

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CRIMINAL) NO. 34207 OF 2018**

IN THE MATTER OF:

Zakia Ahsan Jafri & Anr.

...PETITIONERS

VERSUS

State of Gujarat & Anr.

...RESPONDENTS

CONVENIENCE COMPILATION ON BEHALF OF THE PETITIONERS

VOLUME I

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE-ON-RECORD FOR THE PETITIONERS: MS. APARNA BHAT

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A

**IN THE SUPREME COURT OF INDIA
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KEY POINTS TO BE ARGUED

1. A complaint was filed by the Petitioner with the police wherein she had named 62 Persons as accused as having colluded and acted in conspiracy orchestrating communal violence in the State of Gujarat and asked for registration of FIR. When the Police did not register the FIR, she approached the High Court of Gujarat by way of a Writ Petition. The High Court after hearing arguments rejected the petition but directed the Petitioner to file a complaint under Section 156(3) of the Code of Criminal Procedure.
2. The said order was challenged before this Hon'ble Court by the Petitioner vide SLP (crl) No.1088 of 2006. Vide order dated April 27.2009 this Hon'ble Court was pleased to hand over the case to the SIT appointed by this Hon'ble Court in the other cases of Gujarat riots to "look into the matter". An AC was also appointed by this Hon'ble Court. SIT filed various reports

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before this Hon'ble Court. Vide judgement and order dated September 12, 2011 (reported in **(2011) 12 SCC 302**) this Hon'ble Court was pleased to direct the SIT to file its final report before a Magistrate who was hearing Crime No.67/2002. The Court also granted liberty to the Petitioner to file her objections in case the SIT were to file a closure report. The SIT filed a closure report. The Petitioner filed her detailed objections to the report (Protest Petition). The learned Magistrate after hearing the arguments upheld the closure report. The Petitioner challenged the said order of the Magistrate before the High Court. By the impugned order, the High Court rejected the Petition of the Petitioner.

3. The Petitioner submits that the Learned Magistrate has erred in law by limiting the scope of the case before him. When the Closure Report submitted by the Respondent SIT, under Section 173 (as has been categorically stated in the Supreme Court order dated 12.09.2011 in Criminal Appeal No.1765 of 2011), came up for perusal before the Learned Magistrate and the same was contested by the Petitioner by filing a Protest Petition, the Learned Magistrate was open to choose any one of the following:

a. The Learned Magistrate when dealing with the Closure Report submitted by the Respondent SIT, under Section 173, is convinced after considering the "Closure/Final Report" and the Protest Petition that no

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case is made out for trial, he could have accepted the final report and closed the proceedings.

- b. The Learned Magistrate could have formed an opinion that the facts, set out in the closure report, constitute an offence, pursuant to which he could have proceeded to take cognizance of the offence, under Section 190(1)(b) or 190(1)(c) of the Code of Criminal Procedure, notwithstanding the contrary opinion of the Respondent SIT, expressed in the Closure Report.
- c. The Learned Magistrate may have taken the view, on a consideration of the Closure Report, that the opinion formed by the Respondent SIT is not based on a full and complete investigation or that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, in which case, the Learned Magistrate would have had jurisdiction to give directions to the police, to conduct further investigation. Hence the Learned Magistrate could have declined to accept the final report and direct the police to make further investigation as per the provisions of the Code of Criminal Procedure. (Abhinandan Jha Vs. Dinesh Mishra, (1967) 3 SCR 668, Paragraph No. 15 and 21)
- d. The Learned Magistrate could have treated the Protest Petition as a complaint and proceed to deal therewith in terms of Chapter XV of the Code of Criminal Procedure. (Popular Muthiah Vs. State (2006) 7 SCC 296, Paragraph No.21 and 54)

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4. It is submitted that the Learned Magistrate in the order dated 26.12.2013 (**Pages-174-378 of Volume I and II of the SC Record**) errs in holding that it was not within his powers to direct further investigation or to treat the Protest Petition as a complaint (Page No.61-63 of the Magistrate order). The Learned Magistrate's reliance on Paragraph No.8 and 9 of the Hon'ble Supreme Court order dated 12.09.2011 in Criminal Appeal No.1765 of 2011 to exclude the option or of further investigation by treating the Protest Petition as a complaint is completely misplaced, as the said paragraphs merely state that the Hon'ble Supreme Court having overseen the investigation in order to ensure proper and honest performance of the investigative agency and the Final Report of the Respondent SIT should be placed before the Magistrate as required under section 173(2) of the Code of Criminal Procedure. The order is further flawed in holding that it was not open to the Learned Magistrate to order further investigation under section 173(8) of the Code of Criminal Procedure because the Supreme Court had already included the report of the SIT within the purview of section 173(8). In fact, Paragraph No.9 of the said order categorically states that "*The said court will deal with the matter in accordance with law relating to the trial of the accused, named in the report/charge-sheet, including matters falling within the ambit and scope of section 173(8) of the Code.*" Thus, the order dated 26.12.2013 shows that the proceedings before the Hon'ble Supreme Court and the Orders passed by the Hon'ble Supreme Court particularly orders dated 12.09.2011 and 07.02.2013, **A-33, Pages 933-936 of**

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Volume XIV of the SC Record) were not only not understood properly but were misread. It is submitted that the order is perverse to the extent that the Learned Magistrate refuses to exercise his statutory powers and limits the scope of the proceedings before him whether to accept the closure report of the Respondent SIT or to take cognizance based on the facts brought on record by the Closure Report. The Petitioner further states that the Learned Magistrate has erred by going into the veracity, truthfulness or otherwise of the material on record, which stage comes later during the trial. It is submitted that the Learned Magistrate was legally required to prima facie examine the material on record to find out whether case of reasonable suspicion to take cognizance against the accused was made out. (S K Sinha Vs. State (2008) 2 SCC 492, Paragraph No.22)

5. Further, it is the Petitioner's contention that the Magistrate's order dated 13.12.2013 apart from the aforesaid legal deficiencies is also plagued by major factual lacunae that necessitate the said order be set aside in the interests of justice and the detailed Protest Petition along with exhaustive documentary evidence be taken as a complaint and further investigation be ordered with the issues raised therein. The Petitioners have relied on not a single or stray documents from the Investigation Record but a whole series of events that have been pieced together relying on these documents. The said observations can broadly be covered under the following six heads:
 - a. Conspiracy
 - b. Abetment

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- c. Hate Speech
 - d. Lack of fair investigation and need of further investigation
 - e. Statements and evidence of Sreekumar and Rahul Sharma
 - f. Role of Amicus Curiae
6. **Conspiracy**: It is the Petitioner's case that the incidents of violence across the State of Gujarat that followed after the unfortunate burning of the Sabarmati Express at Godhra were encouraged and condoned and overtly supported by the state government and the actions and omissions on part of the state amounts to conspiracy. The conspirators can be classified in to four groups i.e. Political Establishment, Bureaucrats, Police officers and Private organizations/individuals.

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PART II

ISSUES NOT DEALT WITH BY THE MAGISTRATE AND THE GUJARAT HIGH COURT

1. The following are the issues not dealt with by the Magistrate and the Gujarat High Court.
 - a. **First Component of Conspiracy Prelude and Build Up Before 27.2.2002:** To generate and allow to be generated and deepen feeling of hatred towards a particular community prior to the train incident (State IB Messages and Transcripts of the Tehelka Sting Operation that have been Validated by the CBI Pursuant to an Order by the NHRC)
 - b. **Second Component of Conspiracy** includes Inaction of Accused/ Political/Police/Bureaucrat Functionaries after Intimation of Godhra Incident &Hate Speeches &Mob Mobilisations all over Gujarat on 27.2.2002
 - c. **Third Component of Conspiracy** after Outbreak of Violence on 27.02.2002 and Inaction/Non Response from authorities including Police, Fire Brigade, Other Functionaries (no preventive measures, no deployment of forces, no preventive or prompt arrests, no curfew declared etc)

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Build Up of Communal Mobilisations by VHP Cadres Stock-Piling and Transportation of Arms and Ammunition before the Godhra Incident on 27.2.2002; from SIB Records (State Intelligence Bureau and Tehelka Magazine's Sting Operation

A. Gujarat State Intelligence Bureau (SIB) has records of over two dozen messages, from at least 12.2.2002 onwards that are indicative of serious levels of communal mobilizations by organisations, armed with trishuls, taking place all over Gujarat. This ingredient of the Conspiracy was outlined by the Petitioner in her Complaint dated 8.6.2006 (**Pages 21,22, 23 of Volume III of the SLP Record**) and has been collated by the Petitioners as part of the Protest Petition further detailed with evidence of the actual messages (**Pages 372, 373, 374, 375 at Volume IV of the SLP Record**). The statement of then Additional Chief Secretary (ACS) Home, Ashok Narayan before the SIT (12.12.2009) admits to the Home Dept being in the knowledge of this Mobilisation(**PAGE NO. 9-13**).The duties and responsibilities of the SIB & Home Dept are laid down vide the Gujarat State Police Manual (Volume III), Rule Nos 461(**PAGE NO. 32-33**).

B. In addition to the SIB Messages, evidence in the form of Transcripts of the Sting Operation Conducted by Tehelka is available and was galvanised in the Protest Petition by the Petitioner to corroborate a systematic Build-Up of communal temperatures before 27.2.2002, the Godhra mass arson. (**Pages 314- 319 in Volume IV of the SC SLP Record**).The Sting Operation

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was made public in October 2007, a year and four months after the Complaint was filed. On 5.3.2008, the National Human Rights Commission (NHRC) directed the CBI to authenticate the tapes of the Sting Operation and the CBI has authenticated the same. The SIT Investigation Papers has the complete record of this authentication by CBI. The Petitioners crave leave to produce a soft copy of this 188 page document at the time of the hearing of the petition. Finally, on 27.08.2009, the SIT recorded the statement of journalist, Ashish Khetan who conducted the Sting Operation. **(PAGE NO. 41-46)(Para 920-922 at Pages 608-609 of the Protest Petition at Volume V of the SC SLP Record)**It is also relevant to note that one of the Special Courts set up pursuant to an Order of this Hon'ble Court on 1.5.2009 (in the Naroda Patiya case), in its judgement dated 29.08.2012 convicting several accused (including those on whom the Sting Operation was performed) validated the contents of the Sting Operation and treated it as corroborative evidence. The Petitioner is relying on the relevant parts of the judgement in the Naroda Patiya case and the same are annexed herein.

C. According to the information revealed during the Sting Operation, before 27.2.2002 in the interview conducted in the sting operation "Operation Kalank", Haresh Bhatt, then BJP MLA from Godhra states that there was a well planned conspiracy to import large quantity of ammunition from outside Gujarat and also to ensure weapons within the State. (Para 247, pages 120-

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121 of the Protest Petition). Besides, Dhawal Jayantilal Patel, then VHP District Convener, Sabarkantha also tells Tehelka that he is a registered holder of dynamite which is used for quarrying in the district. He says in his interview recorded during the Sting Operation that he along with some other persons has been trained to make bombs. He says that they make desi bombs that were then distributed and used in various areas **(Para 251 of the Protest Petition at pages 317-318 of Volume IV of the SC SLP Record).**

Anil Patel , VHP Vibhag Pramukh, Sabarkantha also interviewed during the sting operation states that bombs were being smuggled in from Sabarkantha to Ahmedabad from quarries owned by VHP workers. Amish Patel also explains how sections of the Gujarat police , for example N.D. Solanki, then SP of Sabarkantha were full fledged supporters of the VHP. Anil Patel states that Solanki gave him full support and enabled the quick release of Arvind Soni, a VHP leader. Despite these leads given in the sting operation, SIT deliberately chose to ignore this evidence and in fact raises questions about the authenticity of the sting operation. The SIT appears to have simply, without any judicial examination, accepted the contentions of Haresh Bhatt given in his statement dated 29.3.2010. The accused gave an improbable explanation that though he had mentioned of the facts contained in the interview and he confirmed his photographs and voice, the facts were only material given to Mr. Khetan and not based on the facts. The SIT did not investigate the matter of arms and ammunitions being manufactured and distributed by VHP any further.

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Similarly the SIT has accepted the statement of N.D. Solanki, former S.P. of Sabarkantha in 2002 recorded on 17.1.2010 without any further interrogation. They have not gone into the details of the fax message contained in the annexures to the affidavit filed by the former DGP, RB Sreekumar. (**Annexures I Vol.II, Sr.No.116 of the SIT Record** is the statement recorded of Haresh Bhatt and **Sr.No.70 Annexure I Vol. II** is the statement of N.D. Solanki in the SIT Investigation papers.)

S. No	Facts/Details	Supporting Documents/Evidence	Page No. & References
1.	Build Up of Communal Mobilisations by VHP Cadres- Stock-Piling and Transportation of Arms and Ammunition before the Godhra Incident on 27.2.2002; from SIB Records (State Intelligence Bureau), Gujarat	<p>1) 7.2.2002 State Intelligence Bureau messages from PB Upadhyaya to the DGP, Gujarat, State Home Department and all Police stations of Gujarat warning of the communal mobilisations especially near temples, recruitment of volunteers for the programmes and aggressive posturing in Gujarat. (PAGE NO. 1-2)</p> <p>2) 12.2.2002 SIB Message (PB Upadhyaya) to DGP Uttar Pradesh also intimating that 3,000 Kar Sevaks from Gujarat will reach</p>	<p>1) Prelude & Build Up: Zakia Complaint –Protest Petition - Para 239 – Pg. 312 – Vol. IV of the SC Record</p> <p>2) Prelude & Build Up: Protest Petition - Para 426 to 438 – Pg. 372 to 375 – Vol. IV</p> <p>3) Prelude & Build-Up: Protest Petition – Para 956-958 – Pages 637 –Volume V</p> <p>4) Prelude & Build-Up: Protest Petition –Para 980 & Para 983 at Page 644-</p>

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		<p>Ayodhya on 23.2.2002 to participate in the Mahayagna. (PAGE NO. 3-4) (PAGE NO. 5-6)</p> <p>3)13.2.2002 Message from SIB records that Praveen Togadia announced at a press conference that there would be active participation by VHP cadres in the Mahayagna would be enthusiastic. Message sent to all Police stations in Gujarat, DGP and Home department Gandhinagar warns of the possible repercussions of this.</p> <p>4)13.2..2002: RSS, VHP supported by the BJP had decided to have Maha Yagna at Ayodhya (Faizabad) as a sequel to the demolition of the Babri Masjid which was announced by Praveen Togadia, international general secretary of the VHP. Further announcement was that construction of Ram temple will commence</p>	<p>Volume V</p> <p>5) Listed at Page 766 of Volume XIII in the SC Record& at Annexure I Volume I Serial Nos. 62-63 of SIT Record/Investigation)</p> <p>6)These SIB Messages on Prelude & Build-Up are available in the SIT Record/Investigation (Annexure III, File II D-21)as Appendixes to First Affidavit (July 2002 of RB Sreekumar, former ADGP Intelligence, Gujarat, April-September 2002) (D-21 in SIT Papers) and also found in Annexure III, File XXXIV, Page 2 of the SIT Investigation Record. (DGP to SIT, Jan 2010; Listed at Page 795, Volume XIII in the SC Record) apart from also being annexures to DGP Gujarat (2005-2996) Mahapatra's Affidavit at D-54 and</p>
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		<p>from 12.3.2002 onwards. Pursuant to this announcement, the following activities commenced (PAGE NO. 7-8)</p> <p>5) SIB Message dated 16.2.2002 (PAGE NO. 9-13)</p> <p>6) 19.2.2002 Message from DGP INT Gandhinagar to Lucknow, UP by KM Chauhan of Bajrang Dal activists including Prahladbhai Patel on their way to Ayodhya carrying Trishuls with them (PAGE NO. 16-17)</p> <p>7)20.2.2002 DCP-INT (Communal) PB Upadhya SIB Message to DGP, SP, Western Railway Vadodara that 3,000 Kar Sevaks would be leaving on 22.2.2002 from Ahmedabad station. (PAGE NO. 18-19)</p> <p>8)20.2.2002 PB Upadhyaya message to all CPs, SSPS in districts and Home Secretary Gandhinagar intimating decision of</p>	<p>D-139 of the SIT Records Listed at Sr 782 & 789 Volume XIII in the SC Record</p>
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		<p>VHP that Ram Mandir would be constructed at any cost after 12.3.2002 and enrolment of Ram Bhaktas would start from all over the country from 1.3.2002.</p> <p>9)21.2.2002 SIB Message states that Kar Sevaks are going to travel on a train going to Faizabad (Ayodhya) and therefore in respective areas as well as in the railway stations it is necessary to provide bandobast. Take steps to ensure that no untoward incidents take place. Message sent by PB Upadhyaya (SIB-Int-Communa) to DGP, CPS, SPS and Home DepartmentGandhinagar.</p> <p><u>(PAGE NO. 20-21)</u></p> <p>10)21.2.2002 SIB-Int –Communal PB Upadhya sends a Message to DGP Lucknow about the departure of VHP and Bajrang Dal activists (3,000) between 22.2.2002 and 27.2002</p>	
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		<p>under the leadership of Dilip Trivedi for re-building the Ram temple from 15.3.2002 (PAGE NO. 22-23)</p> <p>11) 23.2.2002 DSP Faizabad and Home secretary Gandhinagar about 2800 VHP and Bajrang Dal & Durga Vahini activists under Dilip Trivedi and Kum Malabehn Rawal have left Ahmedabad by Sabarmati Express for Ayodhya on 22.2.2002 at 2050 hours. (PAGE NO. 24-25)</p> <p>12) 25.2.2002 DCP Communal State Intelligence PB Upadhyaya informing SSPs Faizabad and Home Secretariat Gandhinagar that 1900 VHP and Bajrang Dal activists under the leadership of Vijay Pramani, Hareeshbhai Bhatt and Khemrajbhai Desai have left Vadodara by Sabarmati Express train for Ayodhya on 24.2.2002 at 23.10 hours. 27.2.2002 (PAGE NO. 26-27)</p>	<p>Tehelka Transcripts also other References to Prelude of Tehelka Transcripts:</p> <p>a) Protest Petition - Para 245 to 260 – Page 314 to 320 – Vol. IV of the SC Record</p> <p>b) Listed at Page 768 of Volume XIII of SC record, Sr Nos 116 at Annexure II, Volume II (List of Statements in Further Investigation)</p> <p>c) Dhaval Patel's statement Listed at Volume XIII, Page 777 of SC Record,</p>
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		<p>13) 27.2.2002 Message by Sanjiv Bhatt DCP Int Communal to SSP Faizabad and Home Secretariat Gandhinagar that 1,500 VHP, Bajrang Dal and Durga Vahini activists including Narendrabhai Vyas activists have left Ahmedabad for participating in Mahajhap Majayagna by Sabarmati Express for Ayodhya-Faizabad at --.2.2002 at 20.40 hours (PAGE NO. 28-29)</p> <p>All these message are part of the SIT record and annexed hereto as Illustrations All these message are part of the SIT record and annexed hereto as Illustrations</p>	<p>Sr Nos 113 at Annexure II, Volume II (List of Statements in Further Investigation)</p> <p>e)Anil Patel's statement Listed at Page 765, Volume XIII of the SC Record at Sr Nos 113 at Annexure II, Volume II (List of Statements in Further Investigation)</p> <p>f)CD of Transcripts Listed at Volume XIII, Page 845 of the Sc Record (Sr Nos 15, 16 & 17, Annexure IV of the SIT Record/Investigation)</p>
2.	<p>Standard Operating Procedures (SOPs) for Police & Intelligence</p> <p>Statement of Senior Bureaucrat</p>	<p>B) Other Important Evidence/References that should have been assessed by SIT while looking at the Build-Up/ Prelude to Violence from the CRA 205/2014 Record</p> <p>i) Read Former Additional Chief Secretary,</p>	

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		<p>ACS,Gujarat, Ashok Narayan's Statement Dated 12.12.2009 before SIT. He is a senior Bureaucrat in the Home Department and admits to the Prelude and Build Up of Violence Before 27.2.2002 (Kar Sevaks carrying Trishuls); confirms receipts of SIB Messages (PAGE NO. 9-13)</p> <p>ii) Excerpt from the Gujarat Police Manual (Chapter X) on Special Organisations, State Intelligence. (PAGE NO. 32-33)</p> <p>iii) Relevant Page from the Gujarat Government Rules of Business, 1990 that deals with the Responsibilities of the State Government Home Department (PAGE NO. 34-40)</p>	
3.	<p>Jan Morcha Report (Newspaper published from Faizabad Ayodhya dated 24.2.2002</p>	<p>24.02.2002 Article in Jan Morcha a local newspaper published from Faizabad-Ayodhya showing the aggressive</p>	

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		behaviour against minorities of those who had travelled from Gujarat especially at the Rudali police station in UP. <u>(PAGE NO. 30-31)</u>	
4.	Build Up of arms and ammunition before the Godhra Incident (27.2.2002) from Tehelka's Sting Operation	<p>Transcripts of the Tehelka Operation Kalank (Haresh Bhatt, Dhaval Patel and Anil Patel) on the Bomb Making and Arms Importation into Gujarat before 27.2.2002 as also their SIT Statements;</p> <p>1) Statement of Ashish Khetan, then of Tehelka before the SIT dated 27.08.2009 <u>(PAGE NO. 41-46)</u></p> <p>2) Transcripts of the Tehelka Operation Kalank (Haresh Bhatt, Dhaval Patel and Anil Patel) on the Bomb Making and Arms Importation into Gujarat before 27.2.2002 as also their SIT Statements;</p> <p>Anil Patel</p>	<p>References:</p> <p>1. Paras 112-113 at Page 260 of Vol III of the SC SLP;</p> <p>2. Paras 115, 117 at Pages 261 of Vol III of the SC SLP</p>

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		<u>(PAGE NO. 47-58)</u> Haresh Bhatt <u>(PAGE NO. 59-77)</u> Dhawal Patel <u>(PAGE NO. 78-82)</u> 2) 29.08.2012 Judgement of Special Sessions Court in Naroda Patiya Case upholding the Tehelka Sting Operation <u>(PAGE NO. 83-106)</u>	
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The above issues and arguments were brought to the notice of Shri. AK Malhotra, SIT, Gandhinagar by the Citizens for Justice & Peace letter dated 21.04.2011. Additionally, the aforesaid letter also brought to the SIT's notice certain documents that required examination and were part of the SIT record.

(PAGE NO. 107-121)