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Decided on :  
Duration : YY MM DD

**Exh. :** \_\_\_\_\_

**IN THE COURT OF 2<sup>nd</sup> ADDITIONAL SESSIONS JUDGE,  
MAHISAGAR AT LUNAWADA.**

**SESSIONS CASE No. 8/ 2017,10/2017,11/2017,**  
**SESSIONS CASE No.12/2017, 14/2017,15/2017.**

**Complainant :-**

The State of Gujarat

**V E R S U S**

**Accused :-**

| Sr. No. | Name of Accused                       | Residence                        |
|---------|---------------------------------------|----------------------------------|
| 1.      | Nathabhai Bhalabhai Malivad, [Abated] | Mokamsinh na Bhevada,Ta.Khanpur. |
| 2.      | Kalubhai Motibhai Malivad, [Abated]   | Maiyapur,Ta.Khanpur.             |
| 3.      | Somabhai Masurbhai Malivad            | Karanta,Ta.Khanpur               |
| 4.      | Galabhai Vechatbhai Malivad           | Karanta,Ta.Khanpur               |
| 5.      | Laxmanbhai Rupabhai Malivad           | Bharod,(Kakachia),Ta.Khanpur     |
| 6.      | Dhulabhai Lembabhai Malivad           | Bharod,(Kakachia),Ta.Khanpur     |
| 7.      | Mangalbhai Kesrabhai Malivad          | Bharod,(Kakachia),Ta.Khanpur     |
| 8.      | Somabhai Gobarbhai Pagi               | Jetpur,Ta.Khanpur.               |
| 9.      | Bharatbhai Ranchodbhai Meda           | Meda na Muvada,Ta.Khanpur        |
| 10.     | Raisinghbhai Lalabhai Meda [Abated]   | Meda na Muvada,Ta.Khanpur        |
| 11.     | Bhagvanbhai Somabhai Damor            | Kalakhetra,Ta,Khanpur            |
| 12.     | Revabhai Galabhai Malivad             | Talpat na Bhevada,Ta.Khanpur     |
| 13.     | Harishbhai Arjunbhai Malivad`         | Talpat na Bhevada,Ta.Khanpur     |
| 14.     | Shanabhai Galabhai Malivad            | Talpat na Bhevada,Ta.Khanpur     |
| 15.     | Arvindbhai Somabhai Malivad           | Talpat na Bhevada,Ta.Khanpur     |
| 16.     | Babubhai Kalubhai Malivad             | Talpat na Bhevada,Ta.Khanpur     |
| 17.     | Kalubhai Bhurabhai Malivad            | Talpat na Bhevada,Ta.Khanpur     |
| 18.     | Nareshkumar Ramabhai Malivad          | Talpat na Bhevada,Ta.Khanpur     |
| 19.     | Shanabhai Hirabhai Malivad            | Mokam sinh na Bhevada,Ta.Khanpur |
| 20.     | Shaileshbhai Lalabhai Malivad         | Talpat na Bhevada,Ta.Khanpur     |
| 21.     | Dahyabhai Rupabhai Malivad            | Talpat na Bhevada,Ta.Khanpur     |
| 22.     | Ramanbhai Rumalbhai Malivad [Abated]  | Mena,Ta,Khanpur                  |
| 23.     | Babubhai Dhulabhai Malivad            | Talpat na Bhevada,Ta.Khanpur     |

|     |                                             |                                          |
|-----|---------------------------------------------|------------------------------------------|
| 24. | Lalabhai Nanabha Malivad                    | Talpat na Bhevada,Ta.Khanpur             |
| 25. | Shanabhai Galabhai Damor                    | Kala Khetara,Ta.Khanpur                  |
| 26. | Arjunsinh Vajesinh Malivad                  | Mota Khanpur, Ta.Khanpur,                |
| 27. | Arvindsinh @ Bako Dasrathsinh Virpara       | Virpura Na Muvada, (Kanesar) Ta. Khanpur |
| 28. | Vasantkumar Kantilal Pandya                 | Maiyapur,Ta.Khanpur                      |
| 29. | Mangalabhai Bhagabhai Malivad               | Kaslavati,Ta.Khanpur                     |
| 30. | Dhulabhai Motibhai Malivad,                 | Kanod,Chana Shero Falia, Ta.Khanpur      |
| 31. | Ramanbhai Rupabhai Malivad                  | Kanod,Chana Shero Falia, Ta.Khanpur      |
| 32. | Vijaykumar Khumabhai Pagi                   | Kanod,Chana Shero Falia, Ta.Khanpur      |
| 33. | Dhulabhai Somabhai Malivad [Abated]         | Kolambi,Ta.Khanpur                       |
| 34. | Kalubhai Hajurbhai Malivad                  | Bamroda, Ta.Khanpur                      |
| 35. | Galiben W/o. Virabhai Bhalabhai Malivad     | Tanka na Bhevada,Ta.Khanpur              |
| 36. | Revaben W/o. Motibhai Bhalabhai Malivad     | Mokamsinh na Bhevada,Ta.Khanpur          |
| 37. | Ashokbhai Kanabhai Malivad                  | Tanka na Bhevada,Ta.Khanpur              |
| 38. | Bharatbhai @ Arvindbhai Somabhai Pagi       | Karanta, Ta.Khanpur.                     |
| 39. | Chandubhai Hirabhai Machhar                 | Naroda pete Umaria,Ta.Khanpur            |
| 40. | Jashvantbhai Bhathibhai Malivad             | Tank na Bhevada, Ta.Khanpur              |
| 41. | Shantaben W/o.Kanabhai Sardarbhai Malivad   | Tank na Bhevada, Ta.Khanpur              |
| 42. | Minaben W/o. Hirabhai Sardarbhai Malivad    | Tank na Bhevada, Ta.Khanpur              |
| 43. | Shankarbhai Masurbhai Malivad               | Mokamsinh na Bhevada, Ta.Khanpur         |
| 44. | Sardarbhai Bhalabhai Malivd                 | Tank na Bhevada, Ta.Khanpur              |
| 45. | Motibhai Bhalabhai Malivad                  | Mokansinh na Bhevada,Ta,Khanpur          |
| 46. | Jivabhai Virabhai Malivad                   | Tank na Bhevada, Ta. Khanpur             |
| 47. | Savabhai Kalubhai Malivad                   | Mokamsinh na Bhevada, Ta. Khanpur        |
| 48. | Ramanbhai Pratapbhai Malivad                | Tank na Bhevada, Ta.Khanpur              |
| 49. | Laxmanbhai Motibhai Malivad                 | Mokamsinh na Bhevada, Ta. Khanpur        |
| 50. | Bhemabhai Kalubhai Malivad                  | Mokamsinh na Bhevada, Ta. Khanpur        |
| 51. | Rajeshbhai Nathabhai Malivad                | Mokamsinh na Bhevada, Ta. Khanpur        |
| 52. | Lalabhai Kohyabhai Malivad                  | Mokamsinh na Bhevada, Ta. Khanpur        |
| 53. | Ramabhai Kohyabhai Malivad                  | Mokamsinh na Bhevada, Ta. Khanpur        |
| 54. | Somabhai Hirabhai Malivad                   | Talpat na Bhevada, Ta. Khanpur           |
| 55. | Mahendrakumar Savabhai Malivad              | Mokamsinh na Bhevada, Ta. Khanpur        |
| 56. | Kalubhai Hirabhai Malivad                   | Talpat na Bhevada, Ta. Khanpur           |
| 57. | Virabhai Bhalabhai Malivad                  | Tank na Bhevada, Ta. Khanpur             |
| 58. | Raysing @ Rayjibhai Virabai Malivad[Abated] | Mokamsinh na Bhevada, Ta. Khanpur        |
| 59. | Kalubhai Hirabhai Motibhai Malivad          | Mokamsinh na Bhevada, Ta. Khanpur        |

|     |                                                   |                                   |
|-----|---------------------------------------------------|-----------------------------------|
| 60. | Rayjibhai Masurbhai Malivad                       | Tank na Bhevada, Ta. Khanpur      |
| 61. | Malabhai Nathabhai Malivad                        | Mokamsinh na Bhevada, Ta. Khanpur |
| 62. | Somabhai Nathabhai Malivad                        | Mokamsinh na Bhevada, Ta. Khanpur |
| 63. | Fulabhai Virabhai Malivad                         | Mokamsinh na Bhevada, Ta. Khanpur |
| 64. | Bhathibhai Sardarbhai Malivad                     | Tank na Bhevada, Ta. Khanpur      |
| 65. | Virabai Rumalabhai Malivad                        | Mokamsinh na Bhevada, Ta. Khanpur |
| 66. | Pujabhai Hirabhai Malivad                         | Mokamsinh na Bhevada, Ta. Khanpur |
| 67. | Hirabhai Sardarbhai Malivad                       | Tank na Bhevada, Ta. Khanpur      |
| 68. | Jayantibhai Hirabhai Malivad                      | Mokamsinh na Bhevada, Ta. Khanpur |
| 69. | Bharatbhai Jesinghbhai Malivad                    | Talpat na Bhevada, Ta. Khanpur    |
| 70. | Babubhai Hirabhai Malivad                         | Tank na Bhevada, Ta. Khanpur      |
| 71. | Ramabhai Virabhai Malivad                         | Mokamsinh na Bhevada, Ta. Khanpur |
| 72. | Bharatbhai Virabhai Malivad                       | Mokamsinh na Bhevada, Ta. Khanpur |
| 73. | Bharatbhai Hirabhai Damor                         | Doda Vanta,Ta.Khanpur             |
| 74. | Navalsinh Fatabhai Malivad                        | Mena, Ta.Khanpur                  |
| 75. | Kanabhai @ Kanjibhai Sardarbhai Malivad           | Tank na Bhevada, Ta. Khanpur      |
| 76. | Girishbhai Nathabhai Malivad                      | Mokamsinh na Bhevada, Ta. Khanpur |
| 77. | Sanjaykumar @ Bhagabhai Motibhai Malivad          | Mokamsinh na Bhevada, Ta. Khanpur |
| 78. | Ratnabhai Lakhabhai Malivad                       | Tank na Bhevada, Ta. Khanpur      |
| 79. | Shivabhai Shanabhai Malivad                       | Tank na Bhevada, Ta. Khanpur      |
| 80. | Rameshbhai Manilal Malivad                        | Tank na Bhevada, Ta. Khanpur      |
| 81. | Arjanbhai Chhatrabhai Malivad                     | Mokamsinh na Bhevada, Ta. Khanpur |
| 82. | Dhuliben W/o. Savabhai Kalubhai Malivad           | Mokamsinh na Bhevada, Ta. Khanpur |
| 83. | Sukhibeb W/o. Jivabhai Virabhai Malivad           | Tank na Bhevada, Ta. Khanpur      |
| 84. | Surmabhai Somabhai Malivad [Abated]               | Mokamsinh na Bhevada, Ta. Khanpur |
| 85. | Chandubhai Pratapbhai Malivad                     | Tank na Bhevada, Ta. Khanpur      |
| 86. | Chhatrabhai Pujabhai Meda                         | Pujelav,Ta.Khanpur                |
| 87. | Dhuliben W/o.Nathabhai Bhalabhai Malivad [Abated] | Mokamsinh na Bhevada, Ta. Khanpur |
| 88. | Pratapbhai Virabhai Malivad                       | Mokamsinh na Bhevada, Ta. Khanpur |
| 89. | Ajmel Hajur Damor                                 | Umaria(Zer),Ta.Khanpur            |
| 90. | Jesinghbhai Kohyabhai Malivad                     | Mokamsinh na Bhevada, Ta. Khanpur |
| 91. | Mukeshbhai @ Gala Shankarbhai Malivad             | Mokamsinh na Bhevada, Ta. Khanpur |
| 92. | Shanabhai Sagabhai Pagi                           | Isroda,Ta.Khanpur                 |

**Appearance :-**

Ld. **A.G.P. Mr. J. J. Solanki** for the complainant.

Ld. Advocate **Mr. B. P. Solanki** for Accused No 1 to 27, 29 to 44, 47, 50, 52 to 56, 58 to 69, 71, 73, 74, 78 to 80, 82 to 92.

Ld. Advocate **Mr. B. H. Dave** for Accused No.45, 46, 48, 49, 51, 57, 67,70, 72, 75 to 77.

Ld. Advocate **Mr. S. P. Joshi** for Accused No.28.

Ld. Advocate **Mr. A. N. Pancholi** for Accused No.81.

**Offence u/Sec.147, 148, 149, 435, 436, 395, 342, 307, 429, 120-B, of the Indian Penal Code along with u/Sec. 3, 181 of M.V. Act. & u/Sec.135 of G. P. Act**

**: J U D G M E N T :**

- (1) In the present case total 92 accused are involved. The case pertains to Sections 147, 148, 149, 435, 436, 395, 342, 307, 429, 120B of Indian Penal Code as well as Sections 3 and 181 of Motor Vehicle Act and Section 135 of G. P. Act. As far as the criminal case is concerned, all the accused committed the offence under sections of rioting, armed with deadly weapons along with constituted unlawful assembly, mischief by fire with intend to destroy houses and intend to cause damage, dacoity, wrongful confinement, attempt to murder, mischief by killing of cattle, conspiracy, driving vehicles in contravention.

- (2) The brief facts of present case are as under;

The incident occurred on dated 26<sup>th</sup> June, 2009 during the period between 16:30 hours to 18:00 hours in the evening at village Mokamsinh na Bhevada Ta. Khanpur (Bakor), Dist. Mahisagar.

Before narrating the facts of present case, it is required to go to the flash back as to present incident took place.

On dated 18<sup>th</sup> June, 2009 the dead-body of daughter of accused No.46's namely Savitaben aged about 13 years residing at Tank Na Bhevada found in the farm of Dahyabhai Vajabhai Patel. The dead-body of the daughter of accused No.46 was hanging to the Khirani tree, tied her neck with Dupatta and eventually she succumbed to hanging, in pursuant to that Accidental Death Entry No.8/2009 under Sec.174 was registered before Khanpur, police station and police official has conducted inquiry/ interrogation/ investigation with regards to the occurrence of Savitaben's accidental death. The dead-body of Savitaben was found near the farm of Dahyabhai Vajabhai Patel; all the accused suspected on the son of Dahyabhai Vajabhai Patel and all the accused also firmly believes that Arunbhai was responsible to kill Savitaben. In this incident the people of Patel community were not supporting/ co-operating to the police for fair investigation, so keeping animosity all the accused assembled and went to submit letter to Mamlatdar Office at Bakor for neutral police investigation of occurrence on dated 26<sup>th</sup> June, 2009.

After returning back by submitting the said letter; all the accused associated between 16:30 to 18:00 hours in the evening on dated 26<sup>th</sup> June, 2009, along with all the accused other five hundred persons joined them and all those person were full blooded family members, relatives or their community members. All those persons conspired with one another; constituted unlawful assembly; armed with lethal weapons like long handed sickle (in Gujarati known as Dhariya), axes as well as lathi sticks and all the accused came at village Mokamsinh na Bhevada by driving vehicles like Tractor No.GJ-17-D-5949, Tractor No.GJ-17-D-7697, Motorcycle No.GJ-17-R-1692 and Bajaj Kawasaki No.GJ-5-B-J-4396. All the accused shouted "to kill Patels" thus accused created the atmosphere of apprehension and terror and committed the house breaking act at witnesses' houses and accused did looted witnesses' houses. The accused had also set houses on fire by way of setting household articles on fire inside/ front side/ rear side of their house and destroyed the grass and woods thereby causing damage of Rs.1,17,56,656/-. The accused also set ablazed to the cattle of witness Ganeshbhai Nathabhai Patel and cattle succumbed to burn injuries; all the accused were trying to kill witness Kankuben Vajabhai Patel aged 100 years by way of locking the house from outside and also attempted to murder by setting her house on fire. Accused Laxmanbhai Motibhai Malivad was driving tractor No. GJ-17-D-5949 without licence and used the said tractor to commit the offence. All the accused conspired with one another and also abetted. Accused Arvindsinh @ Bako Dasrathsinh Virpura as well as Vasantkumar Kantilal Pandya did the act of instigation and under their instigating leadership; those persons committed the act of instigation; for furtherance to commit the offence, all the accused had contravened the Notification issued by Additional District Magistrate, Panchmahal at Godhra and all the accused came publicly armed with long handed sickle (in Gujarati known as Dhariya), axes and lathi-sticks thereby committed the offence of above sections' ingredients.

- (3) With a view to above sections, the complainant has lodged the complaint and PSO of concerned Police Station has registered the complaint and sent to the Investigating Officer for proper investigation. Investigating Officer has recorded the statements of witnesses and also made various panchnamas, collected P. M. Note and FSL reports as well as medical certificates. After completion of the investigation, the accused Nathabhai along with 72 other accused was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 24<sup>th</sup> August, 2009; accused Arjanbhai Chhatrabhai Malivad

along with 2 other accused was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 23<sup>rd</sup> March, 2010; Navalsinh Fatabhai Malivad along with 6 other accused was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 13<sup>th</sup> January, 2010; Ajmelbhai Hajurbhai Damor along with 2 other accused was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 5<sup>th</sup> February 2011; Shanabhai Sagabhai Pagi was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 16<sup>th</sup> March, 2011 and Surmabhai Somabhai Malivad along with 4 other accused was charge-sheeted to the Ld. Judicial Magistrate First Class, Lunawada on dated 19<sup>th</sup> June, 2010. Copy of the police papers were supplied to the accused under Section 207 of the Cr.P.C. Case was committed to the Court of Sessions u/Sec.209 of Cr.P.C.

(4) The accused have engaged their own private advocate and they have declined to engage advocate provided by Legal Services Authority. My Ld. Predecessor Judge has framed the charge under Section 227 of the Cr.P.C., it was read over to the accused. The accused have not pleaded guilty to the charges as per their statement, and the case was fixed for prosecution evidence. The evidences were recorded under Section 231 of the Cr.P.C.

(5) The prosecution have examined the following witnesses :

| Sr. No. | Name of Witness                        | Exh. |
|---------|----------------------------------------|------|
| 1.      | PW-1 – Bhulabhai Somabhai Patel        | 177  |
| 2.      | PW-2 – Babubhai Nanabhai Patelia       | 220  |
| 3.      | PW-3 – Satishkumar Bhulabhai Patel     | 232  |
| 4.      | PW-4 – Brijesh Charturbhai Patel       | 235  |
| 5.      | PW-5 – Mangalbhai Fulabhai Pagi        | 241  |
| 6.      | PW-6 – Gulabbhai Laxmanbhai Khant      | 243  |
| 7.      | PW-7 – Ashokbhai Parsottambhai Patel   | 247  |
| 8.      | PW-8 – Jagdishchandra Pratapbhai Barot | 252  |
| 9.      | PW-9 – Rajeshbhai Mangalbhai Patel     | 254  |
| 10.     | PW-10 – Raijibhai Masurbhai Khant      | 255  |
| 11.     | PW-11 – Rameshbhai Abhesinh Pagi       | 256  |
| 12.     | PW-12 – Kantibhai Shanabhai Baria      | 258  |
| 13.     | PW-13 – Govindbhai Devabhai Parmar     | 259  |
| 14.     | PW-14 – Dasarathbhai Balusinh Parmar   | 262  |
| 15.     | PW-15 – Khatubhai Ratnabhai Machhar    | 264  |
| 16.     | PW-16 – Vadhabhai Laxmanbhai           | 268  |

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|-----|-----------------------------------------|-----|
| 17. | PW-17 – Pankajbhai Raijibhai Patel      | 273 |
| 18. | PW-18 – Somabhai Hirabhai               | 274 |
| 19. | PW-19 – Rameshbhai Bhagabhai Patel      | 275 |
| 20. | PW-20 – Babubhai Ranchhodbhai           | 276 |
| 21. | PW-21 – Shankarbhai Vajabhai Patel      | 280 |
| 22. | PW-22 – Muljibhai Khatubhai Patel       | 281 |
| 23. | PW-23 – Bhikhabhai Parsottambhai Patel  | 284 |
| 24. | PW-24 - Kanubhai Morarbhai Patel        | 285 |
| 25. | PW- 25 - Mangalbhai Hirabhai Patel      | 286 |
| 26. | PW- 26 - Somabhai Kodarbhai Patel       | 287 |
| 27. | PW- 27 - Kalubhai Motibhai              | 298 |
| 28. | PW- 28 - Natvarbhai Raijibhai           | 299 |
| 29. | PW- 29 - Dahyabhai Ganeshbhai           | 300 |
| 30. | PW- 30 - Kalubhai Lalabhai Patel        | 303 |
| 31. | PW- 31 - Kalubhai Dhulabhai Patel       | 313 |
| 32. | PW- 32 - Raijibhai Nathabhai Patel      | 320 |
| 33. | PW- 33 - Somabhai Shankarbhai Patel     | 322 |
| 34. | PW- 34 - Raijibhai Naranbhai Patel      | 323 |
| 35. | PW- 35 - Lilaben Dahyabhai Patel        | 328 |
| 36. | PW- 36 - Railiben Shanabhai Patel       | 329 |
| 37. | PW- 37 - Kankuben Narsinhbhai Patel     | 345 |
| 38. | PW- 38 - Sukhiben Mangaldas Patel       | 349 |
| 39. | PW- 39 - Rukhiben Laljibhai Patel       | 350 |
| 40. | PW- 40 - Sangitaben Bhikhabhai Patel    | 351 |
| 41. | PW- 41 - Satishbhai Somabhai Patel      | 352 |
| 42. | PW- 42 - Lalabhai Narsinhbhai Patel     | 353 |
| 43. | PW- 43 - Sureshbhai Lalabhai Patel      | 354 |
| 44. | PW- 44 - Jayantibhai Shankarbhai Patel  | 363 |
| 45. | PW- 45 - Bhuriben Raijibhai Patel       | 367 |
| 46. | PW- 46 - Bhuperndrabhai Raijibhai Patel | 368 |
| 47. | PW- 47 - Janakkumar Dahyabhai Patel     | 369 |
| 48. | PW- 48 - Dahyabhai Vajabhai Patel       | 370 |
| 49. | PW- 49 - Natvarbhai Rupabhai Patel      | 371 |
| 50. | PW- 50 - Jitendrakumar Motibhai Patel   | 373 |
| 51. | PW- 51 - Mukeshbhai Ranchhodbhai        | 376 |
| 52. | PW- 52 - Babubhai Dalsukhbhai           | 377 |
| 53. | PW- 53 - Ambalal Chhaganbhai            | 378 |
| 54. | PW- 54 - Mansinh Somabhai               | 379 |
| 55. | PW- 55 - Dalpatsinh Chandansinh         | 380 |
| 56. | PW- 56 - Parthingbhai Pujabhai          | 381 |
| 57. | PW- 57 - Dudhabhai Madiyabhai           | 382 |

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|-----|-------------------------------------------|-----|
| 58. | PW- 58 - Prakashbhai Kalubhai Patel       | 383 |
| 59. | PW- 59 - Bhikhabhai Hirabhai Patel        | 384 |
| 60. | PW- 60 - Bhagirathsinh Narendrasinh Sagar | 388 |
| 61. | PW- 61 - Pravinkumar Prabhatsinh          | 389 |
| 62. | PW- 62 - Hiteshkumar Kalubhai Patel       | 409 |
| 63. | PW- 63 - Dineshbhai Harjibhai             | 411 |
| 64. | PW- 64 - Arvinbhai Becharbhai Asari       | 412 |
| 65. | PW- 65 - Shankarsinh Mangalsinh Parmar    | 420 |

(6) The prosecution have produced the following documentary evidence:-

| Sr. No | Documents                                          | Exh.       |
|--------|----------------------------------------------------|------------|
| 1.     | Panchnama as to place of offence                   | 178        |
| 2.     | Slip of Muddamal Atricle                           | 192 to 206 |
| 3.     | Panchnama of Muddamal Recovery                     | 221 to223  |
| 4.     | Panchnama as to Physical Condition of Accused      | 233,234    |
| 5.     | Panchnama of Muddamal Recovery                     | 236        |
| 6.     | Panchnama of Muddamal Recovery                     | 242        |
| 7.     | Panchnama as to Physical Condition of Accused      | 248 to 250 |
| 8.     | Panchnama as to Physical Condition of Accused      | 257        |
| 9.     | Panchnama of Muddamal Recovery                     | 260        |
| 10.    | Panchnama of Muddamal Recovery                     | 265        |
| 11.    | P.M.note of Cattles                                | 374        |
| 12.    | Panchnama as to Physical Condition of Accused      | 421        |
| 13.    | Panchnama as to Physical Condition of Accused      | 422        |
| 14.    | Panchnama of Muddamal Recovery                     | 423        |
| 15.    | Panchnama of Muddamal Recovery                     | 424        |
| 16.    | Panchnama of Muddamal Recovery                     | 425        |
| 17.    | F.S.L. Report                                      | 426        |
| 18.    | F.S.L. Vadodara Report                             | 427        |
| 19.    | Certificate of authority to Director FSL, Vadodara | 428        |
| 20.    | Report of Section added                            | 429        |

(7) Further statement of the accused are recorded under Section 313 of the Cr.P.C. after closing of prosecution evidence. The accused have denied to commit any offence.

(8) Learned AGP Mr. J. J. Solanki has argued that medical evidence as well as the evidence adduced by I.O. supported the prosecution case and it is reason to believe the said evidences. Learned Advocate for the accused has strenuously argued that oral testimonies of full blooded family members, relatives and

neighbours of the deceased have not supported the prosecution case and hence, the accused is entitled to get benefit of doubt.

**(9) Points of determination**

- i. Whether the prosecution proves beyond reasonable doubt that dated 26<sup>th</sup> June, 2009 during the period between 16:30 hours to 18:00 hours in the evening at village Mokamsinh na Bhevada Ta. Khanpur (Bakor), Dist. Mahisagar all the accused instigated one another and formulated unlawful assembly for the furtherance of common intention to all using the force and violence and all the accused armed with lethal weapon which were sufficient to cause death thereby committed offence under Sec. 147,148 read with Sec.149 of IPC ?
- ii. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused did the act of mischief by fire or explosive substance with intent to cause damage to amount thereby committed offence under Sec.435 of IPC?
- iii. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place, all the accused did the ac of mischief by fire or explosive substance with intent to destroy house thereby committed offence under Sec.436 of the IPC?
- iv. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place, all the accused did the act of dacoity thereby committed the offence under Sec.395 of IPC?
- v. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place, all the accused did the act of wrongful confinement thereby committed the offence under Sec.342 of IPC?
- vi. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place, all the accused did the act of attempting to murder with intention or knowledge thereby committed the offence under Sec.307 of IPC ?
- vii. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused did the act of mischief by killing or maiming cattle of the complainant and thereby committed the offence under Sec.429 of IPC ?
- viii. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused conspired with one another and did an illegal act or an act though not in itself illegal by illegal means caused to be done was an offence punishable under Indian

Penal Code and for furtherance to commit the act pre-meeting of mind was drawn thereby committed the offence under Sec.120-B of IPC?

- ix. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused did the act of driving without having effective licence thereby committed the offence under Sec.3 of M. V. Act?
- x. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused did the act of driving vehicles in contravention of section 3 or section 4 of M. V. Act thereby committed the offence under Sec.181 of M. V. Act?
- xi. Whether the prosecution proves beyond reasonable doubt that above mentioned date, time and place all the accused contravened the Notification issued by authority of Government. Thereby, committed the offence under Sec. 135 of G. P. Act?
- xii. What order?

(10) My findings on the above points are as under with the reasons mentioned herein under.

- i. In negative.
- ii. In negative.
- iii. In negative.
- iv. In negative.
- v. In negative .
- vi. In negative.
- vii. In negative.
- viii. In negative.
- ix. In negative.
- x. In negative.
- xi. In negative.
- xii. As per final order.

### **: REASONS :**

#### **Point Nos. 1 to 11 : -**

- (11) All the points are connected to one another, therefore for the sake of brevity, all the points are discussed jointly hereinafter.
- (12) All the accused were arrested by the Investigating Officer. After completion of entire investigation due to 92 accused involved in this crime. Accused arrested on the different dates, so different supplementary charge-sheets submitted before the learned Magistrate Court and six different cases of committal order

passed by learned Magistrate Court and Sessions case Nos.154/2009, 33/2010, 58/2010, 110/2010, 84/2011, 46/2011 registered by this Court. For the sake of convenience and brevity, all the cases amalgamated by this Court and common evidence recorded by Court for appreciation of evidence as to all those cases. This Court has appreciated evidence commonly and jointly in as much as the facts of all the sessions cases are identical and common.

- (13) Complainant PW-62 complainant Hiteshkumar Kalubhai Patel deposed at Exh.409 that his village publicly known as Mokamsinh na Bhevada, Patel Faliya approximate 32 houses of Patel community are existing wherein all the houses are pakka, tin roof or having roof tiles; all the houses of Patel community are joint and connected and houses adjoining to near the agricultural land and farm. The streets of other community persons are existing and village of complainant situated at lower land level area. According to the deposition of complainant, it seems that on dated 18<sup>th</sup> June, 2009 at Tank Na Bhevada village one dead-body of Savitaben hanging on the Khirni tree which was existing at the farm of Dahyabhai Vajabhai Patel the said farm is publicly known as Dediawala Khetar. The family members, relatives and their community people suspected on the son of Dahyabhai namely Arunbhai as to he was main culprit of Savitaben's murder. The person of patel community made submission before the distinct authority about death of Savita. Complainant supported the facts of the complaint at Exh.409 and categorically stated the complainant came back from Godhra to his village Mokamsinh na Bhevada at 11:00 hours on dated 26<sup>th</sup> June, 2009 and complainant came to know that the people of Savitaben's community went to submit letter before Bakor Mamlatdar for impartial investigation and after submitting letter approximate at 16:30 hours while all the Patel community members were at house, meanwhile male and female member of malivad community came by driving tractor, tempo and bikes; all those people raising shouts "to kill Patel, slaughtering them" as a reason all the persons residing in the Patel Faliya left the houses, locked their houses and reached at nearest mountain. The people of Maliwad community (all the accused) burst at Patel Faliya armed with long handle sickle, axes, lathi-sticks etc. they parked their vehicles and came near their house and courtyard.
- (14) Complainant further deposed that crowd of Maliwad community persons set ablazed the cattle, grass and woods lying in the courtyard and set on fire houses of Somabhai Shankarbhai Patel, Ravjibhai Naranbhai Patel, Kalubhai Lalabhai Patel, Narsinhbhai Laljibhai Patel, Ambalalbai Laljibhai Patel, Kanubhai Morarbhai Patel, Kalubhai Dhulabhai Patel, Bhikhabhai Hirabhai Patel

Muljibhai Khatubhai Patel, Natubhai Ghumabhai Patel at that time police official Dudhabhai and Chunilal who were discharging their duty at Khanpur, police station and deployed at Mokamsinh Na Bhevada village who had informed to Khanpur and Lunawada police station by cellular phone that the crowd became uncontrolled, raising shouts, broken the houses, set houses on fire.

- (15) According to the deposition of complainant, it transpires that the people of Maliwad community looted and acted house breaking and wheat grains kept in the plastic bags were taken by accused and committed the act of house breaking from the house of complainant's brother Prakashkumar and started to set ablaze the houses of other persons of Patel community; wherein Shankarbhai Vajabhai Patel, Janakbhai Dahayabhai Patel, Arunbhai Patel, Dahayabhai Vajabhai Patel, Natubhai Patel, Morarbhai Kuberbhai Patel, Rameshbhai Lalabhai Patel, Somabhai Hirabhai Patel, Mangalbhai Hirabhai Patel, Kalubhai Motibhai Patel and Maniben Wd/o. Kodarbhai Jethabhai Patel. Two houses of Somabhai Kuberbhai Patel made target by accused and the house of Raijibhai Nathabhai Patel and Ganeshbhai Nathabhai Patel were also set ablazed by crowd of Maliwad community. The deployed police officials sprayed tear gas and did fire bullet by revolver. The police officials used force by doing lathi-charge but crowd became uncontrolled. Police officials had caught some persons from crowd and seized their vehicles and complainant lodged the complaint.
- (16) Considering the oral testimony of complainant who is ocular witness had seen the venue of crime as well as occurrence but he stated that crowd was big in size and number of persons involved in the crowd so he is unable to identify the particular person who had played role to commit the crime; whereas in the complaint it had categorically stated the name of all the accused who played key role to commit the offence but in the oral testimony he unable to identify any person who were assailant. 80 to 90 accused charge-sheeted and tried before this court so obviously it is very difficult for complainant to identity all the accused by their particular name but complainant has not identified any single accused while he was stepping into the witness-box. Detailed cross-examination conducted by learned Advocate for the accused and in the cross-examination of complainant stated that the male and female members of his community apprehended so under the terror of accused they fled from their place and left their houses. All the persons to complainant's community reached at the mountain of Dolriya and Vandarved. The distance between venue of crime and mountains is approximately 1.5 to 2 Kms; not only the complainant

has deposed but also people of Maliwad community decided to lodge complaint by complainant so he came forward to lodge complaint and most important admission on behalf of the complainant is that he had not seen and identified the person in the crowd, so complainant declined to accept the facts of identification as to accused during the course of his deposition. Complainant stated that facts of persons whose property and they people became victim but not a single name of any accused denoted in the deposition so it shows that expressly and impliedly complainant supported the accused and such type of oral testimony of complainant are not contemplated weightful evidence. Complainant is the star material witness and he is an advocate by profession and he is knowing each and every consequence about his deposition but he absolutely denied to accept the actual facts of the complaint. The oral testimony of complainant is under the guise of skillful behaviour and complainant is well-aware and well-acquainted with the facts of the complaint; despite he has taken the help of legal devices and attemptss to support the accused in stead of supporting the prosecution story.

- (17) In view of the aforestated oral testimony submitted by complainant during the course of trial, it is pertinent to note that, first of all when 92 accused involved to commit the crime and charge of conspiracy has to be evaluated. The essence of conspiracy offence is the fact of combination of agreement. The agreement may be express or imply, for in part express and in part imply. The conspiracy arises and the offence is committed as soon as the agreement is made and the offence continuous to be committed so long as the combination persist, that is until the conspirational agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. In a criminal conspiracy meeting of mind of two or more person for doing an illegal act is sine-qua-non but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and conduct of the accused.
- (18) The proviso to Sec. 120-A of IPC is important Sec. 120-A and 120-B have brought the law of conspiracy in India inline with the English law by making the overt act on essential when the conspiracy is to commit any punishable offence. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence the offence of conspiracy. The provision under Sec. 120-A and 120-B of IPC read with the deposition of all the witnesses whose statements recorded by police officials during the course of police investigation under Secs. 161 and 162 are to be taken into

consideration not only that but surrounding circumstances, express and imply agreement meeting of mind and depositions of police officials must be taken into consideration as cumulative effect. The conspiracy cannot be evaluated by the oral testimony of one or two witnesses. To decide the ingredients of conspiracy Court has to see the entire evidences submitted by prosecution on record with due care and caution. Mere assemblance of accused would not be contemplated a meeting of mind of agreement amongst accused. In the instant case, complainant supported the facts as to damage suffered by his community members and words to words description averred in his deposition as to damage caused but as far as identification of the accused and assailants those who were star characters and role player to commit offence are concerned, complainant becomes mute. Complainant is the advocate by profession and he is literate person he is knowing each and every consequence as to crime and his deposition.

- (19) The offence of conspiracy cannot be deemed to found established on mere suspicion and surmises or inferences which lack the support of cogent evidence. The offence of conspiracy may be proved by impliedly or expressly conspiracies are secretly planned so sometime it is very difficult to adduce the evidence of secret meeting but surrounding circumstances may be helpful to prove the case.
- (20) In the instant case, number of witnesses cited in the charge-sheet are eye-witnesses so the present case is not based on circumstantial evidence. All the accused were gathered at Mamlatdar Officer, Khanpur to submit the letter for neutral police investigation. No witness has submitted in his oral testimony that the accused was talking of plot to set fire the Patel community's movable and immovable property and it is not proved by prosecution beyond reasonable doubt. There must be proof of that accused who entered into an agreement to do unlawful act is sufficient. The court will be bound to infer that they are not connected and isolated acts but acts are must be been committed by persons agreement made between the accused. Herein this case each alleged conspirator not knew and had not personally communicated with all the rest of accused and persecution fails to adduce any evidence with regards to the unlawful act together people of Malivad community and reached at the Mamlatdar Officer to letter for doing impartial police investigation in respect of the death of their community's daughter, mere gathering is not the conspiracy or meeting of mind. Any solitary person threatens any person of Patel community would not be a matter of conspiracy and the presence of accused at the place of offence are no

condition precedent to prove the charge of conspiracy but meeting of mind every persons are sine-qua-non but in the present case, the ingredients of conspiracy are not prove by prosecution beyond reasonable doubt.

- (21) PW-17 Pankajbhai Raijibhai Patel deposed at Exh.273 he is the eye-witness at the time of occurrence incident in the year 2009 and entire village houses set ablazed but he has categorically stated that how fire was set in the village he does not know. However, he has identified all the accused in the open court but although PW-17 is the eye-witness but not supported the prosecution story and he has not seen any single person to set houses on fire at the time of occurrence and eventually he is star material witness despite turned hostile. PW-18 Somabhai Hirabhai is also eye-witness deposed at Exh.274 the version of PW-18 is half true and he submitted that his house was set on fire but he has not seen any person to commit the crime. PW-18 mainly averred that there was quarrel took place between Patel community and Maliwad community and the root cause of the incident was the daughter of Jivabhai namely Saritaben who was murdered and hanged on the Khirni tree but same time he has stated that "he is not aware of the actual culprit with regards to the death of Saritaben" and he also turned hostile. PW-19 Rameshbhai Bhagabhai Patel deposed at Exh.275 the said witness has seen the crowd persons at scene of crime despite he submitted adverse version in his oral testimony and he also turned hostile. PW-20 Babubhai Ranchodbhai deposed at Exh.276 he is also ocular witness but he turned hostile.
- (22) The statements of following witnesses recorded by Investigating Officer under Secs.161 of CrPC but all those witnesses turned hostile enumerated are PW-20 Babubhai Ranchhodbhai deposed at Exh.276, PW-21 Shankarbhai Vajabhai Patel deposed at Exh.280, PW-22 Muljibhai Khatubhai Patel deposed at Exh.281, PW-23 Bhikhabhai Parsottambhai Patel deposed at Exh.284, PW-24 Kanubhai Morarbhai Patel deposed at Exh.285, PW-25 Mangalbhai Hirabhai Patel deposed at Exh.286, PW-26 Somabhai Kodarbhai Patel deposed at Exh.287, PW-27 Kalubhai Motibhai Patel deposed at Exh.298, PW-28 Natvarbhai Raijibhai Patel deposed at Exh. 299, PW-29 Dahyabhai Ganeshbhai Patel deposed at Exh.300, PW-30 Kalubhai Lalabhai Patel deposed at Exh. 303, PW-31 Kalubhai Dhulabhai Patel deposed at Exh.313, PW-32 Raijibhai Nathabhai Patel deposed at Exh.320, PW-33 Somabhai Shankarbhai Patel deposed at Exh.322, PW-34 Raijibhai Naranbhai Patel deposed at Exh.323, PW-35 Lilaben Dahyabhai Patel deposed at Exh.328, PW-36 Railiben Shanabhai Patel deposed at Exh.329 and PW-37 Kankuben Narsinhbhai Patel deposed at

Exh.345 PW-40 Sangitaben Bhikhabhai Patel deposed at Exh.351 and all the aforesaid witnesses have not supported the prosecution story and eventually they turned and declared hostile witnesses. The deposition of above all the witnesses absolutely adverse to their police statement recorded by Investigating Officer during the course of police investigation under Sec.161 of CrPC. However, of course, the police statement is not substantive piece of evidence and the police statement used as contradiction and omission purpose at the time of appreciation of evidence in criminal trial. In so far as, present case is concerned, all the witnesses mentioned herein above turned hostile and not supported the prosecution story. The oral testimony of all those witnesses would not be considered as a trustworthy evidence some witnesses are important for the prosecution but their adverse oral testimony are not considered as a clinching and cogent evidence all those witnesses have not supported the facts with regards to the 13 years old girl Savitaben hanging on Khirni tree, not only that but all the above mentioned witnesses had also denied to identify the accused and expressed the role of the accused while they were stepping into the witness-box.

- (23) Following panch witnesses examined by prosecution are as under -: PW-1 Patel Bhulabhai Somabhai Patel deposed at Exh.177 who is the second panch as to venue of crime and he squarely supported the facts of panchnama. According to his deposition, it seems that the houses affected by set on fire, utensils and vessels also fired, almirah also burnt, the tin roof of courtyard was set ablazed vehicles household articles furniture, grains, dairy materials and vessels, cows documentary records of dairy, woods and grass, carts, neelgiri tree, roof tiles were also found burning. PW-1 has also stated that coals collected from the venue of crime and seal pack in the Dibba and whatever Dibba collected by police officials sent to the FSL during the course of his deposition the cheat wrapped around Dibba with signature are identified by panch witness and all the procedure of panchnama conducted by the Investigating Officer in the presence of panchas and drawn the panchnama at Exh.178. PW-1 fully supported the facts of panchnama as well as supported the prosecution story along with description of place of offence.
- (24) PW-2 Babubhai Nanabhai Pateliya deposed at Exh.220 and PW-6 Gulabbhai Laxmanbhai Khant deposed at Exh.243 both the panch witnesses as to panchnanama at Exh.220 and said panchnama drawn by Investigating Officer for the recovery of used cartridges at the time firing of bullets. At the time of occurrence according to prosecution story crowd became uncontrolled and

different police officials deployed on the venue of crime and for the order to fire bullets but both the panchs have not supported the facts of panchnama at Exh.222 and after permission of court both the panchas declared hostile.

- (25) PW-3 Satishkumar Bhulabhai Patel deposed at Exh.232 that he called for by Bakor, police station police official to participate as a panch witness on dated 28<sup>th</sup> June, 2009 and second panch witness along with him was Ishwarbhai Pratapbhai and on the next day i.e. on dated 29<sup>th</sup> June, 2009 further police called both the panchas for drawing panchnama. PW-3 further deposed that on dated 28<sup>th</sup> June, 2009 ten accused were present and the physical condition of all those accused panchnama drawn not only that but also wearing clothes and mark of the body also mentioned in the panchnama and accused arrested in the presence of both the panchas. Next day on dated 29<sup>th</sup> June, 2009 when PW-3 participated as a panch witness at that time three males and two females were present and same procedure for all those five accused had been adopted by Investigating Officer. PW-3 supported the facts of panchnama vide Exh.233 and 234.
- (26) In view of the deposition of PW-3, it transpires that the said panch is the Advocate by profession and PW-3 has admitted that the complainant in the present case is also an Advocate and he has completed the LL.B education in the year 2009 and Sanad obtained by him in November,2009. The most important admission made by PW-3 in his oral testimony that he is personally knowing accused (1) Virabhai (2) Ramabhai Virabhai and (3) Bharatbhai Virabhai and all those accused engaged. In the present case, PW-3 is for their defence.
- (27) Being an Advocate, PW-3 was participant as a panch witness and also defending all the three accused whose names has already been mentioned hereinabove so the dual role palyed by PW-3. The role of PW-3 is very contradictory because once he deposed against three accused and other hand he denotes the name of three accused and he has categorically stated still now he is the Advocate of all those accused in the present case so PW-3 is neither trustworthy nor supportive witness for prosecution and his deposition is only for the purpose of achieving his beneficiary goal.
- (28) PW-4 Brijesh Chaturbhai Patel deposed at Exh.235 that he is the panch witness of discovery of weapons but he clearly stated that no object discovered and seized in his presence and he was not reached any place by Govt. vehicle thus he turned hostile and not supported the facts of panchnama vide Exh.236. In fact, according to panchnama six persons namely (1) Chandubhai Hirabhai

Machhar (2) Ashok Maliwad (3) Bharatbhai Somabhai Maliwad (4) Ramanbhai Rupabhai Maliwad (5) Vijay Khumabhai Pagi and (6) Kalubhai Hajurbhai Maliwad all the above six person shown lethal weapons like lathi-sticks and axes to police officials but panchas turned hostile while he was stepping into the witness-box. Likewise PW-5 Mangalabhai Fulabhai Pagi deposited at Exh.241 he is the panch witness of recovery panchnama wooden Bamboo and he also turned hostile and not supported the facts of recovery panchnama vide Exh.242. The second panch of said recovery panchnama is PW-6 Gulabbhai Laxmanbhai Khant deposited at Exh.243 and he also turned hostile and not supported the fact of panchnama at Exh.242 but he is also the witness of the panchnama at Exh.222 mentioned hereinabove i.e. panchnama as to recovery of used cartridges. PW-7 Ashokbhai Parsottambhai Patel deposited at Exh.247 that he is the panch witness to the panchnama at Exh.248, 249 and 250 and he is the panch witness as to arrest of accused but he has not supported the fact of panchnama as to physical condition of accused and arrested accused and the second panch witness PW-8 Jagdishchandra Pratapbhai Barot deposited at Exh.252 and he also turned hostile and identical version averred before the court. PW-9 Rajeshbhai Mangalabhai Patel deposited at Exh.254 and he is also the panch witness of discovery of panchnama at Exh.236 and he also turned hostile and not supported the facts of discovery panchnama. PW-10 Raijibhai Masurbhai Khant deposited at Exh.255 he is also the panch witness of panchnama at Exhs. 222 and 223 and he is panch No.2 and he is also the panch witness of discovery panchnama. PW-11 Rameshbhai Abhesinh Pagi deposited at Exh.256 who is the panch witness of the panchnama at Exh. 257 and said panchnama drawn for the rest of the other twelfth accused as to physical condition. He has not supported the prosecution case and eventually turned hostile. Similarly, the second panch of the said panchnama PW-12 Kantibhai Shanabhai Baria deposited at Exh.258 and he also declared hostile. PW-13 Govindbhai Devabhai Parmar deposited at Exh.259 and PW-14 Dasarathbhai Balusinh Parmar deposited at Exh.262 both the panchas with regards to the facts of panchnama at Exh.260 as to discovery of lethal weapons like lathi-sticks, axes, long handed sickle, Farsa, Bamboo stick etc. they turned hostile. PW-15 Khatubhai Ratnabhai Machhar deposited at Exh.264 and PW-16 Vadhabhai Laxmanbhai deposited at Exh.268 and both the panchas as to facts of the panchnama at Exh.265 and they have not supported the facts of the discovery of muddamal lethal weapons and other twelfth accused discovered to muddamal in the presence of panchas but panchas turned hostile. PW-15 and PW-16 are also the panch witnesses as to panchnama vide Exh.266 which relates to recovery of weapons from rest of seventy accused and both the panchas turned hostile. As

far as the panchnama at Exh.266 is concerned, PW-15 and PW-16 are also the panch witnesses of muddamal vehicle used at the time of occurrence and blue colour tractor bearing No.GJ-17-D-7697 seized in presence of both the panchas and facts of panchnama at Exh.267 drawn by police official but PW-15 and PW-16 turned hostile and not supported the facts of the panchnama vide Exh.266. When panchas declared hostile by the permission of the court does not mean that whatever procedure followed by Investigating Officer while drawing panchnama are false and concocted when longest and due procedure adopted by Investigating Officer while drawing panchnama so court cannot doubted on the procedure followed by police officials and the ratio laid down by Hon'ble Apex Court in the case of **N.C.T of Delhi V. Sunil 2001 2001 Cri. Lj Page No. 504** required to be considered which fully supports the prosecution story as under :

"There is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that search is made to find out a thing or document which the searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. (Para 18)

"It is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact panchnama that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. (Para 20)

Hon'ble High Court of Gujarat laid down the ratio in the case of 2016 (2) reiterated aforesaid principle in the case of **State of Gujarat & Ors. v. Munna @ Rajaf Farid Shah GLR Page No. 1809.**"

- (29) PW-35 Lilaben Dahyabhai Patel deposed at Exh.328 who is living at Mokamsinh na Bhevada along with his family and at present she is discharging her duty as an Aanganwadi worker. On dated 18<sup>th</sup> June, 2009 when she went to attend the meeting of Aanganwadi workers and she returned back at 16:00 hours at her home then she came to know that one dead-body was hanging at her farm on the Khirni tree and said dead-body was identified as daughter of Jivabhai Hirabhai namely Savitaben and thereafter police officials of the Bakor, police station taken her husband to police station and after coming at her home she could not meet her husband but thereafter on dated 26<sup>th</sup> September, 2009 while she was at her home and when she came out of her house no person at her village, thereafter two to three persons seen at the rear side of her home and all those persons were very far from her, so she could not identify, one person was identified by PW-35 was namely Nathabhai Bhalabhai and at present he died thereafter Nathabhai Bhalabhai rushed and ran behind her with long handed sickle (in Gujarati known as Dhariya) having in his hands and thereafter she called police station and eventually police officials arrested Nathabhai and taken him to police station and thereafter she went at her father's house; after leaving village she had seen the picture of village and the picture was very terrible and entire village destroyed due to set on fire. She was also suffered damage Rs.6,00,000/- to 7,00,000/-. Her television, couch, well-pump, important documents, LPG gas bottle also damaged by setting on fire. PW-35 further deposed that she had not seen any accused. She admitted in her deposition that the one complaint lodged before the present incident it was for the death of Savitaben who was found hanging on the Khirni tree and before her death she became victim of rape but said facts are not proved by prosecution beyond reasonable doubt. Looking to her entire deposition, it transpires that Nathabhai Bhalabhai having long handed sickel (in Gujarati known as Dhariya) in his hands and running behind her but PW-35 has not stated any single words about the final outcome of act of Nathabhai who followed PW-35. PW-38 Shukhiben Mangaldas Patel deposed at Exh.349 she stated that she came to know that dead-body of Savitaben hanging on the Khirni tree and when incident happened she was slipping at her home incident occurred at noon time, her husband was also at her home and Dahyabhai Vajabhai came at her home and called her husband and told that all the persons of village came and called you so her husband along with Somabhai Kodar, Kalu Shankar, Dahya Gane, Pankaj Rayaji, Bhikha Parshotam, Kanu Morar, Ramesh Bhaga as well as Hirabhai Somabhai also accompanied to her husband and all those person went between 10:00 o' clock to 11:00 o' clock and returned back between 2:00 o' clock to 3:00 o' clock and husband of PW-38 conveyed her about the condition of hanging

dead-body thereafter on dated 20<sup>th</sup> Virabhai Bhalabhai came at her street and the people of Maliwad community closed and obstructed the egress ingress way to enter in village by putting stones. Road towards the entry of village closed for the purpose of police could not enter inside the village. After closing the way to entry of village PW-38 along with neighbours of her street they are working in their farms. The people of crowds present at the time of occurrence having Dhariya, Axe, Kerosene Carba and their faces wrapped by cloths, so it was impossible to identify them ninety five mango trees cut down with axe and her home also set on fire. PW-38 had explained in her deposition that the persons present in the crowd having lethal weapons were not identified by her because their faces were wrapped with cloths but she stated that all the persons present in the court were present at the time of occurrence and approximates 700 to 800 persons were seen by her and they were far from her but due to distance she could not identify. She was approximate two agricultural farms distance far from the scene of crime and she came to know by tell tell story that person which were present at the time of occurrence, all the household articles lifted up by accused and approximate ten to twelfth houses set on fire and destroyed. The maximum damage caused to her property and the ornaments of her daughter. Her daughter-in-law were looted by accused and her motorcycle also set on fire, almirah, home flour-mill, television were also demolished by fire the cattle habitants was intact but the grass godown which is publicly known as Motu Kodhiyu in the village also set on fire. The grains in the drum were burnt and became black, toor around 38 Kgs were burnt by fire. Police official had arrested Somabhai Kodar and Atulbhai from the scene of crime and subsequently they were released by police. According to the deposition of PW-38 Savabhai Kalubhai, deceased Nathabhai Bhalabhai and Virabhai Bhalabhai came at her village and threatened to the people of village due to the incident with regards to the Savitaben mentioned hereinabove. The dead-body of Savitaben was kept intact for two days after her death however, PW-38 has first time deposed in the open court that Virabhai, Savabhai Kalubhai threatened to the people of village but said facts are not revealed from the police statement of PW-38 recorded by Investigating Officer during the course of investigation. The facts of all those three persons are exaggerated version of PW-38. There would be the enmity between Maliwad community and Patel community. The facts mentioned hereinabove.

- (30) As far as the credibility of oral testimony of PW-38 is concerned, how can she submitted that all the accused whose faces were wrapped with cloths at the time of occurrence. No test of identification parade had been taken place. When PW-

38 was far from two agricultural farms to the venue of crime so the distance are also very long but she told before the court that by tale tale story she came to know the presence of accused and the deposition of PW-38 is absolutely a weakest piece of evidence known as hearsay evidence and major contradiction and omission found in her deposition her oral testimony creates a number of doubts about inculpatory role played by the accused. The court cannot expect from the rustic person of rural area who mentions each and every facts happened at the time of occurrence as photographic memory and video cassette player but to appreciate the evidence under the principle of beyond shadow of doubt, the ocular witness has to denote the crux of the incident seen by her or him. In the present case, charge leveled against the accused under different sections of IPC and having regards to the entire evidence adduced by prosecution along with documentary and oral format most of the cited witnesses in the charge-sheet having the category of ocular witness. The present case is not based on circumstantial evidence no witness has identified any individual person who was role player for furtherance to commit the heinous crime. By and large, most of the witnesses stated in their respective depositions that accused along with big crowd came at village they having lethal weapons, inflammatory liquids and the crowd gathered at village and shaped heinous crime and brutally damaged to the houses and property of Patel community people. It is not necessary who were assailants but when entire crowd was responsible to commit the act, at this juncture the witnesses have to mention the star role player who gave the shape to commit the crime. Similarly, PW-39 Rukiben Lalbhai Patel deposed at Exh.350 almost her deposition is as identical as the oral testimony of PW-38 and she also unable to identify any accused who had participant to commit the crime. PW-39 has also focused in her deposition about the damage caused to the people of Patel community with regards to the property cattle grains etc.

- (31)** The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of ocular 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 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.

When eye witness is examined at length it is quiet possible for her to make 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.

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 not committed by investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

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.

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.

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.

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.

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.

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 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.

A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount 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 contradiction that witness.

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

**2014(1) G.L.H.574 in case of Kabhaibhai @ Kaliyo Punambhai Parmar V. State of Gujarat.**

- (32) Looking to the above dictum, it is the duty of the prosecution to adduce the evidence before the court by way of clinching and cogent evidence but in the present case, no minor discrepancies and minor contradiction found in the deposition of ocular witnesses but major contradiction since in the oral testimony of ocular witness. PW-40 Sangitaben deposed at Exh.351 being a ocular witness she has not uttered any single words about the incident and she also turned hostile. PW-41 Satishbhai Somabhai Patel deposed at the Exh.352 that he came to know about occurrence by telephonic talk from his father and at the time of incident he was at Ahmedabad and approximate Rs.1,00,000/- damage was caused due to his house set ablazed on fire. PW-42 Lalabhai Narsinhbhai Patel deposed at Exh.353 that when incident took place he was living at Chapari village and he got the information about the occurrence but most important averments in the deposition of PW-42 that his mother-in-law was alone at home and mischievous crowd locked the house from outside and set her mother-in-law's house on fire. The police official had broken the rear side of the door of the house of mother-in-law and PW-42 brought her outside the home with coat and after getting above information PW-42 along with his son Suresh immediately reached at Mokamsinh Na Bhevada and shifted her mother-in-law at safe place. PW-42 is not the ocular witness but he managed to save her mother-in-law but oral testimony of her mother-in-law was not adduced by prosecution. The mother-in-law of PW-42 is the victim but why and how prosecution has not examined the same senior citizen old lady and missed the chance to adduce cogent evidence before this court. PW-44 Jayantibhai Shankarbhai Patel deposed at Exh.363 at the time of occurrence he was serving at Vadodara city and he came to know about the incident by telephonic talk from

his elder brother Somabhai and on the next day he reached at his village and his house was not damaged but cart was burnt, door of the house, fan and grill set on fire and damaged. Virabhai, Shivabhai, Bhembhai, Kalubhai they belongs to his village so he can identify the accused. PW-45 Bhuriben Rayajibhai Patel deposited at Exh.367 that she is 78 years old lady and she could not identify the accused because she could not see and hear properly but court has taken due care to persuade actual occurrence although she cannot state that actual facts properly by gesture she could not be submitted the facts. However, PW-45 is not star material witness because she came to know that the people of Malivad community came her village having lethal weapons and she flee from her house as it is and went to her farm so the police statement under Sec. 161 of CrPC of said witness are not as a ocular witness and she had seen the incident far from and subsequently at midnight she came at her home so being a 78 years old lady she could not averred properly far from at her agricultural farm. PW-46 Bhupendrabhai Rayajibhai Patel deposited at Exh.368 that at the time of occurrence he was at Vagodiya factory and he turned hostile. PW-47 deposited at Exh.369 that at the time of occurrence he was carrying out the catering work at Surat city and he came to know the information about occurrence from his telephonic talk and he also turned hostile. PW-48 Dahayabhai Vajabhai Patel who is living retired life along with his family at Mokamsinh Na Bhevada deposited at Exh.370 that his elder son Arunbhai being the profession of advocacy and he is having the land bearing No.2 wherein 3,000 Nilgiri plants existing and in other agricultural farm approximate 275 mango trees existing at the time of occurrence he was at Surat city and he came to know by telephonic talk by Ashok Kalidas. PW-49 Natwarbhai Rupabhai Patel deposited at Exh.371 that he was also living at Surat city and on the next day he had seen the actual facts of the incident.

- (33) PW-50 Jitendrakumar Motibhai Patel deposited at Exh.373 that he was discharging his duty as a veterinary doctor at Khanpur taluka meanwhile he came to know the written information about burning of cattles and in pursuant to that information he came at Mokamsinh Na Bhevada village on dated 27<sup>th</sup> June, 2009 and being a veterinary doctor he performed the post-mortem of five animals and PM report are as under:

Cow-1 : skull bone is seen & whole body mass seen  
Cow-2 : skull bone & whole body mass seen  
Cow-3 : skull bone & whole body mass.  
Buffalo : skull bone & burnt horn & body mass  
Buffalo : skull bone & burnt horn & body mass.

- (34) PW-50 had performed the post-mortem of five animals but PW-50 has not prepared the proper format for the post-mortem of cattles it is the duty of the

PW-50 to fill up the information with regards to the interior as well as exterior injuries sustained by cattles. PW-50 fairly admitted that he has not filled up the information about the dead-bodies of five animals in the proper format but in the office register all the columns with regards to the post-mortem were filled up ultimately PW-50 opined that all the "above mentioned five animals are burnt, the outer skin of all animals is slugged totally and five animals died due to accident burn."

- (35) Looking to the deposition of PW-50, it is very clear that animals were burning due to set on fire most of the witnesses have stated that they flee from their dwelling house due to terrible atmosphere created by mischievous crowd, but no witness come forward before the court to mention the name of any assailants or leader of the crowd so merely corroborative piece of evidence on behalf of expert are not sufficient to prove the case beyond reasonable doubt.
- (36) PW-51 Muskeshkumar Ranchodbhai deposed at Exh.376 that he was discharging his duty at Khanpur, police station on dated 18<sup>th</sup> June, 2009 the people of Malivad community doubted on the son of Dahyabhai namely Arunbhai as to death of Savitaben so the people of Malivad community assembled at Mamlatdar officer at Bakor to submit the letter of impartial investigation. The police officials of Khanpur were deployed for maintaining law and order surrounding Mamlatdar Officer wherein PW-51 himself with Mansinhbhai Somabhai, Babubhai Dalsukhbhai, Ambalal Chaganbhai and other police officials were present at Mamlatdar Officer from 8:00 o' clock in the morning. Some leaders of community assembled and submitted the letter to Mamlatdar and thereafter the crowd to Malivad community scattered. The police officials had doubted on the people of Malivad community that they would commit the offence, so the police officials followed to the people of Malivad community persons. PSI A. B. Asari and police officials mentioned hereinabove departed from Khanpur to reach at Mokamsinh Na Bhevada village. The people of crowd made obstacles by putting stones and blocked the road the police officials had removed the obstacles i.e. stones and thorns and reached at village where incident took place. Meanwhile the people of crowd set house and grass on fire. To see the police officials, the people of crowd left the place and old aged woman who is the mother of Dahyabhai Vajabhai Patel locked from outside and set ablazed her house and police officials brought her out and shifted her at safe place. The crowd was uncontrolled, so the police officials did lathi-charge and police official Parthingbhai Punjabhai as well as police constable Dalpatsinh Chandansinh spreaded tear-gas cell. The crowd was not under control, so by the instruction of superior officer of police as well as

Mamlatdar two round fired. Ten persons from the crowd were arrested by the police at the scene of crime and all the persons participants in the crowd belongs to Mokamsinh Na Bhevada, Karanta village, Kanod village, Jetpur village as well as of Bhevada village. Crowd looted grains, household articles and causing damage to the movable and immovable property of Patel community. The people of the crowd having lethal weapons and came by driving vehicle at the place of occurrence. Being a police official PW-51 has stated the root cause of the incident was the son of Dahyabhai raped on the daughter of Jivabhai thereafter pressed the neck and eventually flee from place. The main reason and reaction of the Malivad community as to allegation of rape and death of Savitaben. PW-52 Babubhai Dalsukhbhai who is also the member of the deployed police officials' team deposed at Exh.373 and his deposition is as identical as the oral testimony of PW-51. PW-53 Amabalal Chaganbhai who was discharging his duty as a head constable on dated 26<sup>th</sup> June, 2009 and he was also one of the members of the police squad team those who followed the crowd of people of Malivad community and reached at the Mokamsinh Na Bhevada and his deposition is also as same as PW-51 and PW-52. PW-54 Mansinh Somabhai deposed at Exh.379 that he was also head constable at the time of occurrence and deployed in the team of police officials. PW-55 Dalpatsinh and Chandansinh deposed at Exh.380 that his role is as a witness those who followed the crowd of Malivad community. PW-56 Parthingbhai Punjabhai deposed at Exh.381 that he was also discharging his duty at Lunawada, police station on dated 26<sup>th</sup> June, 2009. PW-57 Dudhabhai Madiyabhai deposed at Exh.382 that he was also discharging his duty as a head constable at Khanpur, police station, so police officials witnesses PW-51 to PW-57 are the member of police squad and the squad reached at the Mokamsinh Na Bhevada at the time of occurrence and all those witnesses had seen the some parts of the occurrence and arrested ten persons from the spot so their depositions are not merely contemplated as a police witness but latter part of incident seen by them but all those police witnesses cannot be stated that who was the star character and lead role player or main assailant so the entire version of all those witnesses could not be dispelled but the some parts of their deposition must be taken into consideration. However, all those police witnesses are not come within the category of victim so their oral testimony would not more score over them the victim witness those who lost their valuable property like cattle and movable and immovable property but oral testimony of police officials cannot be discarded as straight-jacket and iron jacket formula to bring the home offence mentioned hereinabove as well as charges leveled against accused. The deposition of all the witnesses evaluated as a whole and cumulative manner the

time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Indian Evidence Act, 1872. Thus, there is no legal impediment in convicting a person on the sole testimony of a single witness.

- (37) PW-58 Prakashbhai Kalubhai Patel deposed at Exh.383 that at the time of occurrence he was doing agricultural work at his farm and he was resideing at Pandarvada village and distance between Pandarvada village and Mokamsinh Na Bhevada is 20 to 25 Kms. And he has not seen the incident and he also turned hostile. PW-59 Bhikabhai Hirabhai Patel deposed at Exh.384 the he is not aware and acquainted to the fact of occurrence and on the day of incident he was at High Court of Gujarat and not seen the incident.
- (38) PW-60 Bhagirathsinh Narendrasinh Sagar who was discharging his duty at DSP Office since dated 16<sup>th</sup> March, 2009. At the time of occurrence he was on the same duty. At present PW-60 is the P.I. at Surat and as on dated 26<sup>th</sup> June, 2009 he was also at Mamlatdar Officer along with police squad DySP Katara, PSI, A. B. Asari, PSI Chouhan along with all the police officials. The police staff of Lunawada, Bakor, Kadana and Kothamba police station police officials joined with them at the seen of crime police fired five round and the crowd ran towards the open farm at the time of leaving spot. Police officials had arrested some persons wherein (1)Bharatbhai Mahida (2) Bharatbhai Pagi (3) Somabhai Pagi (4) Somabhai Malivad (5) Laxmanbhai (6) Dhudabhai (7) Ghalabhai Malivad (8) Mangalbhai as well as three other persons. Total eleven persons were arrested. PW-60 fairly admitted in his oral testimony that first time he visited Mokamsinh Na Bhevada at the time of occurrence, before that he had never visited the same village and most important admission of PW-60 that no person had been arrested by him during his visit at Mokamsinh Na Bhevada on the day of occurrence. PW-61 Pravinkumar Prabhatsinh deposed at Exh.389 that he was also accompanied with police official squad and his deposition also as identical as other police constable submitted hereinabove so to avoid the repetition his oral testimony is not reproduced herein this case.
- (39) PW-64 Arvindbhai Becharbhai Asari who was discharging his duty as a PSI in the Bakor, police station on the day of incident took place and complainant PW-62 submitted complaint after lodging complaint for registering the offence the said complaint sent towards PSO Dineshbhai Harjibhai. PW-63 Dineshbhai Harjibhai deposed at Exh.411 that he had registered the complaint as Bakor, police station (I) C. R. No.60/2009 under Secs. 147, 148, 149, 435, 436, 395, 120B, 342, 307 as well as 429 of IPC along with the offence registered under

Secs. 3, 181 of M.V. Act and under Sec.135 of G. P. Act and complaint sent to the PSI S. M. Parmar for investigation. PW-65 Shankarsinh Mangalsing Parmar had conducted the entire investigation with regards to the offence registered hereinabove. PW-65 had drawn the panchnama as to scene of crime and as per the opinion of FSL Officers spot visit the sample collected on the scene of crime and panchanama drawn and recorded the statements of witnesses, drawn the inquest panchnama, discovery of panchnama and other panchnama cattle succumbed to burn injuries. So the post-mortem of animals was also conducted by veterinary doctor and obtained the post-mortem report. PW-65 has submitted the charge-sheet against all the accused. The mischief of fire is the generally called in common parlance as arson. Arson is an offence which ordinarily will attract a term of imprisonment by reference to the gravity of the crime and the sequence. It is not a simple property offence. Sec.435 of IPC connotes "mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause, damage to any property" and Sec.436 of IPC is "the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for custody of property" mischief by putting fire has been contemplated in both the above sections. Mischief has been defined in Sec.435 and Sec.436 of IPC is attracted. When the mischief caused results in destruction of a building. The word 'building' does not suggest that it should be either be brick-built or mud-built or a building of some such durable material.

- (40) Considering the admission of complainant, it clearly shows that the complaint had not seen how the actual fire took place. The allegation in the present case was that accused person had set fire to dwelling house of informant and people living at village Mokamsinh Na Bhevada. Their property and house had set fire. Cattle also succumbed to burn injury but being a star material witness complainant did not support the prosecution case and other witnesses testified that most of the witnesses has seen the members of crowd fleeing from the scene but this fact was not corroborative by any independent witness. Mere police officials submitted in their oral version that ten person arrested on the spot at the venue of crime are not sufficient to charge levelled against accused when 65 total witnesses including police officials and expert veterinary doctor examined by prosecution but except police witnesses, by and large, most of the witnesses have not supported the prosecution case. One or two witnesses stated the name of two to three accused but role played by those accused are not explained by them during their oral testimony. Court should be circumspect and should look for corroboration either direct or circumstantial number of persons

committed arson. The oral testimony of the witnesses highly inconsistent to their police statement recorded under Sec.161 of CrPC usually when a person sets fire what he does that he sets fire and immediately runs away so that he may not be caught or recognised but in the present case the people of crowd must have run away immediately after lighting fire and complainant must have to know about the fire after the movable and immovable property as well as cattle were ablazed in the present case, it was therefore not possible for the witnesses to recognise the culprit because the people of crowd left the spot and all the victims and witnesses ran away to put their house intact in the day time and the victim and witnesses had not taken care to lock their houses but no witness had state that by whom uttered the threatening language as "Maro Kapo" when the people of Patel community turned up and left their movable and immovable property, so it is very difficult to determine the actual role player who committed crime. Some police officials deposed that ten to eleven persons caught and arrested at the place of offence and they tried to run away but such type of version are not sufficient to decide the inculpatory role played by all those ten to eleven persons. Under the guise of curiosity the people of rural area and village people gathered to see the actual scenario happens in their village and mere running away after seeing police and same time police caught and arrested those persons are not considered as a assailants. The deposition of police are not such as all the persons present in the village and all those participants for furtherance to commit the offence. Neither police witnesses nor victim witnesses nor other witnesses had seen the particular person who committed the act of arson. Mere speculation or conjuncture would not be a matter of clinching evidence.

**(41)** The seventy eight years old lady was present at her dwelling house and crowd had locked her house and arson the dwelling house and charge is under Sec.307 of IPC with regards to the attempt to murder. Mens rea required to commit the offence for attempt to cause death as to mens rea the following characters are important :-

- i.** There is a presumption of law that mens rea is required before a persons can be held guilty of a criminal offence;
- ii.** The presumption is particularly strong where the offence is "truly criminal" in character;
- iii.** That the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication of effect of statute;
- iv.** The only situation where the presumption can be displaced is where the statute is concerned with an issue of social concern and public safety is such a concern;
- v.** even where a statute is concerned with such an issue, the presumption of mens rea stands; it can also be shown that the creation of strict liability will be effective to promote the objects of the statute, *Gammon (Hongkong) v. Attorney General*,

**1985 Law Reports of Commonwealth (Cr) 439.** a case of Privy Council. 'Actus reus' is the action causing the effect of the mind of victim. 'Mens rea' is the intention to cause that effect. For, offence of assault both the elements are necessary. When the actus reus of the accused is to drive the complainant party from field, the intention is not for assaulting. No offence is made out ***Heram Saikia v. Laboram Saikia, (1987) 1 Crimes 319 (Gau).***

- (42) Attempting to commit murder under Sec.307 of IPC the court has to see that whether the act irrespective of its results was done with the intention or knowledge and under circumstances mentioned in the sections. The intention or knowledge of the accused must be such as is necessary to constitute murder without this ingredient being established. There can be no offence of attempt to murder under this section; the intention precedes the act attributed to accused. Therefore, the intention to be gathered from all circumstances and not merely from the consequences that ensue the nature of the weapon used. The manner in which it is used, motive for the crime, must be taken into consideration to determine the intention to constitute an offence under Sec.307 of IPC. The intention or knowledge must be such as necessary to constitute murder intending which is a state of mind can never be as a fact it can only be deduced or inferred from other facts. As far as the present case is concerned 78 years old lady had not sustained any injuries. When 78 years old lady's dwelling house locked from outside and the act of arson was done which is absolutely a case as to attempt to murder but by whom such act was done is not proved by prosecution and not any single witness uttered while he/ she was stepping into the witness-box that who locked dwelling house from outside and set the house on fire. Fortunately the door of rear side of house was opened and she was brought out and was shifted to safe place and her valuable life saved but the said act of crowd was heinous but when appreciation of evidence in criminal trial and case having 92 accused so the role of person must be attributed by witnesses during the course of deposition but unfortunately no witness stated the name of any accused or any person to prove the case under Sec.307 of IPC. The role played by particular person or persons must be established merely stated that crowd came and committed the act are not sufficient so the ingredients under Sec.307 are not proved by prosecution beyond reasonable doubt.
- (43) In so far as the offence of dacoity under Sec.395 is concerned, the participation of at least five members is necessary to constitute the offence of dacoity. The definition of dacoity under Sec.391 of IPC denoted as under :

When five or more persons conjointly commit or attempt to commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or

attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

(44) In view of the above section robbery is five or more persons are the main ingredient. There is no particular definition of robbery has been given in the entire Indian Penal Code and the offence of robbery commits either by theft or by extortion. When the big crowd gathered and reached at the village of Mokamsinh Na Bhevada at the time occurrence and according to the oral testimony of witnesses some have stated that accused wrapped with clothes on their faces so test identification parade are necessary but not identification parade had not conducted by Executive Magistrate or Investigating Officer had not arranged the same. The most of the victims and witnesses ran away from their respective houses at the time of incident and all those victims and witnesses hidden themselves behind the mountain and some witnesses reached at their farm. As the incident occurred in the day light, at this juncture Investigating Officer has not arranged test identification parade when 92 accused along with other people crowd came at the spot according to the prosecution story and looted the ornaments, grains etc. but during the course of investigation no muddamal of stolen movable property were recovered. Arson the movable and immovable property including vehicles and cattle are not come within the ingredients under Sec.397 of IPC so the court has to see the ingredients of robbery as well as provision of law with regards to the dacoity. Sometimes, it is very difficult for officer to collect the direct evidence as to robbery offence but immediate recovery of looted muddamal must be helpful to the prosecution to prove its case beyond reasonable doubt. Herein this case, no muddamal recovered involved in committing the crime under Sec.395 of IPC so the direct or circumstantial evidence are not in favour of prosecution case.

(45) As far as Secs. 147, 148, 149 of IPC are concerned, first of all courts has to see the ingredients of rioting under Sec.146 of IPC and secondly to see the act of rioting armed with deadly weapon and thirdly court has to see the ingredients of unlawful assembly under Sec.141 of IPC and fourthly the every member of unlawful assembly whether guilty of offence committed in with common object?

**Ingredients.** - An 'unlawful assembly' is an assembly of five or more persons, if their common object is-

1. to overawe by criminal force

(a) the Central Government, or

(b) the State Government, or

(c) the Legislature, or

(d) any public servant in the exercise of lawful power;

2. to resist the execution of law or legal process;
3. to commit mischief, criminal trespass, or any other offence;
4. by criminal force;
  - (a) to take or obtain possession of any property, or
  - (b) to deprive any person of any incorporeal right, or
  - (c) to enforce any right or supposed right;
5. by criminal force to compel any person-
  - (a) to do what he is not legally bound to do, or
  - (b) to omit what he is legally entitled to do.

(46) The aforestated ingredients read with Sec.146 of IPC

- (a) That there was an unlawful assembly;
- (b) That accused shared the object of such an assembly;
- (c) That such an unlawful assembly was commanded (ordered) to disperse in accordance with law;
- (d) That the accused joined or continued in such unlawful assembly even after it was ordered to be dispersed;
- (e) That the accused so joined or continued knowing that the said unlawful assembly was ordered to be dispersed.

(47) In rioting case, there must be cogent and reliable evidence regarding specific parts played by accused persons for furtherance to commit the offence of rioting the planned manner attack is essential. No evidence adduced by prosecution regarding to specific parts played by accused persons. The people of crowd cannot be said to be a specific part played by the accused. Similarly, the charge of mischief are not proved by prosecution the common object of the 92 accused along with the people of crowd are not proved by prosecution beyond reasonable doubt and discussed hereinabove prosecution fails to prove both the ingredients of Secs.141 and 145 of IPC and ingredients under Secs.148 and 149 are not proved from discovery or recovery of deadly weapons are not sufficient to prove the case under Secs. 148 and 149 of IPC.

(48) The definition of wrongful confinement has been defined under Sec.340 of IPC wrongful confinement restrain the exception to Sec.339 of IPC is also applicable in the case of offence under Sec.342 of IPC because to be a wrongful confinement the offence primary answer the offence of wrongful restrain. The prosecution has not proved that how wrongful restrain made by accused and by whom did act of wrongful restrain no wrongful confinement so of course, proved by prosecution mere assemblance of crowd are not come within the purview of wrongful restrain and wrongful confinement no corroborative or independent witnesses supported the facts as to wrongful restrain and wrongful confinement.

(49) The discussed hereinabove the charge leveled against the accused are mischief by killing cattle but how? by whom? and when? The five animals killed by

arson are not proved. So ingredients under Sec.429 are also not proved by prosecution.

- (50) To prove the case under Sec.135 of G. P. Act, prosecution has to examine the concerned Officer of District Magistrate Office and it the duty of the prosecution to prove the contravention made by accused as to notification issued by district Magistrate for Hathiyarbandi and prosecution has to prove the existence of notification and if yes, prosecution has to prove the facts of wide publishing of said notification. No employee or concerned person discharging duty in the Collector Office was examined by prosecution and no notification published in the newspaper not only that but local police has not send the copy of the said notification to Collector Office also. Incident was occurred inside the farm and no allegation as to incident happened in the public place so ratio laid down by Hon'ble High Court of Gujarat in case of **Bai Shanta Shamalbhai & Ors. v. Union of India 2000(2) GLR Page No. 285** it is held that according to Sec. 37(1) of Gujarat Police Act, 1951 it is desirable to publish the notification issued by District Magistrate merely published in official State Gazette is not called a wide publication. The prosecution fails to adduce satisfactory evidence before the Court and accused had not armed with the weapon in public place but when existence of the notification not proved by prosecution beyond reasonable doubt. So my reply for the point Nos.1 to 11 is in negative.

**Point No :- 12**

- (51) Having thus regards to the contention raised by rival parties and having considered the evidences adduced by prosecution along with framing of charges against the accused, it is pertinent to note that prosecution fails to prove that on dated 26<sup>th</sup> June, 2009 during the period between 16:30 hours to 18:00 hours in the evening at village Mokamsinh na Bhevada Ta. Khanpur (Bakor), Dist. Mahisagar all the accused instigated one another and formulated unlawful assembly for the furtherance to common intention to all by using force and violence and also fails to prove that all accused armed with lethal weapon which are sufficient to cause death as well as accused did the act of mischief by setting fire the movable and immovable properties with intend to destroy house also prosecution fails to prove that act of dacoity committed by all the accused and wrongful confinement of victims and killing or maiming cattle the prosecution miserably fails to prove the pre-meeting of mind and conspiracy amongst all the accused. As far as section under M. V. act are concerned prosecution also fails to prove that at the time of occurrence all the accused did the act of driving without having effective licence and contravened notification issued by Government and also fails to prove the accused armed with deadly

weapons and contravened notification issued by District Magistrate. In view of the above all the accused are entitled to get the benefit of doubt. Hence I pass the following final order for point No.12.

**- : ORDER :-**

- (1) All the accused namely (3) Somabhai Masurbhai Malivad, R/o. Karanta, Ta.Khanpur, (4) Galabhai Vechatbhai Malivad, R/o. Karanta, Ta.Khanpur, (5) Laxmanbhai Rupabhai Malivad, (6) Dhulabhai Lembabhai Malivad, (7) Mangalbhai Kesrabhai Malivad, All R/o. Bharod (Kakachia), Ta. Khanpur, (8) Somabhai Gobarbhai Pagi, R/o. Jetpur, Ta. Khanpur, (9) Bharatbhai Ranchodbhai Meda, R/o. Meda na Muvada, Ta. Khanpur, (11) Bhagvanbhai Somabhai Damor, R/o. Kalakhetra, Ta. Khanpur, (12) Revabhai Galabhai Malivad (13) Harishbhai Arjunbhai Malivad (14) Shanabhai Galabhai Malivad (15) Arvindbhai Somabhai Malivad (16) Babubhai Kalubhai Malivad (17) Kalubhai Bhurabhai Malivad (18) Nareshkumar Ramabhai Malivad, All R/o. Talpat na Bhevada, Ta. Khanpur, (19) Shanabhai Hirabhai Malivad, R/o. Mokam sinh na Bhevada, Ta. Khanpur, (20) Shaileshbhai Lalabhai Malivad, (21) Dahyabhai Rupabhai Malivad, (23) Babubhai Dhulabhai Malivad, (24) Lalabhai Nanabha Malivad, All R/o. Talpat na Bhevada, Ta. Khanpur, (25) Shanabhai Galabhai Damor, R/o. Kala Khetara, Ta. Khanpur, (26) Arjunsinh Vajesinh Malivad, R/o. Mota Khanpur, Ta. Khanpur, (27) Arvindsinh @ Bako Dasrathsinh Virpara, R/o.Virpura Na Muvada, (Kanesar) Ta. Khanpur, (28) Vasantkumar Kantilal Pandya, R/o. Maiyapur, Ta. Khanpur, (29) Mangalbhai Bhagabhai Malivad, R/o. Kaslavati, Ta. Khanpur, (30) Dhulabhai Motibhai Malivad (31) Ramanbhai Rupabhai Malivad (32) Vijaykumar Khumabhai Pagi, all are R/o. Kanod, Chana Shero Falia, Ta. Khanpur (34) Kalubhai Hajurbhai Malivad R/o. Bamroda, Ta. Khanpur (35) Galiben W/o. Virabhai Bhalabhai Malivad R/o. Tanka na Bhevada,Ta. Khanpur (36) Revaben W/o. Motibhai Bhalabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (37) Ashokbhai Kanabhai Malivad R/o. Tanka na Bhevada, Ta. Khanpur (38) Bharatbhai @ Arvindbhai Somabhai Pagi R/o. Karanta, Ta. Khanpur (39) Chandubhai Hirabhai Machhar R/o. Naroda pete Umara, Ta. Khanpur (40) Jashvantbhai Bhathibhai Malivad (41) Shantaben W/o.Kanabhai Sardarbhai Malivad (42) Minaben W/o. Hirabhai Sardarbhai Malivad all are R/o. Tank na Bhevada, Ta.Khanpur (43) Shankarbhai Masurbhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (44) Sardarbhai Bhalabhai Malivd R/o. Tank na Bhevada, Ta. Khanpur (45) Motibhai Bhalabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (46) Jivabhai Virabhai Malivad R/o.Tank na Bhevada, Ta. Khanpur (47) Savabhai Kalubhai Malivad R/o. Mokamsinh na Bhevada, Ta.

Khanpur (48) Ramanbhai Pratapbhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (49) Laxmanbhai Motibhai Malivad (50) Bhemabhai Kalubhai Malivad (51) Rajeshbhai Nathabhai Malivad (52) Lalabhai Kohyabhai Malivad (53) Ramabhai Kohyabhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (54) Somabhai Hirabhai Malivad R/o. Talpat na Bhevada, Ta. Khanpur (55) Mahendrakumar Savabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (56) Kalubhai Hirabhai Malivad R/o. Talpat na Bhevada, Ta. Khanpur (57) Virabhai Bhalabhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (59) Kalubhai Hirabhai Motibhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (60) Rayjibhai Masurbhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (61) Malabhai Nathabhai Malivad (62) Somabhai Nathabhai Malivad (63) Fulabhai Virabhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (64) Bhathibhai Sardarbhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (65) Virabai Rumalabhai Malivad (66) Pujabhai Hirabhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (67) Hirabhai Sardarbhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (68) Jayantibhai Hirabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (69) Bharatbhai Jesinghbhai Malivad R/o. Talpat na Bhevada, Ta. Khanpur (70) Babubhai Hirabhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (71) Ramabhai Virabhai Malivad (72) Bharatbhai Virabhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (73) Bharatbhai Hirabhai Damor R/o. Doda Vanta, Ta. Khanpur (74) Navalsinh Fatabhai Malivad R/o. Mena, Ta. Khanpur (75) Kanabhai @ Kanjibhai Sardarbhai Malivad R/o. Tank na Bhevada, Ta. Khanpur (76) Girishbhai Nathabhai Malivad (77) Sanjaykumar @ Bhagabhai Motibhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (78) Ratnabhai Lakhabhai Malivad (79) Shivabhai Shanabhai Malivad (80) Rameshbhai Manilal Malivad all are R/o. Tank na Bhevada, Ta. Khanpur (81) Arjanbhai Chhatrabhai Malivad (82) Dhuliben W/o. Savabhai Kalubhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (83) Sukhibeb W/o. Jivabhai Virabhai Malivad (85) Chandubhai Pratapbhai Malivad all are R/o. Tank na Bhevada, Ta. Khanpur (86) Chhatrabhai Pujabhai Meda R/o. Pujelav, Ta. Khanpur (88) Pratapbhai Virabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (89) Ajmel Hajur Damor R/o. Umari(Zer), Ta. Khanpur (90) Jesinghbhai Kohyabhai Malivad (91) Mukeshbhai @ Gala Shankarbhai Malivad all are R/o. Mokamsinh na Bhevada, Ta. Khanpur (92) Shanabhai Sagabhai Pagi R/o. Isroda, Ta. Khanpur are **acquitted** under Section 235(1) of the Criminal Procedure Code from charge leveled against them for the offence punishable under Secs.147, 148, 149, 435, 436, 395, 342, 307, 429, 120-B, of the Indian Penal Code along with u/Sec. 3, 181 of M.V.Act. & u/Sec.135 of G. P. Act.

- (2) All the accused are directed to furnish bail bond with surety sum of Rs.10,000/- each for the period of six months u/s.437(A) of Criminal Procedure Code, before the Registrar of District Court, Mahisagar at Lunawada.
- (3) The accused Nos (1) Nathabhai Bhalabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (2) Kalubhai Motibhai Malivad R/o. Maiyapur, Ta. Khanpur (10) Raisingbhai Lalabhai Meda R/o/ Meda na Muvada, Ta. Khanpur (22) Ramanbhai Rumalbai Malivad R/o. Mena, Ta. Khanpur (33) Dhulabhai Somabhai Malivad R/o. Kolambi, Ta. Khanpur (58) Raysing @ Rayjibhai Virabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (84) Surmabhai Somabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur (87) Dhuliben W/o. Nathabhai Bhalabhai Malivad R/o. Mokamsinh na Bhevada, Ta. Khanpur are abated.
- (4) Copy of this judgment be attached to sessions case Nos.10/2017, 11/2017, 12/2017, 14/2017, 15/2017.
- (5) Muddamal be disposed off after appeal period is over.
- (6) Yadi of this judgment be sent to the Jail Authority.

Pronounced in open court today.

**Date : 29.09.2021**  
**Lunawada.**

**(Naresh Girikant Dave)**  
2<sup>nd</sup> Additional Sessions Judge,  
Mahisagar at Lunawada.

**[GJ00467]**