SUPREME COURT OF INDIA

Harendra Sarkar

Vs.

State of Assam

Crl.A.No.907 of 2006

(S.B. Sinha and Harjit Singh Bedi JJ.)

02.05.2008

JUDGMENT

S.B. Sinha, J.

1. Mauza Sangamari Pathar is a small village. It is situated within P.S. Dobaka in the District of Nagaon in the State of Assam. The residents are principally agriculturists. Madhabtoli is a neighbouring village. Appellants are the residents thereof.

2. Taheruddin PW-2 was a resident of Changmazi Patghar. The distance between two villages is about one mile. He had been living in a house consisting of four rooms; each situated in different corners abutting a big court yard measuring 20' x 40'.

3. The incident occurred soon after the demolition of Babri Masjid. A communal riot had taken place. Curfew was imposed.

4. On or about 14th December, 1992 Taheruddin was in his fields. A mob came to his house. In one of the rooms, his wife and six daughters were sleeping. Another room was being occupied by his sons. The mob broke open the door. They allegedly came armed. Near about that time, another house belonging to one Nandu was burning. Allegedly, from two sides, 14-20 people came to the house of Taheruddin.

5. One of his sons, Md. Mustafa PW-3 was in his bed. He was all alone. He allegedly heard the voice of Gopal calling, 'Munshi', Munshi', to which he replied that he was not at home. Gopal and several other people opened the bamboo door. Gopal 'poked' him with a spear which struck at his leg. He took it out and ran outside the house. Two persons standing outside were allegedly recognized by him. They were allegedly armed with 'dao', 'dagger', 'arrows' etc. He saw his father coming towards the home. He asked him not to go home. He raised a hue and cry. Inside the house his mother and two sisters were being backed. He did not recognize any one of the assailants. He returned to the house sometimes later to find that his mother was lying in a critical condition and two sisters lying dead.

6. Taheruddin who, allegedly was prevented from coming to his house by his son and had run away, came there and found a group of people striking the wall of his house with 'dao', 'lathi' etc. One of them, Rahna Gour had shot an arrow at him. It hit his right hand. He saw the accused from a distance of about 2 = nals away (1 nal = about 27-28 feet) ie. About 70 ft. in total. He shouted. An army vehicle arrived there. He found his daughter Bimala in an injured condition. She had died. He also found his other daughter Hajeera lying dead. Taking Bimala on his shoulder, he stood on the road. After the departure of the army personnel, he found his wife Sahera Khatoon lying injured in middle of the paddy field near the house. He carried her home, whereafter she died.

7. Hanif, PW-4, another son of Taheruddin allegedly alongwith Zakir Hussain was in the kitchen. He is said to be a labourer and allegedly also sustained injuries. He has not been examined.

8. Three accused, Kalyash, Hari Singh and Ratan, according to him, entered his room. He was not assaulted but allegedly Zakir was taken away by them. He allegedly took shelter under a banana tree and observed the entire incident. According to him when his mother came out, Gopal, Kalyash,.Ghandul, Krishna and Haren Doctor assaulted his mother who died there. When Hajeera came out from the room, she was assaulted by Badhuram Timu, Hari Singh and Rahna. Other three sisters escaped but Bimala was assaulted by Gopal, Ratan and Haren Doctor. They also caused hurt to Zakir.

9. Although, according to PW-2 the army vehicle came and went away, as per the version of others, both army and police team came to the place of occurrence.

10. Whereas the injured were taken to the District Hospital for treatment by the Police, the dead bodies were taken in the army vehicle.

11. The injured were examined by the Medical Officer at about 1.00 a.m. and were said to have suffered the following injuries:-

> "Zakir Hussain
>
> 1) There was vertical cut injury over the lip. Size 2" x =".
>
> 2) There are six cut injuries over the scalp each about 2" x1/2" in size.
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> 3) Left little finger was severed at the bone of the proximal phalange.
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> 4) There is swelling and tenderness over the right hand.
>
> 5) There were two cut injuries over the back, on each side.
>
> There was multiple cut injury and got injury on the right hand with sharp cutting. Wounds were dangerous in nature.

Md. Mustafa Ahmed:

1. Penetrating injury of the right leg with sharp pointed weapon. Size 1/3" x =". The injury is fresh and margins were irregular.

2. Simple cut injury by sharp pointed object."

12. The injured, Taheruddin and his other sons were taken to Daboka Guest House. They were also taken to the police station. No statement, however, was made by them.

13. The investigating officer, PW-7, B.N. Kalita, however, stated that he had received a message from one Biresh Dutta in regard to a fire. He made a G.D. Entry and sent a police team there. It was numbered as G.D.E. 532 dated 14.12.1992. He came to the place of occurrence. He did not say when he came there. However, according to Taheruddin, a statement was made by him on the next date. Investigating Officers stated that he took up the investigation and drew a sketch map. He allegedly held an inquest of the three dead bodies. Inquest reports, however, are not on record.

14. Post mortem of the three dead bodies were performed at about 12 o' clock on 15th December, 1992.

15. On the dead body of Sahera Khatoon, two incised wounds were found, one at the right side of upper neck and another at the right shoulder.

16. On the dead body of Bimala Khatoon, also two injuries, being incised wounds, were notice; one at the left parietal bone of the neck and the other at the left upper neck.

17. On the dead body of Hajeera Khatoon also two injuries, being incised wounds, were found, one on the right upper neck and another at the right parietal region of scalp.

18. According to Dr. Madhusudhan Dev Goswami, PW-1 (who conducted the post mortem examination), their stomachs were found to be empty. The death in each case was found to have taken place 48 to 72 hours from the time of post-mortem examination. It was opined that in all the three cases the injuries might have been caused by the same weapon.

19. The prosecution is silent as to when the dead bodies were returned to their family. Taheruddin (PW-2) stated that he had come back to the village with another police officer. He did not inform him about the incident. He did not name any accused. The dead bodies were buried.

20. PW-2 made a statement before the Investigating Officer. There is a discrepancy as to when he made this statement.

21. Learned counsel for the State submits that such a statement was made at 12.10 p.m. From the First Information Report it appears that the statement of Taheruddin was received at the police station at about 11.00 p.m. on 15th December, 1992. PW-2 allegedly had made two different statements, one that he made the ejahar (statement) one day after the incident, but at another place, he stated that he had made the statement three days after the incident.

22. PW-4 stated that he had lodged the First Information Report.

23. Be that as it may, admittedly, the investigation had started even prior to lodging of the First Information Report. Post-mortem examinations had been conducted, site map had been drawn before 12.00 p.m. on 15th December, 1999 and as per PW-7, inquest were held but he did not say where the inquest reports are.

24. PWs. 2 and 3 concededly did not see the entire incident. They did not witness the actual assault on the deceased.

25. The learned trial Judge, however, relied upon the evidence of these witnesses. They were treated as eye witnesses.

26. Attention of the witnesses were drawn to the statements made by them before the police authorities. It was pointedly asked as to whether they had named the accused as persons allegedly assaulting the deceased. They had not. Although contradictions in the statements of the witnesses vis-`-vis their statements under Section 161 of the *Code of Criminal Procedure* were noticed, the learned trial judge did not discuss the same stating that they were only minor in nature. They were not.

27. Nirmal Dutta, Nandu Dutta and Shyam Sunder Gour were found to be innocent by the learned trial judge as even PW-3 and PW-4 did not specifically name them as regards their participation in the commission of offence on the night of occurrence. They were acquitted.

28. The High Court disbelieved PW-2 in view of the glaring contradictions noticed in his statements made before the police vis.-a-vis the statement made in his deposition before the Court. According to the High Court the omission on his part to name Gopal who took leading part and Rahna who had allegedly shot an arrow, rendered his evidence highly suspicious. The High Court noticed that PW-3, Mustafa Ahmed, accepted that he had discussions with the witnesses about the names of probable assailants. The High Court, therefore, disbelieved the first informant. It, however, did not consider the entire prosecution case from the angle that thereby, to a large extent, the culpability of the accused and their participation in the incident became doubtful.

29. The High Court noticed serious contradictions made by PW-3 that he had not told about burning of any lamp or Gopal calling his father by name. Whereas, before the police in his statement under Section 161 of the *Code of Criminal Procedure* he had stated that he was in his bed, in his deposition in the Court he stated that he was reading in the room with the help

of the lamp. He also did not inform the investigating officer that after opening the door. Gopal, Hari Singh and Kailash stood in front of the door and Gopal started poking him with a spear.

30. PW-4, according to the prosecution, is a star witness. The contradictions found in his statement before the Court compared to the statements made to the police under Section 161 of the Code of Criminal Procedure had been taken note of by the High Court. He was found to have contradicted himself so far as taking the name of Ratan is concerned. He had also not disclosed that Kalyash and Ratan dragged him out and inflicted injuries on him, or he had been able to recognize the accused by moonlight. The High Court opined that benefit of doubt should be given to Ratan Das, Gundulu Gour and Budhu Timang. The High Court held that as PWs 3 and 4 were inside the room, they had the opportunity to see the actual occurrence, whereas according to the said witnesses themselves, they had gone out of the house. The High Court, therefore, committed a serious error in opining so.

31. If the banana trees where PW-4 could hide himself were within the precincts of house, it is doubtful whether he could see the occurrence after his mother and two sisters came out of the house and in fact who had assaulted the deceased.

32. Two of the dead bodies were found on the road, and one in the field. Out of the twelve accused, named in the First Information Report, six have been acquitted. Involvement of the leader of the mob, namely, Gopal (since deceased) has seriously been doubted. Only five persons have been convicted, who are appellants before us.

33. The G.D. Entry, on the basis whereof, the investigating officer and other police officials came to the place of occurrence has not been filed. Contents thereof, thus, have not been disclosed. Biresh Dutta, who had informed the police, has also not been examined. G.D. Entry, admittedly, as disclosed by the Inspecting Officer, PW.7, did not contain the names of the accused. Zakir, another injured witness, whose relationship with Taheruddin has been stated differently by PWs. 2 and 3 has also not been examined.

34. PW-3, admittedly was taken to the police station. PW-4 had also been taken to the police station. PWs, as noticed hereinbefore alongwith the injured were given shelter in the 'dak bungalow'at Dabaka. Even then no attempt was made to record their statements.

35. It is difficult to appreciate that because of the law and order situation the investigating authorities could not take such statements. Surprisingly, the investigation had already started. All essential actions, namely - making of inquest, getting the postmortem of the dead bodies conducted, obtaining injury reports of the injured persons, preparation of the site map etc. had been undertaken.

36. PW-1 states that he came back with another police officer, but even to him he did not make any disclosure.

37. PW-5 is the scribe of the First Information Report. His house is almost 2 kms. away from that of Taheruddin. When he went to Taheruddin's house, about 100-200 people had gathered there. Taheruddin discussed first "on the things to be mentioned in the "ejahar" and, thereafter only he wrote the same.

38. The abovementioned delay in lodging the First Information Report has not been explained. Lodging of prompt F.I.R. is necessary for providing checks and balances. In a case of this nature, where enmity arising out of land dispute is admitted, in absence of any explanation, delay in lodging the F.I.R. should be viewed with suspicion.

39. First Information Report was lodged after the deliberations. Land dispute between the parties is admitted. Inquest was held even before the recording of F.I.R. Ordinarily, the same is impermissible. [See *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra*[1]]

40. Genesis of the occurrence has not been proved. It is likely that burning of the house of Nandu started first wherefor only information about the burning was given by Ritish Dutta to the Police. The incident in question might have taken place later. Nandu has been acquitted of the charges.

41. From the discussions made hereinbefore, and particularly in view of the conduct of the prosecution witnesses, in our opinion, it is difficult to rely upon the statements of the prosecution witnesses. Medical evidence also does not support the prosecution case. Deaths, according to the doctor occurred 48 to 72 hours prior to the examination of the dead bodies. But, if the prosecution case is to be believed, the same took place within twelve hours from the death thereto.

42. On having a broad conspectus of events, I am of the opinion it is difficult to place implicit reliance on the prosecution case.

43. We are not oblivious of the fact that several Commissions and Committees set up to inquire into the effect of communal riots in different parts of the country severely criticized the role of the investigating officer. Tardy and partial investigation has been held to be not uncommon.

> "In this case, no such question was raised. At no stage any such complaint was made that the investigation carried by the investigating authorities was not proper or fair. Ordinarily, the court shall not raise such a presumption unless appropriate materials are brought on record. The court may or may not raise a presumption that an official act having been done was not in due course of its business, but in a criminal case, no presumption should be raised which does not have any origin in any statute but would cause great prejudice to an accused.
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> The courts, in order to do justice between the parties, must examine the materials brought on record in each case or its own merits. Marshalling and appreciation of evidence must be done strictly in accordance with law; wherefor the provisions of the

Code of Criminal Procedure and Evidence Act must be followed. It, in my opinion, would not be proper to contend that only because an offence is said to have been committed during a communal riot, the provisions of the Code of Criminal Procedure and Evidence Act would not be applied differently vis-`-vis a so-called ordinary case. They are meant to be applied in all situations. Appreciation of evidence must be on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question. Only because in some parts of the country police investigations attracted severe criticism, the same in no manner should be applied in all the cases across the country. Each accused person; even a terrorist, has his human right. He be tried in accordance with law."

44. Article 12 of the Universal Declaration of Human Rights provides for the Right to a Fair Trail. Such rights are enshrined in our Constitutional Scheme being Article 21 of the Constitution of India. If an accused has a right of fair trial, his case must also be examined keeping in view the ordinary law of the land.

"It is one thing to say that even applying the well-known principles of law, they are guilty of commission of offences for which they are charged but it is another thing to say that although they cannot be held guilty on the basis of the materials on record, they must suffer punishment in view of the past experience.

Even then chances of the false implication cannot be ruled out altogether and particularly in a case like the present one when those who have been named in First Information Report and said to have taken a leading role in the matter have been acquitted, the correctness whereof is not in any question. We do not know how a different standard can be applied in case of others. I am, therefore, unable to subscribe to the view that in a case of this nature, the norms of appreciation of evidence should be applied differently.

It is not a case where an unfair trial like *Zahira Habibulla H. Sheikh vs. State of Gujarat*[2] had taken place which was apparent on the face of the record. The question of adopting and applying different norms in a case of this nature, therefore, would not arise. Even in Zahira Habibulla H. Sheikh (supra) the case was transferred to another State, evidences were taken afresh. Such a case has not been made out here. Zahira Habibulla H. Sheikh (supra) must be held to have been decided in a different fact situation. [See *Satyajit Banerjee and Others v. State of W.B. and Others*[3]]

It must be borne in mind that wherever Parliament intended to lay a different standard of proof in relation to certain offences or certain pattern of crimes, it did so. In such a case subject to establishing some primary fact, the burden of proof has been cast on the respondents. There are a large number of statutes where the doctrine of 'reverse burden' has been applied. Save and except those cases where the Parliamentary statutes apply the doctrine of reverse burden, the courts, in my opinion, should not employ the same which per se would not only be violative of Universal Declaration of

Human Rights but also the fundamental right of an accused as envisaged under Article 21 of the Constitution of India.

In *Syed Akbar vs. State of Karnataka*[4] this Court held:-

"28. In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. The primary reasons for non-application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in Andrews v. Director of Public Prosecutions919, "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case". "

The said principles were applied in *Jacob Mathew vs. State of Punjab*[5].

Presumption of innocence is a human right. Such a legal principle cannot be thrown aside under any situation. [See *Narendra Singh and another v. State of M.P.*[6] *and Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another*[7]]

45. Independence of judiciary must be upheld. The superior courts should not do something that would lead to impairment of basic fundamental and human rights of an accused. It is of some interest to note the recent decision of the Privy Council in *The State vs. Abdool Rachid Khoyratty*[8] wherein the statute limiting the jurisdiction of the Court to grant bail by the Mauritius Government was held to be illegal as infringing the doctrine of separation of power which ensures the independence of judiciary.

46. Appellants are, thus entitled to benefit of doubt.

47. These appeals are allowed. If the appellants are in jail, they are directed to be released forthwith, unless wanted in connection with any other case.

JUDGMENT

Harjit Singh Bedi, J

1. I have perused the judgment rendered by my learned Brother Sinha, J. I regret I am unable to accept the conclusions reached. I am accordingly giving my own opinion in the matter.

2. These appeals by way of special leave raise an interesting question as to how evidence in cases involving multiple murders during and arising out of communal riots has to be assessed. They arise out of the following facts:2A. At about 10.00 P.M. on December 14, 1992, Mohd. Taheruddin PW 2, was guarding his paddy crop in his field close to his house in Village Changmazi Pathar, Police Station Daboka, District Nagaon in the State of Assam. His sons, PW 3 Mohd. Mustafa Ahmed and PW 4 Mohd. Hanif Ahmed and one Jakir Ahmed a young boy statedly a close relative, were sleeping in one of the rooms in the house whereas his wife Sahera Khatoon and six daughters including Hazera Khatoon, Jahanara Begum and Bimla Khatoon were sleeping in another room. As it was a moonlit night, Mohd. Taheruddin saw a group of 10 to 12 persons coming from the north and another group from the south approaching his home stead. The intruders entered through the front door of the house and the accused Gopal called out for Taheruddin. Taheruddin moved forward and heard a commotion side and enquired from Mohd. Mustafa Ahmed as to what had happened on which he shouted to his father not to come close as people were being killed. Mustafa Ahmad also ran away whereas Taheruddin hid himself in the paddy fields and saw the attack on his house. He also had a narrow escape as an arrow shot at him by accused Rahna Gore missed his body but hit him on his right hand. The accused persons then ran away from the spot. Taheruddin then came out from his hiding place crying out aloud on which an army vehicle was attracted. He also found that two of his daughters had been killed and his wife Sahera Khatoon seriously injured. She was carried into the house but expired soon thereafter. On enquiry, it was revealed that Mohd. Mustafa and Jakir Ahmad had also been seriously hurt. An army vehicle again returned to the place of incident and the injured were sent to the Nagaon Civil Hospital and the dead bodies to police station Daboka. The First Information Report was recorded in the police station at about 11.00 P.M. on December 15, 1992 - the police station being about eight kilometers away from the place of incident. In the first information report Taheruddin named 13 persons in all, they being Gopal Ghose, Harendra Sarkar, Raton, Krishna, Shyam Gour, Niramal Dutta, Kailash Gour, Nandu Gour, Dhirendra Gour, Budh Ram Bonghand, Barika Timung, Hori Singh Gour and Gundulu Gour.

3. The dead bodies were also subjected to post mortem on December 15, 1992 and it transpired that Sahera Khatoon, wife of Taheruddin aged about 35 years had three incised wounds on her person and the daughters Bimala Khatoon and Hazra Khatoon aged 3 and 7 years respectively had two incised wounds each. Jakir Hussain was also medically examined by Dr. Jiauddin Ahmed PW 6 at about 1.20 A.M. on December 16, 1992 and five injuries, all of them grevious in nature, were found on his person. Hanif Ahmed, PW 4 too was medically examined on the same day and two injuries, one grievous were found on his person. On the completion of the investigation, the accused were charged for offences punishable under Sections 147/148/149/448/302 and 326 of the IPC and as they pleaded not guilty they were brought to trial.

4. The prosecution in support of its case placed primary reliance on the evidence of PW 2 Mohd. Taheruddin and his sons PW3 Mohd. Mustafa (injured) and PW4 Mohd. Hanif in addition to the medical evidence of PW1 Dr. Madhusudan Dev Goswami who had conducted the post mortem examination on the dead bodies on the December 15, 1992 and PW 6 Dr. Jiauddin Ahmad, who had medically examined Jakir Hussain and Mohd. Mustafa PWs and the Investigating Officer B.L. Kalta, PW 7. The prosecution case was then put to the accused and they denied their involvement and pleaded false implication due to enmity.

5. The trial Court in its judgment dated June 18, 2005 relying on the evidence of PW 3 and PW 4, Mustafa Ahmad and Hanif Ahmad respectively, in particular, as corroborated by the medical evidence, held accused Kailash, Hari Singh, Gundul Ratan Das, Krishna Das, Harendra Sarkar, Rahna Gour and Budhu Gour guilty and convicted them under several sections with which they had been charged, viz., under Sections 302/34, 448/34 of the I.P.C and sentenced them to imprisonment for life and fine of Rs.2000/- and in default of payment of fine, to rigorous imprisonment for six months. An appeal was thereafter taken by the accused to the High Court. The High Court observed as under:17. P.W 7, the Investigating Officer, proved the contradictions with regard to PW 4 to the effect that he did not tell him that Kailash and Ratan dragged him out and inflicted injuries on him or that he has been able to recognize the accused persons by moon light. These contradictions proved by P.W 7 in respect of PWs 3 and 4 have been cross-checked by us with the statement recorded under Section 161 Cr.P.C. PW 4 has named Ratan before the Court who had allegedly entered his room and took out Jakir. But Ratan has not been named before the Investigating Officer. Therefore, from this witness, we find evidence against accused Kailash, Ghandul, Krishna, Haren, Badhuram, Tinu, Hari Singh and Rahna. There is nothing said about Ratan by PW's 2 and 3. Therefore, there is doubt about his presence as claimed by the PW 4. So far Ghandul and Badhuram are concerned, we find that it is only PW 4 who had stated about their presence and participation in the alleged crime. He is not supported by PWs 2 and 3 in this regard. In our considered opinion, there is doubt about the presence of Ratan, Ghandul and Baduram at the time of occurrence. In so far Krishna Gore, Kailash Gore, Hari Singh, Haren Sarkar and Rahna are concerned, we find that PWs 3 and 4 have have indicted them as their assailants. PWs 3 and 4 were inside the house and had the opportunity to see the actual occurrence. In the process, they could recognize Kailash Gore, Krishna, Hari Singh, Haren Sarkar and Rahna. PW 3 was reading inside the room and he could recognize them in the light of a lamp. After opening the door, he also saw Gopal

(since deceased), Hari Singh, Krishna, Haren and Rahna. Therefore, his evidence against Gopal (dead) Kailash, Krishna and Haren is also reliable. He had identified them in the moon light from a close proximity. The other accused Ghandul, named by P.W 4 is entitled to benefit of doubt since he has not been named by PWs 2 and 3.And having held as above finally included;

> From this discussion, it appears that the prosecution has succeeded in establishing the charge against Kailash Gour, Krishna Gour, Harendra Sarkar, Hari Singh Gour and Rahna Gour. The other three appellants, namely Ratan Das, Gundulu Gour and Budhu Timang are entitled to acquittal on benefit of doubt"

6. It is in this circumstance, that the appeal at the instance of the convicted accused is before this Court by way of special leave.

7. Before embarking on an appreciation of the evidence which would determine the fate of the appeal, there are several factors peculiar to the present case which brings it out of the category of a usual set of murders and which need to be highlighted. As per the evidence on record, the incident had taken place on the 14th of December 1992 in the disturbances that followed in the aftermath of the destruction of the Babri Masjid in Ayodhya. As is well known, the fall out of the destruction of the Masjid was felt all over India and caused great consternation amongst the Muslim community. Widespread riots broke out throughout the country and the present multiple murders are also a consequence of the happenings in Ayodhya. The genesis of a communal riot, its development as it goes along and the consequences have been identified/underlined by dozens of commissions of inquiry both judicial and administrative for more than four decades now and there appears to be near unanimity that a deliberate attempt is made by the police and the investigating agencies to forestall fair investigation in attacks on the minority communities and on the contrary to connive with the perpetrators. It is indeed tragic that though reams of paper have been used and dozens of suggestions made as to the methods to prevent or to control communal riots, yet the cancer continues to metastasize on account of several factors, one of the predominant being the feeling amongst the assailants, emboldened yet further by the anonymity which a crowd provides, that come what may, no harm will come to them. Several reports have been perused and herein below are a few of the observations made which clearly highlight the anti-minority bias in the police:

> "This commission of inquiry has cited more than half a dozen instances where Muslim religious places adjoining police lines or police stations were attacked or damaged. The argument advanced by the police officers that because they were busy quelling riots at various other places, these police stations were shorn of adequate strength and hence these attacks on religious places could not be punished, did not impress the Commission. It has made this observation because not a single case of damage to a Hindu place of worship near a police station was reported to the Commission.
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> -Report of the Justice Jagmohan Reddy Commission on the Ahmedabad riots of 1969.

The working of the Special Investigation Squad is a study in communal discrimination. The officers of the squad systematically set about implicating as many Muslims and exculpating a many Hindus as possible irrespective of whether they were innocent or guilty. Cases of many Hindus belonging to the Shiv Sena, Rashtriya Utsav Mandal (an extension of the local branch of the Jana Sangh) were wrongly classified as 'A' category and investigations closed and no proper investigation was undertaken into several complaints of murders of Muslims and arson of their property. No investigation was conducted into the composition and activities of Hindu communal and allegedly communal organizations. Deputy superintendent of police S.P. Saraf held private conferences and discussions with several leaders of Hindu organizations including many who were implicated by Muslims in offences of arson and murder.

- Report of the Justice D.P.Madon Commission on the Bhiwandi,Jalgaon and Madad of 1970.

The evidence of the deputy SP says that while on patrol duty he had to curb many among his rank and file who could not restrain themselves when they met Muslims on the road. Similar evidence was given by the sub-collector and other witnesses who have testified saying that while chasing away some Muslims many policemen yelled at them to go to Pakistan. At Mattambaram one or two of them got into the mosque and besides beating Usmankutty Haji, a very respectable person, broke the tube-light and chandeliers in the mosque. There is nothing to show that there was any justification for this action..So far as the minorities are concerned, it is the feeling among them that they are nor getting justice, that they are discriminated against in the matter of appointments in the Public Services, that they do not get equal protection of the law and that their religion is in danger, that prompts them to rally around religious organizations of their own. It is of the greatest importance that appropriate steps are taken by the government to remove the cause fr such feelings in the minorities. There is much truth in saying that if you want peace you must work justice.

-Report of the Justice Josepth Vithyathil Commission on the Tellicherry riots, 1971.

The riots occurred broadly on account of the total passivity, callousness and indifference of the police in the matter of controlling the situation and protecting the people of the Sikh community..Several instances have come to be narrated where police personnel were found marching behind or mingled in the crowd. Since they did not make any attempt to stop the mob from indulging in criminal acts an inference has been drawn that they were part of the mob and had the common intention and purpose.The Commission was shocked to find that there were incidents where the police wanted clear and definite allegations against the anti-social elements in different localities to be dropped out while recording FIRs.

-Report of the J.Ranganath Misra Commission on the 1984 anti-Sikh riots in Delhi.

"1.11 The response of police to appeals from desperate victims, particularly Muslims, was cynical and utterly indifferent. On occasions, the response was that they were unable to leave the appointed post; on others, the attitude was that one Muslim killed, was one Muslim less.

1.12 The alertness of police pickets left much to be desired. Several arson incidents, stabbing and violence occurred within the eye-sight and earshot of the police pickets without any action by them. In one case, a bakery situated within the very compound in which the police station (Jogeswari) is located was attacked, looted and burnt in broad daylight without the police lifting a finger.

1.13 Police officers and men, particularly at the junior level, appeared to have an in-built bias against the Muslims which was evident in their treatment of the suspected Muslims and Muslim victims of riots. The treatment given was harsh and brutal and, on occasions, bordering on inhuman, hardly doing credit to the police. The bias of policemen was seen in the active connivance of police constables with the rioting Hindu mobs on occasions, with their adopting the role of passive on lookers on occasions, and finally, in their lack of enthusiasm in registering offences against Hindus even when the accused were clearly identified and post haste classifying the cases in "A" summary.

1.14 Even the registered riot-related offences were most unsatisfactorily investigated. The investigations showed lack of enthusiasm, lackadaisical approach and utter cynicism. Despite clear clues the miscreants were not pursued, arrested and interrogated, particularly when the suspected accused happened to be Hindus with connections to Shiv Sena or were Shiv Sainiks. This general apathy appears to be the outcome of the built-in prejudice in the mind of an average policeman that every Muslim is prone to crime."

Chapter 1 Preliminary Srikrishna Report On Mumbai riots of 1992-1993 The report of the National Human Rights Commission pertaining to its visit from 19th to 22nd March 2002 to Gujarat after the Vadodra and Godhra riots has made some startling observations:

"The Vishwa Hindu Parishad (VHP) gave a call for "Bandh" on the 28th Feb. pursuant to the Godha incident of burning alive of Karsewaks which wa supported by the Stte BJP. The police did not take effective steps to make proper security arrangements in several areas known for their communal sensitivity. Many felt that the police should have learnt from the past experience that Bandhs supported by the ruling party are never peaceful and should have therefore made full preparations. Whereas the VHP leaders could mobilize their supports for the 'Bandh', the police did not take any effective measures to control the unlawful crowds, while they were building up. The police, by and large, chose to act as silent spectators allowing the crowds to swell in size and become uncontrollable.

While in the previous riots also political elements did play a major part and the police and administration failed to control violence, they were not accused of direct involvement in the carnage. The failure of police and administration in the current riots is attributed not to their professional incompetence but to their attitude of apathy and callousness in general and the accusation of connivance and complicity was made in some cases.

The team heard several allegations of connivance of police in incidents of arson and looting by the marauding crowds. It was alleged that the crowds involved in the destruction of slums opposite Ambika Mill No.1 near Khokra over bridge, Gomtipur, Ahmedabad had the support of the administration (275 hutments housing approximately 1800 persons with 90% Muslims and the other Dalits were totally destroyed). These hutments have been in existence for over 30 years and the Gujarat High Court had ordered status quo in 1999 when the authorities sought to demolish them. It is alleged that one PSI Modi from Gomtipur police station had come to the site in police jeet (GJ1-AR-5432). He parked his jeep near the gate of Ambika Mill, spoke to the mob in the presence of Shri Mohan Bundela, Shri Israil Bhai Ansari and some other activists of Jan Sangarsh Manch. The mob took out 4 to 5 bottles of diesel from the jeep of Shri Modi, which were subsequently used in torching the hutments. Another specific allegation of connivance of police was narrated by some victims at the Shah-e-Alam camp. They charged a senior police Inspector K.K.Mysorewala with misdirecting some helpless Muslims including some young girls into the arms of a murderous mob. (These cases were brought to the notice of the Chief Secretary by the Chairperson for immediate action).

Many representatives of the NGOs/activists accused the police of outright discriminatory approach in the matter of arrest. It was alleged by many that though it was the minority community which was under attack at all the places after the Godhara incident, the bulk of the arrests made by the police were from minority community. Since the official presentation made before the team did not give community-wise break-up of arrests which is an important parameter of police action in the handling of communal riots, the allegations made by police holding responsible position and enjoying high reputation for their integrity cannot be rejected outright.

It was alleged by many that the police allowed the crowds to swell and turn violent by ignoring the calls for help from the victims of mob attack. Admitting that the police presence on such spots was very thin, it was asserted that their sense of duty demanded that they should have used firepower to rescue the persons under attack from mob fury. It was said by many that the police either did not use the weapons or merely fired a couple of rounds in the air without producing any deterrence."

8. This report also indicates a deliberate attempt on the part of the police force in subverting the Rule of Law not only in taking preventive measures, or during investigation but at the time of prosecution as well.

9. The matter does not end with the reports of the judicial commissions alone but has been a matter of deep concern for the administration as well. The First National Police Commission headed by Shri Dharam Vira ICS (Retd.) was set up during the Janata Party Government of Shri Morarji Desai and amongst its distinguished members were several doyen's of the police force with the most intimate and incisive knowledge of police functioning - Justice N.K. Reddy a retired Judge of the Madras High Court, Shri K.F. Rustamji, former Director General of the Border Security Force, Shri N.S. Saxena, former Director of the Central Reserve Police Force, Shri M.S. Gore of the Tata Institute of Social Sciences and Shri. C.V. Narasimhan, a former Director of the Central Bureau of Investigation as its Member-Secretary. The Commission submitted its report in six volumes between 1979 and 1981 and made far reaching recommendations based on the experience that had been gained over the years with regard to the anatomy of a communal riot. Volume VI, Chapter XLVII, Page 9 dealing with "Communal Riots' of the report reads thus:

> "The investigation of crimes recorded is a matter which calls for professional skill and expertise of a different variety. Investigations of crimes cannot be undertaken in moments of tension and confusion. The National Integration Council has observed that special investigation squads should be set up to investigate crimes committed in the course of serious riots. We endorse this observation and recommend that such squads should be set up under the State Investigating agency [State CID (Crime)] to investigate all crimes committed in the course of a riot.
>
> The Madon Commission which inquired into the communal riots in Bhiwandi, Jalgaon and Mahad in the State of Maharashtra in 1969 passed severe strictures against the special investigation squads set up to investigate crime committed in the course of those riots. The Commission observed that these special investigation squads had acted in a partial and biased manner against one community. We take note of this finding and feel that there are many instances where the special investigation squads were not set up properly with the result that some of them acted in an incompetent and biased manner. We would, therefore, recommend that the special investigation squads for investigating into crimes reported in the course of a riot, should consist of officers of high ability who could be expected to act without fear or favour, and without bias or prejudice. These squads should function under the supervision of a fairly senior officer.
>
> We are also aware that once a riot gets under control several forces come into prominence and these forces try to interfere in the registration and investigation of crimes. There is an alarming tendency on the part of several local big wigs to prevent the initiation of action against well-known goondas and anti-social elements. We are aware that the police also is not entirely free from blame in this regard. It should be realized that non-initiation of action against those who commit serious crimes in the

course of a riot is a matter which would destroy the morale and trust of the local population. If the big criminals are left out and only a few small ones are prosecuted the people will lose faith in the investigation processes and in the rule of law. The administration, the police and the politicians should remember that the people are generally aware of the real culprits, and if the official agencies shield these culprits the people would not only look up these agencies as connivers of crime, but as criminals themselves. We strongly recommend that the investigation of reported crimes in serious riot situations should be done thoroughly, competently, quickly and impartially by special teams of competent officers working under the supervision of senior officers. Any interference in this process by any group, however, powerful it may be and whatever may be the reasons should be strongly condemned.

We made a study of the prosecution and disposal of cases registered in the course of serious communal riots in one State. The disposal of the cases examined in this study is as shown below:-

	Place A (1970)	Place B (1970)	Place C (1967)
1. Number of cases reported	11	162	38
2.Number of cases charge-sheeted in the Court of law	6	3	15
3. No. of cases withdrawn with reasons			
4.No.of cases convicted .	3	8	5
5. No. of cases convicted .	3	23	10
6. No. of cases discharged .	..	4	
7'A' Final (True but not detected)	5	125	23
8. 'B' Final (False case)	..	..	..
9. 'C' Final (Mistake of facts)	..	2	..
10.'NC'Final (Non-cognizable case)	..		..

> It will be noticed that a large number of cases ended in final reports. An analysis of the convicted cases showed that these were all simple cases in which the accused were actually caught red handed on the scene of the riot. In the majority of the complaints lodged by the individuals with the police and in which the police carried out investigations, the police were not successful in apprehending the offenders and putting them up before courts of law. It was also noticed that the courts took up to 18 months for disposal of these cases."

10. The table is perhaps illustrative of the malaise that afflicts the police force in many states, as the various reports quoted above which pertain to different states, would reveal. More alarmingly, if things were bad in 1986, what would be the situation as of today?

11. India is a signatory to the Universal Declaration of Human Rights. Article 2 thereof provides for rights without discrimination, without restriction of any kind based on race, language or religion etc., Article 7 provides for equality before law and to the equal protection of the law for all, Article 8 postulates the availability of an effective remedy in law for acts violating the fundamental rights guaranteed to an individual and Article 12 provides for the right to a fair trial. These rights are enshrined in Articles 14 and 21 of the Constitution of India as well. Can it be said in all honesty that the investigation and prosecution in matters relating to communal riots which is really based on protecting human dignity and the right to life, accord with the above principles? The question posed must, of necessity, give cause for introspection. Such being the background, can we evaluate a murder committed during a communal riot as a crime committed in the normal course - a common place crime as ordinarily understood? The answer must be in the negative and for the reasons already quoted above. It is in this background that the arguments raised have to be examined.

12. The learned counsel for the appellants has first and foremost argued that there was a delay of 15 hours in the recording of the FIR and as no explanation was forthcoming, this delay was fatal to the prosecution story. This submission has been supplemented by Mr. Abhijeet Sen Gupta, the learned counsel for the appellants in Criminal Appeal No.1068/2006 by highlighting that as the FIR appeared to have been recorded after the post-mortem and the inquest reports had been prepared, its sanctity and spontaneity had been compromised. In this connection the learned counsel have placed reliance on *State of Punjab vs. Ramdev Singh*[9], *State of Punjab vs. Daljit Singh & Anr.*[10] *and Ramesh Baburao Devaskar & Anr. Vs. State of Maharashtra*[11]. It has also been pointed out that as Md. Jakir, one of those who had been hurt had not been examined as a witness the entire story was shrouded in suspicion, and due to the fact that there appeared to be some animosity between the parties based on a land dispute as had been admitted by PW1 himself, the possibility of false implication was clearly writ large. It has finally been pleaded that as no weapon had been recovered from the accused and the fact that the prosecution witnesses had sought to improve on their statements given to the police in their evidence in Court by attributing individual roles to the accused, required that their evidence could not be accepted at its face value.

13. The learned counsel for the respondent - State has, however, argued that the prosecution evidence had to be examined in the background of the situation that existed in those days with the entire area being curfew bound, consequent upon the total failure of the civil administration with the result that the Army had been called out. It has also been submitted that there was no reason whatsoever to disbelieve that the eye witnesses, two of them greviously hurt, whose presence could not be doubted and though Md. Jakir had not been examined as an eye witness, yet the fact that he too had suffered a grievous injury in the same incident could hardly be controverted. It has further been pointed out that though Md. Taheruddin, the first informant had been disbelieved by the High Court, there was absolutely no reason for doing so as his presence in his home during a communal riot for the purpose of guarding his family of a young wife, six daughters and two sons and his property was but natural. It has finally been pleaded that even assuming that some improvements had been made during the course of their evidence, this was to be expected as the witnesses had been under great stress at the time when their statements had been recorded under Section 161 of the Cr.P.C. and by reflection and hindsight they had been able to gather their wits and to give proper statements in Court. It has finally been pointed out that the benefit of doubt had already been given to the accused inasmuch as several had been acquitted, some by the trial court and some others by the High Court.

14. It would be seen that the arguments raised by the learned counsel for the appellants are on the premise that the incident had happened in a normal civil society where the access to the police is presumed to be easy and where the investigation suffers from no bias. These arguments, from their very nature, cannot be applied to a case where there is a complete break down of the civil administration, the police has lost control of the situation, a curfew imposed and the Army called out and the real possibility (if precedents are to be applied) that the investigation could be directed against the complainant who belonged to a minority community. From the reports that have been quoted above, several broad principles are discernible:

> "(1) that police officers deliberately make no attempt to prevent the collection of crowds;
>
> (2) that half hearted attempts are made to protect the life and property of the minority community;
>
> (3) that in rounding up those people participating in the riots, the victims rather than the assailants are largely picked up;
>
> (4) that there is an attempt not to register cases against the assailants and in some cases where cases are registered loopholes are provided with the intention of providing a means of acquittal to the accused;
>
> (5) that the investigation is unsatisfactory and tardy and no attempt is made to follow up the complaints made against the assailants; and finally

(6) that the evidence produced in Court is often deliberately distorted so as to ensure an acquittal."

15. In this background and situation some of the arguments raised by the learned counsel for the appellants can have absolutely no relevance, and the court must, of necessity, lean even more heavily on the statements of the eye witnesses.

16. It has come in the evidence that the incident had happened at about 10.00 p.m. on 14th December 1992 in the residential house of Mohd. Taheruddin PW2 - the victims his wife and two young daughters who were killed, and one son seriously hurt. It has also come in the evidence of the three main witnesses, that Army personnel had reached the place of incident and had carried the dead bodies to police station Daboka whereas the injured had been taken to the hospital. From the evidence of PW7 B.N. Kalita who was the In-charge of Police Station, Daboka, it is evident that a communal riot had erupted on account of the destruction of the Babri Masjid on December 6, 1992 and that curfew had been clamped in the entire area of Hojai, Daboka and Jamunamukh after December 6, 1992. In this background, it cannot be said that the FIR lodged 15 hours after the incident was belated. It is also significant that this police officer had received information about the incident on December 14, 1992 at about 10 minutes past mid night and on which he had reached the place of incident and had made some enquiries and also recorded Taheruddin's statement but if he had chosen to record the formal FIR at 11 a.m. on December 15, 1992, it cannot be said that the complainant was in any way guilty of delay. The statements of the eye witnesses also reveal that the dead bodies and the injured had been removed from the place of incident by Army personnel. It, therefore, appears that the inquest had not been recorded at the site but it was perhaps elsewhere. It is also clear from the evidence of Dr. Jiauddin Ahmed PW6 that he had medically examined Jakir Hussain and Mustafa Mohd. hortly after mid night on 14th December, 1992 on a police requisition with reference to G.D.No.2000 of Police Station, Daboka. It is therefore somewhat surprising that though the aforesaid persons had been removed to the hospital by the Army and examined on police requisition at about mid night, yet no formal FIR had registered by the police till 11.00 a.m. Two explanations can be given for this omission, one that the police, as is its wont, had refused to register a case or in the alternative and to take a more charitable view, that it had not been possible to do so earlier as the area was under curfew and aflame in a communal riot. The submission about the delay in the lodging of the FIR in the circumstance of the case is without basis. The judgments cited by the learned counsel on this aspect, thus, have no relevance to the facts of the case.

17. The learned counsel for the appellants has also laid much emphasis on the fact that Jakir one of the injured and apparently a close relative of the other eye witnesses, having not been examined, a doubt had been cast on the prosecution story. There is absolutely no justification for this argument. It is clear from the evidence of Dr. Madhusudhan Dev Goswami PW1 that Mohd. Jakir had suffered only a simple injury whereas Mohd. Mustafa had been seriously hurt. It must also be noted that as the incident had happened at the dead of night during communal disturbances which had apparently started on or soon after 6th December 1992, and for Mohd. Taheruddin to be present at home to guard his huge family of

a wife, two sons and six daughters was to be accepted. Conversely, his absence from home during these crucial days would have been most unnatural and alien to normal human behaviour. The High Court has opined that as the statement of Mohd. Taheruddin given in Court was not substantiated by the medical evidence, his evidence was "highly suspicious". This finding is unacceptable as his presence was absolutely natural and the story that he was guarding his crop a short distance away inspires confidence and merely because some persons who had been named by him were ultimately found by the court to be not present would not to our mind dislodge the entire case. Moreover the medical evidence which makes the presence of Taheruddin "suspicious" as per the High Court, is the absence of the arrow injury on the hand. It must, however, be emphasized that Taheruddin's statement on this aspect is a casual one and does not give any indication as to the nature or extent of the injury, except for the observation that the arrow shot at his body had missed the target and had hit his hand instead. The evidence of Taheruddin when read as a whole corresponds in material particulars with the statements of the other two eye witnesses. Likewise, the statement of Mohd. Mustafa, who was seriously injured and Mohd. Hanif clearly support the prosecution story. All three witnesses had witnessed the incident from close quarters and as most of the accused were known to them, they being neighbours, they were in a position to identify them. It is true, as has been contended, that the names of some of the accused do not figure in the statements made to the police, but this omission can be reasonably attributed to a tainted investigation or to the fact that the sheer brutality of the crime had stunned the witnesses into confusion. The horror which would have faced the witnesses, can hardly be exaggerated.

18. It has been argued by the learned counsel for the appellants that the FIR had been motivated on account of the land dispute between Taheruddin and accused Gopal (who died before trial) and Hari Singh and Kailash. Reliance for this argument has been placed on the admission made by Mohd. Taheruddin in his statement that some dispute did exist between them. From the facts and background the converse possibility (as the Commission's reports would suggest) that the accused had, in fact, decided to utilize the disturbed situation to their advantage and to sort out their enemies once for all, cannot be ruled out. On the other hand, it is difficult to accept that a witness who has seen the slaughter of his family would be so perverted or crass as to leave out the real assailants and to rope in innocent persons. The fact that the victims were a young woman, and two children, and grevious injuries to two other young boys supports the view that the murders had not been committed on account of any enmity, but were a fall out of the communal tension prevailing in that area. It bears reiteration, that the victims could hardly have been dealt with on account of any animosity, but the assailants attempted to do away with anyone who came along. In any case, as already mentioned above, the Sessions Judge and the High Court have already done the sifting that is required and ultimately maintained the conviction of only a few of the accused.

19. In conclusion, it must be observed that in matters such as the present one, it is the statements of the eye witnesses which are of the utmost importance and unless very good reasons can be given for disbelieving them, they must be accepted, and the arguments with regard to the delay in the FIR or some minor contradictions in the statements under section 161, vis-`-vis the statements in Court or a flaw in the recording of the post-mortem or the

inquest reports or the non-recovery of murder weapons etc. are a matter of little concern as these issues would be relevant and in normal circumstances and to a situation where the civil administration was functioning effectively, but in a case of a complete break down of the civil administration, these broad arguments are wholly inapplicable. There is, thus, no merit in these appeals. They are accordingly dismissed. (Harjit Singh Bedi)02.05.2008

ORDER

In view of the difference of opinion, let the matter be placed before three-Judge Bench. The Registry is directed to place the records before the Hon'ble the Chief Justice of India for appropriate orders.

[1]*2007 (12) SCALE 272*
[2]*(2004) 4 SCC 158*
[3]*2005 (1) SCC 115*
[4]*AIR 1979 SC 1848*
[5]*(2005) 6 SCC 1*
[6]*(2004) 10 SCC 699*
[7]*(2005) 5 SCC 294*
[8]*[2006] UKPC 13*
[9]*(2004) 1 SCC 421*
[10]*(2004) 10 SCC 141*
[11]*(2007) 12 SCALE 272*