudas at Kapurvas and that he had himself seen the cans of kerosene and that when they had passed in front of his house, a smell was emanating. Except for the aforesaid bare assertion, nothing further has been stated with regard to involvement of the accused by this witness. Moreover, no statement of this witness was recorded prior to the year 2008. This witness is not a victim of the incident nor is any relative of his injured in the incident. Under the circumstances, it was not as if he was suffering from any shock or agony at the relevant time which prevented him from coming forward for making a statement before the police with regard to these facts. Such version which has come on record for the first time in the year 2008, therefore, cannot be accepted for the purpose of proving the charge of conspiracy.

68. **PW-72 Prahladbhai Nathabhai Raval** has been examined at Exhibit-628. This witness is a Raval witness and is a resident of Sardarpura and works as a driver. This witness has deposed that he had seen the Godhra incident on the T.V. as well as read about it in the newspaper and on the next day, Patels of the village had burnt gallas in the market. Right from the school till his house, the gallas had been burnt. The gallas belonged to Ravals, Harijans and Miyabhais. On the next day in the morning, he had woken up early and gone to Sundarpur for driving a car and had returned in the evening at around 8 to 9 o'clock. At that time, there were mobs of Patels of the village in the bazaar. He was at home at night. At around 10 to 10:30, Janhammad Memon's shop was broken and they had also entered Vali Kaka's house and were shouting "kill the bandiyas, cut them" and his house was next to his. They had also hurled abuses at his brother Gugabhai Nathabhai. At Valibhai's place, Jagabhai Nathabhai Bhotu, Bhikhabhai Badarbhai, Talshibhai Haribhai, Ashokbhai Bhaktibhai, Girishbhai Manilal, Talshibhai Haribhai, Jagabhai Ranchhodbhai, Kanubhai Ranchhodbhai and others whose names he does not know were present. They caused damage and went away. He slept at night. At around 1:30, Junaidbhai and Wahidbhai came to call him. At night, he went to Munsafkhan's house. At night, a police car came to call them. He was told to bring Sattarkaka's vehicle and hence, he had gone to Sundarpur to fetch a vehicle. He had gone with the police and came at night to the corner of Shaikh Mohalla. He had taken a 407 car wherein corpses were filled. There were approximately twenty-eight corpses. After the vehicle was filled, in the morning they reached Mehsana. There were two other persons with him. After the post-mortem, the corpses were taken in his car to the

kabrástan and after the burial ceremony at the kabrástan, he had gone to drop the persons who had survived at Ilol at the instance of the police and had returned home at night. He had made an application in connection with the incident and the SIT had recorded his statement at Gandhinagar. He has stated that he can identify the persons who had come in front of Vali Kaka's house and had identified Dahyabhai Kachrabhai in the court.

68.1 In his cross-examination, an omission has been brought out to the effect that the witness had not stated with regard to the Patels having burnt the gallas on the next day after the Godhra incident.

68.2 Referring to the testimony of the witness, Mr. Lakhani has pointed out that in paragraph 2 of his deposition, he has stated that the Patels of their village had set the gallas in the bazaar on fire, however, the fact that he had not stated the same before the SIT in his statement dated 20<sup>th</sup> May, 2008 has been brought on record in his cross-examination. It was submitted that the omission is proved as a contradiction by the Investigating Officer. It was submitted that the statement of this witness was not recorded by the local police at the relief camps nor did he volunteer to do so and after the formation of SIT, he sent an application whereafter the SIT recorded his statement.

68.3 Insofar as the testimony of this witness is concerned, he is not a witness of the main incident. His testimony is only to the effect that after the incident was over, he was told to bring a vehicle and had taken the corpses to Mehsana. The evidence

of this witness finds support in the testimony of PW-46 - Sabirmiya Akumiya Pathan who has deposed regarding this witness being the driver of the 407 vehicle which had taken the corpses to Mehsana Civil Hospital.

**69. PW-84 Imtiyazali Hussainmiya Kureshi** has been examined at Exhibit-657. He has deposed that he was a resident of Sundarpur where he was residing with his family. On 28<sup>th</sup> February, 2002, he was at home. On that day, the Patels of the village told them that for their safety, they should go to their relatives' place or wherever they like. On 1<sup>st</sup> March, 2002, PI Parmar came to their house and called his father and told him that riots are reported and that they should leave for wherever they wanted to go. His father told him to take their mohalla people also. Thereafter, they made a phone call to his paternal uncle Himmatkhan Taajkhan at Sardarpura that if he could find any conveyance he should come and take them. At that time, Shri Parmar's vehicle had come. Thereafter, they went to Sardarpur. Around twenty persons had gone. A jeep which was a 705 Commander made four rounds and they were dropped at Pathan Mohalla at Sardarpura. They had gone there at the instance of Shri Parmar. In the 5th round, when he was coming to Sardarpura in the morning, there was a mob of Patels. Upon his vehicle coming near, the mob of Patels came near his vehicle and Becharbhai Odhavbhai threatened him saying that if he brings other people in the vehicle, then they would sprinkle kerosene on him and set him on fire. Therefore, he told them that alright, he would not come again and thereafter he went off to Sundarpur. He has deposed that he has informed Shri Parmar about the threat given by Becharbhai and Shri Parmar had asked him as to why he was worrying

about it and told him to seat the rest of the people in the vehicle. After seating everyone in the vehicle, Shri Parmar asked him to follow his vehicle. In this manner, Shri Parmar had taken everyone to the Pathan Mohalla at Sardarpura. Shri Parmar has parked his vehicle in front of Darbargarh where they met Munsafkhan. At that time about fifteen to twenty persons had held a meeting at Munsafkhan's house. At that time, he had taken his vehicle to Pathan Mohalla at Sardarpura. After half an hour, he came to learn that at Sundarpur, there were incidents of vandalizing and burning vehicles and gallas belonging to Muslims. At around 9 o'clock, the Patels had burnt shops in front of Shaikh Mohalla. They were of Sardarpura. After half an hour the police vehicle had come. At that time, the mob of Patels had dispersed. After the police had gone away, the mob returned and gathered in the chowk in front of Shaikh Mohalla. From there, they pelted stones at Pathan Mohalla. At that time, they were present. They also pelted stones. After pelting stones, these people went to Shaikh Mohalla. They burnt Shaikh Mohalla and the persons of Shaikh Mohalla were shouting for help. Therefore, the Patel people were throwing the people into the fire and were beating them and throwing them inside in the fire. This continued till about 2 to 3 o'clock. Thereafter, the police came and things calmed down. There was a Jamadar from Pathan Mohalla in the police vehicle who said that twenty-eight people have been killed in Shaikh Mohalla and asked three four persons to come to Shaikh Mohalla with him so he also had gone. Corpses were lying inside Mahemoodmiya Shaikh's house which were in a horrifying condition. He saw them and was shocked and started to faint. Thereafter, he went back to Pathan Mohalla. The witness has further deposed that at the

time of the incident, he had seen Panchal Babubhai Ambalal of Sundarpur. They were lifting Panchal and taking him away and he had sustained a sword injury on the neck. He was taken in Somabhai Prajapati's Commander jeep to a private hospital. The Sardarpura Patels had kept this fact a secret. In the morning at 5 o'clock, a police vehicle came and two buses came and took them to Savala village. The witness has further deposed that on 28th, Mukeshbhai Madhabhai had convened a meeting at Sundarpur. He had gone as a Kar Sevak to Ayodhya and was a member of the Bajrang Dal. He had come to Sundarpur and said that Kar Sevaks had been killed and was instigating people. He had instigated them that persons from their mohalla are at Sardarpura and that they should be killed. At that time, people of the village namely, Sarpanch of Sundarpur Prahladbhai Vanabhai Patel, Ashokbhai Shankarbhai Patel, Naginbhai Kashiram Patel and Mukeshbhai Madhabhai Patel were there. Eight days after the incident, he came to know that anyone who knew about the incident could inform the SIT office at Gandhinagar and therefore, he came to Vijapur and made an application, after which the SIT had recorded his statement. In his cross-examination, various omissions have been brought out. He has also admitted that he was deposing with regard to the facts about the incident for the first time before the court.

69.1 The Investigating Officer (SIT), in his cross-examination, has admitted that the witness Imtiyazali Hussainmiya Kureshi, in his statement dated 21<sup>st</sup> May, 2008, has not stated that thereafter, at around 9 o'clock, the Patels had burnt shops in front of Shaikh Mohalla. That they were of Sardarpura and after half or quarter of an hour, a police vehicle came and the mob

of Patels dispersed. After the police went away, the mob of Patels came again and gathered in the chowk of Shaikh Mohalla ... They also resorted to stone throwing. After pelting stones, those persons went to Shaikh Mohalla. They kindled fires at Shaikh Mohalla and the members of the Shaikh Mohalla were set ablaze and were shouting for help. The Patels were throwing the people alive in the fire after beating them. That this went on upto 2 to 3 o'clock, etc. Various other omissions in the statement of this witness have been brought out in the cross-examination of the Investigating Officer (SIT).

69.2 Mr. Y. S. Lakhani, learned counsel for the appellants/accused submitted that this witness has remained silent for more than six years and for the first time, gave an application dated 13<sup>th</sup> May, 2008 to the SIT as regards the incident. It was pointed out that the witness has categorically admitted that whatever he is deposing before the court regarding the incident, he is saying for the first time. It was submitted that this witness is a resident of Sundarpur and he has clearly deposed that one of the affected Kar Sevaks Mukeshbhai Madhabhai convened a meeting at Sundarpur and instigated the people to kill the people of the mohalla (Muslims). It was pointed out that it has come on record that about fifty Muslims have been shifted from village Sundarpur to Sardarpura and that they had stayed at Pathan Mohalla. This witness was also at Pathan Mohalla of Sardarpura at the time of incident and at the time of incident he had seen one Babubhai Panchal of Sundarpur in an injured condition, being physically lifted and taken in the vehicle of Somabhai Prajapati to a private hospital. According to the learned counsel, if this part of his deposition is read with the depositions of independent police officers, it

probabilises the defence version that the incident had occurred at the hands of outsiders and no persons of the Patel community from Sardarpura were involved. It was submitted that even looking to the first information report being I.C.R.No-54/2002 filed by Himmatkhan Tajkhan Malek of Sundarpur, the submission of the defence would be strengthened.

69.3 It was further submitted that this witness has exaggerated the facts to the extent that at the time of incident, the persons of Patel community after causing injuries to the persons were throwing them in the fire alive. It was submitted that most of the other facts narrated by this witness do not find place either in his application dated 13<sup>th</sup> May, 2008 or in his statement dated 21<sup>st</sup> May, 2008. It was also submitted that no other witness has deposed before the court in line with the story stated by this witness. Thus, whatever he has stated with respect to the incident in question has been stated for the first time in the court and hence, to that extent, he cannot be believed.

69.4 **ANALYSIS:** This witness is a resident of Sundarpur. The defence has strongly relied upon the testimony of this witness to show that the Muslims of Sundarpur who feared their safety in their own village thought that Sardarpura was a safe place and took shelter at Pathan Mohalla at Sardarpura. It is the case of the defence that it was a mob from Sundarpur which had attacked Shaikh Mohalla as the Muslims from their village had taken shelter at Sardarpura. In the opinion of this court, the testimony of this witness does not support the case of the defence for the reason that the witness has stated that the Patels of their villages told them that for their safety, they

should go to their relative's place or wherever they like. This court is of the view that if the people of Sundarpur wanted to kill the Muslims of their village, there was no reason for them to be concerned about their safety and warn them to leave the village and go elsewhere. The evidence of this witness also establishes the fact that about fifty Muslims from Sundarpur had taken shelter at Pathan Mohalla at Sardarpura. The testimony of this witness is highly exaggerated and he states things which no other witness has stated. While the evidence which has come on record from the depositions of the eyewitness/injured witnesses clearly shows that no Muslim was individually assaulted by any member of the mob, this witness gives a highly exaggerated version by saying that the Patels were assaulting the people and throwing them in the fire. Considering the testimony of this witness, he does not come across as a truthful witness and no reliance can be placed upon the testimony of this witness insofar as the main incident is concerned. The defence has also placed reliance upon the testimony of this witness to the extent he has stated that Panchal Babubhai Ambalal of Sundarpur had sustained a sword injury at Sardarpura and was taken in a jeep to a private hospital. The defence, in support of its case that it was a mob from Sundarpur and other villages which had committed the offence and that the people of Sardarpura had always maintained communal harmony and were wrongly being implicated as they had not offered shelter to the victims, has also relied upon the statement made by this witness that Mukesh Madhabhai had convened a meeting on the 28<sup>th</sup> of February at Sundarpur and had instigated the people to the effect that people of their village are at Sardarpura and should be killed.

70. The prosecution has examined five witnesses belonging to the Memon community. The testimonies of these witnesses is significant only for the purpose of establishing that cabins and gallas were set on fire by the mob on the night of 28<sup>th</sup> February, 2002 near the Panchayat office.

71. **PW-39 Janmohammad Ismailbhai Memon** has been examined at Exhibit-438. This witness has inter alia deposed that his shop with goods was burnt on 1<sup>st</sup> March, 2002, however, no damage has been caused to his residential premises. In his cross- examination, the witness has denied that after the sound of firing, there was peace after which they went to Harijanvas. He has denied the suggestion that at about 9:30 at night, mobs of Hindus had gathered and thereafter, the police had resorted to firing to disperse them and upon the people having dispersed, there was peace and they went to Harijanvas. A contradiction has been brought out in his cross-examination to the effect that in his statement dated 10<sup>th</sup> March, 2002, he had stated that on 1<sup>st</sup> March, 2002 at about 9 to 9:30 in the night, mobs of Hindus had gathered and were shouting "kill the Muslims and burn their properties" and when the police came and called upon the riotous mob to disperse and had resorted to firing, the unruly mob had dispersed and thereafter, there was peace in the village and for their safety, they had closed their house and had gone to Harijanvas.

71.1 The learned counsel for the appellants-accused submitted that these six witnesses, viz. PWs-39 to 43 namely, the Memon witnesses and PW-44 Mansuri Munirmohmed Noormohmed are not eye witnesses to the main incident. They

say that their houses are surrounded by houses of the Patel community but no damage has been caused to their houses nor is any one of them injured. All these witnesses have not stated that Patels of village Sardarpura have assembled and attacked. It was submitted that these witnesses, however, have given contradictory evidence as regards the time, hearing of commotion and police firing. It was urged that pertinently none of these witnesses have given any evidence against any of the accused in this case.

**71.2 ANALYSIS:** This witness is one of the witnesses who was running a cloth store. As per the testimony of this witness, on 1<sup>st</sup> March, 2002, at around 8 o'clock to 9 o'clock, he could hear voices saying "burn the Muslims, not a single Muslim should remain alive" and out of fear, they had straightaway gone to Harijanvas. That at around 12 o'clock, they saw smoke coming and at 2:30, the police had come. The witness has stated that after the incident was over, he had gone towards his shop and found that the shop and all the goods therein together with the furniture had been burnt. The witness had thereafter visited Shaikhvas out of curiosity and had seen the police take out corpses and had also seen that about seven to eight persons were alive and taken to the hospital. This witness is not a resident of Shaikh Mohalla and his house is situated opposite the bus stand. Insofar as the testimony of this witness is concerned, he has not named any of the accused nor is he a relevant witness in connection with any of the conspiracy theories which have been advanced on behalf of the prosecution.

72. **PW-40 Mahammadarif Janmahammad Memon** has been examined at Exhibit-441. This witness has deposed that on 1<sup>st</sup> March, 2002, at around 7:30 to 8:00, they heard sounds of the mob which was shouting "burn the Muslims, kill them and burn their properties" and upon hearing the sounds, they went to the Harijan Mohalla. From the Harijan Mohalla, they saw smoke coming out from Shaikhvas and flames of fire. At around 2:30 at night, the police came and they had come out of the Harijan Mohalla and with the police, they had gone to Shaikh Mohalla. The witness has deposed that goods from his shop were looted and his father's cloth shop was totally burnt. The witness has denied the suggestion that he has falsely stated that gallas in the village were set on fire on 28<sup>th</sup> February, 2002.

72.1 **ANALYSIS:** This witness has inter alia deposed that on 28<sup>th</sup> February, 2002, the gallas in their village which belonged to Muslims, had been burnt and the atmosphere was tense. On 1<sup>st</sup> March, 2002, there was a declaration of bandh and he was at home and at around 7:30 or 8:00 in the evening, they had heard voices of the mob shouting "burn the Muslims, kill them and burn their properties" and hence, they had taken shelter at the Harijan Mohalla from where they had seen smoke and flames coming from Shaikhvas. At around 2:30, the police had come and had also taken them outside Harijanvas after which they had gone towards Shaikh Mohalla. The witness has stated that thereafter, they had gone to see his shop and had found that the sanitaryware inside his shop had been stolen and the cement bags had been burnt. This witness is not a resident of Shaikh Mohalla nor is he a witness of the main incident and he has not named any of the accused persons. His testimony is

only relevant to the extent he has stated that the gallas came to be burnt on 28<sup>th</sup> February, 2002. In his cross-examination, it has been brought out that he does not know how many gallas were burnt and in what manner, they were burnt. He has admitted that he is stating about the gallas having been burnt on the basis of what he had heard people say.

73. **PW-41 Abdul Kadir Ismailbhai Memon** has been examined at Exhibit-444. He has deposed that prior to 2<sup>nd</sup> March, 2002, he was running a shop by the name of Memon Kariyana Stores at Sardarpura in the village market where he and his elder son Mohammad Jamaal both were engaged in the business of provisions. In connection with the Godhra incident on 28<sup>th</sup> February, 2002, at night, the gallas at Vadvawala Chowk had been burnt which belonged to Muslims and on 1<sup>st</sup> March, 2002, two gallas belonging to Muslims had been burnt. The situation in the village was tense and the mob of people had gathered and there was a hubbub at 9:30 at night and there were shouts of "kill and cut Muslims" due to which they were afraid and had taken shelter wherever they could at the Harijanvas opposite their house and had hidden there. The commotion continued for the entire night from 9:15 to 1:30 to 2:00 hours at night and smoke was coming out. At 3 o'clock, the police had come and asked them to come out and hence, they had come straight home and then they took shelter at Panpur Camp at Himmatnagar. Thereafter on 11th September, 2002, his statement was recorded by the police and thereafter, by the SIT on 28<sup>th</sup> June, 2002. In his cross-examination, he has admitted that on 28<sup>th</sup> February, 2002, the police were present whereas he has denied the suggestion that on 1<sup>st</sup> March, 2002,

in the evening from 5:30 to 11:00 at night, the police were present in the village.

**73.1 ANALYSIS:** This witness has inter alia deposed that in connection with the incident of burning of the train at Godhra on 28<sup>th</sup> February, 2002, gallas were burnt at Vadvawala Chowk which belonged to Muslims and on 1<sup>st</sup> March, 2002 in the evening, two gallas of Muslims were burnt. That the situation in the village was tense and mobs had collected and there was commotion at 9 to 9:30 with the mob shouting "cut the Muslims" and hence, they were afraid and they had taken shelter at Harijanvas. This witness is also not a witness of the main incident nor has he named any of the accused persons. He, however, has deposed with regard to burning of shops at Vadvala Chowk on 28<sup>th</sup> February, 2002.

**74. PW-42 Altafhussein Valibhai Memon** has been examined at Exhibit-446. The witness has deposed that he had a confectionary, biscuits and cutlery shop. On 28<sup>th</sup> February, 2002 about eight to ten cabins had been set on fire which belonged to Muslims and Hindus. He and his family had taken shelter at the home of Mafatlal Master at Harijanvas. On 1<sup>st</sup> March, 2002, at around 8:30, mobs of people started gathering and hence, they had shut their houses and gone to Harijanvas. They could hear the voices of the mob at night. They could hear voices saying "cut, kill, not a single Muslim should escape". At night, they could hear screams for help coming from Shaikh Mohalla and could see the smoke. The police came at around 2:30 and asked them to come out. After coming out, they went to their house and collected their clothes and went in their own car to Himmatnagar where they

stayed at night at Habibbhai's place and on the next day, they went to Panpur Relief Camp. There, they learnt that out of the people who had taken shelter in Mahemoodmiya's house and had hidden there to save their lives, about twenty-eight to thirty persons were burnt and fifteen to twenty persons had sustained injuries and were taken to Mehsana.

74.1 In the cross-examination of this witness, it has come out that in this incident, no damage has been caused to his house or to his shop. It has further come out that on 28<sup>th</sup> February, 2002, the police were present in the village and that the police had been posted at their village to ensure that no disturbances are caused in the context of the incident of 28<sup>th</sup> February, 2002 and that the police were patrolling the entire village and were also present in the village on 1<sup>st</sup> March, 2002. In his cross-examination, it has come out that in the incident, his house and his shop had not suffered any damage.

74.2 **ANALYSIS:** This witness is also not a witness to the main incident and his testimony is relevant only to the extent he states that on 28<sup>th</sup> February, 2002, gallas belonging to Hindus and Muslims were set on fire and on 1<sup>st</sup> March, 2002 in the midnight, an incident had taken place at Shaikh Mohalla and they could hear screams asking for help late in the night and that the police came at around 2:30 a.m. at night.

75. **PW-43 Arifbhai Valibhai Memon** has been examined at Exhibit-449. This witness has deposed that he has got a cabin by the name Rafash Paan Centre, Opposite Jogani Mata Temple. On 27<sup>th</sup> February, 2002, the Godhra incident had taken place and on the next day, there was a declaration of Gujarat

Bandh and hence, he had kept his cabin closed. He does not know what had happened on that day. On the next day thereafter, there was a declaration of Bharat Bandh and on that day also, they had kept their shop closed. On that night, the gallas had been burnt. He does not remember what had happened thereafter. His galla had also been burnt. He has deposed that the gallas had been burnt on the night of 28<sup>th</sup> and that, on the next day, they heard loud shouts, like kill, cut and hence, they had gone from their house to Harijanvas and had hidden in a house in the Harijanvas. On coming out at around 12:30 hours at night, he had seen that the sounds were coming from Shaikhvas and there was smoke. At around 03:00 to 03:30 hours at night, the police came and informed them to go to safe places. Thereafter, they had gone to Himmatnagar where they had stayed in the house of his elder brother Habibhai and thereafter, they had gone to Panpur Patia camp. In the cross-examination of this witness, it has come out that in the incident, his house has not been damaged. That on 28<sup>th</sup> as well as on the next day, in the incident, no damage has been caused to his house and no person of his family has sustained any injury.

**75.1 ANALYSIS:** This witness is also not a witness of the main incident but has deposed with regard to gallas being burnt on 28<sup>th</sup> February, 2002. He has also deposed with regard to the incident that has taken place late in the night of 1<sup>st</sup> March, 2002 and that they could hear sounds coming from Shaikhvas and could see smoke.

76. Thus, from the testimony of these five witnesses who are Memons, what emerges is that an incident of burning of

cabins/gallas took place on 28<sup>th</sup> February, 2002. On 1<sup>st</sup> March at night, upon hearing the mobs which had gathered there, they had taken shelter at Harijanvas and at around 12 to 12:30 at night, they had heard screams for help coming from Shaikh Mohalla and had seen smoke and flames also.

77. **PW-44 Mansuri Munirahmad Nurmahammad** has been examined at Exhibit-455. He has deposed that he had a Confectionery and Biscuit Cabin opposite his house which is situated near Holi Chakala. On 27<sup>th</sup> February, 2002, the incident of Godhra train burning had taken place and on the next day, there was a declaration of Gujarat Bandh. All businesses were closed. His cabin was also closed. On that night, Hindu mobs had burnt the cabins of Muslims. Approximately, thirteen cabins had been burnt. On the next day, there was a declaration of Bharat Bandh. On that day, the market was closed. The situation in the village was tense. At night, mobs of Hindus came and out of fear, they had closed their house and had gone to the Harijanvas. On that night, there were riots at Shaikhvada. The riots were at the instance of Hindus. In the said riots, twenty-eight persons had lost their lives and others had been injured and were critical. Thereafter, when the atmosphere became calm, and in the morning at around 4 o'clock, they took their private car and went to Panpur, at Himmatnagar. In the riots, his galla had been damaged.

77.1 In his cross-examination, it has come out that this witness has not given any statement before the police and that the police had not questioned him. Thereafter, he says that when he went to Sardarpura to take his luggage under police

protection, at that time, the police had recorded his statement. He has admitted that his statement was recorded by the SIT on 22<sup>nd</sup> May, 2008 wherein he had stated that as the atmosphere in Sardarpura was tense, he along with his family had gone to Harijanvas, thereafter, what happened he does not know. He does not know as to what the police had written down in his statement. At around 9:30 at night, he along with his family had gone towards Harijanvas. Upon his being asked as to whether he wants to state anything about the incident, he had said that the members of the mob had burnt his two paan gallas and had caused damage approximately of Rs.70,000/- Other than that, he does not want to say anything. He has not made any statement before the police on the earlier occasion and that the police had written down on its own and except what he has stated before SIT, he does not want to say anything.

77.2 The learned counsel for the appellants/accused has submitted that all these six witnesses are not eye-witnesses of the main incident. They have stated that their houses are surrounded by houses of Patel community but there is no danger to their house nor is any one of them injured. All these witnesses have not stated that Patels of Sardarpura assembled together and attacked them. However, these witnesses have given contradictory evidence as regards time, hearing of commotion and police firing. It was submitted that pertinently, none of these witnesses have given any evidence against any of the accused in this case.

77.3 **ANALYSIS:** This witness has deposed that on the next day on 28<sup>th</sup> February, 2002, Hindu mobs had burnt

approximately thirteen gallas belonging to Muslims and on the next day, there was a declaration of Bharat Bandh and since the situation in the village was tense and mobs of Hindus were coming at night, out of fear, they had closed their house and had taken shelter at Harijanvas. On that night, there was rioting at Shaikhvada which was done by Hindus. This witness like the Memons has not named any accused and is not a witness to the main incident. His testimony is relevant to the extent he states that gallas were set on fire on 28<sup>th</sup> February, 2002 and that on the next day when they had taken shelter at the Harijanvas, they could hear sounds coming from Shaikhvas at night.

78. The learned counsel has then referred to nine miscellaneous witnesses, viz., PW-37, PW-86, PW-87, PW-88, PW-89, PW-96, PW-97, PW-98 and PW-108.

79. **PW- 37 Babubhai Khodidas Satwara** has been examined at Exhibit-418. At the relevant time, he was working as a Deputy Mamlatdar at Vijapur. He has prepared the map of the scene of offence. He has deposed that as per the situation as seen in the panchnama, he had prepared the map after seeing the site position. In his cross-examination, he has stated that he had taken a measure tape but except for Mahemoodmiya's house, he has not measured any other house. The reason given for not measuring the other houses is that there were many houses. He has admitted that he has not measured the distance between the houses in Shaikh Mohalla and out of the articles referred to in the panchnama, he has shown only those which he saw.

80. **PW-86 Patel Dineshbhai Bhagwanbhai** has been examined at Exhibit-664. This witness was working as a Deputy Engineer in the Uttar Gujarat Vij Company in the Ladol City Division since August, 2007. This witness had received a communication dated 9<sup>th</sup> May, 2008 (Exhibit-666) from G.V. Barot of SIT, Gandhinagar, whereby he was called upon to give information with regard to the details mentioned therein. The witness has further deposed that in connection with the information called for, he has given his reply in writing (Exhibit-667). The witness has deposed that on 24<sup>th</sup> December, 2001, the light connection of the poles had been disconnected as the bill had not been paid. The street-light connection of Sardarpura village had been cut. The witness has deposed that the street-light wires and the wires for household use and commercial purposes are one and the same and if the wire for industrial purposes is on the same pole, then there is a different wire for it. The wires are single-phase and three-phase wires. Except for the street-light wires, the other wires being live wires, if one wants to put on the lights, it could be done.

80.1 In his cross-examination, the witness has admitted that in his reply (Exhibit-667), no information with regard to street-lights has been given. He has admitted that for disconnecting any connection, there is a legal procedure. The bills of the street-light are paid by the concerned Gram Panchayat. If the bills are outstanding and they are not paid, their office issues a notice to the Panchayat. He has deposed that he has ample evidence to show that Sardarpura Gram Panchayat has not paid the light bill. He has further deposed that the light connection was started on 6<sup>th</sup> June, 2002 and from 24<sup>th</sup>

December, 2001 to 6<sup>th</sup> June, 2002, the street-lights were closed. The witness has deposed that the G.E.B. had removed the street-light cable and meter on 15<sup>th</sup> January, 2002, which has been done pursuant to orders passed by Gujarat Electricity Board, and has deposited the same with the Store Department. In his cross-examination, it has further come out that on 27<sup>th</sup> February, 28th February, 1<sup>st</sup> March, 2002 and 2<sup>nd</sup> March, 2002, the street-lights were shut off. He has deposed that from the time when they disconnected the street-light connection and started it, during the entire period in between, the street-lights of the village were shut. In his cross-examination, he has stated that he cannot say as to how many legal electric connections were there in the village as he could do so only after looking at the record. He has admitted that in Exhibit-666, no information had been called for from him as regards the status of the street-lights. In his cross-examination, it has further been elicited that no opinion of his was sought on the question as to whether when the street-lights were shut off and the other three-phase and single-phase industrial wires are on, any connection can be taken therefrom. He has admitted that no report had been called for from him as regards the position of street-light wires and the other wires. He has also stated that he has not visited the site at Shaikh Mohalla and he has got no personal knowledge about the status of the wires there. He is not aware as to how many illegal connections of single-phase and three-phase have been taken at Shaikh Mohalla. He has admitted that the single-phase wires were on till 10:30 of 1st March, 2002. He has deposed that when the three-phase is on, the single-phase connection also remains on. He has deposed that it is true that inside Shaikh Mohalla, if three-phase power is on, then after 10:30 at night, if electric

connections are taken, then the wires may be live. He has deposed that he can make a report as to how many illegal connections were there at Shaikh Mohalla.

80.2 The learned advocate for the appellants – accused has submitted that this witness is an employee of the UGVCL and that from his testimony, even the possibility of taking light from any other live wire is not proved on the record.

80.3 **ANALYSIS:** From the testimony of this witness, it has been established that the street lights were disconnected during the relevant period when the incident took place. At the same time, it appears that the possibility of directly connecting the street lights from the poles cannot be ruled out. This aspect is however, relevant for the purpose of deciding the question as to whether there was any criminal conspiracy and also as to whether there was sufficient light for the witnesses to identify the accused.

81. **PW-87 Patel Jitubhai Chhaganbhai** has been examined at Exhibit-670. He was the Talati-cum-Mantri of Sardarpura village from 1999 to 2006. This witness has deposed that in 2002, Shri Patel Kanubhai Joitabhai was the Sarpanch of Sardarpura Gram Panchayat. After April, 2002, Patel Kachrabhai Tribhovandas was the Sarpanch. When Kanubhai Joitabhai Patel was the Sarpanch, Kachrabhai Tribhovandas was the Deputy Sarpanch. He has stated that street-lights had been provided in Sardarpura village by the Panchayat. The Sardarpura Gram Panchayat for the purpose of starting and repairing the concerned lights had engaged Patel Becharbhai Odhavbhai as a Helper. In 2002, Patel Mathurbhai

Trikambhai was the Helper from the Gujarat Electricity Board and he was the resident of Sardarpura. The witness has deposed that on 27<sup>th</sup> February, the railway bogies were burnt at Godhra. On 28<sup>th</sup> February, 2002, there was a call for Gujarat Bandh. On 1<sup>st</sup> March, there was a call for Bharat Bandh. On 28th February, he was at Sardarpura and was discharging his duties. In the evening, at around 7 o'clock, he went to his house. His village is at a distance of about fifteen kilometres from Sardarpura and he comes on his scooter. On 28<sup>th</sup>, after he returned home, he had come at 10:00 or 10:30 in the morning at Sardarpura village on 1<sup>st</sup> March, 2002. At 10:00 to 10:30 on the 1<sup>st</sup>, cabins were burnt in front of the Panchayat. Those cabins had been burnt on the night of 28<sup>th</sup>. Eight to ten cabins had been burnt and he had made a report to the Taluka Panchayat. Those cabins belonged to Hindus, Muslims, Harijans and Patels. On that day, at around 7:00 to 7:30, he returned to his village. On 2<sup>nd</sup> March, 2002, in the morning at around 5:30, the Mamlatdar made a phone call to him informing that houses had been burnt at Sardarpura and that he should come. He reached Sardarpura at 5:30. At Sardarpura, he went to Shaikhvas. The Muslims who resided at Shaikhvas had gone away and those who had died were already taken to Mehsana Civil Hospital. He had learnt that the cabins in front of Shaikh Mohalla as well as houses in Shaikh Mohalla had been burnt and that about twenty-eight persons had died. He has deposed that Mahemoodbhai's house which was burnt was constructed under the Sarkar Avas Yojana and had a concrete slab. He has deposed that on the street-lights, tube-lights and bulbs had been fixed and in February, the Panchayat did not pay the bill and hence, the Gujarat Electricity Board had cut the street-light connection.

81.1 In his cross-examination, the witness has admitted that on the day prior to the incident and on the day of the incident and even thereafter, the street-lights at Sardarpura were shut off. He has admitted that on 1<sup>st</sup> March, 2002, at 7:30, when he went from Sardarpura to Firojpur, he has gone from the side of the kabristan and at that time, it being winter, it was slightly dark. When he went, the street-lights at Sardarpura village were not on. Near the kabristan also, it was slightly dark. On 1<sup>st</sup> March, 2002, either on the street-lights or anywhere else, he had not seen halogen lamps having been put up. He has admitted that he has not seen any halogen lights. He has admitted that when he was going through Sardarpura village, it was night time and it was dark. In his cross-examination, he has admitted that in his statements dated 22<sup>nd</sup> March, 2002 and 14<sup>th</sup> June, 2008, he has not stated with regard to the cabins having been burnt on 28<sup>th</sup> February.

81.2 The learned counsel for the appellants/accused submitted that this witness falsifies the case of the other prosecution witnesses who has stated that they had seen the incident in brightness of the halogen lights. It was submitted that the evidence of this witness further establishes that the street lights were disconnected at the time of the incident.

81.3 **ANALYSIS:** From the testimony of this witness, it is established that the street lights were disconnected during the relevant period and that it being winter, it was quite dark.

82. **PW-88 Hasmukhlal Thakorlal Modi** has been examined at Exhibit-674. This witness, at the time when his

testimony came to be recorded, was an Assistant Director of Forensic Science, Gandhinagar Ballistic Department and was the Scientific Officer of the Mobile Van at the relevant time when the incident took place. This witness has personally carried out the inspection of the scene of offence on 4<sup>th</sup> March, 2002 from 19:30 to 21:15 hours and has prepared a report. The witness has deposed that upon inspecting the scene of offence, it was found that it was a one room RCC building and had iron doors on the front and back, and similarly, it had two iron windows. On looking from outside, signs of brick-bats having been thrown on the walls were seen and pieces of bricks were lying outside also. Behind the house, near the window, pieces of wood and dried bushes were lying in slightly burnt condition and there were soot marks on the wall of the window. There were signs of force having been used from the outer side on the iron windows of the building. Five rods from the front door of the house had come out and had got separated. On the opening of the door, there were signs of soot. The aldop/latch on the inside also had soot on it and its position showed that the door was not latched from inside. Similarly, the door on the rear side of the house had soot marks on the inside part and there was soot on the aldop/latch also. On examining the position of the soot on the aldop, it was found that it was not latched from inside. Near the window on the rear side of the house, there were half-burnt bushes. Inside the houses, there were remnants of half-burnt clothes. On the floor, there were reddish stains, and on a primary examination, it appeared possible that they may be blood marks. There was soot on the walls of the building as well as on the doors and samples were taken for the purpose of analysis from the soot on the wall, on the pieces of burnt

and half-burnt clothes, the reddish marks inside the house and plastic can and steel tin. The witness has stated that he was informed that this house belonged to Mahemoodmiya Hussainmiya of Sardarpura and is situated in Shaikhvada.

82.1 In the cross-examination of this witness, it has come out that they had not taken any photographs of the place where they had gone. The police had not taken any photographs in his presence. The witness has stated that he had given oral instructions to the police to take photographs which he had given at the scene of offence. While he was there, the police had not called any photographer. He had not asked the police as to why he has not called the photographer in his presence. The witness has stated that there is no reason for not having measured the room and that he had made a rough note of the measurements of the room which was 11 x 18 approximately. He had made a rough note of the length and breadth of the house, the position of the doors and windows as well as the presence of soot on the door, etc. He has deposed that he had seen an electric switch board in the house and that the reason for not writing about the same in his report is because it was burnt by the fire. He had not made any inquiry with regard to short circuit. In his cross-examination, it has further come out that there were signs of force having been used on the windows. The rods of the windows were bent and force had been used in such a manner that they were bent on the inside. He has stated that there is no reason for not writing that the rods of the windows were bent. In his report, he has only stated that force had been used. In his cross-examination, he has further stated that there were signs of force having been used to open the windows from outside as there were marks

on the outer side of the window. He has stated that he has not mentioned as to whether there were stoppers on the windows and that there is no reason for not stating as to whether there were stoppers on the inner side of the windows. He has deposed that there were no signs of force having been used on the window on the front side of the house on the outer side, and he has also not seen any spots/stains below the window. The witness has denied that the rods which had separated from the front door of the room were on account of coming out of the welding, on account of the heat. He has admitted that photographs of the stoppers were not taken. He has admitted that he had not seen any damage having been caused to the stoppers on both the sides. He has stated that there were scattered blood marks and hence, he had not counted them and that the blood marks were so many that they could not be counted. He has admitted that there was soot on all the four walls and on the ceiling.

**82.2 ANALYSIS:** This witness was the Scientific Officer of the mobile van at the relevant time. The testimony of this witness is significant for the reason that he has deposed that there were signs of force having been used from the outer side of the iron windows of Mahemoodmiya's house and that five rods of the front door of the house had come out from the welding and had fallen down. There was soot on the window of the half-door (the door has an inbuilt window on the upper side). That from the soot which had gathered on the aldrop inside, it appeared that the door could be open from inside. Similarly, from the pattern of the soot that had gathered on the door on the rear side and on the aldrop, he had formed the opinion that the door was not closed from inside. From the cross-

examination of the witness, it has come out that there were signs of force having been used on the window; that the rods of the window were bent on the inside as force had been used accordingly. He has stated that he had not recorded that the rods were bent but had stated that force had been used. In his cross-examination, it has further come out that force had been used to open the window from outside and that there were marks of force having been used from the outer side. Thus, the testimony of this witness is corroborative in nature and can be used in support of the testimonies of the witnesses who were inside the room and for the purpose of advancing the theory that the room was closed from outside and that the mob had broken the window for the purpose of pouring kerosene, petrol and burning rags, etc. inside the room.

83. **PW-97 Hafizbhai Nasirbhai Lodha** has been examined at Exhibit-725. The witness has deposed that upon the death of Suhanabalu on 3<sup>rd</sup> March, 2002, her burial ceremony was carried out at the Muslim Kabrastan at Ilol in his presence and in this regard, he had given a certificate dated 1<sup>st</sup> May, 2002 (Exhibit-726). Thus, the testimony of this witness is relevant only for the purpose of establishing that Suhanabalu, daughter of PW-61 Safikmiya Babumiya Shaikh had died at Ilol after the incident and she was buried there.

84. **PW-96 Purshottambhai Nathabhai** has been examined at Exhibit-719. At the time of recording of his deposition, he was discharging duties as an Additional Secretary, Tribal Development Board. The witness has deposed that on 11<sup>th</sup> August, 2008, they received a proposal for adding section 153A (IPC) against eight accused persons. Along with

the proposal, there was a report of about 200 pages. Upon the proposal being received by him through the Branch Officer, he had studied the report, examined the statements of the witnesses, studied the panchnama and thought that it was a fit case for grant of sanction for invoking section 153A of the Penal Code and hence, on 31<sup>st</sup> August, 2008 he made a note seeking sanction from the higher principal officer namely, their Principal Secretary Balvantsinh, who sanctioned the same and thereupon on 5<sup>th</sup> September, 2008, he passed an order in the name of Government of Gujarat sanctioning invocation of section 153A of the Penal Code. The witness has further deposed that on 4<sup>th</sup> October, 2008, a proposal was received for invoking section 153A of the Penal Code against accused No.1 to 67. After studying the relevant case papers, he thought it to be a fit case for granting sanction for invocation of section 153A against those accused persons and made a note for obtaining the approval of the Additional Chief Secretary and the Deputy Chief Secretary Balvantsinh who granted his approval on 23<sup>rd</sup> October, 2008 and upon the sanction being granted, an order under the name of Government of Gujarat sanctioning the invocation of section 153A was issued on 5<sup>th</sup> November, 2008.

85. **PW-108 Vipulkumar Bhogilal Oza** has been examined at Exhibit-760. He has deposed that on 3<sup>rd</sup> March, 2002, police from the Vijapur Police Station had asked him to come there as photography and videography of Sardarpura village was to be done. At first, he was taken to police station and from there, he was taken in a police vehicle to Sardarpura. At Sardarpura, they went to Shaikhvas where P.I. Shri Vaghela was present. Shri Vaghela showed Shaikh Mohalla to him and informed him

that photography of all the houses was to be carried out. He switched on the camera and carried out the videography of all the houses there. The houses with the sheets were burnt and there were ten houses on both sides. The last house was a pucca house. He had also carried out the videography and photography of that house. The videography went for an hour. He had taken about fourteen to fifteen photographs. He had also pointed the camera towards the kabristan which was on the other side. After the videography was over, he was told to go and was dropped at Vijapur. He had given the photo and video cassette to P.I. Shri Vaghela. He has stated that the cassette which is shown to him is the one which he had given to P.I. Shri Vaghela. He has further stated that the sixteen photographs shown to him are the ones which he had taken and that he does not remember whether the negatives of the photos are there. He has received the payment of the bill towards videography and photography from the police station.

85.1 In the cross-examination of this witness, it has come out that when he was carrying on the videography and photography, no one was recording it in writing and that his signature was not obtained on any document. After carrying out the videography and photography, he had returned the same to the police on the next day. At that time, the police had not recorded his statement. The witness has stated that he does not remember whether he had produced negatives of the photographs and that he has not put his signature on the photographs taken by him. He has stated that there was no reason for not showing the time and day in the videography and photography carried by him. That while carrying out videography, nobody had given any commentary. When he

was doing the videography, the audio system was not on. In his cross-examination, he has further stated that when he carried out the photography, the articles were kept as they were and the photographs were taken. When he took the photographs, P.I. Shri Vaghela and other policemen were present. He has denied that he has not taken the photographs No.9 and 16 on 3<sup>rd</sup> March, 2002. He has stated that he has not taken the photographs bearing No.10 and 15.

**85.2 ANALYSIS:** The testimony of this witness is relevant for the purpose of proving the photographs and the video of the scene of offence which are relevant for understanding the situation of the scene of offence and more particularly, the location of and the nature of the houses situated in Shaikh Mohalla.

**86. PW-89 Ambalal Karshanbhai Makwana** has been examined at Exhibit-687. He was the Police Station Officer at Vijapur Police Station at the time of the incident and registered the first information report being Vijapur Police Station I-C.R. No.46 of 2002 at 11:30 a.m. on 2<sup>nd</sup> March, 2002. This witness has deposed that during the relevant period, Shri K. R. Vaghela was the P.I. of Vijapur Police Station and Shri Rathod and Shri Parmar and Shri Gohil were discharging duties as P.S.I. Shri Jadeja was the Dy. S.P. under whose jurisdiction, Vijapur police fell and the District Superintendent of Police was Shri Gehlot. On 28<sup>th</sup> February, 2002, he was on duty from 20:00 hours till 08:00 hours on 1<sup>st</sup> March, 2002. During that time, he had registered I-C.R. No.43/2002 and II-C.R. No.37/2002. On 1<sup>st</sup> March, 2002, he was on duty from 14:00 hours to 20:00 hours as P.S.O. and during that period, he had carried out all the

procedure of noting down the telephone calls or other information which was received. At 15:15 hours, a first information being I – C.R. No.44/2002 was registered and the charge was handed over at 20:00 hours. Thereafter, on 2<sup>nd</sup> March, 2002, while he was on duty as PSO from 08:00 to 14:00 hours, in the meanwhile at 11:30 hours, a first information report in connection with the present incident was received by him with a yadi, whereupon, he registered it as I-C.R. No.46/2002 for the offence punishable under section 302 of the Indian Penal Code etc. at 11:30 hours and forwarded it for further investigation to the P.I. The witness has produced the original station diary before the court and has shown that on page No.6 the entry of I-C.R. No.46/2002 has been made at 11:30 vide entry No.6.

86.1 In the cross-examination of this witness, it has come out that he has received the complaint of Ibrahimbhai Shaikh together with the yadi at 11:30 on 2<sup>nd</sup> March, 2002. He does not remember who brought it. The complainant had not come with the complaint. He has stated that the complaint was received from Mehsana Civil Hospital. He has admitted that prior to the first information report being registered, the police already knew about the incident. In the cross-examination of this witness, it has further come out that on 2<sup>nd</sup> March, 2002, vide entry No.2, he has recorded that from a phone call received from Subhashbhai Dave, it was learnt that Babubhai Ambalal Panchal of Sardarpura has sustained injuries and he had been taken to the hospital. He has deposed that on 28<sup>th</sup> February, 2002, there was police bandobust at Sardarpura. He has further stated that he is aware of the fact that gallas were burnt in the bazaar of Sardarpura village on 28<sup>th</sup> February,

2002. The witness had been recalled for further examination vide order passed below Exhibit-702. Pursuant thereto, the witness has deposed that after postmortem of the twenty-eight persons who had died had been conducted, their clothes were seized at the Mehsana Civil Hospital and were sealed in twenty eight different packets and were produced before him and that he had called two panchas on 2<sup>nd</sup> March, 2002 at 20:30 hours and had opened the clothes and once again carried out a detailed panchnama and seized the same. The witness has deposed with regard to the details of the clothes of the deceased which were seized.

86.2 The learned advocate for the appellants-accused pointed out that the witness has described the clothes of the deceased and in each case, it is recorded that there is black soot, reddish stains and smell of inflammable substance. It was submitted that there is contemporaneous record that one Babubhai Ambalal Panchal of Sardarpura had got injured at night at Sardarpura.

86.3 **ANALYSIS:** This witness was the Police Station Officer of Vijapur Police Station at the relevant time and he has registered the first information report in connection with the offence in question being Vijapur Police Station I-C.R. No.46 of 2002. Since the defence has raised a dispute about the exact time when the first information report was recorded by placing reliance upon the cross-examination of the first informant wherein he has stated that the first information report was recorded at 12:00 in the afternoon, the testimony of this witness is significant for the purpose of proving that the first information report was recorded at the time stated by the first

informant in his examination-in-chief and was registered on 2<sup>nd</sup> March, 2002 at 11:30 a.m.

87. **PW-98 Prajapati Revabhai Shankarbhai** has been examined at Exhibit 729. This witness has deposed that he knows Patel Becharbhai Odhavbhai who lives next to his house. He has further stated that on the date of the incident, he had not met Becharbhai Odhavbhai and he had not told him anything. He, however, has deposed that he had gone with him to Akumiya's house to take the keys of the bore and Akumiya's son had given him the keys of the water works. He has also deposed that on the date of the incident, there was a peace meeting and that the meeting had taken place at the chowk of Pathan Mohalla. This witness has not fully supported the prosecution case and has been declared hostile and cross-examined by the prosecution.

88. The other set of witnesses are police witnesses.

89. **PW-90 Galbabhai Khemabhai Parmar** has been examined at Exhibit-695. This witness has deposed that he was discharging duties as PSI at Vijapur Police Station at the relevant time and Shri K. R. Vaghela was the P.I. The witness has deposed that on 28<sup>th</sup> February, 2002, he was on bandobust duty at Gandhinagar Vidhan Sabha. In the meanwhile, on 27<sup>th</sup> February, 2002, a train had been set on fire at Godhra in the context of which, there was a call of Gujarat Bandh on 28<sup>th</sup> February, 2002 and hence, they were relieved from bandobust at Gandhinagar. After being relieved from Gandhinagar, they had met P.I. Shri Vaghela, Vijapur Police Station, at 12:30 hours and he assigned him patrolling duty at Vijapur and

therefore, he had patrolled at Vijapur and had maintained bandobust. In the meanwhile, at 19:00 hours, he was instructed to go to Ladol with the requisitioned mobile and staff and hence, he reached Ladol. Since there was peace in the village, he returned to Vijapur and continued bandobust at Vijapur. In the meanwhile, they received a message on the wireless of the requisitioned mobile that cabins had been burnt in front of the Panchayat of Sardarpura and hence, he should go there. Therefore, he along with the mobile van and police staff went to Sardarpura village and found that the cabins were burning in front of the Panchayat, and there were no mobs of people. They took steps to extinguish the burning cabins and sent a message to Vijapur to send fire fighters and remained present to extinguish the fire and also took steps for registering a complaint, however, no one came forward to give a complaint. After some time, there was no mob around and there was peace in the village and hence, they returned to Vijapur. On 1<sup>st</sup> March, 2002, at 8 o'clock, P.I. Vijapur had assigned him patrolling at Vijapur town, Anandpura Chowkdi, railway station, etc. and hence, they were patrolling to ensure that no untoward incident occurs. During the course of patrolling, the P.I. told him that mobs were gathering at Sardarpura and that he should go there, and since the atmosphere in the Vijapur is tense, if there is peace there (at Sardarpura), he should return to Vijapur. The witness has further deposed that he, together with the other staff and mobile van went to Sardarpura village and patrolled, but there were no mobs. From there, they went to Sundarpur and met Kureshi Hussainbhai, who told him that he wanted to go to Sardarpura and Bhalak and, therefore, as per his wishes, about fifty men and women were taken by them in their vehicle and

other private jeep and were dropped at Pathanvas in Sardarpura. Thereafter, with a view to maintain peace in the village, he called a peace meeting of the leaders of the village, wherein, Kanubhai Sarpanch, D.K. Patel and two – three other persons remained present and there was a discussion as regards maintaining peace in the village. Thereafter, he set out for patrolling at Sardarpura village. While patrolling, when they reached in front of the Panchayat, in front of the Panchayat as well as on the road, there was a lot of movement of people and therefore, he felt that it was possible that the atmosphere may become tense, due to which, he called the Vijapur Police Station on the wireless set for sending more bandobust and continued patrolling. He also called for further bandobust on telephone. While they were patrolling, PSI Shri M. L. Rathod, together with the second mobile van and staff came for the purpose of bandobust. Both the mobile vehicles together with the staff patrolled at Sardarpura village. While they were on patrol, a mob of about one thousand persons who were armed with weapons and were shouting, came from the side of Sundarpur, at that time, they were in front of the Panchayat of Sardarpura village and from the northern side, that is, from the direction of Sardarpura village, a mob of approximately five hundred people came and tried to burn the gallas. Therefore, in a loud voice, he instructed the mob to disperse, despite which, the mob became uncontrollable, and hence, they resorted to lathi charge; however, the mob did not disperse and hence, a police constable who was with him, burst a tear gas shell. Despite this, the mob became uncontrollable and therefore, upon orders of his Senior PSI Shri Rathod, the accompanying Police Constable Krushnakant fired four rounds in the air with a 303 rifle and the second Police Constable

Popatji fired two rounds in the air with his rifle. In the meanwhile, the mob dispersed. Meanwhile, PSI Shri Gohil came from Ladol side and they also started dispersing the mob. He patrolled on the road and went away towards Ladol and they both, with the mobile van, were patrolling in the village. Thereafter, there was no mob in the village and there was peace. In the meanwhile, PI Shri Vaghela gave a vardhi on the wireless set that the atmosphere in Vijapur was extremely volatile and two Muslim persons have been burnt alive at Ladol and their dead bodies have been brought to Vijapur for performing the last rites and therefore, the situation is extremely volatile and hence, if there is peace, they should immediately return to Vijapur. Whereupon, he had gone to Vijapur with the van and met Shri Vaghela, PI, who had told him to carry out strong patrolling at Vijapur town and therefore, he had patrolled at various points at Vijapur. While patrolling, at 00:00 hours at night, PI Shri Vaghela informed that mobs had again gathered at Sardarpura and that he should go there with the mobile van, whereupon, he immediately left for Sardarpura with the police staff and mobile. While going to Sardarpura, on the way, near Ladol, tyres were placed on the road and were set on fire, big stones and logs of wood had been placed and thereby the road was blocked, and hence, he and his staff attempted to extinguish the fire and remove the obstacles. In the meanwhile, Shri Rathod, PSI, came from Vijapur along with his staff with the second vehicle and they also helped in removing the obstacles. After removing the obstacles, both the mobile vans, proceeded further. Further, down on the road going towards Sardarpura, near Sardarpura, big cement pipes, stones, logs, etc. were kept on the road and the road was absolutely blocked. Those

obstacles were also removed by the staff of both the mobile vans and they went further. Upon reaching Sardarpura, near the PWD office, similar obstacles were kept, which were also removed and they proceeded further. Upon going further, there were tractor trolleys, carts, carriages, stones and logs by way of blockades, up to the Panchayat office, and the staff of both the mobile vans removed such obstacles and proceeded further. Further on, there were no mobs towards Pathan mohalla and there was peace. They went further near Shaikhvas, and saw that the members of the mob were running away in the opposite direction and at the corner of Shaikhvas, they saw two-three gallas and houses were burning. Therefore, they went there and shouted that they had come for helping and started rescue operations. In the meanwhile, two injured Muslim persons had come and they had told them that further ahead, there is the house of Mahemoodbhai, wherein women and children have been burnt, and hence, he and Shri Rathod, along with the policemen, had gone there and tried to open the door and had opened it, from where approximately ten persons who had sustained burn injuries were taken out. While they were carrying out these activities, their other officers, higher officers and staff had also come after some time, and their staff had taken out the people from the neighbouring houses, and the injured persons were immediately sent for treatment in private and government vehicles to Mehsana and twenty-eight persons who had died in Mahemoodbhai's house had also been taken out, and were sent in a private vehicle to Mehsana hospital.

89.1 The witness has further deposed that under the instructions of the higher officer, they had remained present

there for bandobust and on the next day also, they were assigned bandobust duty. There were other Muslims in the village who, as per their wishes, were sent to different villages, viz., Savala, Bhalak and Vijapur, etc., in government vehicles. Thereafter, on the next day, about twenty to twenty-five Muslim persons from the village had met him and informed him that they wanted to go to Shankhpur village, and hence, he dropped them at Shankhpur village in the Vijapur second mobile. On 4<sup>th</sup> March, 2002, till 20:00 hours, he remained at Sardarpura village and carried out patrolling. The Vijapur police recorded his statement on 9<sup>th</sup> March, 2002 and SIT recorded his statement on 16<sup>th</sup> June, 2008 at Gandhinagar. He has further deposed that on 1<sup>st</sup> March, 2002, while he was patrolling, lights were on. The lights were on from the Panchayat building till Shaikhvas and during the second time when they went at 01:45 hours, the lights were shut off.

89.2 In the cross-examination of this witness, it has come out that on 28<sup>th</sup> February, 2002, upon seeing the cabins burning in front of the Panchayat, he had carried out inquiries in that regard, as to who had burnt the cabins and when they were burnt, but he had received no information. Despite calling upon the people to give a complaint in this regard, no one had come forward and given a complaint. He has denied the suggestion that he had given a message to the police station on 28<sup>th</sup> February, 2002 that there was peace in the village and no untoward incident had taken place. He has further stated that on 28<sup>th</sup> February, 2002 at around 12 o'clock, he had sent a message to the police station with regard to the cabins having been burnt and that he had seen the cabins burning at around 11:30 hours at night. The witness has admitted that in his

statement before the SIT, he has stated that on 28<sup>th</sup> February, 2002, the cabins which had been burnt at Sardarpura, had been burnt prior to his having reached there and that in this connection, no one had come to lodge a complaint and that he had not refused to take complaint of any cabin owner or lariwala (hawker). In his cross-examination, it has further come out that at the time when he took the Muslims from Sundarpur to Sardarpura, there was peace in Sardarpura. He has stated that he has not maintained any list of the persons whom he had brought from Sundarpur and that he had taken the Muslims to the house of Munsafkhan in Pathan Mohalla. He had called Kanu Sarpanch and other Hindu leaders on telephone and that all those persons whom he had called, had remained present in the meeting. It has further come out that at 22:00 hours at night, he was at Sardarpura village and at that time, he was carrying out patrolling with the requisite mobile staff. He has also admitted that till 22:00 hours, when he was at the village, no incident had taken place. He has admitted that at 22:00 hours when they were in front of the primary school, at that time, a mob of around one thousand persons armed with weapons had come from the direction of Sundarpur. The mob was incited and was shouting. In his cross-examination, it has further come out that upon coming, the mob first burnt the house of Fakirs. In a loud voice, he had instructed the mob to disperse, however, the mob had not dispersed. He had gone for lathi charge up to the house of the Fakirs. The mob retreated, but again came back. After the mob had fled, they had carried out patrolling till 23:00 hours. While they were patrolling in the village, till 23:00 hours, no untoward incident had taken place. The witness has admitted that at 23:35 hours, he had sent a message to the Vijapur control that there was

peace in the village. He has also stated that when they went from Sardarpura village to Vijapur, there were no obstacles in the way.

89.3 In his cross-examination, it has further come out that two persons who had come out of Shaikh Mohalla had not been rescued by them, but they had come out on their own. They both had sustained burn injuries and were also sent along with the others for treatment. The witness has stated that he had not recorded the statements of the said two persons as at that time, both those persons did not give any statement in his presence. He has further stated that he had not asked their names or addresses, nor had he inquired about the incident from them. Those two persons had only shown the house of Mahemoodmiya, wherein the women and children had been burnt and except this, they did not say anything. The witness has further stated that he got involved in rescue work and that they had neither recorded the names of those persons who had come out alive from Mahemoodmiya's house, nor had he made any inquiries from them. It has further come out from the cross-examination of this witness that in his presence, no police officer had made any inquiry and no police officer had recorded their names. He has admitted that rescue operations inside Shaikh Mohalla were carried out in the light of the police vehicles and that at that time, it was very dark and there were no lights anywhere. He has admitted that when they reached near Shaikh Mohalla, members of the mob ran in the opposite direction in the darkness and that they had seen them go far away in the dark. When they reached there, the street lights in front and rear side of Shaikhvas were switched off. He has admitted that when they reached Sardarpura village at 01:45,

street lights were shut off. He has admitted that in his statement dated 9<sup>th</sup> March, 2002 before the police, he has not stated that on 1<sup>st</sup> March, 2002, while he was patrolling, lights were on from the Panchayat building till Shaikhvas. In his cross-examination, he has further stated that the reason for not taking information or complaint from the two persons is that at that time, he was busy with the rescue operations. The reason for not recording their names was that at that time, they were involved in rescuing people. He has further stated that the reason for not recording their complaint after they were sent to the hospital was because he did not find the two persons and that since he was busy with bandobust, he did not take any steps to trace them out. He has also stated that he had not given any description of those two persons to the P.I. and that he and the persons with him were on bandobust till 20:00 hours on the 4<sup>th</sup>. He had taken steps to trace out the accused till the fourth, however, no one could be found. He has further stated that he has not questioned anybody in connection with the incident. He has not made any inquiry of any person from Sundarpur whom he had brought to Pathan Mohalla at Sardarpura and that he had not made any inquiry with regard to lights.

89.4 The learned counsel for the appellants-accused submitted that in the deposition of this witness, it has come out that the second time when they came to Sardarpura, there were many obstacles right from Ladol and the road was blocked. It was submitted that these facts are important for the reason that the mobs from outside have put up these hindrances so that the police do not come to Sardarpura. It was submitted that though two injured persons had shown

them Mahemoodmiya's house, their identity has not been established. It was contended that the police came to know from them for the first time that a cognizable offence had been committed and that if the police had recorded their statements, true facts would have come out. It was submitted that while the witness has deposed with regard to the presence of light in his examination-in-chief, it has come out in his cross-examination that he had not stated so in his police statement. It was pointed out that it is evident that there were no lights at Sardarpura, inasmuch as, rescue operations were carried out in the light of the vehicles as deposed by the witnesses.

**89.5 ANALYSIS:** From the testimony of this witness, it emerges that an incident of burning of cabins took place in front of the Panchayat Office at Sardarpura on the night of 28<sup>th</sup> February, 2002 and that no one came forward to lodge a complaint in connection therewith. This witness had transported Muslims from Sundarpur to Sardarpura in the evening of 1<sup>st</sup> March, 2002 and had also held a peace meeting of the leaders of the village. While patrolling in Sardarpura he found that the situation in front of the Panchayat Office was tense and hence he called for reinforcements from Vijapur. Accordingly, Shri M.L. Rathod arrived with the second mobile van and staff. That mobs came from the direction of Sundarpur and Sardarpura and became uncontrollable due to which they had to resort to bursting tear gas shells, lathi charge and firing in the air. From his cross-examination, it is revealed that the mob burnt the house of Fakirs and that they had carried out patrolling till 23:00 hours and that till then, there was no untoward incident and that when he sent a message to Vijapur

Control at 23:35 hours, there was peace in the village, whereafter, they returned to Vijapur. In his testimony, it has come out that while they were going to Sardarpura there were obstacles on the road which they had to remove for the purpose of reaching the scene of incident and that at the time when they had left for Vijapur from Sardarpura, the road was clear and there were no obstacles. Though this witness has stated that there were lights at the time when they went for patrolling in the evening, he had not stated so in his previous statement recorded by the police on 9<sup>th</sup> March, 2002. Therefore, the story with regard to existence of lights is a subsequent improvement. From his testimony, it further emerges that he had not taken any steps to record the statements of the two persons who had shown them the scene of incident nor could he establish their identities.

90. **PW-91 Mahendrasinh Lalsinh Rathod** has been examined at Exhibit-699. This witness has deposed that he was discharging duties as a PSI at Vijapur Police Station from 06.12.2001 to 26.06.2002. The witness has, *inter alia*, deposed that on 01.03.2002, he was carrying out patrolling at Vijapur town together with the staff members from 06:00 to 10:00 hours. Thereafter, he received a vardhi from Vijapur Control to go to Ladol village for the purpose of patrolling and hence, he set off to go to Ladol and carried out patrolling at Ladol village along with PSI B. D. Gohil. Since there was peace in the village, he returned to Vijapur at 12:00 hours. Thereafter, he once again received a vardhi to go to Ladol and hence, he went to Ladol village at 14:00 hours and remained present there for the purpose of bandobust in connection with the communal incident which had taken place. He has further deposed that

postmortem of two deceased Muslims was carried out and at 18:30 hours, they came to Vijapur together with the corpses and handed over the dead bodies to the Muslims and since the burial ceremony was to be performed at the kabrastan, they remained present there for bandobust. Thereafter, at 20:00 hours, PI Shri Vaghela gave a vardhi to go to Sardarpura and meet Shri G. K. Parmar, PSI, and hence, he set off along with his staff and reached Sardarpura at 20:30 hours. PSI Shri Parmar met him at the bus stand and both of them carried out patrolling at Sardarpura village and returned near the primary school at the bus stand and were standing on the road and in the meanwhile, a mob of about one thousand people came from the direction of Sundarpur and from the northern side, a mob of about five hundred people came from the direction of Sardarpura village. At that time, the street lights were on. The mob was shouting to burn the properties of Muslim persons and to chase the police and hence, they were cautioned to disperse, however, they did not disperse and hence, he told gasman Khodidas to burst a shell. However, the mob became uncontrollable and PSI Shri Parmar and the staff members resorted to lathi-charge, but the mob did not disperse and started burning the cabins on the northern side and was pelting stones. Hence, he directed Police Constable Krushnakant Kantilal and Popatji Jivanji to fire rounds in the air whereupon, P.C. Popatji Jivanji fired two rounds in the air on the mob towards northern side and Krushnakant Kantilal fired four rounds in the air towards the mob coming from the direction of Sundarpur. Upon such firing in the air, the mobs started running helter skelter, and at that time, as the PSI, Shri B. D. Gohil also arrived with a requisitioned mobile, the persons in the mob fled, and they (the witness and others)

removed the obstacles from the road. PSI Shri Gohil returned and they set off for patrolling in Sardarpura village. In the meanwhile, PI Shri K. R. Vaghela informed him on wireless set that the dead bodies of two persons of Ladol village have been brought to Vijapur town for funeral rites and the mob had gathered there and the situation had become tense and hence, if there was peace there, they should immediately reach Vijapur, and since there were no mobs at Sardarpura and it appeared to be peaceful, they set off for Vijapur. He first went to Vijapur Police Station and lodged a complaint with regard to the cabins being burnt at Sardarpura and the incident with regard to firing. In the meanwhile, upon PI Shri Vaghela coming back from patrolling, he had informed him about this fact. He (the P.I.) informed him (the witness) to lodge a complaint on behalf of the Government and along with such order, he gave a complaint to PSO Shri Devjibhai to register the offence. Thereafter, while they were in the town, PI Vaghela informed him that he had sent PSI Shri G. K. Parmar at Sardarpura village and he also should go to Sardarpura and inform him about the situation prevailing there. Therefore, on 02.03.2002 at 00:10 hours, he set off from Vijapur and came to Ladol village. Upon reaching Ladol, PSI Shri G. K. Parmar and his staff were removing the burning tyres, stones, etc. lying on the road and hence, they helped them. At two – three other such places also, obstacles had been put and they removed them and upon reaching there, they found that there were more, which they removed and while going from Sundarpur to Sardarpura, on the way, carts, carriages, tractor trolleys and guarders of the water supply department, etc. were placed on the road, the road was blocked and they removed them. At the Sardarpura village three roads also, there were obstacles which they had

removed and upon reaching the Panchayat office, trees, etc. were placed and the road was blocked and they removed such obstacles and went towards the bazaar, at that time, the cabins and shops were vandalized and the street lights were shut off. Upon proceeding further at the corner of Shaikhvas, he saw the members of the mob running in the opposite direction in the light. At the corner of Shaikhvas, the cabins were burning, houses were also burning and hence, they had immediately gone inside Shaikhvas and shouted that it was police and there was no reason to be afraid and they should come out. Upon their shouting, two injured persons came to them and informed that, in the house of Maheboobbhai, women, men and children are there, which house has also been set on fire and hence, they immediately reached near that house. Inside the house, people were screaming and therefore, they opened the handle of the door and took out the injured persons. In the meanwhile, PSI Shri Gohil came there and about ten persons were taken out. In the meanwhile, S.P. Shri Gehlot, Dy.S.P. Shri B. V. Jadeja and P.I. Shri Vaghela also came there. Upon the fire fighter coming from Mehsana, steps were taken to take out the injured persons and for extinguishing the fire. The witness has further deposed that the injured persons were taken out and they were taken to Civil Hospital, Mehsana. The witness has further deposed that thereafter, he was engaged in investigating the offence being I.C.R. No.45/2002 and that in connection with this incident, PI, Vijapur has recorded his statement on 09.03.2002 and Shri Barot, Investigating Officer, SIT has recorded his statement on 17.06.2008.

90.1 In his cross-examination, this witness has stated that when he reached the primary school and was standing there, at 22:00 hours, he saw the mob from a distance of about five hundred feet. The mob which he saw had set the gallas and cabins on fire. The witness has admitted that in his statement dated 09.03.2002, he has not stated that when the mob came, the street lights were on. The witness has further admitted that when he received a vardhi from PI Shri Vaghela and in that context, set off at 00:10 hours and reached Sardarpura at 01:45 hours, at that time, the street lights were off and it was dark in the village. The witness has further deposed that when he initially went to Sardarpura on 1st at 20:30 hours, at that time, there were no obstacles on the Vijapur – Sardarpura road. The witness has further admitted that while carrying out patrolling after the firing incident, when he had gone to Vijapur, at that time, there were no obstacles on the road. The witness has deposed that the distance between Sundarpur and Sardarpura is about one and a half to two kilometres; the distance between Ladol and Sardarpura is nine to ten kilometres; and the distance between Vijapur and Sardarpura is about eighteen to twenty kilometres. It has further come out in the cross examination of this witness that when he reached Shaikh Mohalla, it was dark and that he has not recorded the names of the two Muslims who had met him at Shaikh Mohalla. He has denied the suggestion that those persons had not given him any information with regard to the incident. He has stated that he had not taken down their complaint. The reason for not recording their complaint is that both the persons had told him that many women, men and children are inside Mahemoodbhai's house and that they were burnt and hence, he felt that it was necessary to first carry out rescue operations

and had not recorded their complaint. He has stated that he had taken the injured persons to Mehsana Hospital. He has stated that the two injured Muslim persons whom he had met at Shaikh Mohalla had come to the Mehsana Civil Hospital. He has stated that he had not recorded their complaint at Mehsana Civil Hospital, since the In-charge PI, Vijapur was to come. The In-charge PI, Vijapur had come to the Mehsana Civil Hospital; he (the witness), however, had not informed him that these two persons had given him information about the incident. An omission has been brought out to the effect that in his statement dated 09.03.2002 and 17.06.2008, he had not stated that on going further, they reached near Shaikhvas, and from the lights of the vehicles he had seen the members of the mob running in the opposite direction. He has admitted that in his statement dated 09.03.2002, he has stated that on reaching near Shaikhvas, he had seen members of the mob running in the darkness in the opposite direction.

90.2 This witness was recalled for examination and his examination-in-chief was recorded once again, whereupon he had stated with regard to recording of statements of witnesses PW-44 Munir Mohamed Noormohamad Memon, PW-78 Basirabibi, wife of Bachumiya Nathumiya Shaikh and PW-67 Imtiyaz Hussein Mohammadbhai Shaikh. In the cross-examination of this witness, it has come out that PW-78 Basirabibi Bachumiya Shaikh in her statement dated 17<sup>th</sup> April, 2002 had not stated that Jayantibhai Ambarambhai had taken away the account books of the bore from her husband on the 28<sup>th</sup>. A contradiction which was brought out in Basirabibi Bachumiya's statement with regard to Bhajiya incident, has

also been proved to the effect that she had not stated so in her police statement.

90.3 From the cross-examination of the Investigating Officer, it is revealed that in his statement dated 9<sup>th</sup> March, 2002, he had not stated that as they went further and Shaikhvas coming close, they saw in the light of the vehicles, members of the mob fleeing in the opposite direction.

90.4 The learned counsel for the appellants-accused has submitted that the statements of PW-78 Basirabibi and PW-67 Imtiyaz have been recorded after forty-six days on 17<sup>th</sup> April, 2002 and that even after forty-six days, the sequence stated before the police does not find place and that the story narrated before the court was never narrated before any authority. Referring to the testimony of the witness, it was pointed out that the witness has stated that a mob of one thousand persons was coming from Sundarpur side which supports the say of the defence that the mob was not comprised of Patels of Sardarpura, but was comprised of persons from the surrounding villages. It was submitted that this witness has tried to support the case of the prosecution with regard to the existence of light, particularly street lights, though he has not stated so in his statement recorded by the police. It was submitted that as regards the impediments which have come in their way on the road, is also stated by this officer that there were obstacles at various villages until they entered Sardarpura. It was submitted that despite the fact that those two injured persons had come to him on their own and informed him about the incident which is a cognizable offence, and the fact that the said persons were taken to

Mehsana Civil Hospital, which fact is confirmed by the witness, no care was taken to record their statement or for taking the complaint. Attention was invited to the contents of paragraph 6 of the deposition of the witness to point out that he has stated that there was darkness in the village; that when the police force reached the spot, the officers had seen the mob running away in the darkness; and that ten persons were taken out alive from the house in question. It was submitted that material contradiction in the statements of two witnesses, viz. Basirabibi and Imtiyaz whose statements were recorded on 17.4.2002 have been brought on record have been proved through this witness.

91. **PW-92 Jivagiri Vihagiri Goswami** has been examined at Exhibit-701. He has deposed that at the relevant time, he was discharging duties as an Armed ASI at Vijapur Police Station. This witness was patrolling along with PSI Shri G. K. Parmar in the requisitioned mobile van together with P.C. Razakbhai and Daniyalbhai and two home-guards. The deposition of this witness is in line with what has been deposed by P.W. 90 Shri G. K. Parmar. He has also deposed that while Shri Rathod and Shri Parmar were standing in front of the Panchayat, at that time, it was dark, and a mob of around one thousand persons armed with sticks and dharias, was coming, on the road from the side of Sundarpur, shouting, "run", "chase the police" and uttering such words, the mob had become uncontrollable. Therefore, Shri Rathod, in a loud voice, told them to run away, else they would have to use force and carry out lathi-charge, whereupon, Shri Parmar and others became alert and started lathi-charge on the mob. However, since both the mobs had become uncontrollable, Shri Rathod

told P.C. Krushnakantbhai of his own mobile, to fire rounds in the air with his 303 rifle, whereupon, Krushnakantbhai had fired four rounds in the air towards Sundarpur side and P.C. Popatji Jivaji had fired two rounds in the air with his 303 rifle towards Sardarpura on the northern side, as a result of which, both the mobs fled. In the meanwhile, Shri Gohil came from the direction of Ladol with his mobile van and the members of the public fled and Shri Gohil returned with his mobile van to Vijapur. Shri Rathod and Shri Parmar together with the staff carried out two rounds of patrolling around Sardarpura and did not see any member of public. Thereafter, they parked their both mobile vans in front of the primary school. The witness has further deposed that at that time, as the atmosphere in Vijapur town was tense, Shri Vaghela had given vardhi to Shri Rathod, that if there is peaceful atmosphere at Sardarpura, then, they should come to Vijapur with their mobile vans, and accordingly, while patrolling, they had gone to Vijapur. The witness has admitted that when they reached Shaikhvas at about 01:45, at that time, there was darkness and the street lights were shut off. The witness has also stated that while they were patrolling between 17:00 to 23:35 hours at Sardarpura village, he had not seen any halogen lights at Shaikhvas. He has admitted that at 17:30 hours, when they came from Vijapur to Sardarpura, there were no obstacles on the road.

92. **PW-99 Krishnakumar Kantilal** has been examined at Exhibit-734. His examination-in-chief is also in line with the depositions of the other police officers. This witness, in his examination-in-chief, has, *inter alia*, deposed that when they came to Sardarpura village for the first time and were

patrolling, at that time, tube lights of the streets were on. In the cross-examination of this witness, he has admitted that in his statement dated 09.03.2002, he has not stated that the street lights were on. He has admitted that when they reached Shaikhvas, he had not seen halogen lights.

92.1 From the cross-examination of the Investigating Officer it is revealed that in his statement dated 9<sup>th</sup> March, 2002, this witness had not stated that on the first time when they came to Sardarpura village and went on patrol, at that time, the tube lights, bulbs of the street-lights were on..... the persons ran in the light of the vehicle towards Mahadev.

93. **PW-100 Razakbhai Allarakhabhai** has been examined at Exhibit-736. At the relevant time, he was discharging duties as a writer with Shri G. K. Parmar, Vijapur Police Station. In his examination-in-chief, he has, *inter alia*, stated that on the 1st of March, 2002 at about 17:00 hours, under instructions of PI Shri Vaghela, they had gone to Sardarpura village with Shri Parmar in the requisitioned mobile van. The witness has deposed with regard to the Muslims being shifted from Sundarpur to Pathan Mohalla, Sardarpura. The witness has further deposed that thereafter, PSI Shri Parmar with a view to ensure that peace is maintained in the village and no untoward incident happens, had called Hindu leaders, Sarpanch Kanubhai Patel, Ex-Sarpanch Dashrathbhai Patel and the leaders of the Muslim community to the house of Munsafkhan. The witness has thereafter referred to the incident of two mobs coming to the panchayat office and firing of rounds in both the directions and dispersing of the crowds. He has stated that after dispersing the crowd they had patrolled and that together

with Shri Rathod and Shri Parmar and the staff had carried out patrolling with both the mobile vans. The witness has, *inter alia*, stated that while patrolling and going towards Shaikh Mohalla, three cabins were burning and no persons were there, and at that time, street lights were on. Thereafter, since the atmosphere at Vijapur was tense and there was peace in Sardarpura, they had returned to Vijapur and carried out patrolling. Thereafter, at 0:00 hours Shri Vaghela had told them to immediately reach Sardarpura and hence, he went with Shri Parmar in the second requisitioned mobile van, and while going from Vijapur to Sardarpura obstacles like road pillars, wooden logs, and burning tyres had been placed on Ladol road and they had themselves removed the obstacles and were going towards Sardarpura village and in the meanwhile Shri M.L. Rathod and his men had come and had helped them in removing the obstacles. As they went along removing the obstacles, a cart, supports, water supply pipes, trunks of papaya trees were placed on the road opposite the gram panchayat primary school and obstacles were created and removing the obstacles they went with screaming sirens toward Shaikh Mohalla and at that time the street lights were shut off and at a faraway distance they could see the members of the mob running away and at that time as the houses in Sardarpura were burning they shouted "come out, we are the police" whereupon two Muslim persons had come out and informed them that persons were burnt inside Maheboobbhai's house and hence they had started the work of extinguishing the burning houses and Shri Parmar and Shri Rathod had opened Maheboobbhai's house and taken out ten persons who had sustained burn injuries on their bodies, persons lying in injured condition and ten to twelve persons

who had sustained burn injuries were also taken out from the neighbouring houses. The witness has further stated that thereafter, upon the fire fighters coming, they had carried out work of extinguishing the houses in Shaikh Mohalla which were burning.

93.1 In the cross-examination of this witness, an omission has been brought out to the effect that in his statement dated 09.03.2002, he had not stated that while carrying out patrolling, he had seen three cabins burning at the corner of the Shaikh Mohalla and there were no persons there and the street lights were on. In his cross-examination, it has further come out that it had not happened that the members of the mob had attacked the police and caused any injuries. The witness has admitted that when they carried out firing in the air and resorted to lathi-charge, no one was injured and the members in the mob had fled.

93.2 From the testimony of the Investigating Officer (Police), it is brought on record that in his statement dated 9th March, 2002, the witness has not stated that while patrolling and going towards Shaikh Mohalla, three cabins were burnt and at that time, there were no persons there but the street-lights were on.

94. **PW-101 Khodidas Govindbhai** has been examined at Exhibit-737. This witness has also deposed in the line of other police witnesses with regard to patrolling being carried. The witness has deposed that at 01:45 hours, they reached near the gate of Shaikh Mohalla, Sardarpura and saw the mob. The mob was shouting and had set houses on fire. The members of

the mob upon seeing two mobile vans, ran in the direction of Mahadev. Thereafter, they put on the lights of the mobile van and upon reaching Shaikh Mohalla, shouted that they were police personnel and that whoever there is alive, they should come out, whereupon two persons came out and informed that their women, children and men are inside Mahemoodbhai's house and that they are burnt. In his cross-examination, the witness has admitted that in both his statements, he has not stated that he had seen the mob running towards Mahadev.

95. **PW-102, Laljibhai Arjanbhai Desai** has been examined at Exhibit-739. At the relevant time, he was discharging duties as a writer with PSI Shri Rathod, at Vijapur Police Station. This witness has also deposed in the line of the other police witnesses. The witness has deposed that on the first time when they went for patrolling, the street lights in the village were on and second time when they had gone, the street lights in the village were shut off. In his cross-examination, he has denied that in his statement dated 9<sup>th</sup> March, 2002, he had not stated that the first time when they came to the village, street lights were on. He has also denied that in his statement dated 9<sup>th</sup> March, 2002, he had stated that upon reaching Shaikhvas, they had seen the mob running in the opposite direction in the dark. He has admitted that the second time when they came to Shaikhvas, it was dark in Shaikh Mohalla. There was no halogen light. He has denied the suggestion that whatever activities they had carried out were in the light of the head lights of the vehicles. He has stated that since the houses were burning, there was light. The witness has admitted that in his statement dated 9<sup>th</sup> July, 2008, he has not stated the fact regarding ten persons being taken

out alive from Mahemoodmiya's house. He has also admitted that none of the police were injured during the entire incident.

95.1 From the testimony of the Investigating Officer (Police), it has been brought on record that in his statement dated 9<sup>th</sup> March, 2002, this witness has not stated that on the first time when they came to the village, the street-lights were on. The Investigating Officer has further admitted that in his statement dated 9<sup>th</sup> March, 2002, this witness has stated that when they reached Shaikhvas, the members of the mob were running in the opposite direction towards the darkness.

96. **PW-103 Ganpatbhai Narsinhbhai** has been examined at Exhibit-740. He was discharging duties as Head Constable at Vijapur Police Station from 1998 to 2003. In the year 2002, Shei K.R. Vaghela was their P.I. and Shri, Rathod, Shri Parmar and Shri Gohil were discharging duties as P.S.I. At Vijapur, he was initially working as the Head Constable, Town Investigation Beat and thereafter as In-charge of the Second Mobile Van. He too has deposed in line with the testimonies of the other police witnesses. This witness has deposed that they were patrolling at 22:00 hours and they reached near the primary school at Sardarpura, whereupon, a mob of about one thousand five hundred people came from the direction of Sundarpur and another mob of five hundred people came from the direction of Sardarpura and were vandalizing the cabins near the bus stand and their (the witness's) higher authority told them to disperse, but they did not disperse. The witness has thereafter stated with regard to bursting of tear gas shells and resorting to firing. The witness has also deposed that on the

earlier occasion when they were patrolling, and had resorted to firing rounds in the air, the street lights were on.

96.1 In his cross-examination, the witness has denied the suggestion that in his statement dated 16.06.2002, he has not stated that at the first time when they were patrolling, street lights were on. The witness has admitted that in his statement dated 16.03.2002, he has stated that when they reached Shaikhvas, upon seeing the police vehicles, the members of the mob ran away in the dark. The witness has admitted that he has not seen the halogen lights.

96.2 In the cross-examination of the Investigating Officer (Police), it is brought on record that in his statement dated 16<sup>th</sup> March, 2002, this witness has not stated that the first time they went for patrolling, at that time the street-lights were on.

97. **PW-104 Bachubha Vesalji Jadeja** has been examined at Exhibit-744. The witness has deposed that at the relevant time when the incident took place, he was working as Deputy Superintendent of Police, Vijapur Police Station. The witness has, *inter alia*, deposed that on 02.03.2002, at around 2 O'clock at night, the D.S.P. informed the Visnagar control to immediately send the Dy.S.P. to Sardarpura, whereupon, he, together with his commando, writer, gasman, gunman and other staff set out from Visnagar and reached Sardarpura. At that time, at night when they reached near Shaikhvas, street lights were shut off. When they reached Shaikhvas, PSI Shri Rathod, PSI Shri Parmar, Inspector Shri Vaghela and the DSP were present at the scene of incident. At that time, the houses of Shaikhvas were burning and flames were emanating from

the houses. At the corner of Shaikhwada, cabins had been burnt, and a scooter and jeep had also been burnt. At that time, the lights of the vehicles were on and they also had batteries with the help of which, they had gone inside. The witness has further stated that when they reached there, the owner of the jeep as well as two other persons had also come to them and had told them that Mahemoodbhai's house which was the last room, there were many people who were alive and were asking for help and at that time, PSI Shri Rathod, Shri Parmar and PI Shri Vaghela reached there and took about ten persons alive from the said house and ten to fifteen persons were taken out alive from the other houses. The witness has, *inter alia*, also stated that at that time, the fire brigade also arrived and they as well as the persons accompanying them, together, extinguished the fire in the houses at Shaikh Mohalla. The witness has further stated that the men, women and children who were residing at Shaikh Mohalla had requested that as their lives were in danger and they should be shifted to a safer place, and hence, they had called for a bigger vehicle, wherein, many men, women and children who wanted to go, were taken to different places under police protection. They (the police) had remained present there till late at night. On 01.03.2002, the Collector, Visnagar and Deputy Collector had held meeting and hence, he had gone there. Thereafter, he had carried out investigation at Unjha and had returned to Vijapur at night. On 03.03.2002, 04.03.2002, 05.03.2002, 06.03.2002 and up to 23.03.2002, he had carried out supervision in connection with this offence. On 03.03.2002, statements of victims, viz., Sharifabibi wife of Bachumiya, Bachumiya Imammiya, Shabbirhussein Imammiya and his wife and both daughters, were verified. On 04.03.2002, he along

with the P.I. had carried out search of the accused and on that day, about twenty-five accused had been rounded up and on 05.03.2002, remand of the accused was obtained. Since the victims had gone to Ilol, he instructed the P.I. to go there and record their statements. On 06.03.2002, the statements of the victims were recorded at Savala village, which he had verified. The statements of Mahemoodmiya and his daughter, Sharifkhan Bhikhumiya and his wife Aminabibi, and Nazirhussein Kadarmiya, Rasulmiya, Kadarmiya, etc. were recorded by the P.I. and he had verified such statements. In the meanwhile, Shri K. R. Vaghela, P.I. being on sick leave, he had arrested forty-six accused. Thereafter, P.I. Shri Baranda took over the charge and arrested eight accused persons and he had been instructed to complete the investigation within the prescribed time limit. His statement was recorded by Dy. S.P., SIT, Shri Barot on 09.07.2008.

97.1 In the cross-examination of this witness, it has come out that riots had erupted in most of the districts in Gujarat and such riots were between Hindus and Muslims. In his cross-examination, the witness has stated that whichever witness's statements he had verified, he had read over such statements to him. The witness has stated that he had also recorded the statements of persons residing at Patelvas. The witness has further stated that the fire brigade had extinguished the fire with the fire engines. In his cross-examination, it has further come out that under his instructions, the investigating officer Shri K. R. Vaghela had recorded about thirty to thirty-five statements of persons residing in the areas surrounding Shaikhvas. The statements of approximately eight to ten persons residing in Ravalvas, one Parmar, one Vaghela, who

were residing near Sardarpur bus stand, seven to eight persons residing at Patelvas, two to three Prajapatis, two Harijans and one Chauhan of Sardarpura Chamarvas, had also been recorded.

#### **98. ANALYSIS OF THE TESTIMONIES OF THE ABOVE**

**POLICE WITNESSES:** From the testimonies of the above witnesses it appears that by and large they have stated about of the incident of two mobs coming towards the panchayat office and the police resorting to lathi-charge and firing rounds in the air to disperse the crowd, though there are some discrepancies as regards the timing and the manner in which the incident took place. Most of the witnesses have also deposed about existence of street lights earlier during the day and absence of street lights when they came after the incident. However, none of the witnesses have stated about the street lights being on in their statements recorded by the Investigating Officer (Police) at the relevant time when the incident took place and have subsequently stated so before the Investigating Officer (SIT). Considering the fact that all the witnesses are police personnel, it is difficult to believe that all of them would have failed to mention such an important fact when their statements were recorded by the Investigating Officer at the initial stage. It is therefore, apparent that the version regarding street lights being on when they visited Sardarpura prior to the incident is a material improvement in the testimonies of all the police witnesses.

**99. PW-105 Anupamsinh Jaysinh Gehlot** has been examined at Exhibit-750. He has deposed that in the year 2002, he was discharging duties as Superintendent of Police at

Mehsana. The witness has, *inter alia*, deposed that on 28.02.2002, Vishwa Hindu Parishad had given a call of Gujarat Bandh and on that day, the dead bodies of two kar sevaks had been brought to Kadi for the last rites, due to which, tension had spread in the district. In the meanwhile, messages started coming at around 10:30 from all the police station areas and villages with regard to communal incidents and that on this day, many incidents of communal violence had occurred and many persons had died wherein, Visnagar, Unja were included. He immediately reached those places in the entire district from where the messages of communal riots were received and upon reaching there, took effective steps for the purpose of controlling the communal incidents and was on duty continuously for twenty-four hours. The witness has deposed that when he was at Savala village, he received a phone call informing him that Patels of Kansa village had purchased the entire stock of petrol from the petrol pump and that they would set ablaze Savala village at night and hence, he immediately left Unjha and reached Visnagar and then, came to Savala, and there, he alerted the police officials and informed them to carry out necessary investigation in that regard. In the meanwhile, he learnt that the mobs had again gathered at Sardarpura and since there was an apprehension that they would violently attack the Muslims, he gave instructions to the P.I., Vijapur to immediately send officers and resort to effective firing for the purpose of dispersing the mob, if required. After sometime, he had again inquired as to where the vehicles had reached Sardarpura, whereupon the Vijapur Police Station replied on the wireless set that two P.I. had set off and that, on the road ahead of Ladol, there were many obstacles and hence, they were making attempts to remove such obstacles

and proceed further. Therefore, looking to the seriousness of the situation, he too, set off for Sardarpura. He told the P.I., Vijapur that as many officers as are available should immediately reach Sardarpura. When they reached Ladol, they saw that many trees had been cut and burnt on the road. Sewage pipes were placed on the road. The road was also blocked with the help of tractor-trolleys. Such obstacles were kept on the road all the way from Ladol to Sundarpur. They made their way between the obstacles and reached Sardarpura, and upon entering the village, they stopped their vehicle at the corner of Pathanvas and inquired about the place of incident and one person informed them that at the end of the village, he should go towards Shaikhvas where the mob has attacked. From there, they went running with the police staff to the corner of Shaikhvas and it was dark on all four sides. Thereafter, the vehicles also came there and PSI Shri Parmar and Shri Rathod, Vijapur and other staff, had also reached there and they started looking for the victims. They had immediately put on the lights of the vehicles after parking them at the corner of the Shaikhvas, and with the aid of head lights and batteries, they carried out rescue operations of taking the people out from inside the houses which were burning. The PSI and other persons went further into Shaikhvas to a room next to the kabristan, wherein, women, men and children had taken shelter to save their lives, which room had been set on fire and they had taken steps to take them out. Thereafter, Dy.S.P. Shri Jadeja and P.I., Vijapur Shri Vaghela, had also arrived and taken the people out from the room wherein many people were burnt and many people had sustained injuries on account of suffocation and many people were unconscious. All the injured persons were immediately

shifted in the vehicle by instructing PSI Shri Rathod and they were brought to Mehsana Civil Hospital for treatment. Out of them, some of the persons were unconscious and others had died. With a view to see that all of them get immediate treatment and maximum persons can be saved, PI Vaghela was instructed to take them to the Civil Hospital, Mehsana and the Collector, Mehsana as well as City P.I., Mehsana were told to remain present at the hospital and to make necessary arrangements to provide proper treatment to them. Once again, they had tried to ensure that no person is left out. It was dark on all four sides of the village.

99.1 In the cross-examination of this witness, it has come out that it had come to his notice that obstacles had been put on the public road and that persons from the neighbouring villages were walking through the boundaries of the agricultural fields and roaming around causing damage to the lives and properties of Muslims. In his cross-examination, it has further come out that when they reached Shaikh Mohalla, from the houses situated on the outer side which were burning, two persons were taken out alive, and they had informed them that in the room near the kabrastan, many persons were there, and that they too were burnt by pouring kerosene. As it was night time and it was dark, with the help of lights of the police vehicles and batteries, they had rescued ten persons and twenty-eight women, men and children had died. He has admitted that they had searched inside the houses which had caught fire and about forty persons had hidden inside and that the doors of their houses were broken and they were taken out. The witness has stated that upon reaching Sardarpura village and saving the persons who were alive, and sending the

corpses for postmortem and seeing the houses burning, he had felt that a cognizable offence had been committed; however, he did not lodge any complaint about the cognizable offence. He had given instructions to the P.I. to lodge a complaint. He has stated that he has not recorded the complaint of the two persons who had informed him about the room having been set on fire. He had not instructed any of his police officers to register a complaint of either of the two persons. He has also not instructed any of his officers to record the statements of the two persons. The witness has voluntarily stated that both the persons had sustained burn injuries and it was found necessary to immediately send them for treatment. He has stated that he has not recorded the names of said two persons. The witness has further stated that he had felt that these two persons are important witnesses. The witness has voluntarily stated that at that time both those persons were in a burnt condition and other persons in a burnt condition and were coming out in a line and hence, there was no time to record their statements. The witness has stated that the names of the forty persons who were rescued after breaking down the doors have not been recorded and those persons have not been interrogated and that he had given instructions to PI, Vijapur. He has stated that he has not taken the two persons who had met them initially at the Shaikhvas, to the hospital, and has not recorded their statements. The witness has voluntarily stated that he did not remember their faces as they were in a burnt condition. The witness has admitted that the SIT had put questions to him with regard to the people getting shocks from electric wires at Shaikh Mohalla. He has admitted that at the time when they carrying out rescue operations in the light of the head lights of vehicles, they had seen electric wires lying

on the road of Shaikhvas, and many police personnel had experienced shock due to the electric wires, which had been moved to the side with the help of a stick. The witness has stated that he was not in a position to say as to whether the wires were wires which the people from that area had taken from each other's houses. He has admitted that in his statement dated 06.08.2008 recorded by SIT, he has stated that these wires were lying on the road in a scattered condition and different persons from the area had taken electricity connection for their own houses and upon the houses being burnt, he believes that the wires had fallen down.

100. **PW-109 Rohitkumar Dhuljibhai Baranda** has been examined at Exhibit-770. This witness has inter alia deposed that in February, 2002, he was transferred as C.P.I. Mehsana and was discharging duties there. The P.I. of the Vijapur Police Station, Shri K.R. Vaghela had gone on sick leave and hence on the basis of the wireless message from the Superintendent of Police, Mehsana he had taken additional charge at the Vijapur police station on 31.03.2002 and together with the same, he had taken over the investigation in this case. The witness has further deposed with regard to the investigation carried out by him and the statements of witnesses recorded by him. He has also deposed that upon the regular P.I. Shri K. P. Patel being appointed, he had taken charge of Vijapur police station on 22.06.2002 and hence, he had handed over the investigation of this case to him.

100.1 In the cross-examination of this witness, it has come out that, on 21.04.2002, he had recorded thirteen statements, including Thakor Laxmanji Bhikhaji, Patel Girdharbhai

Zaverbhai, Patel Girishbhai Mohanbhai, Patel Kachrabhai Rughnathbhai, Raval Manguben Maganbhai, Raval Kanabhai Dahyabhai, Raval Jagdishbhai Dahyabhai, Raval Babubhai Jethabhai, Raval Hargovanbhai Ganpatbhai, Raval Jagabhai Nathabhai, Patel Puriben Jayantibhai, Patel Ramabhai Mohanbhai and Patel Shantaben Ambaram. On 14.04.2002, he had recorded the statement of Patel Becharbhai Odhavdas, on 25.04.2002, he recorded statements of Prajapati Ganeshbhai Babubhai and Patel Bhikhiben Kanubhai, on 28.04.2002, he had recorded statements of Patel Divaben, wife of Ishwar Govind, Thakor Somiben, wife of Gagaji Danaji, Patel Manguben, wife of Kanti Puja, Patel Nathiben, wife of Govindbhai Balchandbhai, Raval Savitaben, wife of Babubhai Nathabhai, Patel Surekhaben, wife of Popat Mathurdas, Chauhan Girishkumar Mafatlal, Patel Vishnu Zaver, Nayi Dinesh Fakirchand and Patel Natvarbhai Kachrabhai. The witness has stated that on 03.04.2002, he had recorded the statements of Memon Hanifabibi wife of Valibhai Daubhai, Memon Fajalmahammad Hajibhai, Memon Yunus Sattarbhais, Memon Idrish Valibhai, Arif alias Babo Valibhai, Yakub Valibhai, Altaf Valibhai, Sharifmiya Babumiya, the complainant Ibrahim Rasulmiya and Hamidabibi Akbarmiya. Through the testimony of this witness, various omissions and contradictions in the statements of the witnesses have been proved, reference to which shall be made at an appropriate stage, if necessary.

101. **PW-110, Kakusinh Ranjitsinh Vaghela** has been examined at Exhibit-810. This witness has deposed that he was the P.I. In-charge of Vijapur Police Station at the relevant time. The witness has, *inter alia*, deposed that on 2<sup>nd</sup> March, 2002 at 02:30 hours, the District Superintendent of Police, Shri Gehlot

had sent him a message that the P.I., Vijapur should immediately reach Sardarpura. At that time, since fire fighters had come from Mehsana, he took them along and set off for Sardarpura. The road towards Sardarpura was blocked and they had removed the obstacles and reached Sardarpura. At that time, the District Superintendent of Police and the Dy. S.P. Shri Jadeja, etc. had already reached Sardarpura. Thereafter, they had gone to the corner of Shaikhvas where the gallas, etc. were burnt and there was a pucca house in Shaikhvas, wherein many persons were set on fire and at that time, those persons who had sustained injuries and were alive, were brought together from different houses and arrangements were made to immediately send them for treatment and accordingly, about twenty-five persons were sent to Mehsana Civil Hospital in the second mobile van with PSI Shri Rathod. Thereafter, it was felt that out of the corpses in the room, it could be that some of them might be suffering from asphyxia and might still be alive and it was necessary to save them, and hence P.S.I. Parmar was sent to fetch a 407 matador immediately and mattresses were placed below on the matador and all the corpses from Mahemoodmiya's house were placed in the matador. Thereafter, it was also necessary to shift all the Muslims of Sardarpura village to safe places and hence, steps were taken to send them to Savala, Bhalak, Vijapur, etc. through vehicles. After making sufficient bandobust at the site, he took the corpses and came to Mehsana Civil Hospital where they were taken down and arranged in the prison ward. Thereafter, he met Ibrahimhai Rasulbhai, who had received injures and upon asking him to be the complainant, he had given his complaint. In this complaint, he had named twenty-eight persons as accused and the complaint was taken down

as stated by him, which is in the handwriting of his writer Manharsinh. The witness has stated that the complaint was read over to the complainant and he had signed it in his presence and he had made an endorsement that it had been signed in his presence. The witness has also stated that he had recorded the complaint at 09:30 hours at Mehsana Civil Hospital and had forwarded it for registration to the P.S.O., Vijapur together with a yadi, Exhibit-688. The first information report had been registered at Vijapur Police Station by PSO Ambalal as Vijapur Police Station I – C.R. No.46/2002 for the offences punishable under sections 147, 148, 149, 302, 337, 324, 323, 325, 436 of the Indian Penal Code and section 135 of the Bombay Police Act at 11:30 hours and was returned to him for the purpose of investigation together with a yadi, Exhibit-689. Thereafter, he drew the inquest panchnama, Exhibit-223 of the dead bodies, which were identified by Shaikh Najirmahammad Akbarmiya in the presence of the panchas Shaikh Abdulbhai Dalubhai and Chauhan Aminaben, wife of Pirumiya. *Marnottar* (Posthumous) Forms were filled and the dead bodies were sent for postmortem. He, thereafter, received papers of the inquest panchnamas, *Marnottar* (Posthumous) forms, cause of death certificates, etc. from A.S.I., H. M. Sadhu and kept them with the investigation papers. Thereafter, he recorded statements of the witnesses who had come to the Civil Hospital, Mehsana for treatment and were present there, viz., Ashikhussein Bachumiya, Mahommadsattar Bachumiya, Faridabibi, wife of Ashikhussein, Firozabanu, daughter of Bachumiya, Farzanabanu, daughter of Bachumiya, as stated by them. Thereafter, since the injured persons who had come for treatment as well as other persons wanting to be shifted to safe places, they had dropped them at

Ilol and thereafter, he had returned to Vijapur and had drawn the panchnama of recovery of clothes of the deceased. The witness has stated that he had sent the clothes which were received from the Civil Hospital after the postmortem through H.C. Jivagiri to the PSO, at Vijapur. The witness has thereafter deposed that on 03.03.2002, he had come to Sardarpura from Vijapur and since the bandobust was continued he had checked the bandobust and had called the Panch Shaikh Inayat Hussain and another for the purpose of drawing the scene of offence panchnama and upon Shaikh Bachumiya Imammiya showing the scene of offence, the panchnama was drawn as dictated by the panchas. The witness has deposed that around four cans were found at the scene of offence, out of which one can contained about 100 milliliters of kerosene and the other cans had smell of kerosene was emanating from them and burnt as well as half burnt clothes and blood stains were found which were packed separately in the presence of the panchas and after affixing his signature slips were placed and the same were sealed by putting the lac seal of P.I. Vijapur. The panchnama is exhibited as Exhibit-424. The witness has further deposed that the panchnama, Exhibit-424 has been signed by both the panchas and he has made an endorsement that it is signed in his presence. He has deposed that the panchnama had commenced at 11:30 hours in the morning of 03.03.2002 and it was written in the handwriting of his writer Manharsinh. That the facts recorded in the panchnama had been read over to the panchas and after accepting all the facts, they had signed below it. The witness has further deposed that videography of the scene of offence was carried out for the purpose of which, a videographer was called from Vijapur. That the videography was carried out in his presence and that the

photographs were also taken. The photographer had submitted the original cassette, Exhibit-764 and photograph album, Exhibit-765 to him, and the same were kept at the police station. He has further deposed that he had recorded statements of persons residing near the scene of offence, viz., Lilaben, wife of Madhavlal, Gomtiben Babubhai, Induben, wife of Prakashkumar, Madhuben, wife of Ranchhodbhai, Ganeshbhai Gangaram, Manjulaben Ishwarbhai, Prahladbhai Varvabhai, residents of Sardarpura, Shaikhvas and Prajapativas, Sardarpura. The witness has further deposed as regards the arrest of the accused from time to time and drawing of their arrest panchnamas. The witness has further deposed that the residents of Sardarpura had taken shelters at their relatives' places and upon inquiring about them, about six witnesses were found, viz., Sharifabibi, wife of Bachumiya, Bachubhai Imammiya, Sabirhussein Imamsha, Sabirabanu wife of Sabirhussein, Saharabanu daughter of Sabirhussein, Sharifabanu daughter of Sabirhussein and he had recorded their statements. Subsequently, he had gone from Vijapur to Sardarpura and recorded statements of Jashiben wife of Gordhanbhai, Vasantiben wife of Dineshbhai, Kamuben wife of Mangalbhai, Kamuben wife of Baldevbhai, Bhikhiben wife of Jayantibhai, Chandrikaben wife of Prahladbhai, Daliben wife of Shankerbhai, Mangalbhai Ramabhai, Hiraben Amthabhai Shivabhai, Manjulaben Dahyabhai Ishwarbhai and Shantaben wife of Rughnathbhai.

101.1 The witness has further deposed that in this offence, the injured as well as the other witnesses were earlier shifted to a safe place at Ilol and hence, he came to Ilol and met the witnesses, but they said that at present, they do not

want to give their statements and hence, after making an entry in this regard, he returned to Vijapur and continued with the bandobust. The witness has further deposed that on 06.03.2002, he set out from Vijapur and searched for the absconding accused at Sardarpura, Sundarpur and Ladol and upon not finding them he had gone from Sardarpura to Savala village, where earlier the residents of Sardarpura had been sent, and recorded statements of Mahemoodmiya Hussainmiya, Samimbanu daughter of Mahemoodmiya, Rasulmiya Nathumiya, Badrunisha wife of Akbarmiya Nathumiya, Shaikh Sharifabanu Bhikhamiya, Aminabibi wife of Sharifkhan Bhikhamiya, Shaikh Kadarmiya Alumiya, Kulsumbibi wife of Kadarmiya, Shaikh Sabirmiya Kadarmiya, Jakirhussein Kadarmiya, Pathan Munsafkhan Yasinkhan and thereafter, he returned to Vijapur and continued with the bandobust. The witness has further deposed that he had collected postmortem reports of four of the deceased persons. Some of the accused had produced weapons which were seized under panchnama, Exhibit-822. The witness has further deposed that he had gone to Nazirabad camp to inquire about the witnesses. Upon inquiry, he was told that they had gone to Ahmedabad and after making an entry in this regard, he returned to Vijapur. After returning from Nazirabad camp, he had made an entry in the police station diary on 09.03.2002. Thereafter, he had collected injury certificates and postmortem reports. On 10.03.2002, he once again went to Nazirabad camp and upon inquiring about the witnesses, he had recorded statements of Bhikhamiya Kalumiya Shaikh, Sharifmiya Babumiya, Faridabanu, wife of Sharifmiya, Aiyubmiya Rasulmiya, Sahinbanu Aiyubmiya, Aminabanu Achchhamiya, Janhammad Ismail Memon, Mahammadarif Janhammad

Memon, Iqbalmiya Rasulmiya Shaikh, Mustufamiya Rasulmiya, Hibjulmiya Husseinmiya, Akbarmiya Rasulmiya, Akbarkha Nathumiya, Najirmahammad Akbarmiya, Gulamali Akbarmiya, Rafikmiya Mahammadhussein, Ruksanabanu Kesarmiya and Makbulmiya Kesarmiya. The witness has further stated that he had recorded statements of the staff attached to the second mobile, who had been sent to Sardarpur, viz., H.C. Ganpatbhai Narsinhbhai, P.C. Khodidas Govindbhai, P.C. Popatji Jivanji, H.C. Jivagiri Vihagiri, P.C. Ramanbhai Valjibhai. On 17.03.2002, he recorded the statement of the driver of Punjaji Bharthaji. On 18.03.2002, he recorded statements of the staff of the first mobile, viz., PSI B.D. Gohil, P.C. Rameshbhai Shivabhai, P.C. Anilkumar Devusinh, P.C. Rajendrakumar Jaydevlal, Home-Guard Muhammad Aslam, Home-Guard Faridbhai Dosbhai and Home-Guard Vihol Ramaji Maganji. He also recorded the statement of Patel Bipinkumar Mafatlal who had a galla at Ladol road and statements of seven others. He came from Ladol to Sundarpur and recorded the statements of Patel Jagabhai Dhulabhai and four others and also recorded statements of Soni Prafulbhai Natvarlal and Raval Prahladbhai Nathabhai at Sardarpura. On 19.03.2002, he went to Mehsana and recorded statements of fireman Shyamsinh Bholasinh Chauhan and five others. On 25.03.2002, he recorded statements of Shaikh Rafikmiya Bapumiya and Shaikh Jamalbhai Dosbhai. On 30.03.2002, he made a report to the Mamlatdar, Vijapur for drawing a map of scene of offence and sent all the muddamal to the Forensic Science Laboratory for analysis, for which he prepared a forwarding report. At that time, on account of his health having deteriorated, he had gone on sick-leave and P.I. Baranda was handed over the charge. On 22.03.2002, he had recorded the statement of

Jitubhai Chhaganbhai Talati. The witness has further deposed as regards having collected relevant documents from the Medical Officers.

101.2 In the cross-examination of this witness, he has stated that he commenced investigation on 02.03.2002 and continued the investigation till 30.03.2002. The witness has admitted that no complaint has been received on 28.02.2002 at Vijapur Police Station with regard to any incident having occurred on 28.02.2002 at Sardarpura village. He has stated that a first information report being I.C.R. No.45/2002 came to be lodged at 23:50 regarding the offence of rioting at Sardarpura on 01.03.2002. On 01.03.2002 in the evening at around 5 O'clock, he had sent PSI Parmar to Sardarpura. Prior thereto, Muslims had made a representation before him that the situation at Sardarpura was tense. Such representation was made to him at Vijapur town. In his cross examination it has come that that this witness had not sent information in this regard to the Vijapur Police Station and that he had not written down anywhere that he had received such information. That in manner similar to his sending PSI Parmar to Sardarpura, he had also sent PSI Rathod to Sardarpura. He had not made any entry in any document as regards why PSI Rathod was sent to Sardarpura. He had also not informed Vijapur Police Station as to why PSI Rathod was sent to Sardarpura. The witness has admitted that at 22:35 hours, he had received a message that there is peace in Sardarpura village. He has admitted that upon receiving the message at 22:35 hours, he had asked PSI Gohil to return to Vijapur Police Station. He has admitted that upon PSI Rathod returning to Sardarpura and informing him about the incident, he had instructed PSI Rathod to lodge a

complaint in that regard. The witness has stated that after PSI Parmar and PSI Rathod went to Sardarpura at 5 O'clock, he had not talked on the telephone as regards the situation prevailing there. The witness has stated that at 02:30 hours, he received a message from Shri Gehlot to immediately reach Sardarpura and that they were coming. He has stated that prior to Shri Gehlot sending him the message, he had received a message from Sardarpura village that the situation is tense and to send the police. Firstly, he had received a message at 12 O'clock at night. The witness thereafter states that he had not received the message at 12 O'clock at night, but a representation which was made by Muslims, but he does not remember their names. Two-three Muslims had come to him. He has not made any entry in any document or in his case diary in this regard. He has stated that the Muslims came and informed him that there was a tension, hence, he sent PSI Parmar and Rathod. He has stated that after PSI Parmar and Rathod reached Sardarpura and he received the message from Shri Gehlot at 02:30 hours, prior thereto, no other message was received. He has deposed that earlier an incident had taken place at Sardarpura and fire had been ignited. He had gone with the fire fighters to Sardarpura. Earlier, a fire had been stoked near the bus stand at 22:00 hours. Thereafter, at 22:00 hours, fire fighters were not sent but a message was sent. He has stated that he had gone with the fire fighters to Sardarpura after he received the message from Shri Gehlot, and he had made an entry in the case diary in that regard. Shri Gehlot had not asked him to reach Shaikhvas. The cars of Shri Parmar and Shri Rathod were in front and the lights were on, so he went there. He has admitted that when he reached Shaikhvas, he had seen the burnt gallas at the corner, he saw the houses burning and

received information that people had been burnt alive in the house, and saw the persons who had sustained burns, persons who were injured as well as the corpses. At that place, he had not asked Parmar and Rathod about the incident. After reaching the spot and learning about the incident and after seeing the incident, he had felt that a cognizable offence had been committed. He had not informed the Vijapur Police Station about the incident through his mobile van or wireless set. He had not asked PSI Parmar or Rathod to inform the Vijapur Police Station about the incident. He, Parmar, Rathod, Gehlot and other police authorities were present there. He did not ask them to lodge any complaint, nor did he himself lodge a complaint at Vijapur Police Station. He did not record any complaint on the spot. He did not immediately inform the Executive Magistrate or Sub Divisional Magistrate as per the provision of section 174 of the Cr.P.C. He had seen the injured persons at Shaikh Mohalla. He did not inquire from them and record a complaint. He has admitted that the persons who had not sustained any injuries at Shaikh Mohalla were also present, however, at that time, he did not make any inquiry from them. He has admitted that the first inquest was carried out by ASI Sadhu on 02.03.2002 in the morning from 07:00 to 07:30 hours. He has stated that after he received the panchnama, he had seen it. He has stated that Ashikhussein Bachumiya had identified the dead body of Ashiyanabanu. He has admitted that on 02.03.2002, in the morning, inquest of twenty-eight dead bodies was carried out from 10:00 to 14:00 hours. He has admitted that all the dead bodies were identified by Najirmahammad Akbarmiya. He has admitted that all the articles which were found from the dead bodies, except clothes, were given to Najirmahammad Akbarmiya. He has

stated that on 02.03.2002, he has not recorded the statement of Najirmahammad Akbarmiya. He has admitted that for the first time, he has recorded statement of Najirmahammad Akbarmiya on 10.03.2002. He has stated that ASI Sadhu has not submitted any statement of Ashikhussein Bachumiya before him. He has not inquired as to whether ASI Sadhu has recorded any statement of Ashikhussein Bachumiya. He has admitted that Ashikhussein Bachumiya's statement was recorded on 10.03.2002. He has, however, upon verification of the record, stated that on 10.03.2002, the statement of Ashikhussein Bachumiya was not recorded. He is shown the first information report, Exhibit-487 and has stated that the complaint was recorded at 09:30 at Mehsana. He has stated that he had sent Somaji Ranchhodji with a yadi and after getting the complaint registered at 12:30 hours, he had received back papers. He has stated that the time of the complaint as recorded is the time when the recording was complete. He has stated that he has not recorded the statement of Somaji Ranchhodji. He has admitted that the inquest panchnama, Exhibit-222 has been drawn in his presence and that he has made an endorsement in that regard and that the crime register number had been written in the inquest panchnama. He has stated that he had reached Mehsana Civil Hospital in the morning between 07:30 to 08:00 hours. He has admitted that he had seen injured persons at Shaikh Mohalla in the Mehsana Civil Hospital. He has stated that at Mehsana Civil Hospital, on 02.03.2002, he had recorded statements of only five persons and that he had not recorded the statements of other persons of Shaikh Mohalla who were present at the Mehsana Civil Hospital. He has stated that when he reached scene of offence, there were at least thirty to

thirty-five persons. When he reached the hospital, there were between twenty-five to thirty persons. He has admitted that he has not made any inquiry from the persons who were present at the scene of incident, nor has he recorded any complaint. The witness has voluntarily stated that considering the time and circumstances, at that time, it was more important to save the people who were alive and immediately send them to the hospital. He has admitted that at the scene of offence, he has not obtained any information from any person with regard to the incident. He has admitted that after the rescue operations were over, he has not made any inquiry from those persons who were not injured, but were present at the scene of offence about the incident. The witness has voluntarily stated that he did not have the time. The witness has admitted that when he went to Shaikh Mohalla, at that time, Shaikh Ibrahim Rasulbhai was present at the scene of offence, however, he did not know his name. He has admitted that after recording the complaint of the complainant Ibrahimbhai Rasulbhai, it was read over to him immediately. The witness has stated that in the document, Exhibit-487, in the last line of page-2, the words "Ruksana alias Zayda and my daughter Parveen and Raziabu have died", have been given by the complainant. During the course of investigation, he had not found that the fact stated in the complaint that the complainant's wife was Ruksana alias Zayda, is incorrect. The witness has voluntarily stated that subsequently, the name of Raziabu has been changed. He has admitted that in the complaint, the name of complainant's wife was shown as Ruksana and the name of his daughters were Parveen and Razia. Upon examining the record, he has stated that during the course of investigation, it was found that the complainant's wife's name was not Ruksana alias Zayda,

but his daughter's name was Ruksana alias Zayda. He has admitted that Ruksana alias Zayda is not dead, but she is alive. The witness has further stated that the names of the persons recorded at Serial No.7 and 28 of the complaint are not different persons, but one and the same person and during the course of his investigation, he has found that the names of two different persons have wrongly been stated. He has further stated that in his investigation, it is found that the names shown at Serial No.14 and 15 in the complaint, viz., Bakabhai and Kalabhai, have been wrongly stated. The witness has voluntarily stated that Bakabhai Mangalbhai's real name is Jayantibhai alias Bakabhai Mangalbhai as well as Kalabhai Nathabhai's real name is Patel Kanaiyalal alias Kalabhai Nathabhai. The witness has stated that no test identification parade was carried out in respect of Ramesh Gangaram, Rameshbhai Ramabhai, Bakabhai Mangalbhai and Kalabhai Nathabhai, whose names have been recorded in the first information report. The witness has admitted that when he reached Shaikhvas, at that time, it was dark. He has admitted that all the action taken by them was in the light of the vehicles as well as batteries. The witness has admitted that he did not see any halogen lights at the scene of incident, nor were they shown to him. He has admitted that he had investigated as to whether there were any lights at the scene offence at the time of the incident. During his investigation, it has come out that there were no lights at the scene of incident. The witness has thereafter stated that at the time of the incident, there were lights at the scene of offence. He had not seen the lights. He can verify the record and say so. He has stated that the fact regarding there being lights at Shaikh Mohalla has not been revealed in any of the statements. That

later on, from persons of Sardarpura village, he had come to know that there were lights at the time of the incident. However, he is not in a position to name any such person, nor has he recorded the statement of any such person, nor has he recorded the fact that there were lights at the scene of offence in his case diary. He is stating from memory that the lights were on at the scene of offence which he had learnt during the course of his investigation. The witness has stated this was a very significant fact and that there was no reason for not recording any statement with regard to such significant fact and that there was no reason for not writing down the same in his case diary. The witness has admitted that in the scene of offence panchnama, no measurement had been taken recording the distance of the house of Mahemoodbhai from the corner of Shaikhvas. He has deposed that when one enters inside Shaikhvas from the corner, there are rows of houses on both sides. He has admitted that he has not written down the distance between two opposite houses. He has also admitted that he has not shown in the panchnama as to whether from the corner of Shaikhvas, Mahemoodbhai's house is visible or as to whether, from Mahemoodbhai's house, the corner of Shaikhvas is visible. He has admitted that the height of the kabrastan wall is not shown in the panchnama. He has admitted that from the side of Shaikhvas as well as kabrastan, the wall has not been measured. He has admitted that the row of houses in Shaikhvas are situated in a zigzag manner and not in a straight line. He has admitted that the road which comes from Sundarpur goes to Kamalpur via Sardarpura. He has stated that he does not know as to whether the road from behind Mahemoodmiya's house goes towards Kamalpur village. The witness has stated that when the fire brigade

reached, they had carried out the activity of extinguishing the fire on the houses. The fire was extinguished with water. During the course of investigation, he had recorded statements of five personnel of fire brigade, viz., Shyamsinh Bholasinh Chauhan, Hiteshbhai Pravinchandra Bhatt, Modiya Kishorkumar Bhimjibhai, Pandya Jatiram Nagardas and Prandas Kiritkumar Premjibhai. He had recorded the said statements on 19.03.2002, but had not obtained any report of the action taken by the fire brigade. The witness has admitted that he is aware of the fact that it is very important that in such cases, a scene of offence panchnama is properly drawn. The witness has stated that he is not aware as to how a map is to be drawn and that what is to be included is stated in the Police Manual. He has admitted that he is aware that till the map of the scene of offence is drawn, it is required to be protected. There is no reason for not immediately preparing the map. He knows that scale map of the place is required to be drawn. He has admitted that in his investigation, he had learnt that on the date of the incident, many Muslims from Sundarpur had come to Sardarpura and had stayed at Pathanvas. He has admitted that prior to the incident, about fifty Muslim persons from Sundarpur had come to Sardarpura Pathanvas. He has not investigated as to whether the Muslims of Sundarpur who stayed in Pathanvas, had seen this incident. During the course of his investigation, he had gone to three Muslim relief camps for recording the statements, viz., Savala, Vijapur and Nazirabad, near Himmatnagar Mahetapura. He had gone to Savala on 06.03.2002, Nazirabad on 09.03.2002. He had recorded the statements of eleven persons at Savala. He has admitted that he went to Nazirabad, but he had not recorded the statement of a single person. He has denied that a Muslim

advocate was present there and he had refused to let the statements be recorded. He has stated the reason for not recording the statements was that the witnesses had gone to Ahmedabad and not a single witness was found. The persons residing at Nazirabad camp had informed him that the witnesses had gone to Ahmedabad. He has denied the suggestion that wrong information with regard to the witnesses had been given by a Muslim advocate. He has stated that he had not inquired the reason as to why the witnesses had gone to Ahmedabad. On 10.03.2002, he had recorded the statements of eighteen persons at Nazirabad. Upon Exhibit-826 being shown to him, the witness has stated that at Nazirabad camp, Advocate Salimbhai S. Memon was present. He has admitted that whatever information was given to him, was given by him. The witness has admitted that Babubhai Ambalal Panchal had not come forward to lodge any complaint. The witness has admitted that when the persons from Sundarpur had attacked Shaikh Mohalla, at that time, Babubhai Ambalal Panchal had received injuries. The witness has stated that he has not investigated as regards the distance between Shaikh Mohalla and Harijanvas and the agricultural fields. The witness has also not investigated as to whether from Harijanvas and the fields, the offence could be seen. He has stated that he had drawn the panchnama and that he had got the videography of the entire area done as per the panchnama. He had Shaikh Mohalla as well as the bazaar and places where the obstacles were placed video-graphed. There were obstacles on the Sundarpur road and videography was done. They had carried out videography as to where the damage was caused and lastly, they had come to Shaikhvas. In his cross-examination, the witness has further stated that he had not learnt that the

Patels of Sundarpur had threatened Muslims of Sundarpur to vacate the village. He has admitted that on 01.03.2002, after the Muslims of Sundarpur went away, their properties were set on fire. He, however, has denied that after the Muslims from Sundarpur came to Sardarpura, the Hindus of Sundarpur had attacked Sardarpura. He has stated that during the course of investigation into Vijapur Police Station I-C.R. No.46/2002, he had not found that in the context of I-C.R.No.45/2002, the mob had come from the side of Sundarpur and PSI Shri Rathod and Shri Parmar had ordered firing on it. He has admitted that in connection with I-C.R. No.46/2002, he has recorded the statements of PSI M. L. Rathod, H.C. Ganpatbhai Narsinhbhai, H.C. Laljibhai Arjanbhai, P.C. Popatji Jivanji, P.C. Krushnakant Kantilal, Gasman Khodidas Govindbhai, Driver Punjabi Bharthaji, Home-Guard Kanaiyalal Babulal Nayi and Home Guard Vasantlal Babulal. He has admitted that during the course of investigation, he had learnt that at the instance of PSI Rathod and Parmar, on 01.03.2002, Popatji Jivanji and P.C. Krushnakant Kantilal had resorted to firing at the mobs. During the course of investigation, he had come to know that the firing was made at the mob which had come from the direction of Sundarpur. He has admitted that he did receive a message that after the firing, the mob had dispersed and thereafter, from 10:30 to 11:35 hours, there was peace at Sardarpura. He has admitted that during the course of round up, he had arrested twenty-five persons on 04.03.2002. He has admitted that out of the twenty-five persons whom he had rounded up Karshanbhai Tribhovandas, Narayan Shitalmal Lakhvara, Amratbhai Somabhai Patel, Babubhai Lavjibhai Prajapati, Rajesh Amrutbhai Prajapati, Bhavesh Kanubhai Patel, Prahladbhai Somabhai Patel, Bharat Rameshbhai Prajapati,

Kachrabhai Tribhovandas Patel, Jayantibhai Baldevbhai Patel, Mangalbhai Mathurbhai Patel, Gordhanbhai Revabhai Prajapati, Rohit Ramanbhai Prajapati, Ravi Amratbhai Prajapati, Babubhai Kantibhai Patel, Dineshbhai Baldevbhai Patel, Vishnubhai Gopaldas Patel, Kanubhai Karshanbhai Patel, Dahyabhai Varvabhai Prajapati, Raghubhai Revabhai Patel and Mathurbhai Ramabhai Patel, were not named in the first information report. He has admitted that out of the aforesaid persons, the names of twenty-one persons were not mentioned in the first information report. He has admitted that in Exhibit-816, the age of Rohitkumar Ramanbhai was initially written as 17 years, which was corrected to 18 years. The witness has denied the suggestion that Ashikhussein Bachumiya, in his statement, had not named twenty-six persons and that as per his say, he had given names of twenty-five persons. He has admitted that in his case diary, the names of the twenty-five persons are not written and that the names of only three persons, viz., Patel Chaturbhai Kantibhai, Ambalal Chaturbhai and Rameshbhai Gangaram are written. The names of all these three persons are not found in the statement dated 02.03.2002 made by Ashiqhussein Bachumiya. He has denied the suggestion that on 04.03.2002, after those twenty-one persons had been rounded up, false evidence had been created against them. He has denied the suggestion that there was no evidence against twenty-one persons whom he had rounded up. He has denied the suggestion that the witnesses Faridabanu Ashiqhussein, Ashiqhussein Bachumiya, Firozabanu Bachumiya, Farzanabanu Bachumiya, Mahamadsattar Bachumiya, had changed their statements after 04.03.2002. He has denied the suggestion that since the changes were made in the statements dated 02.03.2002, all the names were not found in the case diary. He

has admitted that he has not ascertained the distance between Harijanvas, Ravalvas and the agricultural fields during the course of investigation. He has admitted that during the course of investigation, he has not seen Harijanvas, Ravalvas and the agricultural fields.

101.3 From the cross examination of this witness, the defence has brought out various contradictions in the testimonies of the witnesses whose statements he had recorded, reference to which has been made below the testimony of each individual witness.

102. **PW-111 Patel Kantibhai** has been examined at Exhibit-677. This witness has taken over the investigation from P.I. Baranda on 22<sup>nd</sup> June, 2002. This witness has deposed that after taking over the investigation, accused Ashwin Baldevbhai who was wanted in connection with the offence, presented himself at the Vijapur Police Station and he was arrested and a panchnama of his physical condition had been drawn in the presence of a panch. On 27.07.2002 he had filed a charge-sheet against all the accused involved in the offence and upon certificates being received from the FSL after testing, the same were sent to the court with the copies thereof. Thereafter, he was transferred and he had given up the charge at Vijapur.

103. **PW-112 Gautamkumar Vishnubhai Barot** - This witness has deposed that vide a notification dated 1<sup>st</sup> April, 2008, a Special Investigation Team had been constituted by the State Government under the Chairmanship of R.K. Raghavan, Retired Director, Central Bureau of Investigation wherein Smt. Geeta Johri has been appointed as the Convener

and Member. By an order dated 11<sup>th</sup> April, 2008 of the Convener, SIT, this witness had been appointed as the Investigating Officer. He had thereafter collected the case papers and the case diary from the concerned police station and carried out further investigation under section 173(8) of the Code. This witness has deposed that on 29<sup>th</sup> April, 2008, he had received an application dated 11<sup>th</sup> April, 2008 made by the first informant and other witnesses and summons came to be issued to them remain present before the SIT on 9<sup>th</sup> May, 2008. On 9<sup>th</sup> May, 2008, the previous statement made by the first informant and applicant Ibrahimmiya Rasulmiya was read over to him and his application dated 11<sup>th</sup> April, 2008 was also read over and his affidavit made before the Supreme Court which was in English was explained to him in Gujarati and read over to him. Thereafter, he was asked as to whether he wants to say anything more as regards the offence and his statement was recorded. As per the statement made in the affidavit, item-wise his statement was recorded. Thereafter, the statement of Akbarmiya Rasulmiya, who is also a witness, was read over as well as his previous statement and the contents of his application, and he was asked as to whether he wants to say anything further and his further statement was recorded. On 10<sup>th</sup> May, 2008, the statements made by Akbarmiya Nathumiya, Gulamali Akbarmiya, Bhikhumiya Kalumiya, Bachumiya Imammiya and Iqbalmiya and Sabirmiya as well as Shafikmiya and Rafikmiya Mohammadhussein were read over to them and their application dated 11<sup>th</sup> April, 2008 was read over and they stated further facts with regard to the incident, which were recorded by him. This witness has further deposed that upon examining the case papers, on 15<sup>th</sup> May, 2008 he had gone through the writ petitions filed before the Supreme

Court as well as the deficiencies pointed out by the Chairman and Member of SIT on his site visit on 26<sup>th</sup> April, 2008, he had informed the panchas to remain present at the scene of offence and the panchnama which was taken out at their instance was read over to them, and certain permanent marks/signs at the scene of offence which were not recorded in the earlier panchnama as well as the description of the boundaries of the scene of offence which had not been written at the relevant time, were recorded in their statements. The statements of panch Inayathussain and Ajitbhai Joshi were kept with the investigation papers. On 19<sup>th</sup> May, 2008, summonses were issued to the deponents of the affidavits presented before the Supreme Court to remain present at the office at Gandhinagar. The earlier statement recorded by the Investigating Officer as well as the affidavits made before the Supreme Court were read over to them and the further facts stated by them with regard to the offence were recorded. On 20<sup>th</sup> May, 2008, summons were issued to Sabirmiya Akumiya, Mangabhai Raval, Prahladbhai Raval and Gulamdastgiri Pathan who had made applications to the SIT and they were called and the contents of their applications were read over to them and their statements were recorded in connection with the facts relating to the offence in question. The witness has further deposed that on 22<sup>nd</sup> May, 2008, he had recorded further statements of the witnesses. On that day he had recorded statements of Rafikmiya Babumiya, Basirabibi Bachumiya, Sharifabibi Bachumiya, Farjanabanu, Firojabanu, Khatijabibi, Ruksanabanu, Faridabanu, Sharimiya Bhikhumiya, Aminabibi Sharifmiya, Mahemudmiya Hussainmiya, Amimabanu Mehmudmiya, Sikandarkhan Istiyaqhussain, Badrunisha, etc. On that day, he had also recorded further statements of

displaced persons at Himmatnagar namely, Yunusbhai Memon, Altaf Memon and Jan Muhammad Memon. Thereafter, he had recorded statements of Sabirhussain Fakir and Sabirabibi Fakir at Prantij. The witness has also referred to having arrested certain accused and obtaining their remand, etc. The witness has further deposed that as per the statements made by the witness, there were allegations of loot against the accused as well as kindling fires and hence, on 27<sup>th</sup> May, 2008, he had carried out search of the houses of eight of the accused; however, no objectionable articles were found. On 11<sup>th</sup> June, 2008, the witness recorded further statements of Zakirhussain Kadarmiya, Kulsumbibi Kadarmiya and Rasulmiya Nathumiya and also obtained certain clarifications with regard to the earlier statements which had been recorded by the Investigating Officer. On the same day, he had also recorded the further statement of Munsafkhan Pathan. Since as per the facts emerging from the investigation, on the date of the incident, a peace meeting had been held at Munsafkhan's house and as per the application made by witness Gulamali, the then Sarpanch and other leaders had illegally demanded tax, on 14<sup>th</sup> June, 2008, he had recorded statements of the Talati-cum-Mantri, the members of the lower communities who had attended the peace meeting at the Munsafkhan's house namely, residents of Pathanvas. He had also recorded the statement of the then Medical Officer in charge of the Community Health Centre. Subsequently, he had also recorded the further statement of Police Sub-Inspectors Shri Parmar and Shri Rathod at Gandhinagar and upon inquiry as to whether the street-lights were on when they went to Sardarpura for the purpose of bandobust, it was found that the street-lights were on. In this context, a letter was written to the Deputy Engineer,

UGVCL of the GEB to make an inquiry as to whether at the relevant time, the main electric supply in the village was on and it was found that there was no complaint of electric supply having been cut. The said letter has been exhibited at Exhibit-667. The witness has further deposed that on 24<sup>th</sup> June, 2008, he had gone to Mehsana Civil Hospital. The witness had stated that upon looking at the inquest panchnama and the post-mortem report, there seemed to be a slight discrepancy and hence, he had obtained the statements of the concerned Medical Officers who had carried out the post-mortem and placed the papers along with the investigation papers. Thereafter, on the same date he had recorded the further statement of Sharifabanu Fakir at Kadi. On 28<sup>th</sup> February, 2008, he had recorded the statement of displaced persons Memon Abdul Kadir and Muhammad Arif, etc. On the same day, he had also recorded the statement of Sairabanu Fakir at Vadali, district Sabarkantha. The witness has further stated that at the time of visiting the site, Shri Satwara, the then Circle Officer at the Mamlatdar office, had prepared a map of the scene of offence, however, upon reading the scene of offence panchnama, it appeared that the map was incomplete and hence, the Mamlatdar was instructed in writing to complete the incomplete map of the scene of offence. The witness has further stated that on 9<sup>th</sup> July, 2008, the statements of the police officers who were in charge of the bandobust at Sardarpura were recorded and the same were kept with the investigation papers. On 14<sup>th</sup> July, 2008, a witness to the offence Shri Munsafkhan Pathan, had produced a copy of the affidavit submitted before the Supreme Court and he had recorded an item-wise statement of the witness in connection with the affidavit. On 20<sup>th</sup> July, 2008, statements of the officers

of the Fire Brigade, ONGC, who had carried out the rescue operations at Sardarpura were recorded and they were kept with the investigation papers. On 25<sup>th</sup> July, 2008, the statements of the Home Guards who were engaged in the bandobust at Sardarpura came to be recorded. It was also found from the scene of offence panchnama as well as the statements of the witness, that a religious place named Kabrastan had been damaged, however, section 295 of the Penal Code had not been invoked and hence, he has written to the court to include the said section. On 4<sup>th</sup> August, 2008, Shri Satwara, the Circle Officer, completed the incomplete map of the scene of offence and produced it and a detailed statement was recorded and the statement and the map were kept with the investigation papers. On 5<sup>th</sup> August, 2008 during the course of investigation and from the statements of the witnesses as well as further statements, it became evident that utterances had been made so as to cause communal disharmony and since section 153A of the Penal Code had not been invoked, he made a report for including the said section. The witness has further deposed that on 22<sup>nd</sup> August, 2008, since the accused were in judicial custody and there was sufficient evidence against them, the draft charge-sheet was approved by the SIT Supervisory Officer and hence, a supplementary charge-sheet came to be submitted against the accused in the court of the learned Judicial Magistrate First Class, Vijapur. The witness has further deposed that since the offence under section 153A of the Penal Code was invoked, it was necessary to obtain the permission of the Government under section 196(1) Cr.P.C. Upon such permission being granted by the State Government, the same was kept along with the investigation papers. On 24<sup>th</sup> November, 2008, there was sufficient evidence against twelve

out of thirteen accused and the Supervisory Officer having approved of the draft charge-sheet, the same came to be submitted against twelve accused. On 2nd September, 2009, a supplementary charge-sheet came to be submitted in the Juvenile Court against accused Rohit Prajapati. In this offence, on 18<sup>th</sup> November, 2009, the Police Inspector had got the videography of the scene of offence done and the video cassette came to be produced by the Police Inspector, Vijapur, hence his statement was recorded on 18<sup>th</sup> November, 2009 and the video cassette was kept along with the case papers and statement of Shri Vipul Oza who had done the videography and taken the photographs was recorded and kept with the investigation papers. On 18<sup>th</sup> May, 2010, a supplementary charge-sheet came to be submitted against accused Arvind Kashiram. On 17<sup>th</sup> June, 2010, death certificates of the deceased named in paragraph 11 of the examination-in-chief of the witness were obtained. The witness has further stated that he has not received any application dated 11<sup>th</sup> April, 2005 and that those who have signed the application had signed it on 9<sup>th</sup> May, 2008, and their statements were recorded on 10<sup>th</sup> May, 2008 and their statements were read over to them and that on account of slip of pen, in their statement, instead of 11<sup>th</sup> April, 2008, the date 11<sup>th</sup> April, 2005 is stated. The witness has further deposed that he had also taken the further statement of the Deputy Superintendent of Police as well as the then DSP Shri Gehlot. The witness has further submitted that the witnesses during the course of their testimonies have produced the copies of the affidavits filed by them before the Supreme Court. The witness has further stated that as per the directions of the Supreme Court, inquiry/investigation including further investigation was required to be made and that by way

of further statements, about seventy statements had been recorded and fresh statements of about sixty witnesses had been recorded. In this offence, since it was not established as to how the complainant and the witnesses had identified the accused as stated in the earlier statements of the complainant and the witnesses, the same was established in their further statements. The witness has further stated that earlier while filing the charge-sheet, the offence under sections 295 and 153A of the Penal Code had not been included. That in this offence, as a part of the inquiry, they had obtained statements of police personnel and officers and upon verifying the record, a report had been made to initiate departmental inquiry against two Police Sub-Inspectors and one Police Inspector.

103.1 In the cross-examination of this witness, it has come out that the first informant Ibrahimbhai Rasulbhai Shaikh, in his statement dated 11<sup>th</sup> June, 2008 as well as affidavit dated 6<sup>th</sup> November, 2008, has not stated certain facts as deposed by him before the court, as regards the mob having set two to three cabins of Muslims and cabins of members of other communities in the presence of Shri Rathod and Shri Parmar and thereafter four to five Patels had come to the corner of their mohalla and Rajeshbhai Punjabhai had placed a petrol soaked rag below his cabin and had gone and thereafter he had gone near the cabin and had taken the petrol soaked rag and thrown it away. In the cross-examination of this witness it been brought out that in his statement dated 9<sup>th</sup> May, 2008 before the SIT that the complainant Ibrahimbhai Rasulbhai Shaikh had stated that he does not know Mukeshbhai Madhabhai Patel and does not know anything about any meeting held by him ... he does not know Naranbhai Lallubhai,

M.L.A. or that he had convened any meeting and that he does not want to say anything in this regard. From the cross-examination this witness it has been brought out that the first informant in his statement dated 9<sup>th</sup> May, 2008 had not named Rameshbhai Ramabhai, Dashrathbhai Ambalal, Babubhai Vanabhai, Joitabhai Ramabhai, Rameshbhai Kantibhai, Baldevbhai Ranchhodbhai, Sureshbhai Baldevbhai, Rameshbhai Pabhabhai, Chaturbhai Vitthalbhai, Madhabhai Vitthalbhai, Rameshbhai Kanjibhai, Prahladbhai Jagabhai, Ashwinbhai Jagabhai and Vishnubhai Prahladbhai. From the cross-examination of this witness it is further revealed that Ibrahimbhai in his statement dated 9<sup>th</sup> May, 2008 had stated the facts regarding the role of Naranbhai Lallubhai Patel, M.L.A. in paragraphs 13, 15 and 16 of his deposition. Contradictions in the examination-in-chief of several other witnesses have been brought out in the cross examination of this witness, which has been referred to below the testimony of each individual witness.

103.2 In his cross examination, this witness has admitted that when he started investigation and commenced recording statements, majority of the witnesses had changed the time of the incident. The witness has stated that he had carried out independent investigation as to why the time of the incident had been changed. In this case, after taking charge of investigation, in respect of the time of the incident, he had recorded the statement of Sabirmiya Akumiya whose statement had not been recorded earlier and he had in his application, referred to the time of the incident. When he took over the investigation, thereafter it was revealed in his investigation from the application of Sabirmiya Akumiya that

the incident had taken place at 09:30. After reading application of Sabirmiya Akumiya, during the course of investigation he felt that on the same day at night, a riotous mob had attacked Shaikh Mohalla at 10 O'clock and had burnt the houses, shops and vehicles and by using petrol, kerosene, chemicals and electric current, and had, on the spot, murdered twenty-eight women, men and children who had hidden inside the house of Mahemoodmiya to protect their lives. In the cross-examination of this witness, it has further been elicited that during the course of investigation, he found the affidavits of the witnesses. When SIT took the charge of investigation, nine affidavits handed over to SIT were found. These nine affidavits were made by Ibrahim Rasulmiya, Mustufamiya Rasulmiya, Hijbulmiya Hussainmiya, Najirmohammad Akbarmiya, Ashiqhussein Bachumiya, Mohammadsattar Bachumiya, Sharifkhan Bhikhamiya and Aiyubmiya Rasulmiya, which he had found in the investigation papers. Over and above this, he had also found the affidavit of Jamal Dosubhai Shaikh, who has expired. The witness has further stated that he had received these affidavits from the SIT office which were with the petition of the complainant before the Supreme Court. The witness has stated that he has not investigated as to who had accepted the affidavits made before the SC on behalf of the SIT. The witness has admitted that all these affidavits are of 06.11.2003. He has admitted that he has not inquired as to who in the SIT, accepted these affidavits dated 06.11.2003. He has admitted that the above affidavits are not certified copies of the affidavits submitted before the Supreme Court. He has not inquired as to whether these affidavits have been filed before the Supreme Court. He has not tried to obtain certified copies of the affidavits from the Supreme Court. He has not asked the

witnesses to bring the certified copies if the affidavits are filed before the Supreme Court. He has not examined the stamp vendor in connection with the affidavits, nor has he found out from where the stamps were purchased. He has admitted that all the affidavits bear the signature of Mr. Y.A. Shaikh as a Notary and Mr. Tirmizi as an advocate. He has not recorded the statements of Y. A. Shaikh and Mr. Tirmizi. He had not met advocate Mr. Tirmizi and Notary Mr. Y. A. Shaikh. He has admitted that the names of Raeskhan Azizkhan Pathan and Teesta Setalvad find a mention in these affidavits; however, their statements have not been recorded. He has stated that he had not met both of them. In his cross examination it has been elicited that during the course of investigation, he had found who Teesta Setalvad was. The witness has stated that Teesta Setalvad runs an organisation by the name of Citizens for Justice and Peace, but he had not gone to their office. He has stated that they had made an application to the SIT which was not in connection with the investigation. He has stated that he does not know as to whether Teesta Setalvad had submitted any affidavit regarding the incident to the SIT. He has admitted that in all the affidavits, the number of the criminal miscellaneous application was blank. The witness has further stated that the averments made by Ibrahim Rasulmiya in paragraph-35 of his affidavit, Mustufamiya Rasulmiya in paragraph-8 of his affidavit, Hijbulmiya Hussainmiya in paragraph-10 of his affidavit, Najirmohammad Akbarmiya in paragraph-10 of his affidavit, Ashikhussein Bachumiya in paragraph-8 of his affidavit, Mohammadsattar Bachumiya in paragraph-8 of his affidavit, Sharifmiya Bhikumiya in paragraph-8 of his affidavit and Aiyubmiya Rasulmiya in paragraph-18 of his affidavit, are the same. Further

suggestions have been put to the witness with regard to the affidavits, as to where they were prepared and as to whether they were typed on the same typewriter, etc. The witness has admitted that during the course of his investigation, he had learnt that certain facts which were not stated by the witnesses are mentioned in the affidavits. He has further admitted that during the course of investigation, it appeared that the witnesses were not aware about certain facts stated in the affidavits. He had stated that he has not investigated as to whom the affidavits were handed over after the same were made by the witnesses. He has not investigated as to how the facts which were not stated or as to how false facts have crept into the affidavits. During the course of investigation, he had not learnt that the petition which was filed before the Supreme Court was through the Citizen for Justice and Peace.

103.3 In the cross-examination of this witness, it is further revealed that Teesta Setalvad had filed an affidavit in this case which he had read. The witness has admitted that she was not a witness in connection with this offence. From the investigation papers received by him, he had come to know that many witnesses in this case had contacted Teesta Setalvad. During the course of investigation, he had also come to know that a person by the name of Raeskhan Pathan was working for Teesta Setalvad. The witness has stated that Teesta Setalvad had not personally contacted him, not even on telephone. In his cross-examination, it has further come out that he had not gone to Shaikh Mohalla to ascertain as to from where the witnesses had witnessed the incident. It has also come out from his cross-examination that he had not investigated as to whether halogen lights were available at the

time of the incident. He had investigated as regards on which electric poles in the village the tube-lights were on; but had not got any map prepared about the location of the tube-lights. He had not got any assessment done as regards how the tube-lights were illegally connected and had also not drawn a panchnama in that regard. He had not obtained any opinion of an expert as to how an illegal connection can be switched on and off. The witness has denied the suggestion that the theory of halogen light and tube-lights is subsequently got up. He has admitted that during his investigation, it has been revealed that when the police reached at night after the incident, it was darkness and investigation was carried out in the light of the police vehicles. He had come to know that the lights of the police vehicles were switched on and together with the light of the battery, the corpses were taken out.

104. The next group of witnesses are the medical witnesses. A brief reference is made to the testimonies of the medical witnesses which bear some relevance in the matter.

105. **PW-1 Dr. Dhirajkumar Jivanlal Soni**, has been examined at Exhibit-158. This witness had examined several of the injured persons, viz., Rafik Manubhai Shaikh, Ibrahimmiya Rasulmiya Shaikh (PW-47), Rafikhussein Mahammadhussein Shaikh (PW-62), Firojmiya Makbulmiya Shaikh, Iqbalmiya Rasulmiya Shaikh (PW-49), Akbarmiya Rasulmiya Shaikh (PW-66), Basirabibi Bachumiya Shaikh (PW-78), Hijbulmiya Hussainmiya Shaikh (PW-52), Nazirhussein Akbarmiya Shaikh (PW-51), Mustufamiya Rasulmiya Shaikh (PW-57), Saidabibi Hijbulmiya Shaikh, Suhanabanu Sabbirmiya Shaikh, Gulamali Akbarmiya Shaikh (PW-68), Imtiyaz Mohammad Hussein Shaikh

(PW-67), Hamidabibi Akbarmiya Shaikh (PW-76), Sainabanu Aiyubmiya Shaikh, Faridabibi Asifhussein Shaikh (PW-73), Makbulmiya Kesarmiya Shaikh, Sainabanu Asikhussein Shaikh and Ruksanabibi Ibrahim Shaikh (PW-80). This witness had also carried out the postmortem of the dead bodies of Asiyanabanu Asifhussein Bachumiya Shaikh and Sakkarbanu, wife of Mahemoodmiya Hussainmiya Shaikh. This witness has narrated the history given by the patients when they were brought to the hospital, reference to which shall be made while analyzing the testimonies of the concerned witnesses. In his cross-examination, the witness has admitted that if there are thirty-five to forty persons in a room and if the patient is in the room, then there would be carbon particles and he would have difficulty in breathing. The witness has admitted that if there is smoke in the atmosphere, there would be carbon particles in the respiratory tract. The witness has further admitted that from the history given by the patients before him, he had thought that the incident of burning had taken place in a room. He has admitted that the injured were brought to him two and half hours after the incident and that he did not know that the incident of burning had taken place in a 16 x 11 feet room. He also did not know that there were over forty persons in the 16 x 11 feet room. The witness has admitted that if a person is alive and a room is burning, then if he tries to breath, carbon particles would enter into a respiratory tract. He has also admitted that the dead bodies that he had examined, had sustained burns due to flame injuries and not due to chemicals or short-circuit. The witness has further stated that if there is a 16 x 11 feet room and a person is present there and there are other persons in the room and if he burns and if the living person tries to breath, then carbon particles would certainly

enter the respiratory tract. When in a room of 16 x 11 feet, thirty-three persons are burnt to death, then those surviving persons would feel suffocated. Out of the injured persons who had come for treatment and who had sustained burn injuries, he had not made any attempt to ascertain as to whether there were any carbon particles in their bodies.

106. **PW-2 Dr. Pravinkumar Popatlal Soni** has been examined at Exhibit-211. This witness was discharging duties as a Medical Officer in the Mehsana Civil Hospital. He has deposed that on 02.03.2002 while he was discharging duties at the General Hospital, Mehsana, at 09:30 in the morning, Abedabnu Manubhai Shaikh, aged thirteen years, was examined by him without a police yadi. The patient was at the hospital with her relatives since the previous night; however, she had not taken any treatment. At 09:30, the relatives said that the patient had suffered convulsions over the entire body for five minutes and had vomited once. The relatives had stated that on the earlier day, in the evening, she was administered electric current. The witness has further deposed that if there is a fire in the room and a live electric wire falls on someone, such injury could be caused. The witness has also examined Aminabibi Abumiya Shaikh, Khatimabibi Dost Mohammad Shaikh, Bhikumiya Kalumiya Shaikh (PW-63) and has carried out the postmortem of Parveenbanu daughter of Ibrahimbhai Rasulbhai Shaikh and Saminabanu wife of Mustumiya Rasulmiya Shaikh. The witness has stated in both these cases that if the deceased person is in a room and the room is set on fire with kerosene and petrol, then it is possible to sustain such injuries. This witness has stated that Dr. H. H. Patel had carried out the postmortem of Irfan Hussein

Mahemoodmiya Shaikh. Dr. Patel is presently at Australia. The witness had produced the postmortem report and the record in respect of Irfan Hussein Mahemoodmiya Shaikh.

106.1 In his cross-examination, the witness has denied that since the skin had turned black, and in the history he was informed about the electric burns, on that basis, he is saying that the patient had suffered electric burns. The witness states that the SIT had recorded his statement on 24.06.2008. The witness has further stated that the carbon particles can be emitted from any kind of smoke and due to suffocation a person could die.

107. **PW-3 Dr. Babubhai Nathubhai Chaudhary** has been examined at Exhibit-233. This witness had carried out postmortem of the dead bodies of Rukshanabanu Ibrahim Rasulmiya Shaikh and Sairabanu Abbasmiya Kesarmiya Shaikh. In his cross-examination, the witness has admitted that if a person dies due to suffocation, in such cases, carbon particles would certainly be found in the respiratory tract. The witness has stated that in this case, he has stated that asphyxia was due to suffocation on account of smoke. The witness has stated that if forty persons are in a 16 x 11 feet room and if there is a fire, then a person may die due to smoke or due to fire and the symptoms could be seen. This witness has clarified that the postmortem which he had carried out was not of Rukshanabanu, but of Zaydabanu and that Rukshanabanu was alive. He has pointed out that in his office copy, the name has been corrected to Zaydabanu and he has, accordingly, produced the corrected copy.

108. **PW-4 Dr. Ishwarsinh Ratansinh Solanki** has been examined at Exhibit-244. This witness has carried out the postmortem of the dead bodies of Yunushussein Sherumiya Shaikh and Arifhussein Manubhai Shaikh. This witness has inter alia deposed that the clothes of the deceased Yunushussein Sherumiya Shaikh were stained with soot and the face also was covered with soot. As per his opinion the cause of death was shock due to burns and asphyxia. From the cross-examination of the witness, it has come out that he has not got any blood sample of the deceased examined. The witness has further stated that apart from the carbon particles, there was smoke on the face, legs and clothes of the deceased and that in such circumstances, excess smoke enters inside. The witness has further admitted that there was no smell of petrol on both the dead bodies.

109. **PW-5 Dr. Prakashbhai Laxmandas Shah** has been examined at Exhibit-252. This witness has carried out the postmortem of the dead bodies of Sultanbhai Mahemoodmiya Shaikh and Javedmiya Mustumiya Shaikh.

110. **PW-6, Shaileshkumar Shivabhai Patel** has been examined at Exhibit-262. This witness had carried out the postmortem of Rashidabanu Jamalbhai Shaikh and Idrishbhai Akbarbhai Shaikh.

111. **PW-7 Dr. Anju Muljibhai Parmar** has been examined at Exhibit-271. This witness had carried out the postmortem of the dead bodies of Mahemudabibi, wife of Sherumiya Rasulmiya Shaikh and Vahidabanu, wife of Nazirbhai Akbarbhai Shaikh. In her cross-examination, it has come out that the

police have not asked for her opinion as to whether such injuries could be caused if thirty to forty persons are in a room and the kerosene and petrol is poured and it is set on fire. The witness has admitted that the smell of kerosene or petrol was not emanating from both the dead bodies.

112. **PW-8 Dr. Nilima Ajaybhai Talvelkar** has been examined at Exhibit-278. This witness has performed the postmortem of the dead body of Bismillabanu, wife of Bhikhumiya Kalumiya Shaikh. She has deposed that a smell of kerosene was emanating from her body and that her clothes were stained with soot. She has deposed that the cause of death was shock due to asphyxia. She has further deposed that if there are many persons in a room and the same is set on fire after pouring kerosene or petrol then the injuries shown in column 17 of the postmortem report could be caused and that such injuries are in the ordinary course of nature sufficient to cause death. In her cross-examination, the witness has stated that if there is fire on all four sides and there is kerosene on the body of a person, then the chances of survival are less. Upon a query being put to her, as to whether if there smell of kerosene is coming from a person's body and there is a fire on all four sides, he cannot escape without sustaining any burn injuries, the witness has replied that if there are too many people in the room and the fire is set on and the person is away from the direct flames, then he may not sustain burn injuries.

113. **PW-9 Dr. Kokilaben Maganbhai Solanki** has been examined at Exhibit-283. The witness has carried out the postmortem of the dead bodies of Burubibi Babumiya

Motamiya Shaikh and Faridabanu Mahebubbhai Husseinmiya Shaikh. From her cross-examination, it has come out that while examining both the dead bodies, there was no smell of either kerosene or petrol.

114. **PW-10 Dr. Sangitaben Kailaschandra Jain** has been examined at Exhibit-290. This witness had carried out the postmortem of the dead body of Ruksanabanu Abbasmiya Kesarmiya Shaikh.

115. **PW-11 Dr. Alkaben Dungarbhai Patel**, who has been examined at Exhibit-295, had performed postmortem of the dead bodies of Mumtazbanu wife of Maksubhussein Ketarmiya Shaikh and Mumtazbanu daughter of Sherumiya Rasulmiya Shaikh. From the cross-examination of this witness, it has been elicited that there was no smell of kerosene and petrol emanating from both the dead bodies and since she had not seen the same, it was not noted down. In her cross examination it has been further brought out that if there is a sudden fire, these kind of injuries can be sustained.

116. **PW-12 Dr. Prakash Pravinbhai Patva** has been examined at Exhibit-302. This witness had conducted the postmortem of the dead body of Johrabanu, wife of Manubhai Husseinhbai Shaikh.

117. **PW-13 Dr. Kantilal Babaldas Patel** who has been examined at Exhibit-308 had carried out the postmortem of the dead body of Husenabibi, wife of Hibzulmiya Husseinmiya Shaikh. He has deposed that the deceased had sustained 100% burns and has also stated that if there are many persons

inside a closed room and if kerosene and petrol are poured from outside and then set on fire, the nature of injuries sustained by the deceased, could be sustained. In his cross-examination, he has stated that in a case of burning, if kerosene and petrol has been sprinkled, then smell of petrol or kerosene from the clothes or body may or may not emanate. The witness has admitted that in the present case, there was no smell of kerosene or petrol from the body or the clothes of the deceased.

118. **PW-14 Dr. Bharatkumar Babubhai Solanki**, who has been examined at Exhibit-312, had performed the postmortem of the dead body of Rifakathussein Hijbulmiya Husseinmiya Shaikh.

119. **PW-15 Dr. Jagdishkumar Khodabhai Solanki**, who has been examined at Exhibit-317, had carried out the postmortem of Shaikh Manubhai Husseinbhai.

120. **PW-16 Dr. Vijaykumar Viththalbhai Oza**, who has been examined at Exhibit-322, had conducted the postmortem of the dead bodies of Bachumiya Nathumiya Shaikh and Sherumiya Rasulmiya Shaikh. This witness has stated that the cause of death is due to shock on account of burn injuries as well as the head injuries.

121 **PW-17 Dr. Arvind Kantilal Kapadiya**, who has been examined at Exhibit-331, had conducted the postmortem of the dead bodies of Abbasmiya Kesarmiya Shaikh and Raziabanu, daughter of Ibrahimbhai Rasulmiya Shaikh.

122. **PW-18 Dr. Vinayakrao Vasudevrao Patil**, who has been examined at Exhibit-339, had performed the postmortem of dead body of Abedaben Manubhai Shaikh. This witness has deposed that the cause of death was due to burn injuries and complications arising therefrom and due to the injuries caused to the lungs on account of smoke.

123. **PW-19 Dr. Dharmesh Somabhai Patel**, who has been examined at Exhibit-344, had conducted the postmortem of the dead bodies of Rafikbhai M. Shaikh and Firoz Mahemudhussein Shaikh. In his cross-examination, the witness has admitted that there were no traces of kerosene or petrol on either of the dead bodies.

124. **PW-45 Dr. Vikram Kalidas Parghi** has been examined at Exhibit-461. This witness was discharging duties as a Medical Officer at the Civil Hospital, Ahmedabad. He has deposed that on 2nd March, 2002, a male patient by the name of Rafikbhai Manubhai Shaikh was brought to the Ahmedabad Civil Hospital from Mehsana Civil Hospital along with a transfer memo. While examining the patient at 12:30 hours, he was found to be dead. The witness has further stated that on the same day, Abedaben Manubhai Shaikh, aged 8 years, was brought in a burnt condition for the purpose of treatment. Upon examining her, the patient had sustained burn injuries on both her legs, below her hands and soles of her feet. The burn injuries sustained by the deceased were first degree, second degree and third degree and the patient was brought in a semi-conscious condition. She was sent to the Burns and Plastic Department for proper treatment. Thereafter, she was treated by the concerned doctor. On the same day, Firojbhai

Makbulhussein Shaikh, aged 8 years, was brought for treatment from Mehsana Civil Hospital. However, upon examining him, it was found that the patient had died.

125. The learned counsel for the appellants-accused submitted that considering the nature of the injuries sustained by the deceased persons, which is evident from the postmortem reports, the possibility of those seven persons who were inside the room to escape alive is not only rare but impossible and therefore, their escape is most unlikely. Reference was made to the report of the Forensic Science Laboratory to point out that hydrocarbons and blood were found from the clothes of the deceased persons. It was submitted that, therefore, the presence of blood in the room on all the clothes and pieces of cloth and even on the body of some of the deceased has not been explained by the prosecution, as to how bloodstains to this extent have been found. It was submitted that it is not the case of prosecution that any physical injury was caused to any of the deceased to make the presence of blood possible everywhere. Coupled with the fact that certain deceased have received injuries in the form of either abrasions, contusions, CLWs or even fracture, indicates the possibility of their having been beaten outside the room or inside the room, which is not the case of the prosecution either way. It was submitted that in the absence of bloodstains or kerosene hydrocarbons on the clothes of all the twenty persons claiming to be inside the room, indicates that they were not there inside the room. It was submitted that the prosecution has miserably failed to carry out any scientific investigation and also to seize the clothes of those twenty persons who claim to have come out alive to corroborate the

theory of their being inside. It was submitted that having regard to the fact situation that the room remained closed for more than one to two hours and there were severe flames inside, which resulted into death of twenty-eight persons with the cause of death being because of severe and extensive burns or asphyxia due to suffocation, it was not possible that those twenty persons could have remained alive and escaped without severe burns or inhalation injuries and that, there is no evidence that at least 15 to 16 persons out of 20 have received any injury whatsoever. It was submitted that therefore, the true facts and the genesis of the case have been suppressed by the prosecution.

### **GENERAL OBSERVATIONS :**

126. From the testimonies of the witnesses, it is apparent that all the witnesses have been incisively cross examined as to where they were at the time of the incident whether they remained there, who else was there with them, etc. As noticed earlier, in this case the evidence has been recorded eight years after the incident took place. The incident took place at Shaikh Mohalla wherein there are two rows of houses with eleven houses in the row towards the kabrastan and eight houses on the rear side of the Patel mohalla. Each house adjoins the other and the houses have common walls. These are small houses, all of which open on the common road between the two rows of houses. There is no exit from the rear side of the houses. The houses are not in straight rows and are in an irregular line. At the end of the two rows, Mahemoodmiya's house is situated in the middle. The houses are quite similar, with many houses having small covered

verandahs with half walls and a grilled door leading to the main door of the house, wherein all the rooms are in a straight line. Each house had either one room or two rooms. The incident happened in the middle of the night and there was a huge mob shouting kill the Muslims, cut them and burn them. The mob was armed with weapons and cans of kerosene, petrol, etc. and burning rags and outnumbered the residents of the mohalla. The mob, as per the witnesses, was comprised of one thousand to one thousand five hundred people, but this is just an estimate for a huge mob which appeared to them to be so huge. With a huge violent mob vandalizing and burning their houses, it cannot be gainsaid that the residents of the mohalla would be consumed with terror and would have taken shelter at the place which at that time was near and safe. At this time, the witness would be anxious about his safety and one can hardly expect such witness to ascertain in the darkness as to into whose house he had entered and whether or not anyone else was hiding there. It has come on record through the testimony of one witness that after he entered the house he shut the lights. In these circumstances, even if someone else was inside the house, one may not be aware of it. Besides, these witnesses are rustic and more or less illiterate villagers working as farm labourers or drivers, painters (building), petty shopkeepers.

127. It is well settled as held by the Supreme Court in decisions referred to earlier that discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details,

and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of the witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken so as to render it unworthy of belief. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. The Supreme Court in the context of clause (3) of section 155 of the Evidence Act held that to contradict a witness, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the

chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same. While appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve *the evidence of such witnesses altogether if they are otherwise trustworthy*. Reference may also be made to the decision of the Supreme Court in **State of Punjab v. Hakam Singh**, (2005) 7 SCC 408, wherein the court held thus:

*"After closely going through the statement of PW 3 we are of the opinion that PW 3 is a truthful witness and unsuccessful attempt of the defence to confront her with different types of firearms i.e. whether it was a rifle or it was a gunshot injury fired through .12 bore gun or .303 rifle; all this cross-examination was directed against*

*this rustic villager in order to discredit her testimony. This is most unrealistic approach. We fail to appreciate how can a rustic village lady would explain about bore of gun or rifle. PW 3 whose presence in the house was quite natural and she having clearly identified the respondent who fired the gun at her husband should be enough to establish the factum of whole prosecution story. To expect from her to give the description in a photographic manner is asking for too much. The High Court instead of entering into hair-splitting the testimony of this witness with regard to the firearms used in the occurrence should have concentrated more on the hard truth of the matter instead of finding fault with her testimony. We fail to understand the manner in which the testimony of this witness has been appreciated by the High Court. Sometimes while appreciating the testimony of rustic villagers we are liable to commit mistake by losing sight of their rural background and try to appreciate testimony from our rational angle. When a lady is confronted with a number of intruders in her house armed with deadly weapons and showering bullets she cannot give a very accurate and photographic version as whole thing happened in a few minutes. Therefore, while appreciating such testimony court should give due regard to their rural background and the whole scenario in which the incident happened. She has narrated the whole incident as it happened and also stated that her husband also fired and that shot killed Bhola Singh. That lends considerable support to the testimony of this witness. She was the only witness at the occurrence and she has stated what happened in her house and none was there except Jagdev Singh who had escaped for his life by going out of the house but unfortunately he died."*

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128. While it is true that when there are a large number of persons involved, it may be that a person may not remember their names at a time and may recall certain names at a later stage; however, in a case of this nature where, more persons are named at a much later stage and to a certain extent the witnesses have been tutored and have had the benefit of legal assistance, the chances of false implication

cannot be ruled out. Therefore, it would not be prudent to accept the names of the accused who have been named subsequently. In the opinion of the court, to the extent all the witnesses sing the same tune regarding the incident of 9:30 they appear to be tutored, however, the rest of their testimonies are quite natural. As regards the time of the main incident, the same occurred in the middle of the night. The witnesses who were worried about saving their own lives and that of their kith and kin would hardly have looked at the watch to ascertain the exact time when the mob entered the mohalla. The time stated by the witnesses would, therefore, be based on approximation and much significance cannot be attributed to a little difference in the timings stated by the witnesses. As to how long the people were inside Mahemoodmiya's house during the incident is also required to be viewed accordingly. The versions are to the effect that the mob entered the mohalla at 11:30 to 12:00 at night or even 12:30. The evidence which has come on record is that the mob proceeded by burning one house after the other of the rows towards the kabristan; therefore, it must have taken some time to reach Mahemoodmiya's house. The police witnesses say that they came at 1:45 p.m. while the other witnesses say that the police arrived at 2:30 p.m. This again would be based upon approximation, whereas the timings stated by the police may be on actual basis. A perusal of the evidence of the witnesses, shows that none of them refer to having seen any house being set on fire or being vandalized on the row towards the rear side of the Patel houses. The video recording of the scene of incident leads one to believe that insofar as the row of houses on the rear side of the Patel houses are concerned, the same have been damaged mostly on account of the intense

stone throwing. A perusal of the video recording of Bachumiya Imammiya's house shows that the sheets of the roof have fallen down and there are stones scattered over the floor, however, the household articles are by and large intact except those that may have fallen off on account of stone throwing.

129. On the question of evaluation of the evidence of the witnesses, the learned counsel for the appellants/accused has made certain submissions which are common to most of the witnesses and certain submissions which are peculiar to the individual witnesses. Insofar as the submissions which are peculiar to the individual witnesses are concerned, the same have already been dealt with hereinabove. However, before dealing with the submissions that are common to most of the witnesses, reference may be made to certain legal principles which ought to have been kept in mind by the trial court while recording the evidence of the witnesses.

130. In this case, the learned Special Public Prosecutor has raised a contention that the provisions of section 145 of the Evidence Act have not been complied with in the facts of the present case during the course of cross-examination of the witnesses. However, except for a bare assertion with regard to non-compliance of the provisions of section 145 of the Evidence Act, nothing has been pointed out with reference to the evidence on record to indicate as to how the provisions of section 145 have not been complied with so as to substantiate such contention. In fact, the learned Special Public Prosecutor appeared to be averse to referring to the evidence on record with a view to substantiate the contentions raised by him. While it is true that it is the duty of the court, notwithstanding

the fact that it may not receive assistance from the learned counsel appearing for the parties, to minutely scrutinize the evidence and appreciate the same in proper perspective, however, it is no part of the function of the court to undertake an exercise to substantiate the submission advanced by the learned counsel for any of the parties. If any submission is sought to be advanced on behalf of any party, it is for the learned counsel for the concerned party to substantiate such contention.

131. While this court is not happy with the manner in which the evidence has been recorded in the present case which does not clearly indicate as to whether or not the provisions of section 145 of the Evidence Act have been complied with, at the same time, on a perusal of the evidence of the witnesses, it is apparent that in parts of the cross-examination, there is strict compliance with the provisions of section 145 of the Evidence Act, whereas in other parts, the same does not appear to have been strictly complied with. However, on a consideration of the evidence as a whole, in the light of the principles enunciated by this court in a catena of decisions, reference to which shall be made hereinafter, it is not possible to say with certainty that the provisions of section 145 of the Evidence Act have not been complied with, more so, when the learned Special Public Prosecutor has not demonstrated before the court as to how there is non-compliance of such provision. Moreover, no such contention was raised before the trial court, which was in the best position to say as to whether or not there was strict compliance with the provisions of section 145 of the Evidence Act.

132. In the facts of the present case, even if there is compliance with the provisions of section 145 of the Evidence Act in respect of the depositions of the witnesses, only those passages in the previous statements should have been proved which clearly contradict some portion of the testimony of the witnesses. A perusal of the evidence of the witnesses shows that it is not only those passages which contradict a portion of the examination in chief of the witness have been proved but entire paragraphs of the examination in chief have been put to the witnesses, as a result whereof, it is difficult to understand as to whether or not the witness had actually stated anything before the police. This procedure is not only contrary to the provisions of section 145 of the Evidence Act, but has the effect of burdening the record with much unnecessary matter and is a waste of time.

133. As regards the principles regarding how the evidence should be recorded and more particularly, the cross-examination of the witnesses in the context of section 162 of the Code and section 145 of the Evidence Act should be conducted, it may be germane to refer to the decision of a Division Bench of this court in ***Nareshkumar Kikabhai Tandel v. State of Gujarat***, 1986 Criminal Law Journal 457, wherein it has been held thus:

***"10. Before we part with this case we would like to observe that the learned Special Judge allowed certain questions in cross-examination regarding contradictions with police statements. In fact what we have found throughout is that at all crucial points in cross examination loose ends which could never unite were kept so that the arguments could be advanced. But on those arguments no conclusions could ever be reached. The contradiction was put in such a way that in fact the***

real contradiction was never known, whether it amounted to contradiction or not that also was never seen. It is required to be stated that the contradiction is to be proved in the manner laid down by Section 162 of the Criminal Procedure Code. Every omission does not amount to contradiction unless that omission vitally touches the very factum which is required to be proved by the prosecution. Say in a murder trial in the complaint the name of the accused is not stated at all and it is stated for the first time in court. It is a real contradiction though an omission. But if the witness states that he saw a particular gentleman at 3.30 in the evening to ask him in cross-examination that he did not state that he saw a particular person at 3.30 P.M. and in the police statement if he states that he saw him in the afternoon what is not mentioned is only 3.30 P.M. It is an omission of non-consequential nature. If the contradiction is taken down verbatim in the manner in which the question is asked an impression might be created that he did not even say that he saw him in the evening or in the afternoon. But in fact he had stated that he had seen the person in the evening or in the afternoon. What was not stated was only 3-30 P.M. Now that, therefore, even such an omission is required to be brought on record, it is to be brought in such a way that it becomes clear as to what exactly the contradiction is. Otherwise it would appear that nothing was stated in the police statement. It is also necessary, therefore, that if by bringing out a contradiction that the first statement which is given in the court is totally absurd having regard to the police statement, person is required to be given a chance of explaining as to what he wanted to say or what was his explanation in regard to the contradiction. Now that, therefore, another thing which is required to be noted is that Section 162 of the Criminal Procedure Code required that the contradiction is to be asked in the manner laid down by Section 145 of the Indian Evidence Act which reads as under:

"145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

*This is the manner in which the contradiction is required to be asked and as there were difficulties in regard to what would be the effect of omissions, explanation is added to Section 162 which reads as under:*

*"An omission to state a fact or circumstance in the statement referred to in sub-section (l) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."*

*This Explanation was required to be added because of a case of Tahsildar Singh and another v. State of U.P. reported in A.I.R. 1959 Supreme Court at page 1812 wherein it is observed as under:*

*"The intention of the legislature in framing S. 162 in the manner it did in 1923, was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the Section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused."*

*"The Section was conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police-officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by S. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence of a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."*

*The procedure is also indicated by the Supreme Court and the procedure is stated in paragraph 13 and it reads as under:*

*"Per Majority (Sinha, Kapur, Sarkar and Subba Rao JJ.) The procedure prescribed for contradicting a witness by his previous statement made during investigation, is that, if it is intended to contradict him by the writing, his*

*attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to S. 162 only enables the accused to make use of such statement to contradict a witness in the manner provided by S. 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of S. 145 of the Evidence Act. The argument that it would not be possible to invoke the second part of S. 145 of the Evidence Act without putting relevant questions under the first part thereof cannot be accepted. The second part of S. 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C, before the police be had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit the practice generally followed is to admit it subject to proof by the police officer that you saw a gas light? and he answers "yes", and then the statement which does not contain such recital is put to him as contradiction, the procedure involves two fallacies: one is, in cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of witness's statement, his entire statement could be brought on record. The procedure, therefore, contravenes the express provision of S. 162 of the Code. The second fallacy is that there is no self-contradiction of the primary statement made in the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the Section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case the question could not be put at all: only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement."*

*This High Court also in the case of Ismail Bijalbhai and Others v. The State of Gujarat reported in 8 GLR at page*

25, following the ruling reported in AIR 1959 Supreme Court 1012 (*Supra*) held as under:

"After considering the scope of Section 163 of the Criminal Procedure Code that (1) a statement made by a witness before a police officer in the course of investigation and reduced to writing can be used only to contradict his statement in the witness-box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be used for contradiction not because it is an omission strictly so called but because it is deemed to form part of the recorded statement, and (4) such a fiction is permissible by construction only in the following three cases -(i) when a recital is necessarily implied from the recital or recitals found in the statement, (ii) when it is a negative aspect of a positive recital in a statement, (iii) when the statement before the police and that before the Court cannot stand together."

"It is for the Trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box to give ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfied the requirements of law. It is the duty of the trial Judge to see that only such evidence as is admissible according to law comes on record and by permitting all questions relating to omissions from the statement before the police and by allowing all such omissions to be brought on the record, the trial Judge sometimes permits inadmissible evidence to come on the record of the case and to that extent fails in his duty. When an omission from a statement before the police is brought on record in the cross-examination of a particular witness, it becomes obligatory on the public prosecutor and if the public prosecutor fails to carry out that duty, it becomes obligatory to the Court to put question to the witness and to bring on record under the powers under Section 162 Cr. P.C. as to what the witness actually stated to the Police."

Now, that therefore, if the principles enunciated in these two cases were borne in mind by the learned Special Judge, any questions which are asked in cross-examination could not have been asked or some of them could have been asked in a different way. It is,

*therefore, necessary that in every case where the witness is to be contradicted the Judge should bear in mind the provisions contained in Section 145 of the Indian Evidence Act and Section 162 of the Criminal Procedure Code and the interpretation made of those sections in the two rulings which we have referred above. This would avoid unnecessary questions and it will bring about the result which would be both in the interest of the prosecution and defence and, therefore, in the interest of justice."*

134. In **Ismail Bijalbhai and Others v. State of Gujarat**, 1967 (8) G.L.R. 25, this court held thus: -

*"25. We may also point out that in some cases when omissions from the statement of a witness before the police are sought to be brought on the record of the case by way of contradictions, a wrong impression may be created on the record of the case unless what the witness actually stated in that connection is also brought on the record. Sec.162, Criminal Procedure Code permits the counsel for the prosecution to use the statement recorded by the police in re-examination for the purpose of explaining any matter referred to in the cross-examination of that witness. A serious defect and some injustice to the witness concerned are likely to be caused if merely an omission from the statement before the police is allowed to go on the record and what the witness actually stated before the Court is not brought on the record of the case. As pointed out by the Patna High Court in Yusuf Mia v. Emperor, A.I.R. 1938 Patna 579, when an omission from a statement before the police is brought on the record in the cross-examination of a particular witness, it becomes obligatory on the public prosecutor, and if the public prosecutor fails to carry out that duty, it becomes obligatory to the Court to put questions to the witness and to bring on record under the powers under sec. 162 Cr.P.C. as to what the witness actually stated to the police. At page 585 of the report, it has been observed: -*

*"It is therefore the duty of the Public Prosecutor to see that the negative answer from an investigating officer in respect of the statement of a witness does not*

*create a wrong impression of what the witness stated before the police. He must in these cases bring about other statements to explain the matter referred to in cross-examination. If the Public Prosecutor fails to do so, it is the duty of the Court in fairness to the case and to the witness to bring out facts which will clear up the negative answer. This will be legitimate use of the police diary and one of the modes of taking aid from it in the trial."*

*The negative answer from the police investigating officer which is referred to by the Patna High Court clearly refers to an omission from a particular witness which is sought to be proved by the cross-examination of the police officer; and when such negative answers have been obtained from the police officers, it becomes the duty, as has been pointed out by the Patna High Court, of the Public Prosecutor and also of the Court to see that what the witness actually stated is brought on the record so that a clear picture of what the witness stated and what the witness did not state remain on the record so as to enable the trial Court and the appellate Court, if any, to decide how far the credibility of that particular witness is shaken because of omission amounting to contradictions from the previous statement made before the police."*

135. In **Balu Ram Machhi v. State of Gujarat**, 1985 G.L.H. 455, this High Court noted that while recording the evidence of one Bhogilal, proper attention was not paid by the learned Public Prosecutor who conducted the case before the trial court nor by the learned trial Judge in seeing that proper question was put and proper answer was recorded, with reference to omission or contradiction with regard to the police statement. The court pointed out that there was, in fact, a contradiction and not an omission, so far as the case of the prosecution that witness Bhogilal saw the accused and the deceased together in the fair is concerned, in that there was a contradiction only as regards the spot where the deceased was when he saw the deceased and the accused going together

before the deceased was found dead with bleeding injuries. The court observed that it was the duty of the learned Public Prosecutor as well as the trial Judge to have seen that such omnibus reply was not recorded in the evidence of Bhogilal so as to create an impression that the witness had not at all stated before the police officer that he had seen the accused and the deceased together soon before the incident. The court was of the opinion that in fact the learned trial Judge should have asked the learned advocate for the accused to put a question suggesting the contradiction and not suggesting the omission as had been done in the said case. Even if an answer had come on record, it was the duty of the learned Public Prosecutor to have put a question in re-examination of the witness so as to prove on record as to what the witness had stated before the police officer with regard to this aspect of the incident. The court held that an omission to state a fact in a police statement may or may not amount to contradiction, depending upon the facts and circumstances of each case. Referring to the Explanation to section 162 of the Code, the court held that it was thus clear from the Explanation that while considering whether an omission amounts to contradiction or not, the court has to examine whether it is significant and otherwise relevant having regard to the context in which the omission occurs. The Explanation itself shows that whether any omission amounts to a contradiction in the particular context shall be a question of fact. The proviso to sub-section (1) of section 162 also enables the Prosecutor to use any part of the statement of the witness recorded under section 161 of the Code for the purpose of explaining any matter referred to the cross-examination of a witness. The court held that the learned Public Prosecutor could have and

should have put a question to the witness in re-examination as to what he had, in fact, stated before the police officer with regard to that part of the incident, viz., the accused and the deceased seen together in the fair by the witness before the deceased was found dead. In other words, while bringing on record as to what is not stated by the witnesses before the police officer, what is stated by the witness in that regard and in that context has to be brought on record. Unless this is done, it will not be possible for the court to ascertain as to whether there is any omission amounting to contradiction and if so, what is its effect. The court expressed the hope that the courts below would bear in mind this provision of section 162 together with the Explanation added to section 162 while allowing the defence to put questions with regard to contradiction and/or omission so far as the police statements are concerned and that the Public Prosecutors will also be vigilant in seeing that the witness is re-examined, if necessary, in the light of the provisions of section 162 read with the Explanation added to section 162 of the Code.

136. If one goes through the evidence of the witnesses in the present case, it is evident that the same has been recorded in complete disregard of the above referred principles enunciated by this court, both on the part of the learned Special Public Prosecutor as well as the trial court. A perusal of the testimonies of the witnesses shows that in the cross-examination, the entire deposition has been put to the witness by way of an omission without bringing out the nature of the contradiction and the ultimate result is that it appears that as if the witness had not stated anything in his police statement. The learned Special Public Prosecutor has not thought it fit to

re-examine the witness to bring on record as to what was exactly stated before the police in the statement recorded under section 161 of the Code. Though, this court in the year 1986 had expressed the hope as referred to hereinabove, we again reiterate the sentiments of the court and express a hope that in future, the learned Public Prosecutors appearing in the matter and the trial court shall keep in mind the above referred principles enunciated by this court from time to time while recording the testimonies of the witnesses so as to bring on record the exact contradiction which is sought to be proved by the defence.

### **GENERAL GROUNDS QUA EVIDENCE OF WITNESSES :**

137. The general grounds on which the evidence of the witnesses is sought to be discredited may now be dealt with. Some of the contentions sought to be put forth to discredit the testimonies of the witnesses are: -

- I The veracity of the first information report has been challenged on various grounds.
- II There was an unexplained delay in recording the statement of the witnesses and that despite having ample opportunities, the witnesses have not disclosed the names of the accused at the earliest and have thereafter, initially named as many accused as possible.
- III On the evidence on record and the defence set up by the accused and facts established on record, there is reason to

believe that the offence was committed by mobs from village Sundarpur and other adjoining villages.

IV No test identification parade was carried out during the course of investigation and the witnesses have identified the accused for the first time before the court.

V Majority of the witnesses have disowned the fact regarding time and arrival of the mob and firing resorted to by the police and have changed the sequence of events in the main incident.

VI The mob would not have let the residents of Shaikh Mohalla come out of their houses and go to Mahemoodmiya's house.

VII It was not possible for anyone to survive in the room.

VIII Existence of light at the scene of offence so as to enable the witnesses to identify the accused has not been established.

138. Each of the above grounds is dealt with separately herein below:

139. **Veracity of the first information report:** One of the contentions put forth by the learned counsel for the appellants-accused was as regards the veracity of the first information report lodged by PW-47 Ibrahimbhai Rasulbhai Shaikh. It was, *inter alia*, submitted that the first information report is not a substantive piece of evidence and at the same time, it is not

expected that everything under the sun has to be mentioned in the first information report, but the first information report being one of the most important pieces of evidence, has to be filed at the first immediate available opportunity and has to incorporate the vital facts. It was submitted that from the evidence of the police officers, it has come on record that a cognizable offence has been disclosed before 5:00 a.m. on 02.03.2002 and the police officers have reached the place of incident at about 1:00 or 1:45 a.m. and they were there since then. Reference was made to the testimony of PW-105 Anupamsinh Gehlot to point out that the said witness has deposed that when they reached Shaikhvas at Sardarpura village, they had saved the people who were alive and had sent the corpses of the deceased for postmortem and had seen the houses which had been set on fire and from that, he felt that a cognizable offence has been committed. He had not lodged the complaint in respect of the cognizable offence. That he had instructed his Police Inspector to lodge a complaint. That when two persons who had told them that the room had been set on fire and that there were people inside, he had not instructed any of the police officers accompanying him to record the complaint of any one of the two persons. He had not instructed any officer to inquire from the said two persons. It was submitted that the entire set of facts reveal that when a serious cognizable offence having been disclosed, it was the lawful duty of the officer to take the first information report immediately for the reason that at the spot where the D.S.P. remained for more than three hours, the injured persons were present, the victims who have been injured were present, and other persons of Shaikh Mohalla were also present and the D.S.P. has also admitted that a cognizable offence was

disclosed. It was argued that the officer had stated that he had instructed the Police Inspector to record the complaint, but the Police Inspector has not recorded any complaint. It was submitted that upon receipt of information of commission of a cognizable offence, it was the duty of the police officer to lodge the complaint. It was pointed out that the D.S.P. also had a discussion in respect of the incident with the Collector, Mehsana in the morning at around 4:30 to 5:00, however, no steps were taken for registering a first information report. Reference was made to the testimony of PW-90 Galbabhai Khemabhai Parmar to point out that the said witness has stated that on the night of 1<sup>st</sup> March, when they reached Shaikh Mohalla, two persons had shown them the house of Mahemoodmiya, however, they had not recorded the statements of those two persons, nor had they asked them their names or addresses and that he had not asked the said persons anything with regard to the incident and that in respect of the incident, the two persons had only shown the house of Mahemoodmiya and that women and children had been burnt inside. It was submitted that in the cross-examination of the said witness, he has admitted that during the rescue operation, he had also believed disclosure of a cognizable offence in respect of the incident. It was pointed out that even PW-110 Kakusinh Vaghela has admitted that in the primary interrogation at the spot, disclosure of cognizable offence having been committed was apparent. However, no one either cared to register a first information or record the information obtained from the persons who were interrogated. It was submitted that all the police witnesses have admitted that there was disclosure of a cognizable offence when they were at the spot at 02:30 hours on 02.03.2002 and that it is

clear from the testimony of PW-90 PSI, Shri Galbabhai Khemabhai Parmar, that they had reached Sardarpura at about 01:45 p.m. It was contended that thus, it is clear that though disclosure of commission of a cognizable offence was known to the police officers, they have neither given the complaint themselves nor have they recorded the complaint of persons who were interrogated. Even the initial interrogation as admitted by the witnesses disclosed that a mob had attacked the house of Mahemoodmiya. It was submitted that there was no disclosure at all that the mob from the village Sardarpura or Patels of village Sardarpura had attacked the house of Mahemoodmiya and therefore, the late filing of the first information report or late recording of the first information report assumes importance. Reference is made to the inquest panchnama of deceased Ashiyanabanu (Exhibit-198), to point out that the same was drawn at 07:00 to 07:30 a.m. on 02.03.2002 in the presence of panch witnesses by PW-93 Hargovandas Mohandas Sadhu, ASI. The said witness in his cross-examination has admitted that while drawing inquest on the dead body of Ashiyanabanu, it was known to him that in communal riots when the deceased had received injuries, it can be said to be a cognizable offence. It was submitted that it may be pertinent to note that PW-55 Ashiqhussein Bachumiya Shaikh, in his testimony, has claimed to be an eyewitness, despite which, he has not disclosed anything to the ASI, nor has he taken any steps for lodging the complaint. Moreover, he had also not disclosed names of any of the accused at that point of time. The statement of the said witness appears to have been recorded much after recording of the first information report by the Investigating Officer, PW-110. It was submitted that therefore, it is clear that in the present case,

the first information report, Exhibit-487 has been lodged after drawing up of the inquest panchnama by PW-93 Hargovandas Mohandas Sadhu, ASI. Reference was made to the decision of the Supreme Court in the case of **Ramesh Baburao Devaskar and others v. State of Maharashtra**, (2007) 13 SCC 501, for the proposition that a first information report cannot be lodged in a murder case after inquest has been held. In the facts of the said case, the court noticed that the first information report had been lodged on the basis of the statements made by PW-11 to the informant himself at the spot. The court was of the view that if the said prosecution witness who claims himself to be eyewitness was the person who could lodge the first information report, there was absolutely no reason as to why he himself did not become the first informant.

139.1 Next, it was submitted that PW-110 Kakusinh Ranjitsinh Vaghela, Investigating Officer has deposed that he had recorded the information given by Ibrahimbhai Rasulbhai Shaikh at about 09:30 a.m. on 02.03.2002, whereas PW-47 Ibrahimbhai Rasulbhai Shaikh, the first informant has categorically deposed that the first information was recorded at 12:00 hours noon on 02.03.2002. It was submitted that the first information was recorded at Mehsana Civil Hospital whereafter, PW-110 Kakusinh Ranjitsinh Vaghela sent the complaint to Vijapur Police Station for registering the offence. Referring to the first information report, Exhibit-487, it was pointed out that the same discloses registration time of 11:30 a.m. on 02.03.2002, whereas another inquest panchnama drawn for twenty-eight dead bodies, which commenced at 10:00 a.m. and was completed at 02:00 p.m. on 02.03.2002,

bears the crime registration number of the case. It was submitted that if the first information report was recorded at 12:00 hours, one fails to understand as to how the registration number finds mention in the inquest panchnama. It was submitted that while drawing up the inquest panchnama, all the dead bodies were identified by one Nazir Mohammad PW-51 and their belongings except the clothes of the deceased persons were handed over to the said witness, who claimed to be an eyewitness. It was submitted that despite claiming to be an eye-witness, Nazir Mohammad did not disclose anything about the incident or the accused to the Investigating Officer who himself was present there. It was pointed out that the statement of Nazir Mohammad was recorded at a highly belated stage on 10.03.2002. It was argued that looking to the overall circumstances, the police officers by failing in their duty of recording the first information at the earliest point of time, had given ample time to the first informant, PW-47 Ibrahimbhai Rasulbhai Shaikh to concoct a case and involve the accused by naming them falsely. It was submitted that if the evidence of PW-47, Ibrahimbhai Rasulbhai Shaikh is seen, though the first information report (Exhibit-487) discloses the full names of almost all the twenty-eight accused, the witness has been unable to identify twenty of the accused before the court. It was submitted that though the commission of a cognizable offence had been revealed, none of the police officers who were present there at 02:30 a.m. on 02.03.2002, have recorded the complaint of anyone though they have interrogated persons who were found at Shaikh Mohalla, which persons include injured as well as the persons who were not injured. It was submitted that though it may be the primary duty of the police to shift the injured to the hospital, at the

same time, it was their lawful duty that if any disclosure with regard to commission of a cognizable offence was revealed, to record a complaint of any of those persons who were interrogated. It was submitted that if the persons interrogated do not give the complaint, it is the duty of the police officers to give information to the police station on behalf of the State as a first informant. Referring to the provisions of section 157 of the Code, it was submitted that the same mandates that in respect of information or otherwise, the police officer has to forthwith send a report to a Magistrate empowered to take cognizance of such offence, whereas in the present case, even though high ranking police officers were present and commission of a cognizable offence was revealed to them, neither have they given a first information report, nor have they recorded a first information report of any of the persons who were interrogated by them at the spot.

139.2 From the submissions advanced by the learned counsel for the appellants-accused as well as the evidence on record, it is evident that in the facts of the present case, the conduct of the police authorities is not above board. The manner in which the incident has occurred and the delay on the part of the police in arriving at the scene of offence, are all indicative of the fact that the police had failed to exercise their duties in true spirit. The evidence on record establishes that after the incident, the police arrived at around 02:30 a.m. and took the deceased and injured out of Mahemoodmiya's house. Despite the fact that there were a number of police officers present, including the District Superintendent of Police and the Deputy D.S.P., the names of persons who were taken out of the house were not noted, neither were the names of the persons

who had shown the scene of offence noted. Besides, though the deceased and injured were taken to the hospital by the police, the police did not think it fit to record a first information report. The D.S.P. in his cross-examination (page-7) has stated that he had remained at Shaikh Mohalla till 5 O'clock in the morning where he had made inquiries from the persons whom he met as regards how the incident had happened. However, no steps were taken by him to ensure that the first information report is recorded at the earliest point of time. From the testimonies of the Police Inspector and the Police Sub-Inspectors who were present at the scene of offence immediately after the incident, it is apparent that two injured persons whom the police had first met at Shaikh Mohalla had informed them about women, men and children having been set ablaze in Mahemoodbhai's house and they had also gathered information about the incident from them. However, neither were the statements of those persons recorded, nor were their names and addresses taken down and no complaint was lodged at their instance despite the fact that they had been taken to the Hospital at Mehsana for treatment. While one can understand the explanation that the first priority of the police personnel was to rescue the victims and provide them medical treatment, one fails to understand the conduct of the District Superintendent of Police in not recording a first information report despite the fact that he had remained at Shaikh Mohalla till 5 O'clock and gathered information from the people there about the manner in which the incident had occurred. The appellants-accused now allege that the first informant and other injured witnesses were lax in lodging the first information report and that the delay in recording the first information report had given ample time to the first informant

to concoct a case and involve the accused by naming them falsely. In this regard, it may be noted that in terms of the evidence which has come on record, right from about 10:30 / 11:30 in the evening, Shaikh Mohalla was under siege and the occupants of Shaikh Mohalla were either hiding in their own houses or that of their neighbours and the women and children and some male members had taken shelter in Mahemoodmiya's house. Right from 10:30/11:30 or so, there was heavy stone throwing and the houses were being ransacked and set on fire and the final act of the mob was to set ablaze Mahemoodmiya's house with the women, children and others inside. The witnesses have testified that they could hear the people inside the room screaming and crying for help, but being afraid of the mob, they did not dare to go to their rescue. Thus, the occupants of Shaikh Mohalla had a harrowing night, full of terror and the final outcome was that twenty-eight persons had died inside the house and several persons who had sustained injuries ranging from severe to minor injuries were taken to the hospital. In these circumstances, to expect the persons who have been subjected to such terror and agony to think in a clear manner and approach the police for lodging of first information report is too farfetched. More so, considering the fact that even the police did not deem it fit to ensure that a first information report is lodged at the earliest point of time. However, the mere fact that the police did not deem it fit to record a first information report at the earliest point of time, per se, would not make the veracity of the first information report lodged by the first informant doubtful.

139.3 On behalf of the appellants-accused, reliance has been placed upon the decision of the Supreme Court in the

case of **Ramesh Baburao Devaskar and others v. State of Maharashtra** (supra) for the proposition that a first information report cannot be lodged in a murder case after inquest has been held. In the facts of the said case, the court noticed that the first information report had been lodged on the basis of the statements made by PW-11 to the informant himself at the spot. The court was of the view that if the said prosecution witness who claims himself to be eyewitness was the person who could lodge the first information report, there was absolutely no reason as to why he himself did not become the first informant. In the opinion of this court, the said decision would have no applicability to the facts of the present case, wherein no information about the incident has been recorded prior to the recording of the first information report at the instance of PW-47. In the case before the Supreme Court, the witness had approached the police and had given details about the incident, including the deceased and the accused, but the same was not registered as a first information report as the said witness had asked the police to accompany him to the scene of incident where the first information report was lodged at the instance of an eyewitness. Thus, the question before the Supreme Court was as to whether the second information report could be considered as the first information report. In the backdrop of the facts before it, the Supreme Court had observed thus:

*"A First Information Report cannot be lodged in a murder case after the inquest has been held. The First Information Report has been lodged on the basis of the statements made by PW-11 to the informant himself at the spot. If the said prosecution witness who claimed himself to be the eye-witness was the person who could lodge a First Information Report, there was absolutely*

*no reason as to why he himself did not become the first informant. The First Information Report was recorded on the basis of his information given to the first informant at the spot. All information given by him to PW-13 was made before the Investigating Officer himself. What prevented him from lodging the First Information Report is beyond our comprehension. PW-11, we may place on record, categorically stated that he had disclosed the details of information to all concerned. Therefore, it is expected that the first informant was informed thereabout. We have noticed hereinbefore that the information given by PW-13 had at least been recorded by the police in the Crime Register and he categorically stated a few facts, viz., the main accused Accused No. 9 committed murder of his brother Shivaji Patil and one Baburao Patil. Even the place where the murder took place was known to him. If we are to believe the investigating officer, he recorded the statement after holding inquest. The detailed report in regard to the nature of injuries as also the place where the injuries were inflicted was known to him as inquest report had already been prepared. Such an attempt on the part of the investigating officer has been deprecated by this Court in a large number of decisions. All other witnesses including the Panch witnesses must have been present there. If despite the same, according to Panch Witnesses, at least in respect of Baburao, unknown persons are said to be his assailants, it is evident that PW-11 did not disclose the names of the assailants; at least all of them before PW-9 as also the Investigating Officer."*

139.4 In the facts of the present case, considering the mental status of the witnesses and the large number of affected persons, a witness would not be aware as to whether or not a first information report has already been lodged by any other person. In these circumstances, the fact that the inquest panchnama of the deceased Ashiyanabu was carried out prior to recording of a first information report cannot be attributed much significance. While the course of action adopted by the concerned police officer in conducting the

inquest prior to registration of the first information report cannot be approved, the same *per se* would not affect the veracity of the first information report which came to be lodged subsequently.

139.5 In **Baldev Singh v. State of Punjab**, (2014) 12 SCC 473, the Supreme Court was called upon to decide whether the delay of two months and twenty-one days in lodging the first information report could make the prosecution case one which is not believable. The court held that there cannot be any doubt that delay in lodging of FIR often results in embellishment as well as introduction of a distorted version of what may have actually happened, but facts of each case have to be examined to find out whether delay in lodging FIR is fatal for the prosecution case. In **Lal Bahadur and others v. State (NCT of Delhi)** (supra), the Supreme Court endorsed the following view of the High Court:

*"The High Court on the first issue regarding delay in filing of FIR held that the circumstances of the present case are extraordinary as the country was engulfed in communal riots, curfew was imposed, Sikh families were being targeted by mobs of unruly and fanatic men who did not fear finishing human life, leave alone destroying/burning property."*

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139.6 In the opinion of this court, the above decision would be squarely applicable to the facts of the present case. In this case, though the police were present when the first incident took place on the night of 1<sup>st</sup> March, 2002 after dispersing the violent uncontrollable mob of about one thousand five hundred persons as per the estimate put by the police witnesses, all the three mobile vans with police

personnel left Sardarpura village for Vijapur, leaving the members of the Muslim community at the mercy of unruly elements who took no time in returning to the scene of offence to complete the unfinished task. Soon after the main incident commenced, the police were informed at Vijapur, but it took the police authorities about two hours or more to reach Sardarpura, whereas normally it takes less than half an hour to cover the distance. The reason for delay in arriving at the scene of offence as put forth by the police witnesses is that obstacles had been put up on the road from Vijapur and Ladol till the Panchayat office at Sardarpura, which were in the nature of burning tyres, logs of wood, sewerage pipes, stones, etc. and surprisingly, each contingent of police had to remove obstacles on their way to Sardarpura. After reaching the scene of offence, almost every police witness states that they met two persons who told them that the women, children and others were set ablaze in the house of Mahemoodmiya, whereafter, they proceeded to the scene of offence and rescued the survivors and removed the corpses from the house and sent them to the Civil Hospital, at Mehsana. Though a large number of high ranking officers were present at the scene of offence and there were witnesses available who were not injured, no first information was recorded at the spot and the explanation given is that the first priority was to take the victims to the hospital for treatment. In these circumstances, when the police did not take any steps to record a first information report despite being aware of the commission of a cognizable offence, no blame can be laid at the door of the witnesses for not coming forward to lodge a first information report on their own, considering the prevailing situation where the dice were loaded against them. Therefore, it is only when

the police thought it fit to record a first information report that the same came to be recorded at the instance of the first informant, PW-47 Ibrahimmiya Rasulmiya Shaikh. The record reveals that the victims were taken to the Civil Hospital at about 05:30 a.m. and were given treatment and the first information report was recorded at 09:30 a.m. While an inconsistency has been brought out in the testimony of the first informant to the effect that when the first information report was recorded at 12 O'clock and not at 09:00 a.m., the evidence on record shows that the same was recorded at around 09:30 a.m. It may be reiterated that it has been contended by the learned Special Public Prosecutor that the incident could have been prevented if the police would not have left the village immediately after resorting to firing after which the crowd had dispersed, because immediately thereafter, the crowd had gathered and all the houses in Shaikh Mohalla were ransacked, burnt and destroyed and an incident occurred at Mahemoodmiya's residence where innocent persons lost their lives. Thus, having regard to the overall facts and circumstances of the case and more particularly, the conduct of the police, the delay of about four hours in recording the first information report cannot be said to be fatal and this is not a case where the prosecution case should be disbelieved on the ground of delay in lodging the first information report. In the opinion of this court, the delay in lodging the first information report cannot be attributed to the first informant as the facts on record speak for themselves and the delay stands explained. One of the grounds for assailing the first information report is that while the first informant has named twenty-eight accused persons in the first information report, in his deposition, he has named different persons and

has not been able to identify most of the accused persons. In this regard, one cannot lose sight of the fact that while the incident took place on 01.03.2002, the testimony of the witness, who is a rustic illiterate villager came to be recorded after more than eight years. It has further come on record that after the incident, the witness had migrated from Sardarpura and therefore, had no occasion to see the accused thereafter. Besides, a period of more than eight years is a considerable period and the physical appearances of people change during such period, which would make it difficult to recognize them. Moreover, not everyone possesses a good memory so as to identify a person after such a long period. Therefore, the non-identification of the accused persons and naming of different persons in the deposition would not affect the veracity of the first information report. Moreover, it is settled legal position that a first information report is not a substantive piece of evidence and can only be used to corroborate its maker.

**140. Delay in recording the statements of the witnesses and that despite there being ample opportunities, the witnesses have not disclosed the names of the accused at the earliest:** It has been contended by the learned counsel for the appellants/accused that at the first available opportunity, no efforts were made by the witnesses to narrate their versions either to the police or to the Medical Officers who gave them treatment and that there was considerable delay in recording of their statements which gave them time to fabricate and concoct evidence in an attempt to rope in as many persons as possible. It was contended that there was an unexplained and inordinate delay in recording the statements of the witnesses which have been

recorded at a very belated stage, and that despite having ample opportunities, the witnesses have not disclosed the names of the accused at the earliest and have thereafter, named as many accused as possible. In support of such submission the learned counsel placed reliance upon the decision of this court in the case of **State of Gujarat v. Madhabhai Vitthalbhai**, 1984 G.L.H. 567. It was submitted that after the inordinate delay in recording of the initial statements of the witnesses, statements have been made by the witnesses in the form of affidavits, then in the form of written applications to the SIT and then in the form of statements recorded by the SIT. It has been contended that it has come in evidence that these witnesses were taking shelter in relief camps after the incident, which were managed by persons belonging to their community and they were taken care of by the leaders of their community and were assisted by legal minds and that there were visits by the police officers; however, it seems most of them avoided and refused to give their statements and delayed the process of giving the statements to a later stage so that they could mould the story as per the advice that they may receive. That it has come on record that after six years, the witnesses have come up with facts in the form of applications to the SIT and pursuant thereto, their statements have been recorded. There are a large number of witnesses who were examined by the police and those who were not examined by the police, whose statements have been recorded for the first time by the SIT. It has come in evidence that the witnesses have had a number of opportunities to ventilate their grievance, if any, or at least to say what they wanted to say but they have not chosen to do so. Therefore, the conduct of the witnesses seems unnatural,

unusual and that the tacit silence maintained by them for years together, cannot be excused on any count nor can any explanation thereto be accepted. It has been alleged that though the witnesses had been taken to relief camps under police protection, they remained silent and did not disclose the details of the incident or names of the accused for a period of five days.

140.1 In the context of the submissions with regard to the late recording of the initial statements after a period of five days, ten days, twenty-five days, etc. from the date of the incident, despite the fact that most of the witnesses were available at the Mehsana Civil Hospital and thereafter, were taken in police vehicles to the relief camps, reference may be made to the provisions of section 161 of the Code. Sub-section (1) of section 161 of the Code, inter alia provides for a police officer making an investigation under Chapter XII of the Code to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Sub-section (2) thereof provides that such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions, the answers to which would have a tendency to expose him to a criminal charge or to a penalty of forfeiture. Thus, it is for the Investigating Officer to record the statements of the witnesses and not the other way round. Besides, in the facts and circumstances of this case, the witnesses had either lost their homes in the assault or did not think it safe to return to their homes and were, therefore, lodged at relief camps. Many of the witnesses had lost their near and dear ones in the incident and were also uprooted from their original habitat and had to take shelter in relief

camps and would, therefore, be in a state of mental shock and it could be hardly expected of them to rush to the police officers for recording their statements. In these circumstances, their own survival and tracing out their family members would be the first priority of the witnesses. These relief camps were in different villages and towns, whereas the first information report was lodged with the Vijapur Police Station and the investigation was carried out by an officer of the said police station. It is common knowledge that the atmosphere at the relevant time was hostile to the community to which the victims belong, and considering the hostile atmosphere which was prevailing at that time, it is too much to expect the victims to leave the safety of the relief camps and venture outside to find out as to who was investigating the case and get their statements recorded. Therefore, as and when the Investigating Officer came to the relief camps in search of the witnesses, their statements have been recorded.

140.2 The learned counsel for the appellants has emphatically argued that it has come from the evidence of PW-110, the Investigating Officer (Police), that when he went to Nazirabad Camp for the purpose of recording the statements of the witnesses, he was told that they had gone to Ahmedabad and, therefore, could not record their statements. From the cross-examination of the witness, the learned counsel pointed out that ultimately, on 10<sup>th</sup> March, 2002, he had recorded the statements of about eighteen witnesses. A perusal of the cross-examination of PW-110, the Investigating Officer (Police), shows that it has been brought out that when he went to the Nazirabad Camp on 9<sup>th</sup> March, 2002, at that time, he could not record a single statement; that the witness has initially denied

the fact that Muslim advocates were present there and they had not permitted him to record the statement; that the reason for not recording the statement was that the witnesses had gone to Ahmedabad and that he could not meet a single witness. It has also come out that the persons staying at Nazirabad had stated that the witnesses had gone to Ahmedabad. It was pointed out that the witness had admitted that when he went to Nazirabad Camp, advocate Salimbhai S. Memon was present and whatever information he had received, was received from him. It was submitted that, therefore, it is evident that at a time, all the witnesses would not have gone to Ahmedabad and on the advice of the advocates, they did not give their statements on 9<sup>th</sup> March, and it was only after deliberation with the advocates that they had given their statements on 10<sup>th</sup> March, 2002. It was also pointed out that from the testimony of this witness, it has come out that he had gone to Ilol for the purpose of recording statements of the witnesses who had been shifted to Ilol and that upon meeting the witnesses, they had stated that at present, they do not desire to get their statements recorded.

140.3 Thus, on behalf of the defence it is sought to be submitted that the witnesses have refused to give their statements on the day when the Investigating Officer visited the camp, with a view to deliberate upon and concoct evidence to implicate as many innocent persons as possible. In this regard, it may be noted that statements of eighteen witnesses came to be recorded by PW-110 Kakusinh Ranjitsinh Vaghela at Nazirabad on 10.03.2002, viz., Bhikumiya Kalumiya Shaikh, Sharifmiya Babumiya, Faridabanu, wife of Sharifmiya, Ayubmiya Rasulmiya, Sahinbanu Ayubmiya, Aminabanu

Achchhumiya, Janmohammad Ismail Memon, Mohammadarif Janmohammad Memon, Iqbalmiya Rasulmiya Shaikh, Mustufamiya Rasulmiya, Hizbulmiya Hussainmiya, Akbarmiya Rasulmiya, Akbarkha Nathumiya, Najirmohammad Akbarmiya, Gulamali Akbarmiya, Rafiqmiya Mohammadhussein, Ruksanabanu Kesarmiya and Makbulmiya Kesarmiya. From the testimonies of these witnesses, it appears that some of the witnesses have not named any accused person, whereas the others have named only a limited number of accused persons. In these circumstances, it is difficult to accept the contention that the witnesses were buying time with a view to falsely implicate as many innocent persons as possible. In our opinion, considering the evidence which has come on record, namely, that the witnesses were residing at Sardarpura since several years and the accused were known to them, it cannot be gainsaid that the witnesses must have known a large number of persons belonging to Patel community of Sardarpura. Despite this position, the witnesses have refrained from implicating a large number of persons and have named only a few persons, who according to them were present in the mob. We, therefore, do not agree with the submissions advanced by the learned counsel for the appellants-accused that the delay in recording the statements of the witnesses affects the veracity of their version and that maximum number of innocent persons are sought to be implicated in the offence in question. Moreover, if the entire exercise of naming the witnesses was fabricated and concocted, many witnesses would have named the same accused and would have synchronized their statements and testimonies accordingly. However, upon reading the testimonies of the witnesses, the

same appear to be natural and by and large do not appear to be tutored, except to the extent observed in this judgment.

140.4 At this juncture, it may be apt to refer to the following findings of the Delhi High Court regarding the delay in recording statements of witnesses which found the approval of the Supreme Court in **Lal Bahadur and others v. State (NCT of Delhi)** (supra), viz., “*As regards recording of the statements of witnesses by the police on 30<sup>th</sup> November, 1984 after a delay of 27 days, the High Court observed that the city was in turmoil and persons having witnessed crimes would naturally be apprehensive and afraid in coming forward to depose against the perpetrators, till things settled down; that the State machinery was overworked; and in such circumstances, delay in recording the statements of witnesses cannot be a ground to reduce its evidentiary value or to completely ignore it. The High Court further found that the witnesses prior to the incident were the residents of the same area and knew the assailants and it was not the case of the appellants that the delay could have resulted in wrong identification of the accused.”.*

140.5 It is also required to be kept in mind that the witnesses concerned have lost their near and dear ones in the incident. In some cases, entire families are wiped out, like in case of Sherumiya, the brother of the first informant, who along with his wife and children died in the incident. Thus, the lives of several innocent persons were snuffed out and all the residents of Shaikh Mohalla were engulfed in a feeling of fear and terror. Besides, apart from the incident in question, the situation all over the State and more particularly in Mehsana,

was like a tinder box waiting to conflagrate and there was an atmosphere of animosity prevailing insofar as the members of the Muslim community were concerned. Therefore, apart from the fact that so many members of their families had lost their lives, those who survived also feared for their lives and took shelter in relief camps. It may be pertinent to note that none of the injured witnesses chose to remain in the hospital and take treatment and either took discharge on the same day or left the hospital without permission. Thus, the witnesses did not feel safe even in the hospital. As observed hereinabove, insofar as recording of statements of witnesses under section 161 of the Code is concerned, it is for the investigating officer to record the statements of the witnesses once the investigation has commenced. In this case, it appears that the first priority of the police force was to try to restore the law and order and to bring the situation under control, and it is only thereafter, that the investigating officer took steps to record the statements of the witnesses. As recorded hereinabove, the witnesses were initially taken to different places and different camps and the investigating officer recorded the statements by visiting one place after the other. It is in these circumstances, that the statements of witnesses have been recorded after some delay and not on account of any deliberate intention on the part of the witnesses to delay the recording of their statements.

140.6 On behalf of the appellants-accused, reliance has been placed upon the decision of the Supreme Court in the case of ***Maruti Rama Naik v. State of Maharashtra*** (supra) wherein, the court had found it difficult to place reliance upon the evidence of witness PW-3 therein who was

an injured witness not only because of the omissions mentioned therein but also because of the fact that his statement was recorded a day later when the investigating officer had ample opportunity to record the said statement on the day of the incident itself. The court observed that bearing in mind the fact that even according to this witness, large number of people attacked the deceased and his omission to state the names of those appellants as the assailants in his previous statement, it did not think it safe to place reliance on the evidence of PW-3 to find the appellants therein guilty of the offences charged without there being any material corroboration from other independent acceptable source. Reliance was also placed upon the decision of the Supreme Court in the case of ***Shankarlal v. State of Rajasthan*** (supra), wherein the court observed that the unexplained long delay also created a doubt in its mind as to the genuineness of the prosecution case. Relying upon the above decisions, the learned counsel submitted that the above referred precedents lead to only one conclusion namely that if the explanation given for delay and unusual conduct is found to be implausible and not probable, then it is highly unsafe to rely on such testimonies. It was contended that in the facts of the present case, it is an undisputed fact that the witnesses have not been in a position to not only satisfactorily explain the delay in recording the complaint, but also failed to explain their unusual conduct and hence, no reliance or credence can be attached to the respective testimonies and that the same are required to be discarded in their entirety.

140.7 For the reasons recorded by us as discussed hereinabove, we are of the view that the above decisions of

the Supreme Court would have no applicability to the facts of the present case, inasmuch as, the court is satisfied that the delay in recording the statements to the extent it stands explained as has been discussed in the evidence of each witness hereinabove.

140.8 While considering the submissions advanced by the learned counsel for the appellants-accused regarding delay in lodging the first information report and recording the statements of the witnesses, we cannot be oblivious to the situation prevailing at the relevant time as recorded hereinabove. In these circumstances, we are of the firm belief that no mala fide intention can be imputed to the witnesses for late recording of their statements. Of course, the case of each witness has to be examined independently, and no straight jacket formula can be adopted in this regard. Accordingly, in the backdrop of the then prevailing situation, we are required to consider whether in a given case, the late recording of the statement would dent the credibility of the witnesses.

141. **On the evidence on record and the defence set up by the accused and facts established on record, there is reason to believe that the offence was committed by mobs from village Sundarpur and other adjoining villages.** It has been strongly contended that the attack on Shaikh Mohalla as well as on the cabins and shops on the previous day, viz. 28<sup>th</sup> February, 2002, has been made by persons residing in Sundarpur and other nearby villages/locality and that the people of Sardarpura have always maintained communal harmony and have not played any role in the attack. Such contention is also based on the

topographical location of Sardarpura, which is stated to be on the outskirts of the village and therefore, easily accessible to mobs from outside the village. Insofar as such contention is concerned, while the involvement of people belonging to other villages also having participated in the attack cannot be ruled out, one cannot lose sight of the fact that the witnesses have identified the accused who were known to them and hence, it cannot be said that the people from Sardarpura have not participated in the attack. Besides, if the village people had maintained peace and harmony and had not participated in the attack, there was no reason for the witnesses to falsely implicate them in the offence in question. While it is sought to be suggested that the people of Shaikh Mohalla were enraged by the fact that Patels of the village did not give them shelter and therefore, falsely implicated them, no such question has been put to any of the witnesses during the course of his/her cross-examination. No evidence has been led of any enmity or animosity between the parties, for the witnesses to falsely implicate the accused persons.

141.1 Another reason for believing the participation of the people of Sardarpura is that it is only the houses of Muslims at Shaikh Mohalla that have been damaged and the houses of Hindus adjoining the houses of Shaikh Mohalla have not been touched. Had the attack been by those who were from other villages, they would not have the knowledge as to which houses belong to the Muslims and which houses belong to members of the other communities. Besides, from the topography of Sardarpura as emerging from the testimony of the witnesses, the location of Shaikh Mohalla is such that the same could be harmed without causing any damage to the

properties of members of other communities. Though there are various other localities occupied by Muslims in Sardarpura, they are surrounded by or close to properties of members of other communities. Therefore, Shaikh Mohalla appears to have been selected with a view to see that minimum or no damage is caused to the members of communities other than Muslim. The contention that the incident had taken place at the hands of people of adjoining villages and that the people of Sardarpura had no role to play, therefore, does not merit acceptance.

141.2 From the evidence on record as pointed out by the learned counsel for the appellants-convicts, it appears that there may have been participation of outsiders from village Sundarpur and other neighbouring villages in the commission of the offence in question, but that by itself would not absolve the accused whom the witnesses have identified as being part of the mob which committed the offence. The learned counsel has also referred to the topography of the scene of offence and the damage caused, to suggest that maximum damage has been caused from the rear side, namely by a mob which had come from the road leading to Kamalpur, viz., a mob from Sundarpur. As discussed hereinabove, even if the submissions as regards involvement of people from Sundarpur and other neighbouring villages were to be accepted, the same would not mean that there was no active participation of the people of Sardarpura, more so, when the victims have named and identified them.

**142. No test identification parade was carried out during the course of investigation and the witnesses**

**have identified the accused for the first time before the court.** It has been contended on behalf of the appellants/accused that the witnesses have identified the accused for the first time before the court and that no test identification parade had been conducted prior thereto and hence, such identification before the court cannot be relied upon.

142.1 In the present case, as is evident from the testimonies of the witnesses, it is an admitted position that the accused have been identified for the first time before the court and that no test identification parade has been carried out in respect of any of the accused. On behalf of the appellants/accused reliance has been placed upon the decision of the Supreme Court in the case of **Dana Yadav alias Dahu and others v. State of Bihar** (supra) for the proposition that if a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. Reliance was also placed upon the decision of the Supreme Court in the case of **Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and others** (supra), to contend that in the light of the said decision, the witness has to say before the court as to how he knows a particular accused, which is conspicuously missing in the present case.

142.2 On behalf of the prosecution, the learned Special Public Prosecutor placed reliance upon the decision of the Supreme Court in the case of **Ashok Debbarma alias Achak Debbarma v. State of Tripura** (supra) for the proposition

that when the accused persons are close to the witnesses and they are identified by face, the fact that no T.I. Parade was conducted at the time of investigation is of no consequence. The primary object of the test identification parade is to enable the witnesses to identify the persons involved in the commission of the offence(s), if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is to find out whether or not the suspect is the real offender. Reliance was also placed upon the decision of the Supreme Court in the case of **C. Muniappan v. State of Tamil Nadu**, (2010) 9 SCC 567, wherein the court held that the test identification parade is a part of the investigation and is very useful in a case where the accused are not known beforehand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not a substantive evidence. Actual evidence is what is given by the witness in the court. The court further held thus: -

*"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the*

*object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."*

142.3 In **Kanta Prashad v. Delhi Administration**, AIR 1958 SC 350, the Supreme Court stated that failure to hold such a parade would not make inadmissible the evidence of identification in court. However, the weight to be attached to such identification would be a matter for the courts of fact and it is not for the Supreme Court to reassess the evidence unless exceptional grounds were established necessitating such a course. The court observed that it would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence. The court observed that the above mentioned decision would indicate that while the evidence of identification of an accused in trial is admissible as subjective piece of evidence, it would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused.

142.4 On the question of identification of the accused persons, the learned Additional Public Prosecutor placed reliance upon the decision of the Supreme Court in the case of **Sheo Shankar Singh v. State of Jharkhand and another**, (2011) 3 SCC 654, for the proposition that it is fairly well-settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so, a test identification parade is

conducted with a view to strengthening the trustworthiness of the evidence. Such a test identification parade then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the evidence of identification in the Court even without insisting on corroboration. It was submitted that in the facts of the present case, most of the witnesses knew the accused prior to the incident and had named them, and hence, there was no need to conduct a test identification parade.

142.5 From the principles enunciated in the above decisions, what emerges is that when the accused are known to the witnesses, the fact that no test identification parade is conducted is of no consequence. In ***Ashok Debbarma alias Achak Debbarma v. State of Tripura*** (supra), the Supreme Court expressed the view that the mere fact that the appellant therein was not named in the statement made before the police under section 161 of the Code would not render the evidence of the witnesses tendered in the court, unreliable.

The court held that the statements made to the police during investigation were not substantive piece of evidence and the statements recorded under section 161 of the Code can be used only for the purpose of contradiction and not for corroboration. The court was of the view that if the evidence tendered by the witnesses in the witness-box is trustworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witnesses before the court does not find a place in the statement recorded under section 161 of the Code. The court took note of the fact that the police officer recorded statements of the witnesses in an incident where fifteen persons lost their lives, twenty-three houses were set ablaze and large number of persons were injured. The court was of the view that when PW-10 therein lost his real brother and PW-13 therein lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who all were the miscreants and their names. The court held that the witnesses may be knowing the persons by face, not their name, and, therefore, the mere fact that they had not named the accused persons in the section 161 statement, at that time, would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy. Thus, the court, in the facts of the said case, has upheld identification by face for the first time before the court.

142.6 In ***State of Uttar Pradesh v. Sukhpal Singh and others***, (2009) 4 SCC 385, the Supreme Court observed that in the said case, all the witnesses were otherwise known to the accused persons and they were not strangers to them. In the moonlight and lantern light they clearly identified them.

Therefore, the test identification parade was really not necessary in this case. The court observed that whether test identification parade is necessary or not would depend on the facts and circumstances of each case.

142.7 In the present case, most of the witnesses have named the accused in the statements before the police and/or in the statements before the Investigating Officer, SIT and/or in their depositions before the court and have thereafter identified them in the court for the first time. In some cases, the witnesses have neither named the accused in their statements recorded by the investigating agency and have also not named them in their depositions, but have identified them for the first time before the court. From the decisions of the Supreme Court referred to by the learned counsel for the respective parties, what emerges is that if the accused are the persons known to the witnesses, there would be no necessity of carrying out test identification parade which is normally relevant where the accused is an unknown person, so as to verify as to whether the suspect is the person who actually committed the offence. In the present case, the accused have actually been named by the most of witnesses in their statements before the police. Having regard to the fact that the witnesses have named the accused in their statements before the police, it is evident that the accused were persons known to them. In such circumstances, failure to state in the deposition that the accused persons were actually known to them or as to how they were known to them would not dent the credibility of the witnesses to the extent of identification of such accused. However, whether or not, to accept the identification of a particular accused by a particular witness for

the first time before the court would depend upon the facts and circumstances of the case of each individual witness and therefore, the credibility or otherwise of the identification of the accused persons by a particular witness would have to be considered at the time of analyzing the testimony of each individual witness as to whether such identification of the accused is required to be accepted.

**143. Majority of the witnesses have disowned the fact regarding time and arrival of the mob and firing resorted to by the police and have changed the sequence of events in the main incident.** Insofar as change in the timing of the incident is concerned, the witnesses in their testimonies have by and large deposed that the mob came at around 9:30 in the night shouting kill, cut etc. and burnt three cabins on the corner of Shaikh Mohalla and the police came and dispersed the mob and that the mob once again came at around 11:30 to 12:00, when the main incident took place. However, in the cross examination of the witnesses, a contradiction has been brought out that in the statements recorded by the police, many of the witnesses had stated that the police had resorted to firing to disperse the mob, which they have denied. However, such contradiction has been proved through the testimony of the Investigating Officer (Police). The Investigating Officer (Police) in his cross examination has admitted that Iqbalbhai Rasulbhai Shaikh had in his statement dated 10.3.2002 stated that on 01.03.2002 at about 9:30 at night a mob of Hindus of their village resorted to violence and burnt the cabins and gallas and upon the police coming and resorting to firing, the mob had dispersed. A similar admission is made in the case of Mustufamiya

Rasulmiya Shaikh. Thus, both these witnesses did state about the cabins and gallas being set on fire in the 9:30 p.m. incident and the contradiction is limited to the fact that in the police statements they had stated that the police had resorted to firing to disperse the mob. Contradictions have also been brought on record qua some of the other witnesses, to the extent that in their police statements they had stated that the police had resorted to firing. The contradiction, however, is limited to the police firing and not to the timing. Moreover, this version of cabins being set on fire at 9:30 does get support from the testimony of some of the police witnesses. PW-101 Khodidas Govindbhai (Exh.737) has inter alia deposed that after the incident near the panchayat office which took place at around 10:00 p.m. when they resorted to firing, etc., they were patrolling in the village and during the course of patrolling he had seen two three cabins in a burning condition at the corner of Shaikhvas. This statement of this witness has not been challenged in his cross examination. PW-99 Krishnakumar Kantilal, Unarmed Police Constable in the mobile van of Shri Rathod in his cross examination has stated that when they were patrolling in the village from 8:30 to 10:00, at that time except for the burning of the three cabins no other incident had occurred. He has further stated that in his presence, neither he nor his superior officer or anyone else with him had made any inquiry with regard to the three cabins which were burning. This part of the statement of this witness has gone unchallenged in his cross examination. PW-100 Razakbhai Allarakhabhai Unarmed Police Constable was assigned duties with requisitioned mobile with Shri G K Parmar. He has deposed that after the incident of firing at the panchayat office they had carried out patrolling and while

patrolling when they went towards Shaikh Mohalla, three cabins were burning and there were no persons there and at that time the street lights were on. However, an omission has been brought out that he had not stated so in his statement dated 09.03.2002. PW-102 Laljibhai Arjanbhai Desai has deposed that after the incident of firing they were patrolling in the village when P.I. K.I. Waghela had instructed PSI Rathod that if there was peace in the village then in respect of the incident of firing that has taken place at the village and cabins have been set on fire at the panchayat office as well as the cabins that have been set on fire near Shaikhvas, a complaint is required to be lodged, and hence, they had set off from Sardarpura and had come to Vijapur where a complaint was lodged. There is no cross examination of this witness on this aspect. Thus, several police witnesses have deposed regarding the cabins burning at the corner of Shaikh Mohalla at the time of patrolling, which was prior to the main incident and which has gone unchallenged in the cross examination by the defence. Therefore, though the some of the eye witnesses in their police statements have not referred to burning of cabins at the time of the first incident, the testimonies regarding the burning of cabins at the time of the first incident get corroborated by the testimonies of these police witnesses. Moreover, insofar as the timings of the incidents are concerned, it cannot be said that there is any material inconsistency in that regard.

143.1 One common contradiction brought out in the testimonies of most of the eyewitnesses is that before the police they had stated that at the time of the first incident of 9:30 p.m. the police had resorted to firing, whereas they have

denied this fact in their testimonies. It may be noted that in the police statements of all the witnesses it has been recorded that the police came at 9:30 p.m. and resorted to firing to disperse the crowd, whereas the witnesses before the Investigating Officer (SIT) have stated that this part of their statements recorded by the police was incorrect and that the police had come and dispersed the crowd but had not resorted to firing. Therefore, the inconsistency is as regards the police having resorted to firing during the incident of 9:30 p.m., which the witnesses have stated before the Investigating Officer (SIT) as having been wrongly written by the police. In this regard, the learned Special Public Prosecutor has submitted that having regard to the tense situation prevailing at Sardarpura, the police should have remained there and should not have gone away and further that the police to protect themselves must have recorded in the statements of the witnesses that there was firing. In this regard, it may be noted that several police personnel including Police Sub-Inspectors who were present at the panchayat office at the time of the first incident have been examined by the prosecution. None of these witnesses have stated anything regarding having resorted to firing at the entrance of Shaikhvas at the time of the first incident of 9:30 p.m. when the mob is alleged to have gathered outside Shaikh Mohalla and had started the attack. All the witnesses have deposed regarding an incident at the panchayat office where there was a mob of about one thousand persons from the direction of Sundarpur and a mob about five hundred persons from Sardarpura which had been dispersed by resorting to firing. Thereafter all that the police witnesses say is that they carried out patrolling at village Sardarpura and some such witnesses say that at that time they

had seen three cabins burning at the corner of Shaikh Mohalla. Therefore, except for recording by the police in the statements of the witnesses, which they have subsequently denied having made, there is no corroborative evidence to show that the police had in fact resorted to firing to disperse the mob which had gathered at the entrance of Shaikh Mohalla at 9:30 p.m.

143.2 Insofar as the contention with regard to change of sequence of events on the part of the witnesses is concerned, by and large what the witnesses have deposed is consistent with what is stated by them before the police. However, there are certain discrepancies in the depositions before the court and what is stated before the police. In this regard, it is settled legal position that in regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation, and one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelief though the witness is giving a truthful and honest account of the occurrence

witnessed by him. In the light of the above settled principles, we are of the view that mere change in the sequence of events where they are in the nature of minor discrepancies, would not discredit the veracity of the witnesses.

**144. The mob would not have let the residents of Shaikh Mohalla come out of their houses and go to Mahemoodmiya's house.** The learned counsel for the appellants/accused has submitted that most of the witnesses have deposed before the court that they were hiding in the house of Ibrahimmiya or some other house in Shaikh Mohalla and that after the mob started setting the houses on fire, they had come out and taken shelter in Mahemoodmiya's house. It was submitted that the version given by the witnesses cannot be believed for the reason that the mob would not have let the residents of Shaikh Mohalla come out of their houses and go to the house of Mahemoodmiya. In this regard, it may be noted that it is the prosecution case that Shaikh Mohalla was attacked by a huge mob of Patels of Sardarpura village. However, from the cross examination of the witnesses, certain facts have been elicited which give reason to believe that the involvement of persons from village Sundarpur and other neighbouring villages cannot be ruled out. We have, on the evidence on record found that while the presence of persons from other villages cannot be ruled out, the presence of the accused belonging to village Sardarpura who have been named and identified by the witnesses, stands established. Evidently therefore, the mob was comprised of persons belonging to Sardarpura as well as of people from Sundarpur and other neighbouring villages. If that be so, such persons who were outsiders would not be in a position to identify the

residents of Shaikh Mohalla in the faint light that was available and hence, it is quite possible that the witnesses could have stealthily slipped away without the crowd noticing them. Besides, considering the faint light that was available, it may have been possible for them to hide from the mob without being identified. It may then be contended as to how the witnesses could have identified the accused. This aspect shall be dealt with in detail while dealing with the theory of existence of light as propounded by the prosecution.

**145. Whether it was possible for anyone to survive in the room.** One of the contentions raised is, whether it was possible for anyone to survive inside the room. In this regard, it has been contended by the learned counsel for the appellants-accused that the absence of bloodstains or kerosene or hydrocarbons on the clothes of all the twenty persons inside, indicates that they were not inside the room. It has been submitted that the prosecution has miserably failed to carry out any scientific investigation and also to seize the clothes of those twenty persons, who claim to have come out alive, to corroborate the theory of their being inside. That having regard to the fact situation that the room remained closed for more than one to two hours and there were severe flames inside, which resulted in the death of twenty-eight persons with cause of death because of severe and/or extensive burns or asphyxia due to suffocation, it was not possible that those twenty persons could have remained alive or escaped without severe burns or inhalation injuries and there is no evidence of at least fifteen to sixteen persons having received any injury whatsoever. Thus, true facts and genesis of the incident have been suppressed.

145.1 In this regard, it may be noted that PW-1 Dr. Dhirajkumar Jivanlal Soni, in his cross-examination has opined that when a large number of patients are to be examined at a time, then for ordinary injuries, it is not necessary to carry out tests that are carried out for serious injuries. In the cross-examination of this witness, he has stated that if there is a closed house and a person is caught in the smoke, then the suffocation depends on the amount of smoke. The witness, in his cross-examination (page-33) has admitted that if there are thirty-five to forty persons in a room and there is smoke in the room and if the patient is in the room, then the patient would inhale carbon particles and would have difficulty in breathing. The witness has also admitted that if a person is alive and is in a room which is burning, then when he tries to inhale oxygen, carbon particles would enter his respiratory tract. The witness has also admitted that if in a 16 x 11 room, thirty-three persons have been burnt to death, then the persons who are alive would also suffer from suffocation. The witness has also stated that from the patients who had come to him for treatment of burn injuries, he had not tried to find out if there are carbon particles in their bodies.

145.2 PW-3 Dr. Babubhai Nathubhai Chaudhary, in his cross-examination, has admitted that in case where there is death due to asphyxia, there would certainly be carbon particles in the respiratory tract. The witness has stated that in this case, he has referred to asphyxia on account of suffocation due to smoke. In his cross-examination, he has further stated that if there are forty persons in a 16 x 11 room and there is a fire, the people would die due to smoke or the fire and the

symptoms would be visible. PW-8 Dr. Nilima Ajaybhai has stated that if there is fire on all sides and there is kerosene on the body of a person, there are rare chances of his escaping. She has also stated that if there are too many persons in a room and the fire is at a distance and the person is away from the direct flames, then he may not sustain burn injuries.

145.3 In this case, the fire in the room was only on account of inflammable substances which are alleged to have been poured inside the room at the time of the incident. From the testimony of the panch witness as well as upon a perusal of the video recording of the scene of offence panchnama, there hardly appears to be any wooden furniture inside the room, except a cradle which is lying in a broken condition. The doors and windows of the room are made of steel and therefore, evidently would not catch fire. The scene of offence panchnama also shows that there are rags lying in the room, which though are covered with soot, do not appear to have been burnt. Two pillows were also lying there, which do not appear to be burnt. Evidently therefore, the intensity of the fire was not so much as to burn everything inside the room. A perusal of the panchnama of recovery of clothes of deceased and the inquest panchnama, shows that even the clothes of the deceased in all cases are not fully burnt. From the manner in which the incident has occurred as deposed by the witnesses, it appears that inflammable substances were thrown inside the house from the window and were ignited by throwing burning rags. Therefore, those inside the room who would be sitting near the window from where the inflammable substance was thrown would be drenched with the inflammable substance and depending on the distance from

where the inflammable substance was thrown, varying degrees of such substance would have spilt on their person. In case of a person sitting in the rear side of the room away from the window, there would be no trace of such inflammable substance. Besides, the inflammable substance being a fluid, it would have flowed on the floor which shows why most of those inside have sustained burn injuries on their feet and legs. A perusal of the testimony of the panch of the scene of offence panchnama together with the video recording shows the presence of soot on the upper sides of the front window and door, which means that smoke has escaped from the front door and the windows of the room. Therefore, it may be that on the persons sitting on the side where there were direct flames sustained burn injuries and those close by suffered from suffocation, while those at a distance may not have been so affected as the smoke has also escaped from the front door and windows. Besides, the medical case records of some of the witnesses clearly show that they had pain in the throat, and in the case of Suhanabanu, there was complaint of carbon dioxide poisoning. The evidence on record further reveals that three children were taken out alive in critical condition, who later on succumbed to their injuries. Similarly, it is quite possible that some others who were in the room may have sustained lesser injuries and may have survived. It would all depend on which section of the room which they were occupying and whether the flames reached them. It appears that due to smoke, those inside must have been subjected to asphyxia and suffocation also and some of them appear to have been clawing at the walls in agony. However, when three children, all of tender age, did survive, albeit for a short time, it cannot be ruled out that some adults and children may also

have escaped with lesser injuries. Moreover, the postmortem reports of the deceased persons show that some of them have sustained very few burn injuries, but have died mainly due to suffocation.

145.4 It has been contended on behalf of the appellants-accused that qua those who have survived, no test has been carried out to ascertain as to whether they had inhaled carbon particles. In this regard, from the testimony of the medical officers, it appears that only tests to the extent necessary have been carried out and no investigation have been carried out at the relevant time. Therefore, merely because no such tests to ascertain as to whether those who survived have sustained any inhalation injuries were carried out, would not mean that such survivors were not present in the room. In our opinion, as already recorded at the time of analyzing the evidence of each individual witness, in case when both the parents are present in the room, it is but natural that the child would also be present. Moreover, it is manifest that all the persons who took shelter in Mahemoodmiya's house, did so because they considered it to be the safest place in the mohalla. In these circumstances, it is difficult to believe that a mother would take shelter in the house and not take her children along with her. Therefore, there is no reason to disbelieve that the witnesses and others were accompanied by their children in the house. For the reasons already discussed earlier, we are not inclined to accept the submissions advanced by the learned counsel for the appellants-accused that no person inside the room could have survived.

**146. Existence of light at the scene of offence so as to enable the witnesses to identify the accused has not been established by the prosecution.** Before the trial court, the prosecution has propounded various theories to establish the charge against the accused. One such theory is the existence of light at the scene of offence. The learned counsel for the appellants – accused submitted that all facts relating to light were put up by the witnesses only with a view to show that the witnesses were in a position to identify the accused. It was submitted that firstly, admittedly, the electric connection of the street-lights was disconnected at the relevant time; secondly, the entire theory is not acceptable for the reason that the light theory is subsequently created and is not supported by the panchnama and the site plan; and thirdly, if the light theory goes, then the court will look for evidence as to whether there was a source of light in which the witnesses could identify the accused. It was submitted that the presumption that it was a day of 'beej' and there must be moonlight is not available to the prosecution, inasmuch as, this theory is a question of fact. It was submitted that whether there was moonlight or whether where the incident took place, there was sufficient light, are questions which need to be proved on record by cogent, reliable and oral evidence of the witnesses. It was submitted that the second inference recorded by the trial court namely, that the village people who are used to walk in the dim light can identify people, is again a question of fact to which nobody has deposed. It was submitted that the entire theory of availability of light has been introduced after the SIT came into the picture and one of the persons had said so in the affidavit. It was submitted that having regard to the totality of the facts, when the existence of light is not pleaded

at the initial stage, it would surely be a relevant consideration while examining the veracity of the say of the witnesses about having identified the accused. It was urged that it is an admitted position that the street lights of Sardarpura village had been disconnected at the relevant time, and the prosecution has failed to establish the existence of any external source of light like halogen lights, tube lights, focus lights, etc., which are all in the nature of improvements, and hence, it was not possible for the witnesses to identify the accused having regard to the fact that the incident had taken place at or about mid-night when it was pitch dark. Reliance was placed upon the decision of the Supreme Court in ***Bollavaram Pedda Narsi Reddy and others v. State of Andhra Pradesh*** (supra), wherein the appellants therein were admittedly persons with whom the two witnesses had no previous acquaintance; the occurrence happened on a dark night and the court observed that when the crime was committed during the hours of darkness and the assailants were utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. The court, in the facts of the said case, held that in the absence of cogent evidence that PWs 1 and 2 therein by reason of the visibility of the light at the place of occurrence and proximity to the assailants, had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the appellants therein were the real assailants. Reliance was

placed upon the decision of the Supreme Court in **Arokia Thomas v. State of Tamil Nadu**, (supra), wherein the court observed that undisputedly, at the place of occurrence, there was no electric light. In the first information report, it was nowhere stated that as to what was the source of light in which the witnesses identified the accused persons. When the question was put to PW-1 by the investigating officer during the course of investigation as to whether he identified the accused persons in torchlight, moonlit night or in the light of the vehicle, he kept mum and nowhere stated before the police that he identified the accused persons in the light of the vehicle. It appears that for the first time, the said witness disclosed in his evidence before the Sessions Court after more than two and a half years of the date of occurrence that he identified the accused persons in the light of the motorcycle. The court was of the view that the evidence of the witness disclosing that he identified the accused person in the light of the vehicle, was highly doubtful especially when this statement was made for the first time in the Sessions Court. The decision of the Supreme Court in the case of **State of M.P. v. Gudhan** (supra) was cited wherein the court agreed with the finding recorded by the High Court that if really there was a tube light at the place of incident by which the witness identified the respondent, then the investigating agency would certainly have shown the existence of tube light and its placing in the sketch because it was a very important fact mainly because the identification of the accused is a vital factor to be proved by the prosecution. The court was of the opinion that the benefit of the omission to point out the existence of such light in the sketch should go to the accused.

146.1 As regards the existence of lights at the scene of offence, PW-48 Sabirhussein Kadarmiya has deposed that Patel Ambalal Maganbhai and Amratbhai Somabhai Mahervadia from Kapurvas opposite their house were standing below the electric pole opposite their house and Amratbhai Somabhai had climbed over the pole and joined the ends of wires with the tube light and had directly started the light and made utterances that now they would enjoy beating the bandiyas. In this regard, it may be noted that this witness's house is not situated in Shaikh Mohalla and he lives in one of the scattered Shaikh houses in Sardarpura, therefore, even if such lights were in existence, it would not be directly related to the incident. Apart from that, such story has come up for the first time after eight years and none of the other members of his family have deposed to this effect. Under the circumstances, the say of this witness to the extent of putting up of lights by the above named persons, does not inspire confidence.

146.2 PW-54 Sharifmiya Bhikhamiya Shaikh has deposed that Amratbhai Somabhai Mahervadia had put a halogen lamp on the electric pole. However, apart from such fact, no other details have come forth. The witness was silent in his statement dated 06.03.2002 as regards exactly on which pole such halogen light was put. Similarly, even the police witnesses in their original statements have not referred to the existence of light, but have improved upon their original versions in their statements recorded by the SIT. Therefore, the improved version with regard to existence of lights appears to be the brainchild of the SIT. While it is not necessary that all details should be stated by a witness in the statement recorded by the police at the first instance, because, it may be

that a witness may not recall certain facts while narrating the incident to the police, more so, when it concerns something that happened prior in point of time to the incident, such fact assumes significance because none of the witnesses at the relevant time have stated anything regarding putting up of such halogen lamps, tube lights, etc. and for the first time, the witnesses have come forth with such a story only at the time when affidavits came to be made for submitting the same before the Supreme Court and later on, when the SIT came into the picture or even thereafter, at the stage of recording of their evidence. Having regard to the overall facts that have come on record, one cannot disregard the fact that the stories with regard to external lights having been put up on or near the scene of incident appear to be the result of tutoring. However, non-acceptance of the story with regard to halogen lights, tube lights etc. being put up, does not mean that there was pitch darkness and therefore, the witnesses could not have identified the accused.

146.3 The above referred decisions of the Supreme Court on which reliance has been placed by the learned advocate for the appellants – accused would be squarely applicable to the facts of the present case to the extent the witnesses have referred to the existence of focus lights, halogen lights, direct connection of the tube lights on the street-lights prior to the incident, inasmuch as, such facts have been brought on record by way of improvement in the subsequent statements of the witnesses and did not find any place in the original statements and some of the witnesses have deposed regarding the existence of such external source of light, for the first time, in their testimonies before the court. However, insofar as the

existence of light from the flames of the jeep and the houses as well as the moonlight are concerned, the above decision would not come to the aid of the appellants – applicants.

146.4 It is an admitted position that the incident in question has taken place in the dead of night. The evidence on record reveals that the street lights in the village were not working as the same had been disconnected by the GEB/UGVCL as the village panchayat had not paid the electricity bills. Consequently, the identification of the accused assumes importance. It may be noted that while the first informant, in the first information report, has mentioned that he had identified the accused in the light, in his deposition before the court, which is his substantive evidence, he has not stated so. However, PW-83 Sharifabanu Sabirhussain, in her examination-in-chief, has stated that she had identified the persons in the mob in the moon light and the light of her burning house. Some of the witnesses have deposed that in the light of the flames and other lights, they had seen the accused. The trial court has held that it being "beej" namely the second day after full moon night, there was sufficient light. On behalf of the appellants it has been contended that the fact regarding the day of the incident being the second day after full moon night and therefore, there was sufficient light has not been brought on record through the testimonies of the witnesses or other evidence on record. The trial court was, therefore, not justified in relying upon such fact for coming to the conclusion that there was sufficient light to identify the accused. Apropos such contention, it may be germane to refer to section 57 of the Evidence Act, which says that the court shall take judicial notice of the facts enumerated thereunder,

one of which is: (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette. It cannot be gainsaid that full-moon day and the second day after full moon are divisions of time and hence, it is permissible for the court to take judicial notice of the same. Therefore, it cannot be said that the trial court committed any error in taking notice of such fact.

146.5 The next question that arises for consideration is whether in the absence of street lights, it could be possible to identify the accused. In this regard, it may be noted that from the testimonies of the witnesses it has come on record that they had identified the accused in the moonlight and the light of the flames, etc. At this juncture, it may be apposite to refer to certain decisions of the Supreme Court. In **Surendra Pal v. State of U.P.**, (2010) 9 SCC 399, The Supreme Court held thus:

#### ***"Point IV***

***19. This aspect of the matter has been dealt with elaborately by the courts below. PW 1 stated in the first information report itself that he had seen and identified the accused persons in the moonlight and "in the light of electricity". There is no dispute whatsoever that the appellants and other accused barring two were all previously known to PWs 1 to 4. The occurrence did not take place all of a sudden. The accused after reaching the spot insisted for a compromise of a previous case, obviously some exchange of words took place between the deceased and the accused and the parties must have come close to each other. The appellants were not strangers to any of the witnesses. The evidence of PWs 1 to 4 is consistent with what has been stated by PW 1 in the very first information report that the accused were identified in the moonlight and electric light. In the site plan also, the existence of electric bulb at place "B" is shown.***

**19.1** In this regard the trial court dealt with the matter very elaborately and observed:

“... And at place “B” the bulb is stated and this house is of PW 1 Kirpal Singh and where the position of the bulb is shown the chhabutra of the occurrence is situated just in front of in after the way (road) towards the north side. Therefore, to identify in one (sic one in) light of this bulb is quite natural and there is no contradiction in the statement of any of the witnesses on this point. All the witnesses have stated to have identified the accused in the electric light and moonlight. Also otherwise, the houses of the accused persons are situated beside the house of the victim party, after the raasta and are of the same village. Therefore, under such circumstances, even in less and dim light to identify the accused persons is quite natural.”

**19.2** That apart it is not even suggested by the defence that there was no moonlight whatsoever on that fateful night. For the aforesaid reasons, we find no merit in the contention urged by the learned Senior Counsel for the appellants. The High Court has on reappreciation of the evidence concurred with that finding recorded by the learned Sessions Judge. We are not inclined to interfere with the concurrent finding of fact arrived at by the courts below.”

146.6 In **State of U.P. v. Sukhpal Singh**, (2009) 4 SCC 385, the Supreme Court held thus:

**“20.** The trial court found the testimony of Bhagwant Singh, PW 2, brother of deceased Hiralal and Aidal Singh and PW 5 injured eyewitness Smt Longshree, wife of Hiralal and another injured PW 3 Chandan Giri credible and trustworthy. The appellants were not strangers to the witnesses. They had known each other. There was adequate moonlight and the light of the burning lantern. The trial court analysed the prosecution version and the defence version and came to the clear conclusion that the prosecution has succeeded in establishing its case beyond shadow of doubt.”

**“25.** In the instant case, all the witnesses have stated that they had otherwise known the accused persons and

*they were not strangers to them. In the moonlight and lantern light they clearly identified them. Therefore, the test identification parade was really not necessary in this case.*

**26.** *Whether test identification parade is necessary or not would depend on the facts and circumstances of each case. This Court in a series of cases has taken the view that the test identification parade under Section 9 of the Evidence Act is to test the veracity of the witness and his capacity to identify the unknown persons whom the witness must have seen only once but in the instant case the witnesses were otherwise known to the accused persons, therefore, the test identification parade has no great relevance in the facts and circumstances of this case."*

146.7 Reference may also be made to the decision of the Supreme Court in ***Basudeo Yadav v. Surendra Yadav***, (2008) 15 SCC 124, wherein the court held thus:

**"13.** *So far as identification is concerned, a few decisions of this Court need to be noted. In *S. Sudershan Reddy v. State of A.P.*, (2006) 10 SCC 163, it was noted as follows:*

*"19. In *Nathuni Yadav v. State of Bihar*, (1998) 9 SCC 238, this Court observed that under what circumstances the lack of moonlight or artificial light does not per se preclude identification of the assailants. It was noted as follows:*

*'9. ... Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are,*

*therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meagre, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander.'*

20. In the instant case, the time was about 7 p.m. in the evening in the month of April. The position was again reiterated in *Bharosi v. State of M.P.*, (2002) 7 SCC 239. It was *inter alia* noted as follows:

*'9. ... In relation to the identification of the accused in the darkness, the High Court has clearly stated that in the month of April, the sun sets at about 7.00 p.m. in the evening, the accused were known to the witnesses and could be identified even in faint darkness. Here again, the High Court has relied upon the decision of this Court in *Nathuni Yadav v. State of Bihar*. The High Court has also noticed that the enmity between the deceased and the appellants was not disputed.'*

21. In *Krishnan v. State of Kerala*, (1996) 10 SCC 508, it was observed as follows:

*'11. After giving our careful consideration to the facts and circumstances of the case and the evidence adduced, we do not find any reason to interfere with the well-reasoned judgment passed by the High Court in convicting Appellant 2 Vijaykumar. So far as the contention of insufficient light is concerned, we may indicate that in an open field on a cloudless starry night, there was no difficulty in identifying a known person from a close distance. That apart, it should be kept in mind that there was no difficulty in identifying the victim by the assailants because of existence of some light with which identification was possible. PW 1 being a close relation of both the accused, there was no difficulty for PW 1 to identify them. The accused were also known to the other witness for which he could also identify them. So far as appellant Vijaykumar is concerned, PW 1 had physically prevented him from causing further injury on the deceased and there was a*

*tussle between the two. Hence, there was no difficulty for PW 1 to identify Accused 2 Vijaykumar. His deposition gets corroboration from the deposition of PW 3 who had seen Vijaykumar at the place of occurrence. PW 3 had not seen Vijaykumar causing any injury on the deceased because by the time PW 3 came near the place of the incident and noticed the incident, Vijaykumar had been prevented by PW 1 and his knife had fallen on the ground."*

**14.** Again in *Israr v. State of U.P.*, (2005) 9 SCC 616, it was observed as follows:

*"19. Coming to the plea relating to non-probability of identification, the evidence of PW 3 is very relevant. He has stated that the occurrence took place at the time of isha prayers which are concluded at about 9.30 p.m. There was light of the moon as well as of the neighbouring houses and the electric poles in the lane. The date of occurrence was 11th day of lunar month and the place of occurrence is near the mosque as well as many houses close by. Therefore, identification was possible. Further a known person can be identified from a distance even without much light. The evidence of PW 3 has also been corroborated by the evidence of others. Evidence of PWs 3 to 5 proves that identification was possible."*

**15.** Therefore, the trial court was justified in holding that identification was possible. The hypothetical conclusions of the High Court which are based on surmises and conjectures on the other hand are unsupportable."

146.8 In **Tahsildar Singh v. State of U.P.**, (supra) the Supreme Court held thus:

**"38.** It was then commented that in the first information report the culprits were said to have come from the southern lane, while in court the evidence was that they had come to the well from the eastern lane. The discrepancy is a minor one. Johari must have been concerned with reporting the first firing from the well, and he might have mistaken the actual direction from which the culprits had approached the well. Johari's statement made no mention of the culprits uttering any warning that no one was to run away as they advanced from the well, whereas in court the witnesses spoke to

*that effect. This was a detail which Johari might not have considered to be of sufficient importance, as he was anxious to make a bare statement in order to get the police to proceed to the place of occurrence as quickly as possible. Johari's statement also makes no mention of the culprits examining the bodies of the dead and examining their faces and exclaiming that Asa Ram, one of the men whom they wished to kill, had been killed. Here again, this was a matter of detail which Johari might not have considered necessary to mention. The first information report made no mention of the existence of gaslight. It did, however, mention the existence of light of lantern and existence of moonlight. The existence of light from lantern and the full moon obviously was sufficient to recognise known persons. It is in evidence that the appellants were known for several years to the witnesses who has identified them as participants in the occurrence. It could not be said with absolute certainty that the mention of the existence of light of lantern excluded the existence of gaslight."*

146.9 Insofar as the existence of focus lights, tube lights and halogen lights is concerned, except for the statements of witnesses, that too, after a considerable delay, firstly in the affidavits stated to have been filed before the Supreme Court and thereafter before the Investigating Officer (SIT), none of the witnesses have referred to existence of such lights at the relevant time when their statements came to be recorded by the investigating officer (Police). While it may be that in a few cases, witnesses may not have thought it relevant to state this fact to the investigating officer while recording their initial statements, but when none of the witnesses state this fact in their initial statements and after the SIT took over the investigation, several witnesses come forth with a version regarding existence of such lights, it creates a suspicion that such a story has been subsequently concocted so as to establish that there was sufficient light to identify the accused

in the dead of the night when the incident took place. Moreover, PW-87 Patel Jitubhai Chhaganbhai, the then Talati-cum-mantri of village Sardarpura has deposed that the street light supply in the village had been disconnected on account of non-payment of electricity bills, and that on 1<sup>st</sup> March, 2002 he had not seen any halogen lights either on street light poles or elsewhere. Even if it is assumed that the putting up of focus lights and halogen lights etc. may not have been referred to by the witnesses at the relevant time on account of ignorance or not thinking it to be relevant, having regard to the fact that such statements have come at a later stage, the Investigating Officer (SIT) ought to have collected corroborating material on the basis of panchnama of the places where such lights are stated to have been put up and obtained details thereof. Today what we have is a scene of offence panchnama, which apart from the fact that it is not duly proved in accordance with law, is silent about the existence of any such light at or near the scene of offence. The panch witness in his testimony also does not refer to the existence of any such lights. For the first time the witnesses in their statements recorded before the Investigating Officer (SIT) have referred to the existence of focus lights, halogen lights and street lights. However, in the cross examination PW-112, viz. the Investigating Officer (SIT), who had recorded the statements of the witnesses, the defence has elicited that he had not investigated as to whether halogen lights were available at the time of the incident. He had investigated as regards on which electric poles in the village, the tube-lights were on; but had not got any map prepared about the location of the tube-lights. He had not got any assessment done as regards how the tube-lights were illegally connected and had also not drawn any panchnama in

that regard. He had not obtained any opinion of an expert as to how an illegal connection can be put on and switched off. Though the witness has denied the suggestion that the theory of halogen light and tube-lights is subsequently got up, he has admitted that during his investigation, it has been revealed that when the police reached at night after the incident, it was dark and investigation was carried out in the light of the police vehicles. He had come to know that the lights of the police vehicles were switched on and together with the light of the battery, the corpses were taken out. Therefore, in the absence of any corroborative material having being brought on record, it would be hazardous to place reliance upon the statements of witnesses which have been made at a much later stage, only after the SIT came into the picture for the purpose of accepting the existence of halogen lights, focus lights and the tube-lights on the street lights being directly connected and switched on.

146.10 However, merely because the existence of halogen lights, focus lights or street lights at the scene of offence has not been established, *per se* is no reason to believe that the witnesses could not have identified the accused. Having regard to the fact that the incident had occurred in the dead of night, it is apparent that in the absence of street lights, the visibility would be considerably less. The trial court has taken note of the fact that the incident had taken place on the second day after full moon night and hence, in all probabilities, there would be moon light. The existence of moon-light is also supported by the testimony of PW-83 Sharifabano Sabirhussain, and her version has not been dislodged during the course of her cross-examination. Moreover, the evidence on record also reveals that about five houses in Shaikh Mohalla

had legal electric connections. A perusal of the video recording of the scene of offence clearly shows that most of the houses had electricity connections. From the testimony of PW-86 Patel Dineshbhai Bhagvanbhai, Deputy Engineer, UGVCL, it has come on record that while electric supply of the street lights had been disconnected on 24.12.2001 and remained disconnected till 06.06.2002, the street light wires, domestic use and commercial use wires have a common wire and if there is an industrial use connection, then there is a separate wire. These are single phase and three phase wires. If the wires other than street lights are live, then from the live wire the lights can be put on if one so desires. In his cross-examination, it has come out that on the previous day, the three phase supply was on from 22:30 to 08:30 in the morning which was in respect of agriculture and industrial use. In his cross-examination, it has further come out that the single phase supply was on till 10:30 at night on 01.03.2002 and that since three phase supply on, single phase supply would also be on. Thus, from the testimony of this witness, it is established that the electric supply for domestic use (single phase) was on during the night of 01.03.2002 at Shaikh Mohalla. In the opinion of this court, having regard to the fact that the atmosphere was tense throughout the day and incidents of stone throwing and burning of cabins had taken place earlier, it is more probable than not that the people of the mohalla would be awake and therefore the lights in the houses may be on. One of the witnesses has deposed that after he entering a house for the purpose of hiding from the mob, he switched off the lights. This also goes to show that the lights in the houses in Shaikh Mohalla were on. Besides one cannot ignore the fact that it was the second day after full moon night and hence

there would be sufficient moonlight to recognise known persons. Moreover, since Bachumiya's jeep and some of the houses were set ablaze, it is natural that there would be tall flames throwing considerable light. Therefore, since the accused were known to the witnesses, the witnesses would have been in a position to identify them as the moonlight, the light from the flames of the burning houses and jeep, etc., and the lights from the houses, would be sufficient to identify them from a reasonably close distance. Having regard to the proximity from which the witnesses have seen the accused, there is no reason to believe that they could not have identified the accused in the available light. In these circumstances, the identification by the witnesses of accused persons who were otherwise known to them in the available light, is quite possible and plausible and therefore, the contention that in view of the street lights being disconnected, the witnesses could not have identified assailants, does not merit acceptance.

**147. Affidavits made by witnesses for the purpose of submitting them before the Supreme Court:** Another relevant aspect of the matter which requires consideration is the affidavits made by some of the witnesses for the purpose of submitting the same in some proceeding before the Supreme Court. As noticed earlier, in this case, after the submission of the charge-sheet on 27<sup>th</sup> July, 2002, some time on 6<sup>th</sup> November, 2003, nine persons had made affidavits which were to be submitted in certain proceedings before the Supreme Court. All those witnesses who have made such affidavits which are stated to have been submitted before the Supreme Court have been incisively grilled as regards where

and how such affidavits were prepared. However, the witnesses have denied having made such affidavits at the instance of any NGO or at the instance of Teesta Setalvad and her associates, though some of the witnesses do say that they had a talk with Teesta Setalvad on the phone. On behalf of the appellants – accused, it has been pointed out with reference to the cross-examination of the witnesses that it has come on record that all nine affidavits by different witnesses were made on the same day with continuous serial numbers before the Notary, which is suggestive of the fact that they are prepared at one place with the help of a legal mind and were got affirmed together with different stories and facts to implicate as many innocent persons as possible.

147.1 In this regard, it may be noted that PW-55 Ashiqhussain Bachumiya Shaikh, in his cross-examination, has stated that he had a talk with Teesta Setalvad on telephone. Various questions were put to the witness as regards the manner in which the affidavits were prepared. The witness has admitted that in his affidavit dated 6<sup>th</sup> November, 2003, he has stated that "*I have made this statement of my own free will and having fully understood the implications of this statement. I have made this statement upon detailed questioning on the telephone of a Journalist/Human Rights Activist – Teesta Setalvad and in the presence of Shri Raikhan Azizkhan Pathan*". PW-52 Hizbulmiya Hussainmiya Shaikh, in his cross-examination (para 11) has stated that on 5<sup>th</sup> November, 2003, in the evening, Jamalbhai Dosbhai had told them about making affidavits. He, Jamalbhai, Ibrahim Rasulbhai, Nasirmahammad Akbarmiya, Ayubmiya Rasulmiya, Mustufamiya Rasulmiya, Ashiqhussain Bachumiya and Sattarmiya Bachumiya had gone

to the Mirzapur Court at Ahmedabad for making the affidavits. All the above persons had made affidavits at the Mirzapur Court and it had taken them the whole day. He has stated that he does not remember as to who was the Notary and that on that day, they had put two signatures, one on the affidavit and one on the register. He does not remember as to whom he had given the affidavit. He has denied that the affidavits were prepared on the computer at Teesta Setalvad's office and that Rais Khan, Munsaf Khan and advocate M.M. Tirmizi had prepared them and they had merely signed them. He has admitted that all of them had signed serially from Serial No.58/03 to 66/03 in the Notary's register. These facts are sought to be brought on record by the defence with a view to show that the victims have not deposed the correct facts and have fabricated facts at the instance of the NGO and have sought to implicate as many innocent persons as possible. In this regard, it appears that the affidavits have not been prepared by the witnesses on their own and having regard to the tenor and the facts as stated in the affidavits, they appear to have been drafted by a legal mind to evoke the sympathy of the court. Even the facts stated in the affidavits do not appear to be correct and appear to have been taken on telephone as disclosed by one witness. In the testimony of some of the witnesses, they have deposed facts which are not consistent with the facts stated in the affidavits. It appears that the witnesses appear to have been advised to stick to the facts as stated in the affidavit, inasmuch as, most of the witnesses have adhered to the stand adopted by them in the affidavits made by them and to the extent they have not adhered to the averments made in the affidavits, they have explained the reason why.

147.2 PW-47 Ibrahimiya Rasulmiya Shaikh upon being confronted with the facts stated in the affidavit has stated that the facts averred in the affidavit are correct and not what is deposed before the court. It may be noted that the affidavits came to be prepared after the charge-sheet has already been filed and nothing has been brought on record to show exactly in which proceeding before the Supreme Court, the affidavits were made or have been filed. It appears that some proceedings were instituted before the Supreme Court for transfer of riot cases relating to the Godhra incident outside the State of Gujarat as well as for further investigation. It is in some such proceeding that the affidavits were to be filed. As to how the affidavits have come on record is stated by PW-112 Gautamkumar Vishnubhai Barot namely, the Investigating Officer (SIT). In the cross-examination of this witness, it has been elicited that during the course of investigation, he found the affidavits of the witnesses. When SIT took over the charge of investigation, nine affidavits handed over to the SIT were found. These nine affidavits were made by Ibrahim Rasulmiya, Mustufamiya Rasulmiya, Hizbulmiya Hussainmiya, Nazirmahammad Akbarmiya, Ashiqhussain Bachumiya, Mohammad Sattar Bachumiya, Sharifkhan Bhikumiya and Ayubmiya Rasulmiya, which he had found in the investigation papers. Over and above these, he had also found an affidavit of Jamal Dosubhai Shaikh who has subsequently passed away. The Investigating Officer has further stated that he had received these affidavits from the SIT office with the petition of the complainant before the Supreme Court. He has further stated that he has not investigated as to who in the SIT had accepted these affidavits and has admitted that all the affidavits are of 6<sup>th</sup> November, 2003. He has admitted that the

affidavits are not certified copies of the affidavits submitted before the Supreme Court and that he has not inquired as to whether these affidavits have been filed before the Supreme Court. He has not tried to obtain certified copies of the affidavits from the Supreme Court nor has he asked the witnesses to bring certified copies if the affidavits are filed before the Supreme Court. The Investigating Officer (SIT) has further admitted that all the affidavits bear the signature of Mr. Y.A. Shaikh as Notary and Mr. Tirmizi as advocate. He has also admitted that the names of Raiskhan Azizkhan Pathan and Teesta Setalvad find a mention in these affidavits. The witness has further stated that the averments made by Ibrahim Rasulmiya in paragraph 35 of the affidavit, Mustufamiya Rasulmiya in paragraph 8 of his affidavit, Hizbulmiya Hussainmiya in paragraph 10 of his affidavit, Nazirmahammad Akbarmiya in paragraph 10 of his affidavit, Ashiqhussain Bachumiya in paragraph 8 of his affidavit, Mohammad Sattar Bachumiya in paragraph 8 of his affidavit, Sharifmiya Bhikumiya in paragraph 8 of his affidavit and Ayubmiya Rasulmiya in paragraph 18 of his affidavit, are the same. The witness has also admitted that during the course of his investigation, he has learnt that certain averments which the witnesses had not stated find place in the affidavits. He has also admitted that during the course of investigation, it appears that the witnesses were not aware about certain facts stated in the affidavits and that he has not investigated as to whom the affidavits were handed over after the same were made by the witnesses. He has also not investigated as to how the facts which are not stated or how false facts have crept into the affidavits.

147.3 From the facts referred to hereinabove, it is apparent that certain affidavits have been made by the above-named eight witnesses. The facts stated in those affidavits to some extent are inconsistent with the facts deposed before the court. While, from the facts which have come on record as aforesaid, it appears that the affidavits have been made on account of tutoring, nonetheless, what has been stated in the affidavits are averments made on oath by the witnesses and they are, therefore, bound by them. While we are conscious of the fact that making false averments on oath is a serious offence, we cannot be oblivious to the circumstances in which and how the affidavits were prepared. On a reading of the evidence, it is evident that to the extent of making of the affidavits is concerned, the victims are tutored and they have not come with the correct facts. Nonetheless, from the testimony of PW-52 Hizbulmiya Hussainmiya Shaikh and PW-112 Gautamkumar Vishnubhai Barot, the Investigating Officer (SIT), it is evident that the affidavits have not been prepared by the witnesses and that without taking proper instructions, on the basis of telephonic talk, the affidavits have been prepared by the NGO and the witnesses have affirmed them without even understanding the implications of making such an affidavit. While appreciating the evidence of these witnesses, one cannot forget the class of society to which they belong, namely, they are rustic villagers working in the agricultural fields of the Patels or are drivers or engaged in colour work, petty shopkeepers having carts or cabins, etc. Moreover, one cannot ignore the glaring fact that these witnesses have overcome a huge tragedy whereby they have not only lost their near and dear ones but have lost their homes and hearth and have been located to some other places

and under the influence of so-called well-wishers who may have promised to get them justice, appear to have done as they were told.

147.4 Be that as it may, it is a fact that the witnesses have made such affidavits. What is most confounding is why the prosecuting agency sought to place such affidavits on record, when from the testimony of the Investigating Officer of the SIT, it is evident that he was well aware of the fact that certain averments which the witnesses have not stated find place in the affidavits and that the witnesses were not aware about certain facts stated in the affidavits. It also appears that the Investigating Officer was aware of the fact that false facts have crept into the affidavits. Nonetheless, despite the fact that the affidavits made by the witnesses have no relation to the investigation in this case, the Investigating Officer of the SIT has sought to bring such affidavits on record by placing them together with the charge-sheet papers. Not only that, to make matters worse, apart from the fact that such affidavits are placed along with the charge-sheet papers, during the course of the examination-in-chief of the witnesses, the learned Special Public Prosecutor has sought to bring the affidavits on record and had requested the court to exhibit the same. One fails to understand as to why when the averments made in the affidavits are inconsistent with the facts deposed by the witnesses before the court, and more so, when the affidavits have no direct relation to the investigation into the offence in question and have been made after the submission of the charge-sheet, the prosecution sought to spoil its own case by trying to bring on record such affidavits containing facts which were inconsistent to what was deposed before the

court. It may also be noted that the Investigating Officer (SIT) has recorded statements of witnesses in connection with the averments made in the affidavits. One fails to understand as to how the contents of these affidavits which had been made for a totally different purpose, were germane to the investigation of the offence. From the record of the case, it emerges that the Investigating Officer has not even ascertained as to in connection with which proceedings these affidavits have been made and for what purpose. Nonetheless, the Investigating Officer (SIT) has recorded statements of witnesses in the context of their affidavits during the course of further investigation. As to what is the evidentiary value of such affidavits and to what extent the same could be put to the witnesses has been already discussed hereinabove while considering the provisions of section 145 and clause (3) of section 155 of the Evidence Act and hence, we need not dilate any further on this aspect.

148. Since the complicity or otherwise of the accused in both the conviction cases as well as acquittal cases would have to be examined together, it would be necessary to deal with the contentions raised on behalf of the appellants in the appeals filed by the State and the private parties challenging the acquittal of thirty-one accused persons. Various theories have been propounded by the prosecution and the learned counsel for the victims with a view to establish the charges against the acquitted accused, more particularly, the charge of criminal conspiracy under section 120B of the Indian Penal Code.

149. **CRIMINAL CONSPIRACY:** The first theory propounded is that the accused to further the conspiracy hatched by them

had put up lights at strategic places in and around Shaikh Mohalla with a view to identify the victims. In this regard, on behalf of the appellants in the acquittal appeals, Mr. K. B. Anandjiwala, learned Special Public Prosecutor appearing on behalf of the SIT and Mr. Mihir Desai, learned counsel for the appellants in Criminal Appeals No.140, 142 and 148 of 2012 have submitted that the prosecution has adduced sufficient evidence on record to establish the hatching of a conspiracy between the accused. It was submitted that the prosecution has, through the testimonies of PW-60 Bachumiya Imammiya and PW-48 Sabirhussein Kadarmiya, duly established that Patel Ambalal Maganbhai and Amratbhai Somabhai Mahervadia had joined the ends of the wires from an electric pole to the tube-light and directly started the light. That while doing so, they had made certain utterances about how they would enjoy beating the Muslims. It was pointed out that PW-54 Sharifmiya Bhikumiya Shaikh has also deposed regarding Amratbhai Somabhai Mahervadia having put up a halogen light on the electric pole on 1<sup>st</sup> March, 2002 in the evening at around 7 O'clock and having stated that now they would enjoy beating the bandiyas. It was pointed out that PW-56 Ayubmiya Rasulmiya Shaikh has also deposed that on 1<sup>st</sup> March, 2002, he had gone towards Munsafkhan's house and while he was returning home, he had seen the halogen lights on the street-lights focused towards their mohalla and that he had asked Kanubhai Sarpanch regarding the street-light bill having not been paid and was told that the light bill was paid and had also said that now they would enjoy beating the Muslims. He had further deposed that Wireman – Mathurbhai Trikambhai had climbed up and started the light. It was pointed out that PW-60 Bachumiya Imammiya Shaikh has deposed that on 28<sup>th</sup>

February, 2002, at around 5 o'clock in the afternoon, Wireman – Mathurbhai Trikambhai had directly started the light on the street-light pole at the entrance of the mohalla and Becharbhai Odhavbhai and Kanubhai Sarpanch were present below the pole. Moreover, PW-65 Akbarmiya Nathumiya Shaikh had also stated that on 28<sup>th</sup> February, 2002 between 5:00 to 6:00 in the evening, Mathurbhai Trikambhai (Wireman), Kanubhai Sarpanch, Becharbhai Odhavbhai had put focus lights on the street-lights. Referring to the testimony of PW-71 Mangabhai Ramabhai Raval, it was pointed out that the said witness has deposed that late at night, mobs of Patels were seen and that the focus lights were on. Reference was also made to the testimonies of police personnel, viz., PW-91 Mahendra L. Rathod, PW-99 Krishnakumar Kantilal, PW-102 Laljibhai Desai, PW-103 Ganpat Narsinh and PW-110 Kakusinh Ranjitsinh Vaghela, to point out that all these witnesses had stated that at the time of the incident of 09:30 p.m., they had seen that the street lights were on. It was pointed out that therefore, the prosecution has adduced ample evidence to establish that the accused had pre-planned and pre-conspired to put up the focus and halogen lights so as to identify the victims. It was submitted that therefore, the trial court was not justified in not accepting the same.

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149.1 Insofar as the existence of lights at the scene of offence and the testimonies of the witnesses in this regard are concerned, the same has been dealt with in detail hereinabove. It may be noted that the record of the case reveals that all these stories about putting up of focus lights, halogen lights, directly connecting the street lights, etc. have germinated initially in the affidavits dated 06.11.2003 filed by

some of the witnesses, which, as discussed hereinabove, evidently have been filed under the guidance of an NGO. All the statements of witnesses with regard to existence of such halogen lights, tube-lights, street lights, etc. have been recorded only after the SIT came into the picture in the year 2008. At the relevant time, when the statements of the witnesses were recorded after the occurrence of the incident, none of them have referred to the existence of such lights. It may be that since the main incident occurred at 11:30 at night on 1<sup>st</sup> March, 2002, the witnesses, at the relevant time, may not have mentioned about putting up such halogen lights, focus lights, street lights, etc. as these incidents are stated to have taken place earlier during the day, on account of not understanding the significance thereof. At the same time, it is difficult to believe that all the police personnel would also forget such a significant detail. Therefore, when all the witnesses, including the police witnesses come out with stories regarding existence of street lights, halogen lights, etc., much belatedly, after a period of more than six years, such evidence would be required to be examined cautiously and cannot be accepted at face value. The facts as emerging from the record of the case reveals that except for the fact that the PW-47, the first informant has, in the first information report, mentioned existence of lights [which fact he has not stated in his evidence], none of the witnesses have referred to the existence of any external source of light for the purpose of identification of the accused at the relevant time when their statements were recorded by the Investigating Officer (Police). Under the circumstances, for the reasons stated earlier as well as the reasons stated hereinabove, the prosecution case regarding putting up of halogen lights, focus lights or directly

connecting the tube lights on the street lights at the scene of offence, with a view to further the conspiracy hatched by them, appears to have been got up at a later stage, and does not merit acceptance.

149.2 The next contention put forth to establish the charge of conspiracy is what the learned counsel for the accused has referred to as the "bhajiya theory". The prosecution has placed reliance upon the testimony of PW-78 Basirabibi Bachumiya Shaikh, who has deposed that on 1<sup>st</sup> March, at 5 O'clock in the evening, she had gone to purchase gram flour from the shop of Dahyabhai Vanabhai, who had asked her as to what she wanted to do with the flour and she had informed him that she wanted to make bhajiyas, whereupon, Dahyabhai Vanabhai had told her that for the last time today, they may eat bhajiyas and that tomorrow, they would eat only provided they remain alive. It was pointed out that the testimony of PW-47 Ibrahimiya Rasulmiya Shaikh corroborates the testimony of this witness as he has deposed regarding Basirabibi having narrated such facts to him. In this respect it may be noted that the evidence on record shows that neither Basirabibi Bachumiya nor Ibrahimiya Rasulmiya, had, at the relevant time when their statements recorded by the police, mentioned any such incident. For the first time such incident came to be mentioned in the affidavit made by Ibrahimiya Rasulmiya for the purpose of filing it before the Supreme Court. Thus, the incident appears to have been got up as an afterthought. Besides, even if the version given by the witnesses were to be believed, at best it could be said to be an utterance made by Dahyabhai Vanabhai in the context of the hostile atmosphere that was prevailing after the burning

of the train at Godhra. Such utterance cannot be read to be a part of a conspiracy as is sought to be contended on behalf of the prosecution.

149.3 Before the trial court, the prosecution had referred to the testimony of PW-46 Pathan Sabirmiya Akumiya, who had deposed that on 01.03.2002, one Becharbhai Odhavbhai had gone to him for keys of the water pump, which he had not given. However, subsequently Becharbhai Odhavbhai had once again gone to him at 8:30 p.m. and had said that the Sarpanch had asked him to get the keys and hence he had handed over the keys to him. It was contended before the trial court that the taking away of the water pump keys earlier during the course of the day was part of a pre-planned conspiracy. However, before this court, the learned counsel for the prosecution as well as for the victims have not pressed the said ground.

149.4 One of the main grounds on which the charge of conspiracy has been pressed is based on the hate speech allegedly given by two persons, viz., Haresh Bhatt and Naranbhai Lallubhai, MLA of Unjha. To substantiate such contention, reference was made to the testimony of PW-60 Bachumiya Imammiya Shaikh, who had deposed that on 27.02.2002, when he was sitting below the banyan tree in the corner of the mohalla, three to four cars came from the market side and went towards Mahadev. Such vehicles belonged to Haresh Bhatt and leaders of the Bajrang Dal and that inside the Mahadev temple, a meeting of Patels had been convened and trishuls had been distributed, and at that time Haresh Bhatt was saying that if there are riots this time, not a single

Muslim should escape and that, if they (the Patels) want weapons, they should ask him. It was pointed out that this fact finds support in the testimony of PW-46 Pathan Sabirmiya Akumiya, who had stated that about twenty to twenty-five days prior to the incident at Shaikhvas, Haresh Bhatt, leader of the Vishwa Hindu Parishad had come to the village and had held a meeting of the youth belonging to the Patel community. At that time, he was working at the water-works and when Haresh Bhatt came, there was a crowd of Patel youth at the temple. Hareshbhai, in volatile language, was giving a speech that these Muslims are a burden upon Hindustan and they have no right to live in Hindustan. This time if they get a chance and there are riots, not a single Muslim should remain alive. Thereafter, Haresh Bhatt had distributed Trishuls. It was submitted that thus, from the testimonies of PW-60 Bachumiya Imammiya Shaikh and PW-46 Pathan Sabirmiya Akumiya, it is evident that prior to the incident Haresh Bhatt had come to Sardarpura and had instigated the Patel youth which is clearly indicative of a conspiracy having been hatched. It was further pointed out that PW-49 Iqbalmiya Rasulmiya Shaikh has deposed that three days prior to the incident, Naranbhai Lallubhai, MLA of Unjha had come to the Mahadev temple, where a meeting of Patel youth had been convened and he had stated that they could do whatever they liked; that the Government was with them. It was submitted that the prosecution has duly established that Naranbhai Lallubhai, the then MLA of Unjha had come to the Mahadev temple at Sardarpura and had given an inciting speech assuring the Patels that the Government was theirs and they could do whatever they want. It was submitted that all these events which have taken place prior to the date of the incident, clearly

establish that the attack was a pre-planned and pre-concerted one.

149.4.1 In this regard, it may be noted that PW-46 Pathan Sabirmiya Akumiya, has stated that about twenty to twenty-five days prior to the incident, Haresh Bhatt, leader of Vishwa Hindu Parishad had come to the Sardarpura and had held a meeting of the Patel youth, whereas PW-60 Bachumiya Imammiya has stated that on 27.02.2002 (viz. two days prior to the incident), Haresh Bhatt, leader of the Vishwa Hindu Parishad had come to the village and had held a meeting of the youth belonging to the Patel community at Mahadev temple and had given an inciting speech. Therefore, there is no consistency between the versions given by two witnesses as to when Haresh Bhatt had actually come to Sardarpura. Besides, if one considers the testimony of PW-46 Pathan Sabirmiya Akumiya, Haresh Bhatt must have come to Sardarpura even prior to the date of burning of the train at Godhra, at which point of time, there was no question of hatching any conspiracy, as is sought to be alleged. Insofar as the presence of Naranbhai Lallubhai, MLA of Unjha is concerned, PW-49 Iqbalmiya Rasulmiya Shaikh has deposed regarding his presence at Sardarpura and his having instigated the Patel youth, three days prior to the incident, which also is prior to date of the incident of burning of the train at Godhra. Moreover, this version has come for the first time in the year 2008 when the witness's statement came to be recorded by the SIT, and hence, does not inspire confidence. In the aforesaid premises, this court does not find any substance in the submissions advanced on behalf of the prosecution that

the meeting convened by the above two persons were part of a conspiracy which culminated into the incident in question.

149.5 Another incident put forth to advance the charge of conspiracy is based on the testimony of PW-60 Bachumiya Imammiya Shaikh, who has stated that four days prior to 27.02.2002, he was sitting at Rafikbhai's galla and at that time, Raghubhai Revabhai had come and told him that his cabin was touching his house and that he should lift it from there as fodder was stored in his house, which would get burnt. In this regard, apart from the fact that the witness has not stated such facts in his statement dated 02.03.2002, even otherwise, he has stated that this incident had taken place four days prior to 27.02.2002, on which date, there was no question of any conspiracy being hatched, inasmuch as, the same was prior to the burning of the train at Godhra on account of which riots had erupted all over the State.

149.6 Yet another ground put forth to advance the charge of conspiracy is based upon the testimony of PW-60 Bachumiya Imammiya Shaikh, wherein he has deposed that on 28.02.2002, there was a call of Gujarat Bandh and that in the morning at around 10 O'clock, he was sitting at his galla, at that time, Patel Rajeshbhai Punjabhai, Rameshbhai Kantibhai, Maheshbhai Jivanbhai had come and had said that as there is a call for Gujarat Bandh, he should close his galla. Rameshbhai Kantibhai had caught Rafikbhai by the collar and thereafter, those people had gone towards Mahadev. It may be noted that this incident was not narrated by the witness at the initial stage when his statement was recorded by the police. However, even if the facts stated by the witness at a

subsequent stage are to be believed, at best, it could be said that those persons were trying to enforce the call of Gujarat Bandh. However, that by itself would not give rise to a suspicion that a conspiracy was being hatched which took its final form in the assault on Shaikh Mohalla.

149.7 One more ground put forth is based upon the testimony of PW-63 Bhikumiya Kalumiya Shaikh who has deposed that on 28.02.2002, the gallas were burnt in the bazaar. Thereafter, they had come home and at around 4 O'clock, he had gone to the bazaar, at that time, Shankerbhai who had a shop adjoining the shop of Anifbhai Abdulbhai, was lifting the stock from his shop and that he asked him as to why he was suddenly emptying his shop and he said that he was to take another shop on rent and that the goods were to be kept in the compound of Mahakali Mandir. Thereafter, they had returned. The testimony of this witness was sought to be relied upon to contend that a conspiracy was being hatched to burn the properties of the Muslims, and, therefore, Shankerbhai was vacating his shop adjoining the shop of Anifbhai Abdulbhai. Apart from the fact that this fact has not been stated by the witness in his first statement recorded by the police, even otherwise, the mere fact that a person was shifting his shop, that too, a person who is not an accused in the case, cannot, in any manner, be said to constitute a factor to establish the offence of criminal conspiracy. At best it could be that having regard to the atmosphere prevailing at the relevant time, the said person may have anticipated trouble and have taken precautionary measures.

149.8 Yet another ground propounded by the prosecution to press the charge of criminal conspiracy under section 120B of the Penal Code, is based on the testimony of PW-68 Gulamali Akbarmiya Shaikh, who had deposed that on 27.2.2002, in the evening at around 4 o'clock, he was doing colour work at the Jain Derasar, Sardarpura. He was working outside in the front side of the Derasar, when Ambalal Maganlal Kapur and Becharbhai Odhavbhai passed by and were saying "cut the bandiyas". In this regard, it may be noted that the witness, in neither of his statements dated 10.3.2002 and 10.5.2008 has referred to any such incident and has come out with this version for the first time in his deposition before the court. Moreover, according to this witness the said persons were saying cut the bandiyas, however, he has not stated as to in what context were they saying so. It is difficult to believe that such utterances which the witness is stated to have overheard, could in any manner advance the case of the prosecution as regards the charge of conspiracy under section 120B of the Penal Code.

149.9 The charge of conspiracy has also been pressed into service by placing reliance upon the testimony of PW-71 Mangabhai Ramabhai Raval, who has deposed that on 01.03.2002 at around 9 O'clock, Ramabhai Mohanbai Patel had parked a tractor on the side of his house wherein, there were two, three, four barrels of kerosene and one barrel of petrol. Thereafter, he had seen Natubhai Kacharabhai Patel, Jayantibhai Ambaram Patel, Kalabhai Bhikhabhai Patel, Bakabhai Mangalbhai Patel, Kantibhai Prabhudas, Jitendrakumar Kantilal, Bhikhabhai Joitabhai, passing through the road in front of his house. They had gone towards the

house of Kantibhai Prabhudas at Kapurvas and that he had himself seen the cans of kerosene and that when they had passed in front of his house, the smell of kerosene was emanating. Pertinently, except for the aforesaid bare assertion nothing further has been stated with regard to the involvement of the accused by this witness. Moreover, the statement of this witness was for the first time recorded in the year 2008. This witness is not a victim of the incident nor is any relative of his injured in the incident. Under the circumstances, it was not as if he was suffering from any shock and agony at the relevant time, which prevented him from coming forward and informing the police about these facts. Such a belated version which has come on record after a period of more than six years, does not inspire confidence and does not carry the prosecution case any further.

149.10 The charge of conspiracy is further pressed on the specious ground that PW-74 Sikandarmiya Rasulmiya Shaikh has deposed that on 27.02.2002, he had gone for doing labour work in the agricultural field of Baldevbhai Vanzara and that upon returning from the field, Kanubhai Joitabhai was sitting at the galla of Ishwarbhai Gopalbhai and he (Kanubhai Joitabhai) had said that he (the witness) would not get Kuber (pan masala) as his people have burnt the train at Godhra. It may be noted that the statement of this witness was not recorded at the relevant time and for the first time he has stated so before the SIT on 22.05.2008, at which point of time he had stated that Ishwarbhai Gopalbhai had told him that he would not get Kuber. Moreover, even if the said version is believed, at best it may be stated to be a reaction to the incident of burning of the train at Godhra on 27.02.2002; however, on the

basis of such a reaction, it cannot be said that the same was indicative of a pre-planned conspiracy.

149.11 Another ground on which strong reliance has been placed by the prosecution to establish the charge of criminal conspiracy is based upon a version that an iron rod had been placed inside the window of the Mahemoodmiya's house. In this regard, reliance has been placed on the testimony of PW-48 Sabirhussain Kadermiya, who had deposed that at the time of the incident a long iron rod was placed in the window of Mahemoodmiya's house, through which current was passed and that the D.S.P. touched the rod and also felt the current.

PW-105 Anupamsinh Shrijaysinh Gehlot (District Superintendent of Police) has deposed that he had seen electric wires lying on the road of Shaikhvas and several police staff had felt the electric current and hence, the wires had been moved to the side with a stick. This version with regarding an iron rod having been put through the window of Mahemoodmiya's house for the purpose of passing current does not find support from the testimony of the D.S.P., who has stated that the wires were lying on the road, whereas it was not the case of the prosecution that the electric wires were put on the road for the purpose of electrocuting the members of Shaikh mohalla. So far as the testimony of PW-48 Sabirhussain Kadermiya is concerned, such facts were not narrated by him in his statement dated 6.03.2002, and he has come up with this story at a much belated stage on 10.05.2008. Moreover, from the testimonies of the medical officers and the post-mortem reports of the deceased, nothing has been brought on record to indicate that any of the persons who were inside the room had died due to electrocution. In the

case of one of the victims viz., Abeda, some evidence has come on record with regard to her having convulsions on account of electric current. However, from the testimony of the medical officer, nothing has been brought on record to show that the victim had suffered from electrocution injury. Under the circumstances, on this ground also it is not possible to hold that a conspiracy had been hatched by the accused.

149.12 Another ground on which emphasis has been laid on behalf of the prosecution with a view to bring home the charge of conspiracy is with regard to the incident which is stated to have taken place on the evening of 28.02.2002, wherein shops and cabins were burnt near the panchayat office at Sardarpura. Testimonies of several witnesses have been relied upon, who have stated that their shops/cabins were set on fire on the evening of 28.02.2002. Reliance has also been placed upon the testimonies of the following witnesses to establish that a meeting had been held on 01.03.2002 at the residence of PW-70 Munsafkhan Yasinkhan Pathan to discuss lodging of a complaint against the Patels of the village who had burnt their cabins. PW-56 Ayubmiya Rasulmiya Shaikh, has deposed that on 01.03.2002 at 5 O'clock in the evening he had gone towards Munsafkhan's house where Kanubhai Sarpanch had come and there was a meeting at Munsafkhan's house wherein it was told that forget the gallas having been burnt on 27<sup>th</sup>, now nothing like that will happen, but after some time he said that it was not within his means and that they should defend themselves. PW-90 PSI Parmar has deposed that for the purpose of maintaining peace in the village a peace meeting was held wherein Kanubhai Sarpanch, D.K. Patel and two three other persons had remained present. PW-71 Mangabhai

Ramabhai Rawal has also supported the fact regarding a meeting having been held at the house of Munsafkhan Pathan. He, however, has deposed regarding being present during the first part of the meeting. From the testimony of PW-70 Munsafkhan Pathan, it has come on record that a peace meeting was held in the evening of 1<sup>st</sup> March, 2002 at his house, wherein leaders of the Patels of the village were invited. The former Sarpanch belonging to the Patel community, viz., Patel Dashrathbhai Kacharabhai had come to his house and was sitting there, when the sitting Sarpanch of the village, Patel Kanubhai Joitabhai had come to his house and efforts were made to call the leaders of the Patel community through him also to ensure that there are no riots in the village, at that time, he had said that it was not within his means and had left. This factor regarding the sitting Sarpanch who belongs to the Patel community having stated that the situation was not in his hands is sought to be put forth as suggestive of a conspiracy being hatched by the accused. In the opinion of this court, when pursuant to the incident of burning of the train at Godhra on 27.02.2002 tension prevailed all over the State and more particularly in Mehsana district, a statement made by the Sarpanch in meeting that was also attended by the former Sarpanch, that the situation was not in his hands can by no means be construed to be a factor for establishing a charge of conspiracy against those accused.

149.13 The trial court in the impugned judgment and order has discussed in detail the contentions put forth on behalf of the prosecution for establishing the charge of conspiracy and has held that the same was not established. For the reasons recorded hereinabove as well as for the reasons recorded by

the trial court, this court is in agreement with the view adopted by the trial court that the prosecution has failed to prove the charge of criminal conspiracy under section 120B of the Penal Code. Moreover, as rightly submitted by the learned counsel for the appellants/accused, in this case the trial court has held that the charge under section 120B of the Penal Code has not been established qua the accused who have been convicted. The prosecution has not challenged the acquittal of those accused qua charge under section 120B of the Penal Code, and hence, the findings recorded by the trial court qua those accused have attained finality. In this regard it may be pertinent to note that on the same set of facts and evidence, the accused persons who have been convicted by the trial court have already been acquitted of the charge under section 120B of the Penal Code and said decision has become final to that extent as the acquittal of those accused of the offence under section 120B has not been challenged by the prosecution. Therefore, for the same incident when the other co-accused have been acquitted of the charge under section 120B of the Penal Code, on the self-same material, it is not possible to sustain the charge qua the other accused. For this reason also, the submission with regard to the charge of conspiracy under section 120B of the Penal Code having been established, does not merit acceptance.

**150. Test to be adopted where there are a large number of offenders:** In this case, there are a large number of offenders as well as a large number of witnesses. The Supreme Court, in a catena of decisions has laid down the test to be adopted for the purpose of convicting the accused where there are a large number of offenders.

150.1 A Constitution Bench of the Supreme Court in the case of **Masaltı v. State of U.P.**, AIR 1965 SC 202, held that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain conviction. It was further held that where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. The court was of the view that in a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable and that even though it is the quality of the evidence that matters and not the number of witnesses, still it is useful to adopt such a mechanical test.

150.2 In **State of U.P. v. Dan Singh** (supra), the court once again placed reliance upon the above referred principles in the case of *Masaltı* (supra).

150.3 In **Chandra Shekhar Bind v. State of Bihar**, (2001) 8 SCC 690, the Supreme Court held thus:

**“9.** However, this is an incident in which a large number of accused had participated. The Constitution Bench of this Court has, in the case of *Masaltı v. State of U.P.*, AIR 1965 SC 202, held that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict the accused persons, whereas evidence given by half-a-dozen witnesses which is not trustworthy would not be enough to sustain the conviction. It was held that where a criminal court has to

*deal with evidence pertaining to the commission of an offence involving a large number of offenders, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. It was held that in a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable. It was held that even though it is the quality of the evidence that matters and not the number of witnesses, still it is useful to adopt such a mechanical test.*

**10.** *This two-witness theory has also been adopted by this Court in the case of Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283. It is held that there is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is held that it is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. It is held that even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. It is held that all the same, when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting."*

150.4 In ***State of Maharashtra v. Ramlal Devappa Rathod***, (2015) 15 SCC 77, the Supreme Court held thus:

**“21.** *That brings us to the question whether in an attack such as the present one, how far the principle laid down by this Court in Masaltı is applicable? In Masaltı one Laxmi Prasad and his armed companions had proceeded to the house of one Gayadin. On the instigation of Laxmi Prasad, the assailants broke open the doors of the house of Gayadin, killed four persons including Gayadin and dragged their bodies out of the house whereafter one more person was killed. These five dead bodies were then taken to the field and set on fire. Out of thirty-five accused who were convicted, ten accused were given*

*death sentence. The High Court confirmed their sentence of death and out of the remaining accused, seven were given benefit of doubt. Insofar as the accused who were convicted with the aid of Section 149, the High Court adopted a test and held that unless at least four witnesses had shown to have given a consistent account against any of the appellants, the case against them could not be said to have been proved. The decision discloses that except Laxmi Prasad, none of the assailants was assigned any particular part. The evidence as regards other accused was that they were part of unlawful assembly which is evident from the following observations of this Court:*

*"7. ... It also considered another feature which characterised the evidence of all the witnesses and that was that they gave their account of the incident substantially in similar terms and did not assign particular parts in respect of overt acts to any of the assailants except Laxmi Prasad, Accused 1."*

*The observations of this Court further show that though testimony of a single witness would be enough to convict an accused person, in a case involving large number of accused, where the witnesses depose to the fact that certain persons were members of unlawful assembly which had committed the offences in question, a test so adopted by the High Court was found to be safe. It was observed that though every member of the unlawful assembly would be liable for the offence committed by anyone actuated by and entertaining common object of the unlawful assembly, in the absence of any overt act or specific allegation, it was possible to adopt such test.*

**22.** *We may at this stage consider the law of vicarious liability as stipulated in Section 149 IPC. The key expressions in Section 149 IPC are:*

- (a) *if an offence is committed by any member of an unlawful assembly;*
- (b) *in prosecution of common object of that assembly;*
- (c) *which the members of that assembly knew to be likely to be committed in prosecution of that object;*
- (d) *every person who is a member of the same assembly is guilty of the offence.*

*This section makes both the categories of persons, those who committed the offence as also those who*

were members of the same assembly liable for the offences under Section 149 IPC, if other requirements of the section are satisfied. That is to say, if an offence is committed by any person of an unlawful assembly, which the members of that assembly knew to be likely to be committed, every member of that assembly is guilty of the offence. The law is clear that membership of unlawful assembly is sufficient to hold such members vicariously liable."

150.5 In ***Inder Singh v. State of Rajasthan***, (2015) 2 SCC 734, the Supreme Court once again adopted the principles enunciated in ***Masalti*** (supra). The relevant part of the decision is extracted hereinbelow:

**"20.** So far as the principle of caution as enunciated in *Masalti* is concerned, we find ourselves in agreement with the submission advanced by the learned Senior Counsel Mr Basant that in the peculiar facts of the case, the courts below should have further decided as to how much corroboration was required for accepting the presence and participation of individual accused person. The informant had though claimed presence of 29 persons but subsequently five were acquitted by the trial court and one was acquitted by the High Court. On this issue, on going through the charts disclosing number of witnesses who have deposed against individual appellants to show their presence, participation, weapon and overt act, if any, we find that the test approved in *Masalti* case and subsequently followed in several other cases including *Busi Koteswara Rao*, (2012) 12 SCC 711, needs to be followed in this case also. In the latter judgment in para 13 the law on the subject has been expounded in very clear terms:

"13. It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question."

**21.** Since the accused persons and the six material eyewitnesses in this case are co-villagers, it is expected that at least three witnesses should be in a position to name individual accused persons for sustaining his conviction."

150.6 Before arriving at a conclusion as regards the test to be adopted in this case, it may be apposite to discuss certain other relevant aspects of the matter.

150.7 Considering the fact that the incident has taken place in the dead of the night, the identification of the accused also assumes significance, and hence, it may be germane to refer to certain decisions in this regard.

150.8 In **Dana Yadav alias Dahu v. State of Bihar** (supra), the court held that it is well settled that failure to hold test identification parade which should be held with reasonable despatch does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. The court held that ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. [Emphasis supplied]

150.9 In **Bollavaram Pedda Narsi Reddy and others v. State of Andhra Pradesh**, (supra), the appellants therein

were admittedly persons with whom the two witnesses had no previous acquaintance; the occurrence happened on a dark night and the court held that when the crime was committed during the hours of darkness and the assailants were utter strangers to the witnesses, the identification of the accused persons assumes great importance.

150.10 In **Mulla v. State of U.P.**, (2010) 3 SCC 508, the court held that identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right line. The identification can also be used as corroboration of the statement in court. The necessity of holding an identification parade can arise only when the accused persons are not previously known to the witnesses. [Emphasis supplied]

150.11 Thus, the Supreme Court has held that identification parade is necessary only where the accused persons are not previously known to the witnesses. It has also been held that if a witness identifies the accused in court for the first time the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence.

150.12 On a perusal of the evidence adduced by the prosecution, it is found that some of the witnesses have named the accused persons in their statements recorded by the Investigating Officer (Police) as well as Investigating Officer (SIT) and have also named such accused in their deposition

and have identified them. Some witnesses have named the accused in their statements recorded by the police, have named them in their depositions and have identified them before the court. Some witnesses have not named the accused in their statements before the police, but have named them in their subsequent statements before the SIT and have named them in their depositions and have identified them in the court. Some witnesses have not named the accused in any of their statements before the police but have named them in their depositions and have identified them before the court, whereas some of the witnesses have neither named the accused in any of the statements nor in their depositions but have identified them by their face before the court. In some cases, the witnesses have named the accused in their depositions but have not identified them before the court.

150.13 It is in the backdrop of the aforesaid legal position, that the evidence on record is required to be evaluated. In the opinion of this court, having regard to the nature of the evidence adduced by the witnesses as discussed earlier and the circumstances in which the incident has taken place, viz., that the incident had taken place in the middle of the night when admittedly the electric supply of the street lights had been switched off and the identification of the accused was based upon the moonlight and the light of the flames of the burning houses, etc., it would not be safe to base a conviction solely upon the testimony of a single eyewitness. In the light of the principles laid down in the case **Masalti** as followed in the subsequent decisions of the Supreme Court, the court is of the view that having regard to the facts of the present case, it

would be in the interest of justice to adopt the test of two witnesses who have given a consistent account of the incident.

**151. What should be considered as a consistent account of the incident:** As regards what should be considered as a consistent account of the incident, the court is of the view that insofar as the witnesses who have not named the accused in their previous statements nor have they named them in the deposition but have identified them before the court for the first time, in the light of the principles enunciated by the Supreme Court in the case of **Dana Yadav** (supra) the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. Therefore, the evidence of witnesses who have only identified the accused by face before the court without naming them in their deposition or in any previous statement cannot be taken into consideration while considering the complicity of such accused.

**151.2** Insofar as the witnesses who have named the accused for the first time in the statement recorded by the SIT in the year 2008 is concerned, having regard to the facts which have come on record, namely, that the witnesses were assisted by an NGO; as well as the fact that affidavits which had been made by eight of the witnesses appear to have been made with the assistance of an NGO; and the fact that the testimonies of the some of the witnesses also to some extent appear to be tutored, it would be unsafe to rely upon the testimonies of witnesses wherein the accused have been named for the first time in their statements before the SIT.

Therefore, the test which the court thinks fit to adopt in the present case is where at least two witnesses who have named the accused in their first statement recorded by the police (including in the first information report) at the relevant time when the incident took place and have subsequently named such accused in their depositions and identified them in the court, can be placed reliance upon for the purpose of convicting the accused. In the opinion of this court, if a witness has named an accused in the initial statement and has thereafter not named him in the subsequent statements, the same is not relevant inasmuch as the subsequent statements are merely further statements in addition to what was stated in the first statement. However, where the witness has not named an accused in his first statement but names him thereafter, it would not be safe to rely upon the same as chances of false implication cannot be ruled out. The evidence against each of the accused is, accordingly, required to be examined from this angle.

**152. The complicity of each of the accused may now be examined individually:**

**153. Accused No.1 Patel Rameshbhai Kanjibhai (Sessions case No.275 of 2002):** Insofar as this accused is concerned, PW-47 Ibrahimmiya Rasulmiya has named him in respect of the main incident of 11:30 p.m. The said witness has named him in the first information report lodged on 02.03.2002 and has also named him in his deposition. He, however, has not named him in the statement before the police dated 10.3.2002 and has also not identified him before the court.

153.1 PW-68 Gulamali Akbarmiya has named this accused in respect of the main incident of 11:30 p.m. in his statements dated 10.03.2002 and 01.06.2002 and has also named him in his deposition and identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

153.2 PW-73 Faridabibi Ashiqhussain has deposed that since it was a long time since she had named the accused in her statement before the police, she could only identify them by their faces. Accordingly, she has identified this accused in connection with the incident of 11:30 p.m. only by face without naming him.

153.3 Considering the totality of the evidence against this accused, only one witness, viz., PW-68 Gulamali Akbarmiya has named him in the police statement as well as in his deposition and has identified him. Therefore, the two witness test adopted by this court is not satisfied in the case of this accused.

154. **Accused No.2 Chaturbhai alias Bhuriyo Viththalbhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the main incident in the complaint and has also named him in his deposition but has not named him in any of the statements and has failed to identify him before the court.

154.1 PW-46 Sabirmiya Akumiya has named this witness in his deposition as well as identified him before the court in

respect of incident of 28.02.2002 and not in respect of the main incident.

154.2 PW-55 Ashiqhussain Bachumiya has named this witness in his statement dated 02.03.2002 as well as 01.06.2002 in connection with the main incident and has named him in his deposition and identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

154.3 PW-59 Mohommadsattar Bachumiya has named this witness in his statement dated 02.03.2002 but subsequently in his statement dated 19.05.2008, he has stated that he had not named the accused in his statement dated 02.03.2002 and that the police had written down the name on their own. The witness has named the accused in his deposition and has also identified him in the court. However, in view of the fact that the witness in the subsequent statement had retracted his earlier statement, it would not be safe to rely upon the testimony of this witness.

154.4 PW-66 Akbarmiya Rasulmiya has named this witness in connection with the main incident in his statement dated 10.03.2002 recorded by the police. He has also named him in the deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

154.5 PW-70 Munsafkhan Pathan has named this witness in the statement recorded by the police as well as by the SIT as well as named him in the deposition and has identified him

before the court. However, as discussed hereinabove, witness is not a witness of the main incident, and therefore, his testimony is not relevant for the purpose of ascertaining the culpability of this accused.

154.6 PW-73 Faridabibi Ashiqhussain has not named this accused in any of her statements nor has she named him in her deposition but she has identified him by his face.

154.7 PW-77 Badrunisha Akbarmiya has named this accused in her statement dated 06.03.2002 and has also named him in her deposition but has mis-identified this accused inasmuch as she has identified Chaturbhai Kanjibhai as Chaturbhai Vithalbhai

154.8 PW-79 Samimbanu Mohmmadmiya has not named this accused in any of her statements nor has she named him in her deposition but she has identified him by his face.

154.9 Therefore, in the case of this accused, two of the witnesses, namely, PW-55 Ashiqhussain Bachumiya and PW-66 Akbarmiya Rasulmiya have named him initially in their statements recorded by the police as well as in their depositions and have also identified them before the court. The two witness test is, therefore, satisfied in the case of this accused.

**155. Accused No.5 Jayantibhai Mangalbhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in his statement dated 09.05.2008 as well as in his deposition and has identified him before the court. However,

this witness has not named this accused in the first information report as well as in the statements recorded by the police on 10.03.2002 and 01.06.2002.

155.1 PW-46 Sabirmiya Akumiya Pathan has named this accused in his deposition as well as identified him in respect of the incident of forcible closure of cabins on 28.02.2002, which is not relevant for the purpose of deciding the culpability of the accused insofar as the main incident is concerned.

155.2 PW-55 Ashiqhussain Bachumiya has named this accused in his statement dated 02.03.2002 as well as 19.05.2008 and has also named him in his deposition but has failed to identify him before the court.

155.3 PW-57 Mustufamiya Rasulmiya has named this accused in his statements dated 19.05.2008 and 05.08.2008. He has also named him in his deposition and has identified him before the court. This witness, however, has not named this accused in his statement recorded by the police on 10.03.2002.

155.4 PW-59 Mohommadsattar Bachumiya has named this accused in his statement dated 02.03.2002, however, in his statement dated 09.05.2008 he had stated that he had not named this accused and that the police have written the name own their own. This witness has named the accused in his deposition but has failed to identify him.

155.5 PW-62 Rafikmiya Mohmmadhussain has named this witness in his deposition and identified him before the court

but has not named him in his statement dated 10.03.2002 recorded by the police or statement dated 10.05.2008 recorded by SIT.

155.6 PW-66 Akbarmiya Rasulmiya has named this witness in his deposition but has failed to identify him. He has also not named him in his statements dated 10.03.2002 or 09.05.2008.

155.7 PW-71 Mangabhai Ramabhai has named this witness in his deposition and has identified him in respect of carrying barrels of kerosene. He, however, is not a witness to the main incident. Moreover, he has not named this accused in his earlier statement recorded by the SIT.

155.8 PW-78 Basirabibi Bachumiya has named this accused in connection with the main incident in her statement dated 17.04.2002 as well as in her deposition and has also identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

155.9 Thus, out of the above referred witnesses, only PW-78 Basirabibi Bachumiya has named this accused in her statement recorded by the police as well as in her deposition and has identified him before the court. Therefore, the two witness test is not satisfied in the case of this accused.

156. **Accused No.6 – Amrutbhai Somabhai Patel:** In the case of this accused, PW-48 Sabirhussain Kadermiya has named him in his statement dated 10.05.2008 recorded by the SIT and has named him in his deposition and has identified him

in respect of the incident of 28.02.2002 with regard to putting up of focus light.

156.1 PW-54 Sharifmiya Bhikhumiya has named this accused in his statement dated 22.05.2008 as well as in his deposition but has failed to identify him before the court. This witness is not a witness to the main incident but has deposed with regard to the accused having put up a halogen light on the pole.

156.2 PW-55 Ashiqhussain has not named this accused in any of his previous statements nor in his testimony, but has identified by him his face before the court.

156.3 PW-59 Mohommadsattar Bachumiya has named this accused in connection with the incident of 1:30 in his statement recorded by the police on 02.03.2002. However, subsequently in his statement dated 19.05.2008 recorded by the SIT, the witness has stated that he has not named the accused and that the police had written down the name on their own. This witness has not named the accused in his deposition but has identified him.

156.4 PW-70 Munsafkhan Pathan has named this accused in his statements dated 06.03.2002 as well as 11.06.2008 and has named him in his deposition and identified him in respect of the incident at Pathan Mohalla. This witness is not a witness to the main incident.

156.5 From the witnesses who have deposed against this accused, it is evident that the evidence of none of the

witnesses meets with the criteria adopted by this court. In fact, none of the witnesses have named this accused in respect of the main incident of 11:30 in any of their statements or in their depositions. Two of the witnesses only identified him by face before the court. Insofar as PW-48, PW-54 and PW-70 are concerned they have not named the accused in connection with the main incident. Therefore, this appears to be a case of no evidence against this accused.

**157. Accused No.11 Jagabhai Davabhai Patel:** In the case of this accused, PW-47 Ibrahimiya Rasulmiya has named him in the first information report as well as in the statement recorded by the SIT and in his deposition, but he has failed to identify him before the court.

157.1 PW-59 Mohommadsattar Bachumiya has named this accused in his statement dated 02.03.2002, but subsequently in his statement dated 09.05.2008 recorded by the SIT, this witness has stated that he has not named the accused but the police had written down the name on their own. The witness has named the accused in his deposition and identified him.

157.2 PW-70 Munsafkhan Pathan has named this witness in his statement dated 06.03.2002 recorded by the police but in subsequent statement dated 11.06.2008 he had stated that he has not named the accused but the police have written down the name on their own. The witness has named this accused in his deposition and has identified him, but in respect of the incident that took place at Pathan Mohalla.

157.3 From the above evidence, it is apparent that insofar as PW-47 Ibrahimmiya Rasulmiya is concerned, he has failed to identify the accused. PW-70 Munsafkhan Pathan is not a witness to the main incident. Though PW-59 Mohommadsattar Bachumiya has named the accused in his statement dated 02.03.2002 but subsequently he had resiled from such statement before the SIT. However, he has named the accused in his deposition and has identified him before the court. Thus, the testimonies of none of the witnesses are sufficient to implicate the accused in terms of the criteria adopted by this court. Insofar as PW-70 Mohommadsattar Bachumiya is concerned, even if his testimony were to be accepted even then the two witness test would not be satisfied. Therefore, this accused is also entitled to be given the benefit of doubt. It may be noted that the trial court while analysing the culpability of this accused has initially recorded thus: "*Thus considering the evidence of all the three witnesses, P.W. 70 was a police employee, much conversant with the law and procedure and educated person. If he has not mentioned the name of his accused in his statement, affidavit, in that circumstances if he is identifying the accused before the court and saying that, he saw the incident from his old house at Pathan Mohalla, much reliance cannot be placed upon the testimony of this witness in respect of identification of this accused. While P.W. 59 – has identified this accused before the Court but in any of his statement, he has not stated the name of this accused. And the complainant who has named the accused in the complaint but has not identified the accused before the Court. From such type of evidence, it cannot be said that, prosecution has proved the involvement of this accused beyond reasonable doubt.*" However, thereafter the trial court

has proceeded to observe thus: "*Therefore, considering the appreciation of evidence while discussing the evidence of witnesses the presence of this accused in the mob is satisfactorily proved by the Prosecution and he was in the mob. Thus, it is proved by the prosecution beyond reasonable doubt that, present accused was the member of unlawful assembly*". In the light of the earlier factual findings recorded by it that it cannot be said that the prosecution has proved the involvement of this accused beyond reasonable doubt, it is beyond comprehension as to how the trial court came to a contrary conclusion that the prosecution had proved beyond reasonable doubt that the accused was a member of the unlawful assembly. Such carelessness on the part of the trial court has resulted in the accused having to remain behind bars despite a finding that the prosecution has not proved the involvement of the accused beyond reasonable doubt.

**158. Accused No.12 – Prahaladbhai Somabhai Patel:** In the case of this accused, PW-55 Ashiqhussain Bachumiya has named him in connection with the main incident in his statement dated 02.03.2002 as well as 19.05.2008 and has named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

158.1 PW-79 Samimbanu Mohammadmiya has not named this accused in any of her statements including her deposition but has identified him by his face.

158.2 Similarly, PW-80 Ruksanabanu Ibrahimmiya has not named the accused in any of the statements before the police

nor in her deposition, but has identified him by his face before the court.

158.3 Thus, out of the three witnesses, it is only the evidence of PW-55 Ashiqhussain Bachumiya which meets with the criteria adopted by this court. Therefore, the two witness test is not satisfied in the case of this accused.

**159. Accused No.14 – Kachrabhai Tribhovandas Patel:**  
In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in his statement dated 09.05.2008 as well as in his deposition and has identified him. He, however, has not named him in the first information report as well as his statements dated 10.03.2002 and 01.06.2002 recorded by the police.

159.1 PW-48 Sabirhussain Kadermiya has not named this accused in his statement dated 06.03.2002 or 10.05.2008 but has named him in his deposition in connection with the main incident and has identified him.

159.2 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his statements dated 01.06.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.3 PW-56 Ayubmiya Rasulmiya has named this accused in his statement dated 19.05.2008 as well as in his deposition and has identified him before the court. He,

however, has not named the accused in his statement dated 10.03.2002.

159.4 PW-57 Mustufamiya Rasulmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 as well as 05.08.2008 as well as in his deposition and has also identified him. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.5 PW-58 Sabirhussain Fakir has named this accused in respect of the incident of 8:30 at Dharoi colony. He has named him in his statement dated 22.05.2008 as well as in his deposition and has identified him. He, however, has not named him in the statement dated 10.03.2002. This witness is not a witness of the main incident.

159.6 PW-59 Mohommadsattar Bachumiya has initially named this witness in connection with the main incident in the statement dated 02.03.2002 recorded by the police but in the statement dated 19.05.2008 recorded by the SIT, the witness has stated that he has not named the accused but the police have written down the name on their own. The witness has named this accused in his deposition and identified him.

159.7 PW-60 Bachumiya Imammiya has named this accused in connection with the main incident in his statements dated 03.03.2002, 09.05.2008 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.8 PW-61 Shafikmiya Babumiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in the statements dated 10.03.2002 and 3.05.2002.

159.9 PW-62 Rafikmiya Mohmmadhussain has named this witness in connection with the main incident in the statements dated 10.03.2002 and 10.5.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.10 PW-63 Bhikumiya Kalumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.11 PW-65 Akbarmiya Nathumiya has not named this accused in any of the statements before the police nor in his deposition but has identified him in the court.

159.12 PW-66 Akbarmiya Rasulmiya has named the accused in connection with the main incident in his police statement dated 10.03.2002 as well as in the statement dated 09.05.2008 recorded by the SIT and has named him in his deposition and has identified him before the court. The

evidence of this witness, therefore, meets with the criteria adopted by the court.

159.13 PW-67 Imtiyazbhai Mohammadhussain has named this accused in connection with the main incident in his statements dated 17.04.2002 as well as 22.05.2008 and has named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.14 PW-68 Gulamali Akbarmiya has not named the accused in either of his statements dated 10.03.2002 or 10.05.2008 and has named him in his deposition and identified him before the court.

159.15 PW-69 Mahemoodmiya Hussainmiya has not named the accused in his statement dated 06.03.2002 but has named him in the deposition and has identified him before the court.

159.16 PW-70 Munsafkhan Pathan has named this accused in his statement dated 06.3.2002 and 11.06.2008 and has also named him in his deposition and identified him in connection with the incident of Pathan Mohalla. He, however, is not a witness of the main incident.

159.17 PW-73 Faridabibi Ashiqhussain has not named this witness in any of her statements before the police or the SIT as well as in her deposition but has identified him before the court by his face.

159.18 PW-75 Firozabanu Bachumiya has named this witness in statement dated 22.05.2008 as well as in her deposition and has identified him. She, however, has not named her in her statement dated 02.03.2002.

159.19 PW-77 Badrunisha Akbarmiya has not named this accused in her statement dated 06.03.2002 or 22.05.2008 but has named him in the deposition and has identified him before the court.

159.20 PW-78 Basirabibi Bachumiya has named this accused in connection with the main incident in her statement dated 17.04.2002 as well as in her deposition and has identified him. The evidence of this witness, therefore, meets with the criteria adopted by the court.

159.21 PW-79 Samimbanu Mohammadmiya has not named this accused in any of her statements nor in her deposition but has identified him by face in the court.

159.22 PW-83 Sharifabanu Fakir has named this accused in her statement dated 03.03.2002 as well as in the deposition but has failed to identify him. She, however, is not a witness to the main incident but the incident which occurred at 8:30 p.m. at Dharoi colony.

159.23 From the evidence of the above witnesses, it emerges that eight witnesses namely, PW-55 Ashiqhussain Bachumiya, PW-57 Mustufamiya Rasulmiya, PW-60 Bachumiya Imammiya, PW-62 Rafikmiya Mohammadhussain, PW-63 Bhikhumiya Kalumiya, PW-66 Akbarmiya Rasulmiya, PW-67

Imtiyazbhai Mohmmadhussain and PW-78 Basirabibi Bachumiya have named this accused in their statements recorded by the police as well as in their depositions and have identified him before the court. The evidence of all these witnesses, who are witnesses of the main incident meets the criteria adopted hereinabove. The two witness test, therefore, stands duly satisfied in the case of this accused.

**160. Accused No.16 Mangalbhai Mathurbhai Patel:** PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his statements dated 02.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

160.1 PW-58 Sabirhussain Fakir has named this accused in his statements dated 03.03.2002 and 22.05.2008 as well as in his deposition and has identified him in connection with the incident of 8:30 p.m. at Dharoi colony. As noted earlier, this witness is not a witness of the main incident.

160.2 PW-60 Bachumiya Imammiya has named this accused in his statement dated 10.05.2008 in connection with the main incident of 11:30 p.m. and has also named him in his deposition and has identified him before the court. He, however, has not named him in his statement dated 03.03.2002.

160.3 PW-66 Akbarmiya Rasulmiya has named this accused in his statement dated 09.05.2008 as well as in his

deposition but has failed to identify him. He has also not named him in his statement dated 10.03.2002.

160.4 PW-78 Basirabibi Bachumiya has named this accused in connection with the main incident in her statement dated 22.5.2008 as well as in her deposition and has identified him before the court, but has not named him in her statement dated 17.04.2002.

160.5 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in her statements dated 10.03.2002 or 22.05.2008 and has also not named him in her deposition but has identified him before the court by his face.

160.6 PW-82 Sabirabibi Fakir and PW-83 Sharifabanu Fakir have both named this accused in their depositions and have identified him but not named him in their previous statements recorded by the police. Moreover, both these witnesses are not witnesses of the main incident.

160.7 From the evidence of the witnesses referred to hereinabove, it emerges that PW-55 Ashikhussain Bachumiya is the only witness whose evidence meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

161. **Accused No.18 – Bhikhabhai Joitabhai Patel:** In the case of this accused, PW-55 Ashikhussain Bachumiya has named him in connection with the main incident in his statements dated 02.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The

evidence of this witness, therefore, meets with the criteria adopted by the court.

161.1 PW-66 Akbarmiya Rasulmiya has not named this accused in either of his statements dated 10.03.2002 or 09.05.2008, but has named him in his deposition and identified him.

161.2 Similarly, PW-68 Gulamali Akbarmiya has not named this accused in the statements dated 10.03.2002 or 10.05.2008 but has named him in his deposition and has identified him before the court.

161.3 PW-71 Mangabhai Ramabhai has not named this accused in the statement dated 20.05.2008, but has named him in his deposition and identified him in connection with the incident of carrying barrels of kerosene.

161.4 PW-76 Hamidabibi Akbarmiya has not named this accused in either of her statements but has named him in her deposition and has mis-identified him before the court by identifying Jagabhai Jivanbhai as Bhikhabhai Joitabhai. Besides, this court while analyzing the testimony of this witness has already held that no reliance can be placed upon her evidence as regards the culpability of the accused.

161.5 Thus, in the case of this accused, the evidence of PW-55 Ashiqhussain Bachumiya alone meets with the criteria adopted by the court. The two witness test, therefore, is not satisfied in the case of this accused.

**162. Accused No.27 Mathurbhai Ramabhai Patel:** PW-48  
Sabirhussain Kadermiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 06.03.2002 recorded by the police.

162.1 PW-59 Mohommadsatar Bachumiya had initially named this accused in connection with the main incident in his statement dated 02.03.2002, however, subsequently before the SIT when his statement dated 19.5.2008 came to be recorded, the witness had stated that he had not named the accused and that the police had written down the name on their own. The witness has also named the accused in his deposition and has identified him.

162.2 PW-62 Rafikmiya Mohammadhussein has named the accused in connection with the main incident in the statements dated 10.03.2002 and 10.05.2008 but has not named him in his deposition. He, however, has identified him before the court.

162.3 PW-65 Akbarmiya Nathumiya has not named this accused in either of his statements dated 10.03.2002 or 10.05.2008 nor in his deposition but has identified him before the court.

162.4 PW-68 Gulamali Akbarmiya has not named this accused in either of his statements dated 10.03.2002 and 10.05.2008 but has named him in his deposition and has identified him before the court.

162.5 PW-70 Munsafkhan Pathan has named this accused in the statements dated 06.03.2002 and 11.06.2008 as well as in his deposition and has identified him in connection with the incident of Pathan Mohalla. It may be recalled that this witness is not a witness of the main incident.

162.6 From the evidence of the above witnesses, insofar as Munsafkhan Pathan is concerned, he is not the witness of the main incident. Insofar as the other witnesses who have deposed with regard to the main incident are concerned, none of them meet with the criteria adopted hereinabove. Therefore, the two witness test is not satisfied in the case of this accused.

**163. Accused No.28 – Sureshbhai Ranchhodbhai Patel:**

In the case of this accused, PW-48 Sabirhussain Kadermiya has named him in connection with the main incident in the police statement dated 06.03.2002 as well as in his deposition and has identified him. The evidence of this witness, therefore, meets with the criteria adopted by the court.

163.1 PW-54 Sharifmiya Bhikhamiya has named him in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition but has failed to identify him.

163.2 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this

witness, therefore, meets with the criteria adopted by the court.

163.3 PW-69 Mahemoodmiya Hussainmiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition but has failed to identify him.

163.4 PW-81 Dilavarkhan Abbasmiya has not named this accused in his statement dated 22.05.2008 as well as in his deposition but has identified him by his face.

163.5 From the testimonies of the above witnesses, it emerges that PW-48 Sabirhussain Kadermiya and PW-68 Gulamali Akbarmiya have named this accused when their statements were recorded at the relevant time immediately after the incident had taken place and have also named him in their respective depositions and have identified him before the court, thus satisfying the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

164. **Accused No.30 Tulsibhai Girdharbhai Patel:** In the case of this accused, PW-47 Ibrahimiya Rasulmiya has named him in the first information report as well as in his statement dated 09.05.2008. He has also named him in his deposition but has failed to identify him.

164.1 PW-51 Nazirmohammad Akbarmiya has named this accused in connection with the main incident in his statements

dated 10.03.2002 and 19.05.2008 and has also named him in his deposition but has failed to identify him before the court.

164.2 PW-57 Mustufamiya Rasulmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 5.08.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

164.3 PW-61 Safikmiya Babumiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statements dated 10.03.2002 and 03.05.2002.

164.4 PW-65 Akbarmiya Nathumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 as well as 10.05.2008. He has also named him in his deposition and identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

164.5 PW-66 Akbarmiya Rasulmiya has named this accused in his statement dated 09.05.2008 as well as in his deposition but has failed to identify him before the court. He has also not named him in his statement dated 10.03.2002.

164.5 PW-67 Imtiyazbhai Mohammadhussain has named this accused in connection with the main incident in his statement dated 22.05.2008 as well as in his deposition but

has failed to identify him before the court. He has not named him in his statement dated 17.04.2002.

164.6 PW-68 Gulamali Akbarmiya has named the accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition but has failed to identify him before the court.

164.7 PW-77 Badrunisha Akbarmiya has not named this accused in either of her statements dated 6.03.2002 or 22.05.2008 but has named him in her deposition and has identified him before the court.

164.8 PW-79 Samimbanu Mohammadmiya has not named this accused in either of her statements dated 6.03.2002 or 22.05.2008 as well as in her deposition but has identified him by his face in the court.

164.9 PW-81 Dilavarkhan Abbasmiya has not named the accused in his statement dated 22.05.2008 or before the court but has identified him by his face.

164.10 From the evidence of the witnesses, it is found that the evidence of PW-57 Mustufamiya Rasulmiya and PW-65 Akbarmiya Nathumiya satisfies the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

**165. Accused No.31 – Ramanbhai Jivanbhai Patel:** In the case of this accused, PW-46 Sabirmiya Pathan has not named him in his statement dated 20.05.2008, but has named him in

his deposition and has identified him in connection with the incident of 28.02.2002 of forcible closure of cabins.

165.1 PW-48 Sabirhussain Kadermiya has not named this accused in either of his statements dated 6.03.2002 or 10.05.2008, but has named him in his deposition and has identified him before the court.

165.2 PW-59 Mohmadsattar Bachumiya has, in his statement dated 02.03.2002, named this accused in connection with both the incidents of 9:30 as well as 11:30 in the evening. However, subsequently before the SIT, at the time of recording the statement dated 09.05.2008, the witness has stated that he has not named the accused but the police have written down the name on their own. He, however, has named the accused in his deposition and has identified him before the court.

165.3 PW-67 Imtiyazbhai Mohammadhussein has named this accused in connection with the main incident in both his statements dated 17.04.2002 and 22.05.2008 as well as in his deposition, but has failed to identify him before the court.

165.4 PW-68 Gulamali Akbarmiya has not named this accused in either of his statements dated 10.03.2002 or 10.05.2008 as well as in his deposition, but has identified him before the court.

165.5 Therefore, the evidence of none of the above witnesses meets with the criteria adopted by the court. The

two witness test, therefore, is not satisfied in the case of this accused.

**166. Accused No.32 Rajeshkumar Karshanbhai Patel:** In the case of this accused, PW-55 Ashiqhussain Bachumiya has named him in connection with the main incident in both his statements dated 02.03.2002 and 19.05.2008 as well as in his deposition, and has also identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

166.1 PW-62 Rafikmiya Mohammadhussein has named this accused in connection with the main incident in both his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

166.2 PW-68 Gulamali Akbarmiya has named this accused in his statement dated 10.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 10.03.2002.

166.3 Thus, out of the above referred three witnesses, the evidence of PW-55 Ashiqhussain Bachumiya and PW-62 Rafikmiya Mohammadhussein meets with the criteria adopted by this court. The two witness test, therefore, stands satisfied in the case of this accused.

**167. Accused No.33 Rameshbhai Kantibhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has

not named him in his statements dated 10.03.2002, 01.06.2002, 09.05.2008 or 11.06.2008. He, however, has named him in the first information report as well as in his deposition, but has failed to identify him before the court.

167.1 PW-46 Sabirmiya Pathan has not named this accused in his statement dated 20.05.2008, but has named him in his deposition and has identified him before the court in connection with the incident of 28.02.2002 at the Water works and the incident of forcible closure of cabins. This witness is not a witness of the main incident.

167.2 PW-51 Nazirmohammad Akbarmiya has named the accused in connection with the main incident in both his statements dated 10.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

167.3 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his statements dated 02.03.2002 as well as 09.05.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

167.4 PW-59 Mohommadsattar Bachumiya had initially named this accused in his statement dated 02.03.2002, however, in his statement dated 09.05.2008 recorded by the SIT, he had stated that he had not named the accused but the police had written down the name on their own. He has named

the accused in his deposition and has also identified him before the court.

167.5 PW-60 Bachumiya Imammiya has named this accused in connection with the incident of forcibly closing down cabins on 28.02.2002 as well as the incident of 9:30 p.m., in his statement dated 10.05.2008 as well as in his deposition but has failed to identify him before the court. He has also not named him in his statement dated 03.03.2002.

167.6 PW-62 Rafikmiya Mohammadhussein has named this accused in his deposition in connection with the incident of forcible closure of cabins on 28.02.2002, but has not named him in either of his statements dated 10.03.2002 or 10.05.2008. He has also failed to identify him before the court.

167.7 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition, but has failed to identify him. He has also not named him in his statement dated 10.03.2002.

167.8 PW-68 Gulamali Akbarmiya has not named his accused in connection with the main incident in either of his statements dated 10.03.2002 and 10.05.2008, but has named him in his deposition and has identified him.

167.9 From the testimonies of the witnesses, it emerges that the evidence of PW-51 Nazirmohammed Akbarmiya and PW-55 Ashiqhussain Bachumiya meets with the criteria

adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

**168. Accused No.34 Madhabhai Vithhalbhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in the first information report as well as in his deposition but has failed to identify him before the court. He has also not named him in his statements dated 10.03.2002, 01.06.2002, 09.05.2008 and 11.06.2008

168.1 PW-46 Sabirmiya Pathan has named this accused in his deposition in connection with the incident of distribution of Trishuls, in connection with the incident of 28.02.2002 at the Water Works and forcible closing of cabins on 28.02.2002 and has identified him before the court. He, however, has not named him in his statement dated 20.05.2008. Besides, this witness is not a witness of the main incident.

168.2 PW-48 Sabirhussain Kadermiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition but has failed to identify him before the court. He also has not named him in his statement dated 06.03.2002.

168.3 PW-49 Iqbalmiya Rasulmiya has named this accused in connection with the main incident in both his statements dated 10.03.2002 as well as 10.06.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

168.4 PW-51 Nazirmohammed Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 19.05.2008 but has not named him in his deposition. He, however, has identified him before the court.

168.5 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in both his statements dated 02.3.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

168.6 PW-56 Ayubmiya Rasulmiya has named this accused in connection with the main incident in both his statements dated 10.03.2002 and 19.05.2008 and has named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

168.7 PW-57 Mustufamiya Rasulmiya has named this accused in connection with the main incident in his statements dated 19.05.2008 and 05.08.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 10.03.2002.

168.8 PW-66 Akbarmiya Nathumiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition but has failed to identify him before the court. He has also not named him in his statement dated 10.03.2002.

168.9 PW-68 Gulamali Akbarmiya has not named this accused in his statement dated 10.03.2002 or 10.05.2008, but has named him in his deposition and has identified him before the court.

168.10 From the evidence of the above witnesses, it emerges that the evidence of PW-49 Iqbalmiya Rasulmiya, PW-55 Ashiqhussain Bachumiya, PW-56 Ayubmiya Rasulmiya and PW-65 Akbarmiya Nathumiya meets with the criteria adopted by the court. The two witness test, therefore, stands satisfied in the case of this accused.

169. **Accused No.35 Sureshkumar Baldevbhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in the first information report as well as in his deposition, but has failed to identify him before the court. He has also not named him in any of his statements dated 10.03.2002, 01.06.2002, 09.05.2008 or 11.06.2008.

169.1 PW-46 Sabirmiya Pathan has named this accused in his deposition in connection with the incident of distribution of trishuls, incident at the Water Works on 28.02.2002 and incident of forcibly closing of cabins on 28.02.2002, but has not named him in his statement dated 20.05.2008. The evidence of this witness does not relate to the main incident of 1st March, 2002.

169.2 PW-52 Hizbulmiya Hussainmiya has named this accused in his statement dated 19.05.2008 as well as in his

deposition, but has failed to identify him before the court. He has also not named him in his statement dated 10.03.2002.

169.3 PW-62 Rafikmiya Mohammadhussain has named this accused in connection with the incident of forcibly closing down of cabins on 28.02.2002 as well as in his deposition. He, however, has failed to identify him before the court. He has also not named him in his statements dated 10.03.2002 or 10.05.2008.

169.4 PW-70 Munsafkhan Pathan is not the witness of the main incident. He has named this accused in his statement dated 11.06.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 06.03.2002.

169.5 From the evidence of the above witnesses, it emerges that the evidence of none of the witnesses meets with the criteria adopted by this court. The two witness test, therefore, is not satisfied in the case of this accused.

170. **Accused No.37 Vishnubhai Prahaladbhai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in the first information report as well as in his deposition, but has failed to identify him before the court. He has also not named him in his statements dated 10.03.2002, 01.06.2002, 09.05.2008 or 11.06.2008.

170.1 PW-51 Nazirmohammed Akbarmiya has named the accused in connection with the main incident in both his statements dated 10.03.2002 and 19.05.2008 as well as in his

deposition and has also identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

170.2 PW-64 Rafikmiya Babumiya has named this accused in connection with the main incident in his statement dated 27.03.2002 as well as in his statement dated 22.05.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

170.3 From the testimonies of the above witnesses, it emerges that the evidence of PW-51 Nazirmohammed Akbarmiya and PW-64 Rafikmiya Babumiya meets with the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

171. **Accused No.38 Rajendrakumar alias Rajesh Punjabhai Tribhovan Patel:** In case of this accused, PW-47 Ibrahimiya Rasulmiya has named him in connection with the main incident in the first information report dated 02.03.2002 as well as in his statement dated 09.05.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

171.1 PW-49 Iqbalmiya Rasulmiya has named this accused in connectin with the main incident in his statements dated 10.03.2002 and 10.06.2008 as well as in his deposition but has failed to identify him before the court.

171.2 PW-56 Ayubmiya Rasulmiya has named the accused in connection with the main incident in both his statements dated 10.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

171.3 PW-59 Mohammadsattar Bachumiya has named this accused in connection with the main incident in his statement dated 02.03.2002, but has subsequently in his statement dated 19.05.2008 recorded by the SIT, he has stated that he had not named the accused and that police had written down the name on their own. He has named the accused in his deposition and has identified him before the court.

171.4 PW-60 Bachumiya Imammiya has named this accused in connection with the main incident in his statements dated 03.03.2002 and 10.05.2008 as well as in his deposition, but has failed to identify him before the court.

171.5 PW-62 Rafikmiya Mohammadhussein has named this accused in his deposition in connection to the incident of forcible closing of cabins on 28.02.2002 and has identified him before the court. He, however, has not named him in his statements dated 10.03.2002 and 10.05.2008. Thus, apart from the fact that this witness had not named this accused when his statement was first recorded after the incident, he had named him in connection with the incident of 28.02.2002 and not the main incident.

171.6 PW-65 Akbarmiya Nathumiya has named this accused in connection with the main incident in both his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has also identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

171.7 PW-66 Akbarmiya Rasulmiya has named this accused in both his statements dated 10.03.2002 and 09.05.2008 as well as in his deposition, but has failed to identify him before the court.

171.8 PW-67 Imtiyazbhai Mohammadhussein has named this accused in his deposition and has identified him before the court. He, however, has not named him in either of his statements dated 17.04.2002 and 22.05.2008.

171.9 PW-68 Gulamali Akbarmiya has named this accused in his statements dated 10.05.2008 and 11.04.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 10.03.2002.

171.10 PW-69 Mahemoodmiya Hussainmiya has named this accused in his deposition but has failed to identify him before the court. He has also not named him in either of his statements dated 06.03.2002 or 22.05.2008.

171.11 PW-70 Munsafkhan Pathan has named this accused in connection with the incident that took place at Pathan Mohalla in his statements dated 06.03.2002 and 11.06.2008 as

well as in his deposition and has identified him before the court. As discussed earlier, this witness is not a witness of the main incident.

171.12 PW-78 Basirabibi Bachumiya has named this accused in her statement dated 22.05.2008 and has named him in her deposition and has identified him before the court. She, however, has not named him in her statements dated 17.04.2002 and 11.06.2008.

171.13 From the evidence of the witnesses, it emerges that the evidence of PW-47 Ibrahimiya Rasulmiya, PW-56 Ayubmiya Rasulmiya and PW-65 Akbarmiya Nathumiya meet with the criteria adopted by this court. The two witness test, therefore, stands satisfied in the case of this accused.

172. **Accused No.40 – Prahladbhai Jagabhai Patel:** In the case of this accused, PW-47 Ibrahimiya Rasulmiya has named him in the first information report dated 02.03.2002 as well as in his deposition, but has failed to identify him before the court. He has also not named him in all his subsequent statements.

172.1 PW-52 Hizbulmiya Hussainmiya has named him in his statement dated 10.03.2002 as well as in his deposition, but has failed to identify him before the court.

172.2 PW-54 Sharifmiya Bhikumiya has named this accused in connection with the main incident in statement dated 06.03.2002 as well as in his deposition and has

identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

172.3 PW-56 Ayubmiya Rasulmiya has named the accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition, but has failed to identify him before the court. He has also not named in statement dated 10.03.2002.

172.4 PW-59 Mohmmadsattar Bachumiya has named this accused in connection with the main incident in his deposition and has identified him before the court. He, however, has not named him in either of his statements dated 02.03.2002 or 19.05.2008.

172.5 PW-69 Mahemoodmiya Hussainmiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and has also identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

172.6 PW-70 Munsafkhan Pathan has named this accused in his statements dated 06.03.2002 and 11.06.2008 in connection with the incident of Pathan Mohalla and has named him in his deposition and has identified him before the court. This witness, however, is not a witness of the main incident.

172.7 From the testimonies of the above witnesses, it is found that the evidence of two of the witnesses, namely, PW-54 Sharifmiya Bhikumiya and PW-69 Mahemoodmiya Hussainmiya meets with the criteria adopted by the court. The

two witness test, therefore, stands satisfied in the case of this accused.

**173. Accused No.41 – Rameshbhai Ramabhai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in the first information report dated 02.03.2002 as well as in his deposition but has failed to identify him before the court. He has also not named him in all his subsequent statements.

173.1 PW-48 Sabirhussain Kadermiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

173.2 PW-51 Nazirmohammad Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 19.05.2008 as well as in his deposition, but has failed to identify him before the court.

173.3 PW-58 Sabirhussain Fakir has named this accused in connection with the incident of Dharoi colony which occurred at 8:30 at Dharoi in his statement dated 03.03.2002 and 22.05.2008 as well as in his deposition, but has failed to identify him. As noticed earlier, this witness is not a witness of the main incident.

173.4 PW-63 Bhikhamiya Kalumiya has named this accused in connection with the main incident in his deposition and has identified him before the court. He, however, has not

named him in either of his statements dated 01.06.2002 and 06.11.2003.

173.5 PW-65 Akbarmiya Nathumiya had initially named this accused in connection with the main incident in his statement dated 10.03.2002, however, in statement dated 10.05.2008 recorded by SIT he had stated that he had not named him, but he has named him in his deposition and has identified him before the court. Thus, this witness has resiled from his earlier statement recorded by the police wherein he had named this accused, when his statement came to be recorded by the SIT and has therefore, taken inconsistent stands.

173.6 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition and has identified him. He, however, has not named him in statement dated 10.03.2002.

173.7 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 and has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

173.8 PW-70 Munsafkhan Pathan has named this accused in connection with the incident at Pathan Mohalla in his statements dated 06.03.2002 and 11.06.2008 as well as in his

deposition and has identified him before the court. But this witness is not a witness of the main incident.

173.9 PW-82 Sabirabibi Fakir has named this accused in connection with the incident of 8:30 p.m. at Dharoi colony but has failed to identify him. She has also not named him in her statements dated 03.03.2002 and 22.05.2008.

173.10 From the evidence of the above referred witnesses, it emerges that the evidence of two of the witnesses, namely, PW-48 Sabirhussain Kadermiya and PW-68 Gulamali Akbarmiya meets with the criteria adopted by the court. The two witness test, therefore, stands satisfied in the case of this accused.

**174. Accused No.42 – Parshottambhai @ Paashaabhai Mohanbhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the main incident in the first information report dated 02.03.2002 as well as in his statement dated 09.05.2008. He has also named him in his deposition but has failed to identify him before the court.

174.1 PW-54 Sharifmiya Bhikhumiya has named this accused in connection with the main incident in his statement dated 10.03.2002 as well as in his deposition, but has failed to identify him before the court.

174.2 PW-55 Ashiqhussain Bachumiya has named this witness in connection with the main incident in his statements dated 02.03.2002 and 09.05.2008 as well as in his deposition and has identified him before the court. The evidence of this

witness, therefore, meets with the criteria adopted by the court.

174.3 PW-61 Shafikmiya Babumiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statements dated 10.03.2002 or 03.05.2002.

174.4 PW-62 Rafikmiya Mahmmadhussain has named this accused in statements dated 10.03.2002 and 10.05.2008 as well as in his deposition but has failed to identify him before the court.

174.5 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 10.03.2002 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

174.6 PW-67 Imtiyazbhai Mohmmadhussain has named this accused in connection with the main incident in his statements dated 17.04.2002 and 22.05.2008. He has also named him in his deposition but has failed to identify him before the court.

174.7 PW-68 Gulamali Akbarmiya has named this accused in his deposition in connection with the main incident, but has failed to identify him before the court. He has also not named him in statements dated 10.03.2002 or 10.05.2008.

174.8 PW-69 Mahemoodmiya Hussainmiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition, but has failed to identify him before the court.

174.9 PW-70 Munsafkhan Pathan has named this accused in connection with the incident at Pathan Mohalla in his statements dated 06.03.2002 and 11.06.2008 as well as in his deposition, but has failed to identify him before the court.

174.10 PW-77 Badrunnisha Akbarmiya has named this accused in connection with the main incident in her statements dated 06.03.2002 and 22.5.2008 as well as in her deposition, but has failed to identify him before the court.

174.11 PW-78 Bashirabibi Bachumiya has named this accused in connection with the main incident in her statement dated 22.05.2008 as well as in her deposition, but has failed to identify him before the court. She has also not named him in her statement dated 17.04.2002.

174.12 PW-81 Dilavarkhan Abbasmiya has not named this accused in his statement dated 22.05.2008 as well as his deposition, but has identified him before the court by his face.

174.13 From the evidence of the witnesses, the evidence of two of the witnesses, namely, PW-55 Ashiqhussain Bachumiya and PW-66 Akbarmiya Rasulmiya meets with the criteria adopted by the court. The two witness test, therefore, stands satisfied in the case of this accused.

175. **Accused No.43 Ashwinbhai Jagabhai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the first incident in the first information report dated 02.03.2002 as well as in his deposition, but has failed to identify him before the court. He has also not named this accused in any of his statements recorded either by the police or by the SIT.

175.1 PW-52 Hizbulmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 10.03.2002 as well as in his deposition, but before the court has identified Jayesh Jaga as Ashwin Jaga. Therefore, this witness has failed to correctly identify the accused.

175.2 PW-54 Sharifmiya Bhikumiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition, but he has failed to identify him before the court.

175.3 PW-59 Mohommadsattar Bachumiya has named this accused in connection with the main incident in his deposition and has also identified him before the court but has not named him in his statements dated 02.03.2002 or 19.05.2008.

175.4 PW-62 Rafikmiya Mohammadhussein has named this accused in connection with the main incident in his statements dated 10.03.2002 as well as 10.05.2008 and has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

175.5 PW-65 Akbarmiya Nathumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 as well as 10.05.2008 and has named him in his deposition but has failed to identify him before the court.

175.6 PW-69 Mahemoodmiya Hussainmiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

175.7 PW-75 Firozabanu Bachumiya has named this accused connection with the main incident in her statement dated 22.05.2008 but has not named him in her deposition or in statement before the police but has identified him by face before the court.

175.8 From the evidence of the witnesses, it emerges that the evidence of PW-62 Rafikmiya Mohammadhussein and PW-69 Mahemoodmiya Hussainmiya meets with the criteria adopted by the court. The two witness test is, therefore, satisfied in the case of this accused.

176. **Accused No.44 – Ambalal Maganbhai Patel:** In case of this accused, PW-47 Ibrahimiya Rasulmiya has named him connection with the main incident in his statements dated 02.03.2002 and 09.05.2008 and also in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.1 PW-46 Sabirmiya Pathan has named this accused in his deposition and has identified him in connection with the incident of distribution of trishuls by Haresh Bhatt. He, however, has not named him in his statement dated 20.05.2008. This witness is not a witness of the main incident.

176.2 PW-48 Sabirhussain Kadermiya has named this witness in connection with the main incident in his statements dated 06.03.2002 and 10.05.2008 as well as in his deposition, and identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.3 PW-54 Sharifmiya Bhikumiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.4 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his statement dated 19.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 02.03.2002.

176.5 PW-58 Sabirhussain Fakir has named this accused in connection with the incident of 8:30 p.m. at Dharoi colony in his statements dated 03.03.2002 and 22.05.2008 and has also named him in his deposition and has identified him before the court. He, however is not a witness of the main incident.

176.6 PW-59 Mohommadsattar Bachumiya has initially named this accused in connection with the main incident in his statement dated 02.03.2002, but subsequently in his statement recorded by the SIT on 19.05.2008, he had stated that he had not given the name of the accused but the police had written down the name on their own. He, however, has named the accused in his deposition and has identified him before the court.

176.7 PW-60 Bachumiya Imammiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 03.03.2002.

176.8 PW-61 Shafikmiya Babumiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has identified him. He, however, has not named him in his statements dated 10.03.2002 and 03.05.2002.

176.9 PW-62 Rafikmiya Mohammadhussein has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.10 PW-63 Bhikumiya Kalumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition

and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.11 PW-64 Rafikmiya Babumiya has not named this accused in either of his statements dated 27.03.2002 and 22.05.2008 but has named him in his deposition and has identified him before the court.

176.12 PW-65 Akbarmiya Nathumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008, but has not named him in his deposition and has identified him before the court.

176.13 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 09.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.14 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.15 PW-69 Mohammadmiya Hussainmiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and

has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.16 PW-70 Munsafkhan Pathan has named this accused in his statement dated 11.06.2008 in connection with the incident of Pathan Mohalla and named him in his deposition and has identified him. He, however, has not named him in his statement dated 06.03.2002. This witness is not a witness of the main incident.

176.17 PW-75 Firozabanu Bachumiya has named this accused in connection with the main incident in her statements dated 02.03.2002 and 22.5.02008 as well as in her deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

176.18 PW-76 Hamidabibi Akbarmiya has named this accused in her deposition and has identified him before the court. She, however, has not named him in her statement dated 21.06.2002. Moreover, while analysing the testimony of this witness, the court has found that the testimony of this witness is not trustworthy and no reliance can be placed upon the same.

176.19 PW-77 Badrunisha Akbarmiya has named this accused in connection with the main incident in her statements dated 06.03.2002 and 22.05.2008. She has also named him in her deposition and has identified him before the court. The

evidence of this witness, therefore, meets with the criteria adopted by the court.

176.20 PW-82 Sabirabibi Fakir has named this accused in her statement dated 22.05.2008 as well as in her deposition but has failed to identify him. She has also not named him in her statement dated 03.03.2002. Besides, this witness has named the accused in connection with the incident of 8:30 at Dharoi colony and is not a witness of the main incident.

176.21 PW-83 Sharifabanu Fakir has named this accused in connection with the incident of 8:30 at Dharoi colony and has named him in her deposition but has failed to identify him before the court. She has also not named him in her statements dated 03.03.2002 and 24.06.2008.

176.22 From the testimonies of the above witnesses, it is found that the evidence of PW-47 Ibrahimmiya Rasulmiya, PW-48 Sabirhussain Kadermiya, PW-54 Sharifmiya Bhikhumiya, PW-62 Rafikmiya Babumiya, PW-63 Bhikhumiya Kalumiya, PW-66 Akbarmiya Rasulmiya, PW-68 Gulamali Akbarmiya, PW-69 Mohammadmiya Husainmiya, PW-75 Firozabanu Bachumiya and PW-77 Badrunisha Akbarmiya meets with the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

177. **Accused No. 46 Rameshbhai Prabhahai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in the first information report dated 02.03.2002 as well as in his deposition, but he has failed to identify him before the court. He has also not named him in any of the

statements made before the police or before the SIT. Since his witness has named the accused in the first information report and has named him in his deposition, the fact that he had not named the accused in his subsequent statements recorded by the Police and the SIT would not bear much relevance. He, however, has failed to identify the accused before the court.

177.1 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his statement dated 02.03.2002 as well as 19.05.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

177.2 Thus, out of the above referred two witnesses it is only the evidence of PW-55 Ashiqhussain Bachumiya which meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

178. **Accused No.48 Jayantibhai Ambalal Patel:** In respect of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the main incident in his statements dated 02.03.2002 and 09.05.2008 as well as in his deposition, but he has failed to identify him before the court.

178.1 PW-46 Sabirmiya Pathan has named this accused in his deposition in connection with the incident of 28.02.2002 in respect of forcible closing down of cabins and has identified him before the court. He, however, has not named him in his statement dated 20.05.2008. Thus, this witness is not a witness of the main incident.

178.2 PW-48 Sabirhussain Kadermiya has named this accused in connection with the main incident in his statement dated 06.03.2002 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

178.3 PW-55 Ashiqhussain Bachumiya has not named this accused in either of his statements dated 02.03.2002 and 19.05.2008 but he has named him in connection with the main incident in his deposition and has identified him before the court.

178.4 PW-59 Mohommadsattar Bachumiya has named this accused in connection with the main incident in his deposition and has identified him before the court, but has not named him in either of his statements dated 02.03.2002 and 19.05.2008.

178.5 PW-60 Bachumiya Imammiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition, but has failed to identify him before the court. He has also not named him in his statement dated 03.03.2002.

178.6 PW-65 Akbarmiya Nathumiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

178.7 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 09.05.2008 but has not named him in his deposition as well as his statement dated 10.03.2002, but has identified him before the court.

178.8 PW-68 Gulamali Akbarmiya has not named this accused in either of the statements dated 10.03.2002 and 10.05.2008 but has named him in connection with the main incident in his deposition and has identified him before the court.

178.9 PW-70 Munsafkhan Pathan has named this accused in his statement dated 11.6.2008 as well as in his deposition in connection with the incident of Pathan Mohalla and has identified him before the court. He, however, has not named him in his statement dated 06.03.2002. This witness is not a witness of the main incident.

178.10 PW-71 Mangabhai Ramabhai has named this accused in his deposition in connection with the incident of carrying barrels filled with kerosene and has identified him, but he has not named him in his statement dated 20.05.2008 recorded by the SIT. This witness is not a witness of the main incident.

178.11 PW-78 Bashirabibi Bachumiya has named this accused in connection with the main incident in her statement dated 17.04.2002 as well as in her deposition and has

identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

178.12 Thus, out of the above witnesses, the evidence of three of the witnesses, namely, PW-48 Sabirhussain Kadermiya, PW-65 Akbarmiya Nathumiya and PW-78 Bashirabibi Bachumiya meets with the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

179. **Accused No.49 Kanubhai Joitabhai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition. He, however, has failed to identify him before the court. He has also not named him in the first information report as well as in his statements dated 10.03.2002 and 01.06.2002.

179.1 PW-46 Sabirmiya Pathan has named this accused in his deposition in connection with the incident which occurred in the morning of 28.02.2002 as well as in connection with the incident of taking away the key to the Water Works and has also identified him. He, however, has not named him in his statement dated 20.05.2008. In any case, this witness is not a witness of the main incident.

179.2 PW-48 Sabirhussain Kadermiya has named this accused in connection with the main incident in his statement dated 10.05.2008 as well as in his deposition and has also identified him before the court. He, however, has not named him in his statement dated 06.03.2002.

179.3 PW-56 Ayubmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 19.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 10.03.2002.

179.4 PW-58 Sabirhussain Fakir has named this accused in his statement dated 22.05.2008 in connection with the incident that took place at 8:30 p.m. at Dharoi colony and has also named him in his deposition and has identified him. He, however, has not named this accused in his statement dated 03.03.2002. This witness is not a witness of the main incident.

179.5 PW-60 Bachumiya Imammiya has named this accused in his statement dated 10.05.2008 in connection with directly connecting the light on the pole as well as in respect of the incident of 9:30 when cabins were set on fire. He has also named him in his deposition and has identified him before the court. He, however, has not referred to the incident of directly connecting the light on the pole in his statement dated 03.03.2002 nor has he referred to the incident of setting cabins on fire in such statement. This witness, therefore, has not named this accused in connection with the main incident.

179.6 PW-63 Bhikhumiya Kalumiya has named this accused in connection with the main incident in his deposition and has identified him. He, however, has not named him in his statements dated 10.03.2002 and 10.05.2008.

179.7 PW-64 Rafikmiya Babumiya has named this accused in connection with the main incident in both his statements dated 27.03.2002 as well as 22.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

179.8 PW-65 Akbarmiya Nathumiya has named this accused in connection with the incident of putting up of focus light on 01.03.2002 at around 4.00 to 5.00 p.m. and has also named him in his deposition and has identified him. He, however, has not referred to this incident in his statement dated 10.03.2002. This witness has, therefore, is not a witness of the main incident in connection with this accused.

179.9 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition and has identified him. He, however, has not named him in his statement dated 10.03.2002.

179.10 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his deposition and has also identified him before the court but has not named him in either of his statements dated 10.03.2002 and 10.05.2008.

179.11 PW-70 Munsafkhan Pathan has named this accused in connection with the incident of Pathan Mohalla in his statement dated 11.06.2008 as well as in his deposition and has identified him before the court. He, however, has not

named him in his statement dated 6.3.2002. This witness is also not a witness of the main incident.

179.12 PW-74 Sikandarmiya Rasulmiya has named this accused in his deposition in connection with the incident of refusing to give Kuber and has also identified him. This witness is also not a witness of the main incident.

179.13 PW-79 Samimbanu Mohammadmiya has not named this accused in her statements dated 06.03.2002 and 22.05.2008 as well as in her deposition, but has identified him by the face.

179.14 PW-82 Sabirabibi Fakir has named this accused in her deposition in connection with the incident of 8:30 p.m. at Dharoi Colony but has failed to identify him. She has also not named him in her earlier statements. This witness is not a witness of the main incident.

179.15 PW-83 Sharifabanu Fakir has named this accused in her deposition in connection with the incident that took place at Dharoi Colony but has failed to identify him and has not named him in her earlier statements. This witness is also not a witness of the main incident.

179.16 From the evidence of the above referred witnesses, it is only the evidence PW-64 Rafikmiya Babumiya which meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

**180. Accused No.50 Ramanbhai Ganeshbhai Prajapati:**

PW-49 Iqbalmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 10.03.2002. However, in his cross-examination a contradiction has been brought out to the effect that in his statement dated 10.05.2008, he had stated that Prajapati Ramanbhai Ganeshbhai was not present in the mob. The witness has, however, denied the suggestion. The contradiction is, however, proved through the testimony of PW-112 Shri G.V. Barot, who in his cross-examination has admitted that this witness in his statement dated 10.05.2008 had stated that Ramanbhai Ganeshbhai was not a member of the mob. The witness has, however, named the accused in his deposition and has identified him before the court.

180.1 PW-51 Nazirmohammad Akbarmiya has named this accused in his statement dated 10.03.2002 but subsequently in his statement dated 19.05.2008 before the SIT he has stated that this accused was not in the mob. The witness has named this accused in connection with the main incident in his deposition and has identified him. However, in his cross-examination, he has categorically stated that Prajapati Ramanbhai Ganeshbhai was not a member of the mob.

180.2 PW-52 Hizbulmiya Hussainmiya has named this accused in connection with the main incident in his deposition and has identified him before the court. He, however, has not named him in his statements dated 10.03.2002, 19.05.2008, 11.06.2008 or 05.08.2008.

180.3 PW-55 Ashiqhussain Bachumiya had initially named this accused in connection with the main incident in his statement dated 02.03.2002 but subsequently in his statement before the SIT on 19.05.2008 he had stated that he has not named the accused but the police had written down the name on their own. The witness has also named the accused in his deposition and has identified him before the court.

180.4 PW-56 Ayubmiya Rasulmiya had initially named this accused in his statement dated 10.03.2002 but subsequently in his statement dated 19.05.2008 recorded by the SIT, he had stated that he had not named this accused and that the police had written down the name on their own. He has named the accused in his deposition but has failed to identify him before the court.

180.5 PW-65 Akbarmiya Nathumiya had initially named this accused in his statement dated 10.03.2002. However, subsequently in his statement dated 10.05.2008 recorded by the SIT, he has stated that he has not named this accused. He, however, has named the accused in his deposition but has failed to identify him before the court.

180.6 PW-75 Firozabanu Bachumiya has named this accused in her deposition in connection with the main incident and has also identified him. She, however, has not named him in her statement dated 02.03.2002 or 22.05.2008

180.7 PW-82 Sabirabibi Fakir has named this accused in connection with the incident of 8:30 p.m. at Dharoi colony in her statements dated 03.03.2002 and 22.05.2008 as well as in

her deposition and has identified him before the court. She, however, is not a witness of the main incident.

180.8 From the evidence of the above witnesses, it emerges that the evidence of none of the witnesses meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

181. **Accused No.52 Dahyabhai Kachrabhai Patel:** In case of this accused, PW-46 Sabirmiya Pathan has named him in his deposition in connection with the incident that took place in the morning of 28.02.2002 and has identified him. He, however, has not named him in his statement dated 20.05.2008. Besides, he is not a witness of the main incident.

181.1 PW-49 Iqbalmiya Rasulmiya has named this accused in connection with the main incident in his statements dated 10.03.2002, 10.05.2008 and 10.06.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

181.2 PW-51 Nazirmohammad Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 19.05.2008 and has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

181.3 PW-56 Ayubmiya Rasulmiya has named this accused in connection with the main incident in his statements

dated 10.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

181.4 PW-72 Prahladbhai Nathabhai, who is not an eyewitness, has named this accused in his statement dated 20.05.2008, but has not named him in his deposition but has identified him before the court.

181.5 PW-80 Rukhsanabanu Ibrahimiya has not named this accused in her statements dated 10.03.2002 and 22.05.2008 as well as in her deposition but has identified him before the court by face.

181.6 From the evidence of the above witnesses, it emerges that the evidence of PW-49 Iqbalmiya Rasulmiya, PW-51, Nazirmohammad Akbarmiya, PW-56 Ayubmiya Rasulmiya meets with the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

182. **Accused No.54 Mathurbhai Trikambhai Patel:** In case of this accused, PW-46 Sabirmiya Pathan has named him in his statement dated 06.05.2008 as well as in his deposition, in connection with the incident that took place in the morning of 28.02.2002. He has also named him in his deposition and has identified him before the court. This witness, however, is not a witness of the main incident.

182.1 PW-49 Iqbalmiya Rasulmiya has named the accused in connection with the main incident in his statements dated

10.03.2002 and 10.05.2008 as well as 10.06.2008. He has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

182.2 PW-56 Ayubmiya Rasulmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 19.05.2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

182.3 PW-58 Sabirhussain Fakir has named this accused in his deposition in connection with the incident that took place at 8:30 p.m. at Dharoi colony and has identified him. He, however, has not named him in his statements dated 03.03.2008 and 22.05.2008. This witness is not a witness of the main incident.

182.4 PW-60 Bachumiya Imammiya has named this accused in his statement dated 10.05.2008 in connection with the incident of directly connecting the light on 28.02.2002 and has also named him in his deposition and has identified him. He, however, has not referred to this incident in his statement dated 03.03.2002. This witness has not named this accused in connection with the main incident.

182.5 PW-63 Bhikhamiya Kalumiya has named this accused in connection with the main incident in his deposition but has failed to identify him before the court. He has also not

named him in either of his statements dated 10.03.2002 and 10.05.2008.

182.6 PW-64 Rafikmiya Babumiya has named this accused in connection with the main incident in his statements dated 27.03.2002 and 22.05.2008 as well as in his deposition but has identified Parsottamdas Mohanbhai as Mathurbhai Trikambhai. Thus, the witness has not been able to correctly identify the accused.

182.7 PW-65 Akbarmiya Nathumiya has named this accused in his statement dated 10.05.2008 as well as in his deposition in connection with the incident of connecting the street light between 4.00 to 5.00 p.m. on 01.03.2002 and has also named him in his deposition and identified him before the court. He, however, has not named him in his statement dated 10.03.2002. This witness has, therefore, not named this accused in connection with the main incident.

182.8 PW-66 Akbarmiya Rasulmiya has named this accused in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition but has failed to identify him before the court. He has also not named him in his statement dated 10.03.2002.

182.9 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his statements dated 10.03.2002 and 10.05.2008 and has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by this court.

182.10 PW-83 Sharifabanu Fakir has named this accused in her deposition in connection with the incident of 8:30 p.m. at Dharoi colony and has identified him. She, however, has not named him in her statements dated 03.03.2002 and 24.06.2008. In any case, this witness is not a witness of the main incident.

182.11 From the evidence of the witnesses it emerges that the evidence of three of the witnesses, namely, PW-49 Iqbalmiya Rasulmiya, PW-56 Ayubmiya Rasulmiya and PW-68 Gulamali Akbarmiya meets with the criteria adopted by this court. The two witness test is, therefore, satisfied in the case of this accused.

**183. Accused No.7 in Sessions Case No.120 of 2008**

**Dahyabhai Vanabhai Patel:** In case of this accused, PW-47 Ibrahimmiya Rasulmiya has named him in connection with the main incident in his statement dated 09.05.2008 as well as in his deposition and has identified him before the court. He, however, has not named him in the first information report dated 02.03.2002 as well as in his statements dated 10.03.2002 and 01.06.2002.

183.1 PW-73 Faridabibi Ashiqhussain has not named this accused in either of her statements dated 02.03.2002 and 11.06.2008 as well as in her deposition, but has identified him before the court by face.

183.2 PW-78 Bashirabibi Bachumiya has named this accused in connection with the Bhajiya incident in her

statement dated 22.05.2008 and has also named him in her deposition and has identified him before the court. She, however, has not named him in connection with the main incident.

183.3 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in either of her statements dated 10.03.2002 or 22.05.2008 as well as in her deposition, but has identified him before the court by face.

183.4 From the evidence of the witnesses, it emerges that the evidence of none of them meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

**184. Accused No.9 in Sessions Case No.7 of 2009**

**Kalabhai Bhikhabhai Patel:** In the case of this accused, PW-46 Sabirmiya Pathan has named him in his deposition in connection with the incident of 28.02.2002 of forcibly closing the cabins and has identified him before the court.

184.1 PW-48 Sabirhussain Kadermiya has named this accused in connection with the main incident in his statements dated 06.03.2002 and 10.05.2008 but has not named him in his deposition. He, however, has identified him before the court.

184.2 PW-55 Ashiqhussain Bachumiya has named this accused in connection with the main incident in his deposition and has identified him before the court but has not named him in his statements dated 02.03.2002 or 19.05.2008.

184.3 PW-62 Rafikmiya Mohammadhusain has named this accused in connection with the main incident in his deposition and has identified him before the court but has not named him in either of his statements dated 10.03.2002 and 10.05.2008.

184.4 PW-68 Gulamali Akbarmiya has named this accused in connection with the main incident in his deposition and has identified him, but has not named him in his statements dated 10.03.2002 and 09.05.2008.

184.5 PW-71 Mangabhai Ramabhai has named this accused in his deposition in connection with the incident of carrying barrels of kerosene but has failed to identify him before the court. He has also not named him in his statement dated 20.05.2008.

184.6 Thus, the evidence of the above witnesses reveals that the evidence of none of the witnesses meets with the criteria adopted by this court. The two witness test is, therefore, not satisfied in the case of this accused.

**185. As to whether the two witness test criteria is satisfied in the case of the accused who have been acquitted by the trial court may now be examined.**

**185-A. Accused No.4 - Narayanlal Sheetmal Lakhwara:** In the case of this accused, PW-55 Ashiqhussain Bachumiya Shaikh has named him in connection with the main incident in his statement dated 19.05.2008 as well as in his

deposition but has failed to identify him. He has also not named him in his statement dated 02.03.2002. Except for the testimony of this witness, which does not meet with the criteria adopted by the court, there is no other evidence against this accused. The two witness test is, therefore, not satisfied in the case of this accused.

**186. Accused No.8 – Rajeshkumar Amratbhai Prajapati:**

In the case of this accused, PW-55 Ashiqhussain Bachumiya Shaikh has named him in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002 and has also named him in his deposition but has failed to identify him before the court.

186.1 PW-81 – Dilawarkhan Abbasmiya Shaikh has not named this accused in his statement dated 22<sup>nd</sup> May, 2008 but has identified him by face.

186.2 From the evidence of the above witnesses, it is found that the evidence of neither of the two witnesses satisfies the criteria adopted by this court. Therefore, the two-witness test is not satisfied in the case of this accused.

**187. Accused No.9 – Bhaveshkumar Kanubhai Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named this accused in relation to the incident that occurred on the morning of 28<sup>th</sup> February, 2002 and has identified him but he has not named him in his statement dated 20<sup>th</sup> May, 2008. This witness is, therefore, not a witness of the main incident.

187.1 PW-55 Ashiqhussain Bachumiya Shaikh has named this accused in connection with the main incident in his

statement dated 2<sup>nd</sup> March, 2002 and has also named him in his deposition but has failed to identify him before the court.

187.2 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in her statements dated 10<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2005 but has identified him in the court by face.

187.3 Thus, out of the three witnesses who have deposed against this accused, the evidence of none of the witnesses satisfies the criteria adopted by the court. Therefore, the two-witness test is not satisfied in the case of this accused.

188. **Accused No.12 Prahladbhai Somabhai Patel:** In the case of this accused, PW-55 Ashiqhussain Bachumiya Shaikh has named him in his statements dated 2<sup>nd</sup> March, 2002 and 19<sup>th</sup> May, 2008 and has also named him in his deposition and has identified him before the court. The evidence of this witness, therefore, satisfies the criteria adopted by the court.

188.1 PW-79 Samimbanu Mohmadiya Shaikh has not named the accused in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him by his face.

188.2 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in her statement dated 10<sup>th</sup> March, 2002 or 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him by his face in the court for the first time.

188.3 Thus, out of the above three witnesses, the evidence of only PW-55 Ashiqhussain Bachumiya Shaikh meets

with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**189.        Accused No.17 – Gordhanbhai Revabhai**

**Prajapati:** In the case of this accused, PW-52 Hizbulmiya Hussainmiya Shaikh has named him in connection with the main incident in his deposition and has identified him. The witness has also named this witness in his statement dated 10<sup>th</sup> March, 2002, but subsequently in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that the accused was not in the mob and that the police had written the name on their own.

**189.1**      PW-55 Ashiqhussain Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002, but before the SIT in his statement dated 19<sup>th</sup> May, 2008, he has stated that he had not given his name. The witness has named the accused in his deposition and has identified him as Ashwin Baldev before the court. Thus, the witness has not correctly identified this accused.

**189.2**      Thus, out of the two witnesses, the evidence of neither of the witnesses meets with the criteria adopted by this court. The two-witness test is, therefore, not satisfied in the case of this accused.

**190.        Accused No.20 – Ravikumar Amratbhai Prajapati:**

In the case of this accused, PW-52 Hizbulmiya Hussainmiya Shaikh has named him in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as in his

deposition but has identified one Rajesh Amrat as the accused Ravi Amrat before the court. Therefore, the witness has not correctly identified the accused.

190.1 PW-55 Ashiqhussain Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002 but in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that he has not given his name. He has also named this accused in his deposition, but has failed to identify him before the court.

190.2 PW-81 – Dilawarkhan Abbasmiya Shaikh has not named this accused in his statement dated 22<sup>nd</sup> May, 2008 as well as in his deposition but has identified him by his face in the court.

190.3 Thus, out of the three witnesses who have deposed against this accused, the evidence of none of the witnesses meets with the criteria adopted by this court. The two-witness test, therefore, is not satisfied in the case of this accused.

191. **Accused No.21 – Babubhai Kantibhai Patel:** In the case of this accused, PW-51 Nazirmahammad Akbarmiya Shaikh has named him in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as in his deposition and has also identified him before the court. The evidence of this witness, therefore, satisfies the criteria adopted by the court.

191.1 PW-59 Mohammad Sattar Bachumiya Shaikh has named this accused in connection with the main incident in his

statement dated 2<sup>nd</sup> March, 2002, but in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that he had not named the accused but the police had written down his name on their own. He has named the accused in his deposition but while identifying the accused before the court, he has stated that he was not present, though in fact, he was present. Thus, the witness failed to identify the accused.

191.2 PW-70 Munsafkhan Yasinkhan Pathan has named the accused in his statement dated 6th March, 2002 in connection with the incident of stone throwing at his old house at Pathan Mohalla on 1<sup>st</sup> March, 2002 but subsequently, in his statement dated 11<sup>th</sup> June, 2008, he had stated that he had not named this accused. The witness has named the accused in his deposition and has identified him before the court. This witness is not a witness of the main incident.

191.3 Thus out of the above witnesses, the evidence only one witness namely, PW-51 Nazirmahammad Akbarmiya Shaikh meets with the criteria adopted by the court. The two-witness testis, therefore, not satisfied in the case of this accused.

192. **Accused No.22 – Dineshkumar Baldevbhai Patel:**  
In the case of this accused, PW-48 Sabirhussain Kadarmiya Shaikh has named him in his deposition in connection with the main incident but has failed to identify him before the court. He has also not named him in his statement dated 6<sup>th</sup> March, 2002.

192.1 PW-59 Mohammad Sattar Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002 but in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that he had not named the accused but the police had written down the name on their own. He has named the accused in his deposition and has identified him before the court.

192.2 PW-73 Faridabibi Ashiqhussain Shaikh has not named the accused in either of her statements dated 2<sup>nd</sup> March, 2002 and 11<sup>th</sup> June, 2008 and has also not named him in her deposition but has identified him in the court by face.

192.3 Thus, out of the above three witnesses who have testified against this accused, the evidence of none of the witnesses meets with the criteria adopted by this court. The two-witness test, therefore, is not satisfied in the case of this accused.

193. **Accused No.25 – Dahyabhai Varvabhai Prajapati:** In the case of this accused, PW-52 Hizbulmiya Hussainmiya Shaikh has named him in his deposition in connection with the main incident but has identified one Jaga Jivan as the accused Dahya Varva. Thus, the witness has not correctly identified this accused. This witness has also not named the accused in his statements dated 10<sup>th</sup> March, 2002, 11<sup>th</sup> June, 2008 or 5<sup>th</sup> August, 2008.

193.1 PW-55 Ashiqhussain Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002 as well as in his deposition

and has identified him before the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

193.2 PW-68 Gulamali Akbarmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 but has not named him in his deposition. He, however, has identified him before the court.

193.3 PW-75 Firozabanu Bachumiya Shaikh has named the accused in connection with the main incident in her statement dated 2<sup>nd</sup> March, 2002 as well as in her deposition, but has identified one Gordhanbhai Revabhai as the accused Dahyabhai Varvabhai. The witness has, therefore, not correctly identified this accused.

193.4 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in her statements dated 10<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him for the first time by face only before the court.

193.5 Thus, from the evidence of the witnesses, the evidence of only one witness namely, PW-55 Ashiqhussain Bachumiya Shaikh satisfies the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

194. **Accused No.26 – Raghubhai Revabhai Patel:** In the case of this accused, PW-59 Mohammad Sattar Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002. However, in

his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that he has not named him and the police had written down the name on their own. The witness has named the accused in his deposition, but has failed to identify him before the court.

194.1 PW-60 Bachumiya Imammiya Shaikh has named this accused in connection with the incident of 27<sup>th</sup> February, 2002 whereby this accused told this witness to remove his cabin which was adjoining his house as the fodder would be burnt, in his deposition but has failed to identify him. In his statement dated 3<sup>rd</sup> March, 2002, he has not mentioned this incident. Insofar as this accused is concerned, this witness has not implicated him in the main incident.

194.2 PW-61 Safikmiya Babumiya Shaikh has named this accused in his deposition and has identified him before the court. He, however, has not named him in his statements dated 10<sup>th</sup> March, 2002 or 3<sup>rd</sup> May, 2002.

194.3 PW-70 Munsafkhan Yasinkhan Pathan has named this accused in his statement dated 6<sup>th</sup> March, 2002 as well as in his deposition in connection with the incident of stone-throwing at his old house at Pathan Mohalla on 1<sup>st</sup> March, 2002. However, in his statement dated 11<sup>th</sup> June, 2008, he has stated that he had not given this name. He has also identified the accused. This witness is not a witness of the main incident.

194.4 PW-75 Firozabanu Bachumiya Shaikh has named this accused in connection with the main incident in her statements dated 2<sup>nd</sup> March, 2002 and 22<sup>nd</sup> May, 2008 and has

also named him in her deposition but has failed to identify him before the court.

194.5 Thus, the evidence of none of the witnesses who have deposed against this accused meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**195. Accused No.29 Chaturbhai Kanabhai Girdharbhai**

**Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya Shaikh has named him in connection with the main incident in the first information report dated 2<sup>nd</sup> March, 2002. He has also named him in his deposition but has failed to identify him before the court.

195.1 PW-48 Sabirhussain Kadarmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 6<sup>th</sup> March, 2002.

195.2 PW-49 Iqbalmiya Rasulmiya Shaikh has named this accused in connection with the main incident in his statements dated 10<sup>th</sup> March, 2002, 10<sup>th</sup> May, 2008 as well as 10<sup>th</sup> June, 2008. He has also named him in his deposition but has failed to identify him before the court.

195.3 PW-52 Hizbulmiya Hussainmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as in his deposition but has failed to identify him before the court.

195.4 PW-55 Ashiqhussain Bachumiya Shaikh has named this accused in connection with the main incident in his deposition and has identified him before the court. He, however, has not named him in his statement dated 2<sup>nd</sup> March, 2002.

195.5 PW-56 Ayubmiya Rasulmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as 19<sup>th</sup> May, 2008. He has also named him in his deposition but has failed to identify him before the court.

195.6 PW-59 Muhammad Sattar Bachumiya Shaikh has named this accused in connection with the main incident in his statement dated 2<sup>nd</sup> March, 2002 but subsequently in his statement dated 19<sup>th</sup> May, 2008 recorded by the SIT, he has stated that he had not named the accused and that the police had written down the name on their own. This witness has named the accused in his deposition and has identified him before the court as Chatur Kana. Since Chatur Kana is merely as short form of the name of the accused, it cannot be said that the witness has not identified him.

195.7 PW-61 Safikmiya Babumiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him. He, however, has not named him in his statements dated 10<sup>th</sup> March, 2002 and 3<sup>rd</sup> May, 2002.

195.8 PW-77 Badrunisha Akbarmiya Shaikh has named the accused in connection with the main incident in her statement dated 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him as Chaturbhai Vitthalbhai instead of Chatur Kanjibhai. Thus, she has not correctly identified this accused. Moreover, she has also not named him in her statement dated 6<sup>th</sup> March, 2002.

195.9 PW-80 Rukshanabanu Ibrahimmiya has not named the accused in her statements dated 10<sup>th</sup> March, 2002 or 22<sup>nd</sup> May, 2008 as well as in her deposition, but she has identified him before the court for the first time by face only.

195.10 Thus the evidence of the none of the above witnesses, meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

#### **196. Accused No.36 Dashrathbhai Ambalal Dwarkadas**

**Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya Shaikh has named him in connection with the main incident in the first information report dated 2<sup>nd</sup> March, 2002 and has also named him in his deposition, but has failed to identify him before the court.

196.1 PW-64 Rafikmiya Babumiya Shaikh has named this accused in connection with the main incident in his statements dated 27<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008 as well as in his deposition and has also identified him in the court. The evidence of this witness, therefore, meets with the criteria adopted by the court.

196.2 PW-79 Samimbanu Mohmadmiya Shaikh has not named this accused in her statements dated 6<sup>th</sup> March, 2002 or 22<sup>nd</sup> May, 2008. She has also not named him in her deposition but has identified him before the court by face only.

196.3 PW-80 Rukshanabanu Ibrahimmiya has not named this accused in either of her statements dated 10<sup>th</sup> March, 2002 or 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him by face only before the court.

196.4 Thus, out of the witnesses who have deposed against this accused, the evidence of only PW-64 Rafikmiya Babumiya Shaikh meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

197. **Accused No.39 – Baldevbhai Ranchhodbhai Dwarkadas Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named him in his deposition in connection with the incident dated 28<sup>th</sup> February, 2002 near the water works as well as the incident whereby the mob was forcibly getting the cabins closed down in the morning of 28<sup>th</sup> February, 2002 morning and has also identified him before the court. He, however, has not named the accused in his statement dated 20<sup>th</sup> May, 2008. This witness is not a witness of the main incident.

197.1 PW-47 Ibrahimmiya Rasulmiya Shaikh has named this accused in the first information report dated 2<sup>nd</sup> March,

2002 and has also named him in his deposition, but has failed to identify him.

197.2 PW-52 – Hizbulmiya Hussainmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as in his deposition, but has failed to identify him.

197.3 PW-68 – Gulamali Akbarmiya Shaikh has named this accused in connection with the main incident in his deposition, but has failed to identify him. He has also not named him in his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008.

197.4 Thus, out of the witnesses who have deposed against this accused, the evidence of none of the witnesses meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

198. **Accused No.47 Jivanbhai Dwarkadas Patel:** In the case of this accused, PW-79 Samimbanu Mohmadmiya Shaikh has not named him in her statements dated 6<sup>th</sup> March, 2002 and 22<sup>nd</sup> May, 2008 and has also not named him in her deposition but has identified him before the court by face only.

198.1 Similarly, PW-81 Dilawarkhan Abbasmiya Shaikh has not named this accused in his statement dated 22<sup>nd</sup> May, 2008 or in his deposition but has identified him before the court by face only.

198.2 Thus, the evidence of neither of the two witnesses, who though have not deposed against this accused, have

identified him before the court, meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**199. Accused No.51 Ashutosh (Pavankumar) Murlidahar**

**Marwadi:** In the case of this accused, PW-49 Iqbalmiya Rasulmiya Shaikh has named him in connection with the main incident in his statements dated 10<sup>th</sup> March, 2002, 10<sup>th</sup> May, 2008 and 10<sup>th</sup> June, 2008 as well as in his deposition and has also identified him before the court. The evidence of this witness, therefore, satisfies the criteria adopted by the court.

199.1 PW-65 Akbarmiya Nathumiya Shaikh has named the accused in his statements dated 10<sup>th</sup> March, 2002 as well as 10<sup>th</sup> May, 2008 and has also named him in his deposition, but has failed to identify him before the court.

199.2 Thus, out of the two witnesses who have deposed against this accused, the evidence of only PW-49 Iqbalmiya Rasulmiya Shaikh meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

200. **Accused No.53 Rameshbhai Baldevbhai Patel:** In the case of this accused, PW-73 Faridabibi Ashiqhussain Shaikh has not named him in her statements dated 2<sup>nd</sup> March, 2002 and 11<sup>th</sup> June, 2008 and has also not named him in her deposition, but has identified him before the court by face only.

200.1 Similarly, PW-81 Dilawarkhan Abbasmiya Shaikh has not named the accused in his statement dated 22<sup>nd</sup> May, 2008 as well as in his deposition but has identified him by face only before the court.

200.2 Thus, the evidence of neither of the above two witnesses who though have not deposed against this accused, have merely identified him before the court, meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**201. Accused No.1 in Sessions Case No.120 of 2008:**

**Babubhai Vanabhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya Shaikh has named him in his deposition in connection with the main incident and has identified him before the court. He, however, has not named him in the first information report as well as in his statements dated 10<sup>th</sup> March, 2002, 1<sup>st</sup> June, 2002, 11<sup>th</sup> June, 2008 and 9<sup>th</sup> May, 2008.

201.1 PW-78 Basirabibi Bachumiya Shaikh has named the accused in connection with the main incident in her statement dated 22<sup>nd</sup> May, 2008 as well as in her deposition and has identified him. She, however, has not named him in her statement dated 17<sup>th</sup> April, 2002.

201.2 Thus, out of the two witnesses who have deposed against this accused, the evidence of neither of them meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**202. Accused No.2 in Sessions Case No.120 of 2008:**

**Rameshbhai Kachrabhai Patel:** In the case of this accused, PW-49 Iqbalmiya Rasulmiya Shaikh has named him in connection with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him. He, however, had not named him in his statement dated 10<sup>th</sup> March, 2002.

202.1 PW-81 Dilawarkhan Abbasmiya Shaikh has not named the accused in his statement dated 22<sup>nd</sup> May, 2008 or in his deposition but has identified him before the court by face only.

202.2 Thus, out of the two witnesses who have deposed against this accused, the evidence neither of the witnesses meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**203. Accused No.3 in Sessions Case No.120 of 2008:**

**Babubhai Kanjibhai Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named him in his deposition in connection with the incident that took place in the morning on 28<sup>th</sup> February, 2002 and has identified him. He, however, has not named him in his statement dated 20<sup>th</sup> May, 2008. This witness is not a witness of the main incident.

203.1 PW-49 Iqbalmiya Rasulmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him as Babu Kana before the court. He, however, has not named him in his statement dated 10<sup>th</sup> March, 2002.

203.2 PW-52 Hizbulmiya Hussainmiya Shaikh has named this accused in connection with the main incident in his statement dated 19<sup>th</sup> May, 2008 as well as in his deposition but has failed to identify him before the court. He has also not named him in his statements dated 10<sup>th</sup> March, 2002, 11<sup>th</sup> June, 2008 and 5<sup>th</sup> August, 2008.

203.4 PW-73 Faridabibi Ashiqhussain Shaikh has not named this accused in her statements dated 2<sup>nd</sup> March, 2002 and 11<sup>th</sup> June, 2008. She has also not named him in her deposition but has identified him before the court by face only.

203.5 PW-78 Basirabibi Bachumiya Shaikh has named this accused in connection with the main incident in her statement dated 22<sup>nd</sup> May, 2008 as well as in her deposition but has failed to identify him before the court. She has also not named him in her statement dated 17<sup>th</sup> April, 2002.

203.6 PW-81 Dilawarkhan Abbasmiya Shaikh has not named this accused in his statement dated 22<sup>nd</sup> May, 2008 as well as in his deposition but has identified him before the court by face only.

203.7 Therefore, out of the above witnesses who have deposed against this accused, the evidence of none of them meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

204. **Accused No.4 in Sessions Case No.120 of 2008: Kanubhai Revabhai Patel:** In case of this accused, PW-59

Mahammad Sattar Bachumiya has named him in connection with the main incident in his deposition and has identified him before the court. He, however, has not named him in his statements dated 2<sup>nd</sup> March, 2002 or 19<sup>th</sup> May, 2008.

204.1 PW-78 Basirabibi Bachumiya Shaikh has named this accused in connection with the main incident in her statement dated 22<sup>nd</sup> May, 2008 as well as in her deposition and has identified him before the court. She, however, has not named him in her statement dated 17<sup>th</sup> April, 2002.

204.2 PW-81 Dilawarkhan Abbasmiya Shaikh has not named the accused in his statement dated 22<sup>nd</sup> May, 2008 or in his deposition but has identified him before the court by face only.

204.3 Thus, the evidence of none of the above three witnesses meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

205. **Accused No.5 in Sessions Case No.120 of 2008: Natwarbhai Kachrabhai Patel:** In the case of this accused, PW-59 Mahammad Sattar Bachumiya has named him in connection with the main incident in his deposition and has identified him before the court. He, however, has not named him in his statements dated 2<sup>nd</sup> March, 2002 and 19<sup>th</sup> May, 2008.

205.1 PW-71 Mangabhai Ramabhai Raval has named this accused in his deposition in connection with the incident with

regard to collection of kerosene from tractor on 1<sup>st</sup> March, 2002 at 9:00 p.m. and has identified him before the court. He, however, has not named him in his statement dated 20<sup>th</sup> May, 2008. This witness is also not a witness of the main incident.

205.2 Thus, out of the two witnesses who have deposed against this accused, the evidence of neither of the witnesses meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**206. Accused No.6 in Sessions Case No.120 of 2008:**

**Ashwinbhai Baldevbhai Patel (Nagar) (Botham):** In the case of this accused, PW-49 Iqbalmiya Rasulmiya Shaikh has, in his statement dated 10<sup>th</sup> March, 2002, stated that there were two Ashwinbhai Baldevbhai in the village and that Ashwin Baldev Gaadiwala was in the mob. He has named him in connection with the main incident in his statements dated 10<sup>th</sup> May, 2008 and 10<sup>th</sup> June, 2008 as well as in his deposition and has identified Ashwin Baldev as Ashwin Baldev Botham before the court, however, it is not clear as to whether he has identified Ashwin Baldev as Ashwin Baldev Botham or Ashwin Baldev Gaadiwala.

206.1 PW-56 Ayubmiya Rasulmiya Shaikh has named the accused in connection with the main incident in his statement dated 10<sup>th</sup> March, 2002 as well as in his deposition but has failed to identify him before the court.

206.2 PW-57 Mustufamiya Rasulmiya Shaikh has named this accused in connection with the main incident in his statement dated 5<sup>th</sup> August, 2008 as well as in his deposition

and has identified him before the court. In his statement dated 10<sup>th</sup> March, 2002, the witness has stated that Ashwin Baldev Joita Gaadiwala was in the mob. Thus, this witness is not consistent as regards which Ashwin Baldev was present in the mob, whether it was Ashwin Baldev Joita Gaadiwala or this accused, that is, Ashwin Baldev Patel (Nagar) (Botham).

206.3 PW-60 Bachumiya Imammiya Shaikh has named this accused in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition in connection with the incident of 9:30 p.m. of burning of cabins on 1<sup>st</sup> March, 2002. He, however, has not identified him before the court. He has also not named this accused in his statement dated 3<sup>rd</sup> March, 2002.

206.4 PW-65 Akbarmiya Nathumiya Shaikh has named the accused in connection with the main incident in his statements dated 10<sup>th</sup> March, 2002 and 10<sup>th</sup> May, 2008 as well as in his deposition, but has failed to identify him before the court.

206.5 PW-68 Gulamali Akbarmiya Shaikh has named this accused in his deposition in connection with the main incident and has identified him before the court. He, however, has not named him in his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008.

206.6 Thus, out of the six witnesses who have deposed against this accused, the evidence of none of the witnesses meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**207. Accused No.8 in Sessions Case No.120 of 2008:**

**Joitaram Ramabhai Patel:** In the case of this accused, PW-47 Ibrahimmiya Rasulmiya Shaikh has named him in his deposition in connection with the main incident and has identified him before the court. He, however, has not named him in the first information report dated 2<sup>nd</sup> March, 2002 as well as in his statements dated 10<sup>th</sup> March, 2002, 1<sup>st</sup> June, 2002, 11<sup>th</sup> June, 2008 or 9<sup>th</sup> May, 2008.

207.1 PW-51 Nazirmahammad Akbarmiya Shaikh has named this accused in connection with the main incident in his statements dated 10<sup>th</sup> March, 2002 and 19<sup>th</sup> May, 2008 as well as in his deposition and has identified him before the court. The evidence of this witness, therefore, satisfies the criteria adopted by the court.

207.2 PW-58 Sabirhussain Imamshah Fakir has named this accused in his deposition in connection with the incident which took place at 8:30 p.m. at the Dharoi Colony. He, however, could not identify this accused before the court and had stated that the accused was not present despite the fact that the accused, in fact, was present before the court. This witness has also not named this accused in his statements dated 3<sup>rd</sup> March, 2002 and 22<sup>nd</sup> June, 2008. In any case, this witness is not a witness of the main incident.

207.3 PW-62 Rafikmiya Mahammadhussein Shaikh has named the accused in his deposition but has failed to identify him before the court. He has also not named him in his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008.

207.4 Thus, out of the witnesses who have deposed against this accused, the evidence of only one witness, namely, PW-51 Nazirmahammad Akbarmiya Shaikh meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**208. Accused No.2 in Sessions Case No.7 of 2009:**

**Laxmanbhai Dhulabhai Patel:** In the case of this accused, PW-57 Mustufamiya Rasulmiya Shaikh has named him in connection with the main incident in his statements dated 19<sup>th</sup> May, 2008 and 5<sup>th</sup> August, 2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 10<sup>th</sup> March, 2002. The evidence of the sole witness, therefore, does not meet with the criteria adopted by this court.

208.1 Since only one witness has named this accused, whose evidence also does not meet with the criteria adopted by the court, it is manifest that the two witness test is not satisfied in the case of this accused.

**209. Accused No.3 in Sessions Case No.7 of 2009:**

**Mahesh Jivanbhai Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named him in his deposition in connection with the incident which took place in the morning of 28<sup>th</sup> February, 2002 and has identified him before the court. He, however, has not named him in his statement dated 20<sup>th</sup> May, 2008. This witness is not a witness of the main incident.

209.1 PW-59 Mohammad Sattar Bachumiya Shaikh has named this accused in connection with the main incident in his

statement dated 2<sup>nd</sup> March, 2002, however, before the SIT in his statement dated 19<sup>th</sup> May, 2008, he has stated that he had not named the accused and that the police had written down the name on their own. The witness has also named the accused in his deposition and has identified him before the court.

209.2 PW-60 Bachumiya Imammiya Shaikh has named the accused in connection with the incident of closing down of gallas on 28<sup>th</sup> February, 2002 in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition but has failed to identify him before the court. This witness has not referred to this incident in his statement dated 3<sup>rd</sup> March, 2002. Though this witness has named this accused in connection with the main incident in his statements dated 10<sup>th</sup> March, 2002 as well as 10<sup>th</sup> May, 2008, he has not named him in connection with the main incident in his deposition before the court.

209.3 PW-65 Akbarmiya Nathumiya Shaikh has not named this accused in any of his statements or in his deposition, but has identified Ramanbhai Jivanbhai as Mahesh Jivanbhai.

209.4 PW-68 Gulamali Akbarmiya Shaikh has named this accused in his deposition in connection with the main incident but has failed to identify him before the court. He has also not named him in his statement dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008.

209.5 Thus, out of the above witnesses, the evidence of none of the witnesses meets with the criteria adopted by the

court. The two-witness test is, therefore, not satisfied in the case of this accused.

**210. Accused No.5 in Sessions Case No.7 of 2009:**

**Prahladbhai Varvabhai Prajapati:** In the case of this accused, PW-52 Hizbulmiya Hussainmiya Shaikh has named him in his deposition in connection with the main incident but has initially identified Mathur Trikam as Prahla Varva but thereafter has identified him correctly. He, however, has not named him in his statements dated 10<sup>th</sup> March, 2002, 11<sup>th</sup> June, 2008 or 5<sup>th</sup> August, 2008.

210.1 PW-82 Sabirabibi Sabirhussain Fakir has named this accused in her deposition in connection with the incident of 8:30 p.m. at Dharoi Colony. She, however, has failed to identify him before the court. She has also not named him in her statements dated 3<sup>rd</sup> March, 2002 and 22<sup>nd</sup> May, 2008. This witness, in any case, is not a witness of the main incident.

210.2 PW-83 Sharifabanu Sabirhussain Fakir has named this accused in connection with the incident of 8:30 p.m. at Dharoi Colony in her statement dated 24<sup>th</sup> June, 2008 as well as in her deposition, but has failed to identify him before the court. She, however, has not named him in her statement dated 3<sup>rd</sup> March, 2002. This witness also, is not a witness of the main incident.

210.3 Thus, out of the three witnesses who have deposed against this accused, the evidence of none of the witnesses meets with the criteria adopted by this court. The two-witness test, therefore, is not satisfied in the case of this accused.

**211. Accused No.6 in Sessions Case No.7 of 2009:**

**Jagabhai Jivanbhai Patel:** In the case of this accused, PW-50 Zakirhussain Kadarmiya Shaikh has named him in connection with the main incident in his statement dated 11<sup>th</sup> June, 2008 and has also named him in his deposition but has failed to identify him before the court. He, however, has not named him in his statement dated 6<sup>th</sup> March, 2002. It may be noted that while analyzing the testimony of each of the witnesses individually, this court has found that the testimony of this witness is not credible and cannot be relied upon.

211.1 PW-52 Hizbulmiya Hussainmiya Shaikh has named this accused in connection with the main incident in his statements dated 11<sup>th</sup> June, 2008, 5<sup>th</sup> August, 2008 and 19<sup>th</sup> May, 2008 as well as in his deposition but has identified him as Dahya Varva. Thus, the witness has failed to identify this accused before the court. He has also not named him in his statement dated 10<sup>th</sup> March, 2002.

211.2 Thus, out of the two witnesses who have deposed against this accused, the first witness apart from the fact that his evidence does not meet with the criteria adopted by the court, has also been found to be untrustworthy and the evidence of the second witness also does not meet with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**212. Accused No.7 in Sessions Case No.7 of 2009:**

**Upendra Manilal Patel:** In the case of this accused, PW-48 Sabirhussain Kadarmiya Shaikh has named him in connection

with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him before the court. He, however, has not named him in his statement dated 6<sup>th</sup> March, 2002.

212.1 PW-50 Zakirhussain Kadarmiya Shaikh has named the accused in his statement dated 11<sup>th</sup> June, 2008 as well as in his deposition but has failed to identify him. He has also not named him in his statement dated 6<sup>th</sup> March, 2002. As discussed earlier, while analyzing the testimony this witness, the court has found that the testimony of this witness is not credible and cannot be relied upon.

212.2 Thus, the evidence of neither of the two witnesses who have deposed against this accused, meets with the criteria adopted by the court. The two-witness test, therefore, is not satisfied in the case of this accused.

**213. Accused No.8 in Sessions Case No.7 of 2009:**

**Sanjay Ambalal Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named him in connection with the incident that occurred in the morning of 28<sup>th</sup> February, 2002 in his deposition and has identified him. He, however, has not named him in his statement dated 20<sup>th</sup> May, 2008. Moreover, this witness is not a witness of the main incident.

213.1 PW-48 Sabirhussain Kadarmiya Shaikh has named this accused in connection with the main incident in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him. He, however, has not named him in his statement dated 6<sup>th</sup> March, 2002.

213.2 Therefore, the evidence of neither of the witnesses who have deposed against this accused meets with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

**214. Accused No.10 in Sessions Case No.7 of 2009:**

**Govindbhai Mohanbhai Patel:** In the case of this accused, PW-46 Sabirmiya Akumiya Pathan has named him in his deposition in respect of the incident that occurred on 28<sup>th</sup> February, 2002 in the morning and has identified him. He, however, has not named him in his statement dated 20<sup>th</sup> May, 2008. This witness, even otherwise, is not a witness of the main incident.

214.1 PW-62 Rafikmiya Mohmadhussain Shaikh has named this accused in his deposition in connection with the main incident and has identified him before the court. He, however, had not named him in either of his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008.

214.2 PW-68 Gulamali Akbarmiya Shaikh has named this accused in his deposition in connection with the main incident and has identified him before the court. He, however, has not named him in his statements dated 10<sup>th</sup> March, 2002 or 10<sup>th</sup> May, 2008.

214.3 PW-80 Rukshanabanu Ibrahimmiya has not named the accused in either of the statements dated 10<sup>th</sup> March, 2002 or 22<sup>nd</sup> May, 2008 as well as in her deposition but has identified him in the court by face.

214.4 Thus, out of the witnesses who have deposed against this accused, none of them satisfy the criteria adopted by the court. The two-witness test, therefore, does not stand satisfied in the case of this accused.

**215. Accused No.11 in Sessions Case No.7 of 2009:**

**Babubhai Gokaldas Patel:** In the case of this accused, PW-49 Iqbalmiya Rasulmiya Shaikh has named him in his statement dated 10<sup>th</sup> May, 2008 as well as in his deposition and has identified him. He, however, has not named him in his statement dated 10<sup>th</sup> March, 2002.

215.1 Thus, the evidence of the sole witness who has deposed against this accused does not meet with the criteria adopted by the court. The two-witness test is, therefore, not satisfied in the case of this accused.

216. From the analysis of the evidence against each of the accused it is clear that the two witness test adopted by this court is not satisfied in the case of any of the accused who have been acquitted by the trial court by giving the benefit of doubt. Under the circumstances, no case has been made out for reversing the judgment and order of acquittal and convicting the said accused.

217. Insofar as the accused who have been convicted by the trial court, from the analysis of the evidence against each of the accused individually applying the criteria adopted by the court and the two-witness test, it is found that the two witness test is satisfied in the case of seventeen of the accused.

**218. Applicability or otherwise of the provisions of section 149 of the Penal Code:** Before proceeding further, it would be important to bear in mind that in the present case, in case of most of the accused, no overt act has been attributed by any of the witnesses and the accused have been convicted under section 302 of the Penal Code and other provisions of the Indian Penal Code, with the aid of section 149 thereof. The two essential ingredients of section 149 of the Penal Code are that there must be commission of an offence by any member of the unlawful assembly and that such offence must be committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. In ***Masaltı v. State of U.P.*** (supra), it was urged that on behalf of the accused that the evidence given by the witnesses conformed to the same pattern and since no specific part was assigned to all the assailants, that evidence should not have been accepted. The Supreme Court was of the view that this criticism was not well-founded and held that where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the facts of the said case, several weapons were carried by each member of the unlawful assembly, but it appeared that the guns were used and that was enough to kill five persons. The court held that in such a case, it would be

unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. The court observed that appreciation of evidence in such complex cases is no doubt a difficult task; but the criminal courts have to do their best in dealing with such cases` and it is their duty to sift the evidence carefully and decide which part of it is true and which is not.

218.1 In **Lalji v. State of U.P.**, (1989) 1 SCC 437, the Supreme Court held thus:

*"8. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in Section 141 IPC, an assembly of five or more persons is designated an "Unlawful Assembly", if the common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth", and "Fifth" of that section. An assembly, as the Explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be"*

merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific

*overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.*

*10. Thus, once the court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it."*

218.2 In **Ramesh v. State of Haryana** (supra), the Supreme Court expressed the opinion that the common object of an unlawful assembly has to be gathered from the nature of the assembly, arms possessed by them and the behaviour of the assembly at or before the occurrence. It is an inference which has to be deduced from the facts and circumstances of each case. The court held that to attract the mischief under section 149 of the Penal Code, it is not necessary that each of the accused must commit some illegal overt act. When the assembly is found to be unlawful and if offence is committed by any member of the unlawful assembly in prosecution of the common object, every member of the unlawful assembly shall

be guilty of the offence committed by another member of the assembly. It has to be borne in mind that an assembly which is not unlawful when assembled, may subsequently become an unlawful assembly. In the facts of the said case, the court found that there was overwhelming material to show that the appellants therein variously armed, including with firearms, assembled at one place and thereafter came to the place of occurrence and started assault together and when protested by the deceased, one of the members of the unlawful assembly shot him dead and some of them caused injury by firearm, gandas, lathi, etc. to others. All of them had come and left the place of occurrence together. In view of these facts, the court found that there was no escape from the conclusion that the appellants therein were the members of the unlawful assembly and offences have been committed in pursuance of the common object and hence, each of them was liable for the offence committed by any other member of the assembly.

218.3 In ***Sunilkumar v. State of Rajasthan*** (supra), the Supreme Court held thus: -

*"7. The pivotal question is the applicability of Section 149 IPC. The said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained*

one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

8. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a

consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot *eo instanti*.

9. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person

*commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence. The word "knew" used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part; but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda v. State of Mysore, AIR 1956 SC 731)"*

218.4     **In *Susanta Das and others v. State of Orissa*** (supra), the Supreme Court held that when one reads section 149, since at the very outset, it refers to the participation of each member of an assembly, it is to be necessarily shown that there was an assembly of five or more persons which is designated as unlawful assembly under section 149 of the Penal Code. When once, such a participation of five or more persons is shown, who indulged in an offence as a member of such an unlawful assembly, for the purpose of invoking section 149, it is not necessary that there must be specific overt act

played by each of the members of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such member knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a member of an unlawful assembly, the offence as stipulated under section 149 of the Penal Code will stand proved.

218.5 Before this court, it has been contended on behalf of the accused that after entering into Shaikh Mohalla, very few people could gather or come near Mahemoodmiya's house and that it was not possible for a mob of five hundred to one thousand people to gather, spread fear and remain in Shaikh Mohalla as there was no sufficient space to accommodate such a huge crowd. It was submitted that even if it is believed for the sake of argument that there was a huge crowd, none of the accused have caused any injury to anyone with any weapons until the incident in question happened at Mahemoodmiya's house. According to the learned counsel for the appellants/accused, the facts on record indicate that the mob did not have the object to kill, to cause injury or to commit any offence under the Indian Penal Code, much less share any common object to do so. It was submitted that when the assault had started, none of the members of the mob would have been aware that several persons would take shelter in Mahemoodmiya's house, therefore, it is inconceivable that the members of the mob shared a common object to commit the offence under section 302 of the Penal Code. It was submitted that there is absolutely no evidence as to who poured

kerosene and who ignited it, nor is there any substantive evidence of any door or window having been broken as alleged, inasmuch as, neither the panchnama of the scene of offence nor the testimony of the FSL officer support such claim. It was submitted that through the cross-examination of the witnesses, it has been brought on record that there were persons of other villages who had participated in the assault. It was urged that considering the background of the incident, the gathering of mobs from another village prior to the incident, absence of any motive, nature of the assembly and the non-use of weapons, behaviour of the members of the mob at or after the incident and the common object, if any, are relevant factors which are required to be considered by the court. Reference was made to the decision of the Supreme Court in **Baladin v. State of U.P.** (supra) for the proposition that it is well-settled that mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142 of the Penal Code. Reliance was placed upon the decision of the Supreme Court in **Sherey v. State of U.P.** (supra) wherein it was held that when there is a general allegation against a large number of persons, the court naturally hesitates to convict all of them on such vague evidence. The court has to find some reasonable circumstance which lends assurance. The court, accordingly, found it safe to convict only those accused whose presence was not only consistently mentioned from the stage of first information report but also to whom all overt acts had been attributed.

218.6 On behalf of the prosecution and the private appellants (victims), it had been contended that once a person is held to be a party to an unlawful assembly with a common object, no overt act needs to be attributed to that person for being found guilty of the offence in question. It was submitted that this is a case where there is no doubt and it cannot be seriously disputed that a large mob entered into an area in which they were not residing and went to the end of the area of the locality/mohalla and certain people were killed. It was submitted that there is no doubt about this fact, and the fact that there was an unlawful assembly, and that the kind of statements which were being made by the accused have been repeated by one witness after the other. It was submitted that the common object of the unlawful assembly was to inflict physical harm and kill the persons of a particular community which cannot be doubted. It was urged that if this is not doubted, then as per the decisions of the Supreme Court, each person who is a member of that unlawful assembly would be guilty irrespective of the overt act committed by that person. In that context, the only thing which one has to verify is whether a particular person was present in the assembly or not. Nothing more needs to be done. It was, accordingly, submitted that once it is shown that there is some amount of credible evidence that a person was part of a mob which has gone inside where everyone who had gone inside was shouting and screaming, etc., there is no question of there being any bystander. The only question which the court is then required to answer is as to whether such person was part of the mob or not.

218.7 In the present case, indisputably, a large mob entered Shaikh Mohalla which was an area occupied solely by the residents thereof, who belong to the Shaikh community. Shaikh Mohalla is not a big colony, but is comprised only of two rows of houses on either side of a narrow road, at the end of which Mahemoodmiya's house, viz. the place where twenty-eight persons were burnt alive, is situated. The road between the two rows of houses is not big enough for vehicles to pass through and the evidence on record shows that a jeep could enter only up to a certain distance. Therefore, it is not as if this was a common road used by the public as thoroughfare. The mob came at or about 11:30 at night which is not an hour when the public is up and about, more so, in a village. The mob came armed with weapons and inflammable substances and burning rags. The common object of the mob to burn and destroy the houses at Shaikh Mohalla together with the occupants thereof is manifest. The mob had entered Shaikh Mohalla, which is comprised of only residential houses, at an unearthly hour. The members of the mob had no valid reason for being present at Shaikh Mohalla at that time of the night. Therefore, the very fact that the mob had entered Shaikh Mohalla in the middle of the night and had ransacked the houses and set them on fire; and had set Mahemoodmiya's house wherein residents of Shaikh Mohalla had taken shelter, ablaze; is indicative of the fact that the members of the mob shared the common intention to destroy the houses of Shaikh Mohalla and cause loss of life. Besides, the fact that the mob had taken care to see that it was the houses in the row on the side of the kabristan which are set on fire and the houses in the row on the rear side of the Patel houses are ransacked and damaged in a manner whereby no damage is caused to the

houses belonging to the Patels, reveals the intention of the mob to cause as much damage as possible to the Muslim community without causing any loss or damage to any other community. For some reason, no evidence has come on record with regard to any individual being assaulted by the mob, though some of the deceased persons like Bachumiya Nathumiya, have sustained severe wounds that could be caused by weapons. But the dead tell no tales and, therefore, there is no evidence of any assault by any member of the mob on any individual person. Nonetheless, the evidence on record shows that all the members of the mob came together and intentionally resorted to pelting stones and then vandalizing, ransacking and burning houses one after the other on the row towards the kabrastan. They also set Bachumiya Imammiya's jeep and a scooter lying in an open plot in that row on fire. Other witnesses have sustained injuries on account of stone throwing. Since some of the members of the mob were carrying cans of inflammable substances and others were carrying burning rags, it cannot be gainsaid that all the members of the unlawful assembly would have been aware of the offence which was likely to be committed in the prosecution of the common object. The evidence of the witnesses shows that the mob proceeded inside the mohalla burning house after house, till they reached the Mahemoodmiya's house [where the women and children and few male members of Shaikh Mohalla had taken shelter under the belief that it was safe, not suspecting what was in store for them]. The mob then broke the windows of the house and poured kerosene and petrol and ignited the same with burning rags, without a shred of pity for the innocent children of tender age and women whose cries for help rent the air but to no

avail. Since the house was surrounded by the mob which was armed with weapons, those members of Shaikh Mohalla who were outside could not come to their rescue and had to bear with their family members screaming with agony.

218.8 Much emphasis had been laid on behalf of the appellants/accused on the testimony of PW-75 Firozabano Bachumiya Shaikh who, in her cross-examination has stated that upon going to Mahemoodmiya's house, she closed the doors and windows. Support is taken from the decision of the Supreme Court in ***Mohd. Iqbal M. Sheikh v. State of Maharashtra***, 1998 SCC (Cri) 1064, for the proposition that in such circumstances, the normal human conduct is that the persons would come out of the house irrespective of the danger which they may face even coming out. In this regard, it may be noted that from the testimonies of the police witnesses, it is their consistent case that they opened the door from outside. This version finds corroboration in the testimony of PW-88 Hasmukhlal Thakorlal Modi (who at the relevant time was the Scientific Officer of the mobile van), who has opined that there were signs of force having been used from outside on the window of the house. The aldrop inside was coated with soot and looking at its position, it was open on the inside. Similarly, the door on the rear side was covered with soot on the inside and the aldrop was also coated with soot. The Officer has opined that upon looking at the position of the soot on the aldrop, it could not have been closed from inside. This part of the testimony of the witness with regard to the doors not having been closed from inside, has not been challenged in his cross-examination. In the cross-examination of this witness, he has stated that there were signs of force having been

applied to open the window from outside. There were marks of use of force on the outside. Thus, the evidence on record shows that the doors of the house were not closed from inside. Besides, PW-78 Basirabibi in her cross-examination has denied that they had closed both the doors and windows. She has stated that the window was open, though she does not know what part of the window was broken. PW-80 Rukshanabanu in her examination-in-chief has deposed that the police had come and taken them out. In her cross-examination, she has stated that they had not tried to come out of the front or the back door and has voluntarily stated that they were surrounded on all four sides and there was no possibility of coming out. It may be noted that the incident had happened in the dead of night and it is an admitted position that the lights inside Mahemoodmiya's house were not on. Therefore, the only light available inside the room would be on account of the flames of the inflammable material. Also having regard to the circumstances in which the witnesses and others had taken shelter in the room and the fact that about forty to fifty persons were occupying the small room, it would be too much to expect the persons inside the jam-packed room to notice as to whether or not the doors and windows were latched or whether they were broken. Apart from the fact that in the absence of light, it would not be possible to see things clearly inside the room, one can only imagine the terror that those inside the room must have experienced and one cannot expect them to behave like normal people and observe everything around them. Therefore, it would be prudent to rely upon the evidence of the FSL officer.

218.9 Besides, in view of the observation of the Supreme Court in ***Mohd. Iqbal M. Sheikh v. State of Maharashtra***, that the normal conduct is that the persons would come out of the house irrespective of the danger which they may face even coming out, one can safely presume that it was not possible that for those inside the room to come out, the most probable reason whereof would be that the doors were closed from outside. Insofar as the number of persons in the mob is concerned, the number of five hundred to one thousand persons is merely an estimate of the number of persons the witnesses thought were in the mob. Considering the time of the night when the mob had come, one can hardly expect the number of persons to be stated with exactitude. From the topography of Mahemoodmiya's house, it appears that there is open space around it. On the front side is the road between the two rows of houses in Shaikh Mohalla which goes on further from the side of Mahemoodmiya's house towards the garbage dump. On the front side also, there is an open space and on the side before the row of Patel houses starts, there is an open plot. Therefore, there was sufficient space outside Mahemoodmiya's house for a large mob to gather.

218.10 It has come on record from the testimonies of witnesses, that Mahemoodmiya's house admeasured 16 x 11 feet, which comes to 176 square feet. It may be noted that there was hardly any furniture or other articles occupying any place inside the house. Therefore, considering the number of children inside the room, it is quite possible that there could have been forty or fifty persons inside the house. Therefore, if around forty to fifty persons could fit inside a 16 x 11 feet room, a large number of persons would be in a position to

occupy the area surrounding the house. In the opinion of this court, when one considers the entire lane leading up to Mahemoodmiya's house and the open space surrounding it, it is quite possible that a mob of four hundred to five hundred persons could have entered Shaikh Mohalla.

218.11 The Supreme Court in ***Sunilkumar v. State of Rajasthan*** (supra) has held that "common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and the language of the members composing it and from a consideration of all the surrounding circumstances. In ***Baladin v. State of U.P.*** (supra), the Supreme Court held that it is well-settled that mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142 Indian Penal Code.

218.12 Reverting to the facts of the present case, from the manner in which the mob came together in the dead of night to a place where they ordinarily would not be found at this or any other time, there is no question of any of the accused persons being an innocent bystander. None of the persons who were part of the mob had any business being present at Shaikh Mohalla at that time of the night, and hence, none of them can be heard to contend that they were innocent bystanders. The

persons in the mob were either armed with weapons, stones, inflammable substances or burning rags. The consistent version given by the witnesses is that they came together shouting "kill the miyas, cut them, burn them, not a single one should remain alive" and initially resorted to intense stone-pelting and thereafter, proceeded to ransack and burn the houses one by one till they reached Mahemoodmiya's house where the women and children and a few men had taken shelter and surrounded it and threw stones and bricks on it and broke the window and poured kerosene and petrol and ignited it with burning rags, thereby burning most of those who were inside alive, and left the mohalla together. Thus, the common object of the mob to destroy and burn the properties of a particular community together with the occupants, is clearly established.

218.13 Section 142 of the Penal Code bears the heading "being member of unlawful assembly" and lays down that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Examining the complicity of the accused in the light of the above statutory provision, the main incident started near about midnight, when ordinarily people would be asleep. The persons in the mob, including the accused, were not residents of Shaikh Mohalla and had no cause or reason to be present at the scene of offence at the time of the incident. Most of the members of the mob were armed with weapons, stones, inflammable substances and burning rags. Evidently therefore, the assembly did not have any lawful object in mind. Whoever joined such assembly would have been aware of the

fact that it was an unlawful assembly and the intention of every person in the mob to join such assembly is established from the mere presence of such person at the scene of offence having regard to the above circumstances. The case of the accused, therefore, clearly falls within the ambit of section 142 of the Penal Code. Consequently, it is not necessary to show that every individual accused had done or omitted to do something which would make him a member of an unlawful assembly. In view of the above findings, there is no escape from the conclusion that the accused were members of the unlawful assembly and the offences have been committed in pursuance of the common object and hence, each of them shall be liable for the offence committed by any other member of the assembly. In the opinion of this court, the trial court committed no error in holding the accused guilty with the aid of section 149 of the Indian Penal Code.

**219. Discussion on applicability of the other provisions with which the appellants/accused have been convicted.**

The trial court has acquitted the appellants/accused of the charges under section 120B, 395, 397 and 396 of the Penal Code and has held them guilty of the offences punishable under sections 143, 147, 144, 148, 302 read with sections 149, 307 read with sections 149, sections 323, 324 and 325 read with sections 149, sections 435 and 436 read with section 149, sections 447 and 448 read with section 149, sections 336 and 337 read with section 149, and sections 295A, 153A and 297 of the Indian Penal Code and section 135 of the Bombay Police Act. On behalf of the appellants – accused, it had been contended that from the testimony of the witnesses, no evidence has been adduced to prove the commission of the

offence under section 302 of the Indian Penal Code. It was further submitted that no evidence has been led to even establish the charge under sections 323, 324, 325 and 307 of the Penal Code. It was urged that the witnesses have consistently stated that they have not seen anybody causing any injury to any individual.

219.1 It has also been submitted on behalf of the appellants/accused that it has come in evidence that certain witnesses were seen by the mob, yet they were not assaulted, which proves that the mob which has been referred to by the witnesses has not killed anyone or set Mahemoodmiya's house on fire. It was submitted that if it was the intention of the mob to set Mahemoodmiya's house on fire and to kill the persons belonging to a particular community, the witnesses who were found in the mohalla and seen by the mob were soft targets; however, no member of the mob has harmed them. Therefore, it cannot be said that the mob had the object of killing the persons belonging to a particular community. It was contended that the fact that no witness or resident of Shaikh Mohalla was assaulted by the members of the mob, clearly shows that there was no intention to commit the offences punishable under sections 323, 324, 327 and 307 of the Penal Code. It was submitted that the most important proved fact under which the accused can take shelter is that the witnesses have not seen anybody causing any injury.

219.2 Before dealing with the submissions advanced by the learned counsel for the appellants-accused, it may be germane to refer to certain statutory provisions in the Penal Code.

**"299. Culpable homicide.** - Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

**300. Murder.-** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

*Secondly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. or-*

*Thirdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-*

*Fourthly.- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.*

**302. Punishment for murder.-** Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

219.3 In the present case, the accused have come to Shaikh Mohalla as members of an unlawful assembly which has indulged in intense stone-throwing, vandalizing houses and setting them on fire and have set on fire Mahemoodmiya's house by throwing inflammable substances which they had carried with them, as a result whereof twenty-eight persons died on the spot due to burn injuries and/or suffocation and four others died subsequently, whereas several other persons

and witnesses sustained burn injuries of varying degrees. As discussed earlier while considering the applicability of section 149 of the Penal Code, the members of the mob when they formed the unlawful assembly, must have been aware that setting a room full of people on fire by pouring inflammable substances inside and igniting them would be likely to cause death or such bodily injury as is likely to cause death of those inside the room. The intention of the members of the unlawful assembly to cause such bodily injury which they knew is likely to cause death is evident from the acts committed by the mob. The intention of the mob to cause bodily injury to the persons inside the room has been established through the testimony of the medical witnesses, who have deposed that the bodily injuries sustained by the victims are sufficient in ordinary course of nature to cause death. It bears repetition that in the facts of this case, it is not necessary to establish the overt role played by each accused as they have formed an unlawful assembly and the offences have been committed by them in pursuance of the common object, and hence, each of the accused is liable for the offence committed by any other member of the assembly. In this case, apart from the persons who have died of the injuries sustained by them, by their act of setting Mahemoodmiya's house on fire and intense stone pelting, the members of the unlawful assembly have voluntarily caused hurt to many of the witnesses and others who have sustained burn injuries of varying degrees and also injuries on account of stone throwing. The attempt of the mob evidently was to murder all those who were inside the room. Thus, the offence punishable under section 302 of the Penal Code has been clearly made out. The offence punishable for voluntarily causing hurt under section 323 of the Penal Code,

the offence punishable for voluntarily causing hurt by dangerous weapons or means under section 324 of the Penal Code, the offence for voluntarily causing grievous hurt under section 325 of the Penal Code and the offence of attempt to murder punishable under section 307 Of the Penal Code are also clearly established by the prosecution by leading sufficient and cogent evidence in that regard.

219.4 The learned counsel for the appellants/accused has also made reference to the provisions of section 336 and 337 of the Penal Code, to submit that the common object to commit such offence also cannot be invoked by taking everyone within the sweep of section 149. Reference was also made to the decision of the Supreme Court in the case of **S.N. Hussain v. The State of Andhra Pradesh**, (1972) 3 SCC 18, wherein the Supreme Court has held that rashness consists in hazarding a danger or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular.

219.5 At this juncture, reference may be made to the provisions of section 336 and 337 of the Penal Code which read thus: -

**“336. Act endangering life or personal safety of others. - Whoever does any act so rashly or negligently as to endanger human life or the personal safety others,**

shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to two hundred and fifty rupees, or with both.

**337. Causing hurt by act endangering life or personal safety of others.** - Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

219.6 In **Sushil Ansal v. State through CBI**, AIR 2014 SC (Supp) 293, the Supreme Court has held thus: -

"48. The terms 'rash' or 'negligent' appearing in Section 304-A extracted above have not been defined in the code. Judicial pronouncements have all the same given a meaning which has been long accepted as the true purport of the two expressions appearing in the provisions. One of the earliest of these pronouncements was in *Empress of India v. Idu Beg*, ILR (1881) 3 All 776, where Straight, J. explained that in the case of a rash act, the criminality lies in running the risk of doing an act with recklessness or indifference as to consequences. A similar meaning was given to the term 'rash' by the High Court of Madras in *In Re: Nidamarti Negaghushanam*, 7 Mad HCR 119, where the Court held that culpable rashness meant acting with the consciousness that a mischievous and illegal consequence may follow, but hoping that it will not. Culpability in the case of rashness arises out of the person concerned acting despite the consciousness. These meanings given to the expression 'rash', have broadly met the approval of this Court also as is evident from a conspectus of decisions delivered from time to time, to which we shall presently advert. But before we do so, we may refer to the following passage from "A Textbook of Jurisprudence" by George Whitecross Paton reliance whereupon was placed by Mr. Jethmalani in support of his submission. Rashness according to Paton means "where the actor foresees possible

*consequences, but foolishly thinks they will not occur as a result of his act".*

*49. In the case of 'negligence' the courts have favoured a meaning which implies a gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual which having regard to all the circumstances out of which the charge arises, it may be the imperative duty of the accused to have adopted. Negligence has been understood to be an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do. Unlike rashness, where the imputability arises from acting despite the consciousness, negligence implies acting without such consciousness, but in circumstances which show that the actor has not exercised the caution incumbent upon him. The imputability in the case of negligence arises from the neglect of the civil duty of circumspection."*

219.7 Thus, insofar as the invocation of sections 336 and 337 of the Penal Code is concerned, the same would be attracted when there is an allegation of rash or negligent act. In the opinion of this court, this is a case where an offence has been deliberately committed and the actions of the unlawful assembly cannot be said to have been in the nature of rash or negligent acts as contemplated under the provisions of sections 336 and 337 of the Penal Code. The acts committed by the unlawful assembly are not rash and negligent as to endanger human life, but acts whereby they have voluntarily caused grievous hurt to the victims. In these circumstances, the offences under sections 336 and 337 of the Penal Code are not established in the facts and circumstances of the case. The trial court was, therefore, not justified in convicting the accused for the said offences.

219.8 As regards the offence punishable under section 295A of the Penal Code viz. maliciously insulting religion, it was submitted on behalf of the accused that except for those alleged words stated by Mohammad Sattar, nobody at the initial stage had said anything about words being used. All the other accused who have referred to such utterances have said so after 10<sup>th</sup> March, 2002. It was submitted that the use of hate words has not ultimately been proved and that beyond this, nothing has been brought on record and hence, the appellants/accused should not have been convicted for the offence under section 295A of the Penal Code.

219.9 For the purpose of better appreciating the controversy, reference may be made to the provisions of section 295A of the Penal Code, which read thus: -

***"295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.- Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."***

219.10 On a plain reading of section 295A of the Penal Code, it is apparent that for the purpose of attracting this

section, the accused must have by words, either spoken or written, or by signs or by visible representations or otherwise, insulted or attempted to insult the religious beliefs of a class of persons. From the evidence on record, all that is said by the witnesses is that some of the members of the mob have referred to them as "bandiyas", which is a derogatory word used in relation to persons belonging to the Muslim community, and have made utterances to kill them, cut them and burn them. From the utterances made by the members of the unlawful assembly, there is nothing whatsoever which would amount to insulting or attempting to insult the religion or religious beliefs of the class to which the victims belong. Targeting a class of persons on the basis of religion and insulting or attempting to insult the religion or religious belief of such class of persons are two different things. Having regard to the evidence on record, the offence under section 295A of the Penal Code cannot be said to have been proved.

219.11 Insofar as invocation of section 153A of the Penal Code is concerned, it was submitted on behalf of the accused that sanction has been obtained for prosecuting the accused for the said offence. The order granting sanction is based only on the use of such words. Therefore, if section 295A is held to be non-applicable, as a necessary corollary, the charge under section 153A of the Penal Code also must fail. It was submitted that there is no evidence as to who caused damage to the tomb, nor is there any evidence whatsoever of any witness as to who caused such damage. It was, accordingly, urged that the offence under section 153A of the Penal Code has also not been proved.

219.12 Before dealing with this submission, it may be apposite to refer to the provisions of section 153A of the Penal Code which read thus: -

***"153A. Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony. - (1)***

*Whoever -*

*(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or*

*(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or*

*(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,*

*shall be punished with imprisonment which may extend to three years, or with fine, or with both.*

**Offence committed in place of worship, etc.- (2)**  
*Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."*

219.13 In the opinion of this court, the offence in question would squarely fall within the ambit of clause (b) of sub-section (1) of section 153A of the Penal Code, inasmuch as, the act of the accused of assaulting the residents of Shaikh Mohalla and damaging and destroying their properties and causing loss of life and injury to the persons belonging to a particular religious community, would certainly be prejudicial to the maintenance of harmony between the different religious groups and would have the effect of disturbing the public tranquility. The charge under section 153A of the Penal Code, therefore, stands duly established.

219.14 In the light of the above discussion, the court is of the view that the prosecution has failed to establish the commission of the offences punishable under sections 336, 337 and 295A of the Penal Code and hence, the appellants/accused are required to be acquitted of the charges under those sections.

220. For the foregoing reasons, Criminal Appeal No.1/2012 partly succeeds and is accordingly allowed. Accused No.6 – Amratbhai Somabhai Patel and Accused No.35 – Sureshkumar Baldevbhai Patel of Sessions Case No.275 of 2002 are hereby acquitted of all the offences with which they are charged. Criminal Appeal No.4 of 2012 and Criminal Appeal No.5 of 2012 succeed and are accordingly allowed.

Accused No.9 of Sessions Case No.7 of 2009 – Kalabhai Bhikhabhai Patel is hereby acquitted of all the offences with which he is charged. The judgment and order of conviction and sentence qua the above accused is hereby quashed and set aside and the appellants are ordered to be forthwith set at liberty unless otherwise required in any other case. Their bail bonds shall stand discharged.

Accused No.1 – Rameshbhai Kanjibhai Patel, accused No.5 – Jayantibhai Mangalbhai Patel, accused No.11 – Jagabhai Davabhai Patel, accused No.16 – Mangalbhai Mathurbhai Patel, accused No.18 – Bhikhabhai Joitabhai Patel, accused No.27 - Mathurbhai Ramabhai Patel, accused No.31 – Ramanbhai Jivanbhai Patel, accused No.46 – Rameshbhai Prabhahai Patel, accused No.49 – Kanubhai Joitaram Patel, accused No.50 – Ramanbhai Ganeshbhai Prajapati in Sessions Case No.275 of 2002 and accused No.7 in Sessions Case No.120 of 2008 – Dahyabhai Vanabhai Patel are hereby given benefit of doubt and acquitted of all the offences with which they are charged. The judgment and order of conviction and sentence qua the above accused is hereby quashed and set aside and the appellants are ordered to be forthwith set at liberty unless otherwise required in any other case. Their bail bonds shall stand discharged.

While maintaining the judgment and order of conviction and sentence qua accused No.2 – Patel Chaturbhai @ Bhurio Vitthalbhai, accused No.14 – Patel Kacharabhai Tribhovandas, accused No.28 – Patel Sureshbhai Ranchhodhbhai, accused No.30 – Patel Tulsibhai Girdharbhai, accused No.32 – Patel Rajeshbhai Karsanbhai, accused No.33 – Patel Rameshbhai

Kantibhai, accused No.34 – Patel Madhabhai Vitthalbhai, accused No.37 – Patel Vishnubhai Prahladbhai, accused No.38 – Patel Rajendrakumar @ Rajesh Punjabhai, accused No.40 – Patel Prahladbhai Jagabhai, accused No.41 – Patel Rameshbhai Ramabhai, accused No.42 – Patel Purshottambhai @ Pashabhai Mohanbhai, accused No.43 – Patel Ashwinbhai Jagabhai, accused No.44 – Patel Ambalal Maganbhai Kapur, accused No.48 – Patel Jayantibhai Ambalal, accused No.52 – Patel Dahanbhai Kacharabhai and accused No.54 – Patel Mathurbhai Trikamdas in Sessions Case No.120 of 2008, they are hereby acquitted of the offences under sections 336, 337 and 295A of the Indian Penal Code. The judgment and order of conviction and sentence is hereby set aside to the aforesaid extent qua the said accused whereas the rest of the order of conviction and sentence is hereby maintained.

Criminal Appeals No.140 of 2012, 142 of 2012, 148 of 2012, 192 of 2012 and 582 of 2012 fail and are accordingly dismissed.

Note:- While delivering the judgment, reference has also been made to certain decisions which were not cited by the learned counsel for the respective parties; however, such reference was made after drawing the attention of the learned counsel for the respective parties to such decisions and informing them that we seek to refer to those decisions and giving them an opportunity to deal with the same.

**(Harsha Devani, J.)**

**(Biren Vaishnav, J.)**

hki/parmar/zgs\*

