ÃITEM No. 1A Court No.3 SECTION PIL
(For Judgment)

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

WRIT PETITION (CRL.)No. 109/2003

NATIONAL HUMAN RIGHTS COMMISSION ....Petitioner(s)

Vs.

STATE OF GUJARAT & ORS. ....Respondent(S)

WITH
CRL.M.P.NO.10719/2003 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.7078/2003 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.7827/2003,8193/2003 & 8194/2003 IN
W.P(CRL)NO.109/2003

CRL.M.P.NO.11668/2003 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.11689/2003 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.4782/2003 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.3741/2004 & 3742/2004 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.6864/2004 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.9236/2005 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.6767/2006 IN W.P(CRL)NO.109/2003

CRL.M.P.NO.7824/2007 IN W.P(CRL)NO.109/2003

W.P(Crl.)No.D17953/2003

T.P.(Crl.) No.194-202 & 326-329/2003

SLP(C)No.7951/2002

SLP(Crl.)No.4409/2003

SLP(Crl.)No.5309/2003

W.P(Crl.)No.216/2003

T.P.(Crl.) No.66-72/2004

T.P.(Crl.) No.43/2004

W.P(Crl.)No.118/2003

T.P.(Crl.) No.233-234/2004

W.P(Crl.)No.37-52/2002

W.P(Crl.)No.284/2003

CRL.M.P.NO.6767/06 IN CRL.MP. NOS.3741-3742/2004

CRL.MP.NO.4485/2006 IN SLP(Crl.)No.3770/2003

Date :01/05/2009 This Petition was called on for judgment today.

For Appearing Parties:

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R.M.Vithlani, Dr. Meera Agarwal, Ejaz Maqbool,
Dr. Kailash Vasdev, In Person, M/s.
P.H.Parekh, M/s. Corporate Law Group, and M/s.
Arputham,Aruna & CO., Advs.

Hon'ble Dr. Justice Arijit Pasayat pronounced Judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice P.Sathasivam and Hon'ble Mr. Justice Aftab Alam.

Certain directions have been given in terms of the signed judgment. List the writ petition and connected petitions after four months.

(Shashi Sareen)
Court Master

(Shashi Bala Vij)
Court Master

Signed Reportable judgment is placed on the file.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITON (CRL.) NO. 109 of 2003

National Human Rights Commission ..Petitioner

versus

State of Gujarat and Ors. ..Respondents

With

Crl.M.P. No.10719/2003 in WP (Crl.) No.109/2003
Crl.M.P. No. 7078/2003 in WP (Crl.) No.109/2003

Crl.M.P. No. 7827/2003, 8193/2003 & 8194/2003 in WP (Crl.) No.109/2003

Crl.M.P. No. 11668/2003 in WP (Crl.) No.109/2003
Crl.M.P. No. 11689/2003 in WP (Crl.) No.109/2003
Crl.M.P. No. 4782/2003 in WP (Crl.) No.109/2003
Crl.M.P. No. 3741/2004 & 3742/2004 in WP (Crl.) No.109/2003
Crl.M.P. No. 6864/2004 in WP (Crl.) No.109/2003
Crl.M.P. No. 9236/2005 in WP (Crl.) No.109/2003
Crl.M.P. No. 6767/2006 in WP (Crl.) No.109/2003

Crl.M.P. No. 7824/2007 in WP (Crl.) No.109/2003
W.P. (Crl.) No.D.17953/2003
TP (Crl.) Nos. 194-202 and 326-329/2003
SLP (Crl.) No.7951/2002
SLP (Crl.) No.4409/2003
SLP(Crl.) No.5309/2003
WP(Crl.) No.216/2003
TP(Crl.) No. 66-72/2004
TP(Crl.) No.43 of 2004
WP(Crl.) No. 118 of 2003
TP(Crl.) Nos. 233-234/2004
WP (Crl.) Nos. 37-52/2002
WP (Crl.) No.284/2003
Crl.M.P. No.6767/2006 in Crl.M.P.Nos. 3741-3742/2004 in WP(Crl.)No.109/2003 Crl.M.P. No.4485/2006 in SLP (Crl.) No.3770/2003

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. By order dated 26.3.2008 in this group of cases this Court had directed the Gujarat Government to constitute a five members Special Investigation Team (in short the 'SIT') to be headed by Mr. R.K. Raghavan, former Director of the Central Bureau of Investigation to undertake inquiry/investigation including further investigation in nine cases. It was further directed that the SIT shall submit its report within a particular time. The State Government issued a Notification dated 1.4.2008 constituting the SIT. On 11.2.2009 the SIT has submitted its consolidated report. It has indicated therein that since its constitution the SIT has made considerable progress in respect of each of the nine cases and the current status is as follows:

1: Godhra Railway Police Station Cr. No 09/02

Applications received	63
Witnesses examined	183(125 old & 61 new)
Number arrested	--
Charge sheets filed	-
Stage of investigation	Completed

2: Khambholaj Police Station Cr. No 23/02

Applications received	17
Witnesses examined	85(30 old & 55 new)
Number arrested	Court is requested to issue

process against 16 accused
Charge sheets filed Amended separate charge sheet-1

Stage of investigation Completed

3: Khambholaj Police Station Cr. No 27/02

Applications received 17

Witnesses examined 39

Number arrested -

Charge sheets filed -

Stage of investigation Completed

4: Naroda Police Station Cr. No 98/02

Applications received 06

Witnesses examined 450

Number arrested 20

Chargesheets filed 02

Stage of investigation Nearly complete

5: Naroda Police Station Cr. No 100/02

Applications received 88

Witnesses examined : 341

Number arrested 17

Chargesheets filed 01

Stage of investigation Nearly complete

6. Meghaninagar Police Station Cr. No 67/02

Applications received 59

Witnesses examined 227
Number arrested 18

Chargesheets filed 03

Stage of investigation. Nearly complete

7: Visnagar Police Station Cr. No 60/02

Applications received 05

Witnesses examined 42

Number arrested 03

Chargesheets filed 01

Stage of investigation Nearly complete

8. Vijapur Police Station Cr.No.46/02

Applications received 13

Witnesses examined 39

Number arrested 21

Chargesheets filed 02

Stage of investigation Completed

9. Prantij Police Station Cr.No.100/02

Applications received 10

Witnesses examined 24 (14 old and 10 new)

Number arrested -

Chargesheets filed -

Stage of investigation Completed

2. In separate sealed covers the IO's report in each case accompanied by the Supervising IGP and the Chairman's comments were submitted. The other members of the team are Shri C.B. Satpathy, Smt. Geetha Johri, Shri Shivanand Jha and Shri Ashish Bhatia. The last three are officers of the Indian Police Service from the Gujarat cadre.

3. Pursuant to the directions given by this Court copies of the report were supplied to learned Amicus Curiae and learned counsel for the State of Gujarat. Suggestions have been given by learned Amicus Curiae, learned counsel for the State and some of the parties in the proceedings.

4. Several important aspects need to be noted in these cases. Firstly, due to the efforts of SIT, persons who were not earlier arrayed as accused have now been arrayed as accused. From the details indicated above it appears that in most of the cases a large number of persons have been additionally made accused. Besides this, a large number of witnesses were also examined in each case. This goes to show the apparent thoroughness with which the SIT has worked. Therefore, the SIT shall continue to function until the completion of trial in all the cases and if any further

inquiry/investigation is to be done the same can be done as provided in law, more particularly, under Section 173 (8) of the Code of Criminal Proceudre,1973 (in short the 'Code').

5. A few important aspects concerning the cases need to be noted.

(1) Fair trial

(2) Modalities to ensure that the witnesses depose freely and in that context the need to protect the witnesses from interference by person(s) Connected with it is the protection of victims who in most cases are witnesses.

(3) Able assistance to court by competent public prosecutors.

(4) Further role of SIT.

6. So far as fair trial is concerned the discovery and vindication and establishment of truth are certainly the main purposes of courts of justice. They are the underlying objects for the existence of the courts of justice.

7. The importance of the witnesses in a criminal trial does not need any reiteration. In Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Ors. (2006 (3) SCC 374) it was observed as under:

"22. The complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions, ideas and ideals. If the court acts contrary to the role it is expected to play, it will be destruction of the fundamental edifice on which the justice delivery system stands. People for whose benefit the courts exist shall start doubting the efficacy of the system. "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased.' " (Per Lord Denning, M.R. in Metropolitan Properties Co. Ltd. v. Lannon, All ER p. 310 A.) The perception may be wrong about the Judge's bias, but the Judge concerned must be careful to see that no such impression gains ground. Judges like Caesar's wife should be above suspicion (Per Bowen, L.J. in Leeson v. General Council of Medical Education.)

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24. It was significantly said that law, to be just and fair has to be seen devoid of flaw. It has to keep the promise to justice and it cannot stay petrified and sit nonchalantly. The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection lose hope (see Jennison v. Baker). Increasingly, people are believing as observed by Salmon quoted by Diogenes Laertius in Lives of the Philosophers, "Laws are like spiders' webs: if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away." Jonathan Swift, in his "Essay on the Faculties of the Mind" said in similar lines: "Laws are like cobwebs, which may catch small flies, but let wasps and hornets break

through."

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30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgements of one of the ablest judges who ever sat in this Court", Vice-Chancellor Knight Bruce said (ER p.957):

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination .... Truth, like all other good things, may be loved unwisely--may be pursued too keenly--may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price ... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

32. Restraints on the processes for determining the truth are multifaceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

"It is the merit of the common law that it decides the case first and determines the principles afterwards.... It is only after a series of determination on the same subject-matter, that it becomes necessary to ‘reconcile the cases’, as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."

33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new changing circumstances, and exigencies of the situation--peculiar at times and related to the nature of crime, persons involved--directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

34. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of

evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

"It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson’s eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated

scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

40. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in Dhanaj Singh v. State of Punjab. It was observed as follows: (SCC p.657, paras 5-7)

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P.)
6. In Paras Yadav v. State of Bihar it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in Ram Bihari Yadav v. State of Bihar if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh."

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

8. It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establishes the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is the reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book.

9. Vide an order dated 8th August 2003 in the matter of National Human Rights Commission v. State of Gujarat, this Court regretted that "no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses."

10. Further, in the case of Zahira v. State of Gujarat (2004 (4) SCC 158), while transferring what is known as the ‘Best Bakery Case’, to Mumbai vide its order dated 12th April, 2004, directed: "The State of Gujarat shall also ensure that the witnesses are produced before the concerned court, whenever they are required to attend them, so that they can depose freely without any apprehension of threat or coercion from any person. In case any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. "

11. The Law Commission in its 14th Report (1958) referred to 'witness-protection', but that was in a limited sense. That related to proper arrangements being provided in the Courthouse, the scales of travelling allowance, their daily allowance etc.

12. The National Police Commission Report (1980) again dealt with the inadequacy of daily allowance for the witnesses, but nothing more.

13. The 154th Report of the Law Commission 1996 contained a chapter on Protection and facilities to Witnesses. The recommendations mostly related to allowances and facilities to be made available for the witnesses. However, one of the recommendations was: "Witnesses should be protected from the wrath of the accused in any eventuality". But, Commission had not suggested any measure for the physical protection of witnesses.

14. The 178th Report of Law Commission, again, referred to the fact of witness turning hostile, and the recommendations were only to prevent witnesses from turning hostile. The report suggested an amendment to insert Section 164-A to the Code.

15. The Law Commission of India's 198th Report has also voiced similar concerns and has categorically stated "it is accepted today that WIP is necessary in the case of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences"

16. Under the English law, threatening a witness from giving evidence, is contempt of Court. So also any act of threat or revenge against a witness after he has given evidence in Court, is also considered as contempt. In 1994 the U.K. Government enacted a law known as Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. Section 51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who is helping with or could help with the investigation of a crime. Under a similar law in Hong-Kong, Crimes Ord. (Cap. 200) HK, if the threat or intimidation is directed even as against a friend or relative of the witness, that becomes a punishable offence

17. In the United States, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorized the Witness Security Programme. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

18. The Attorney General takes the final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The Programme assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, overweighs the need for that person’s testimony. A similar programme is in Canada under Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters" [Section 3]. Protection given to a witness may include relocation, accommodation and change of identity as well as counseling and financial support to ensure the security of the protectee or to facilitate his becoming self-sufficient. Admission to the Programme is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an .international criminal court or tribunal [Sections 5 and 6]. The extent of protection depends on the nature of the risk to the security of the witness, the value of the evidence and the importance in the matter.

19. The Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides

protection and other assistance for witnesses [Section 4]. The witness must disclose a wealth of information about himself before he is included in the Programme. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. [Section 7]. The Commissioner has the sole responsibility of deciding whether to include a witness in the Programme.

20. The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers [Section 4]. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. [Section 7) and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director [Section 9]. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the following factors, inter-alia, [Section 10] for deciding whether a person should be placed under protection or not:

(i) The nature and extent of the risk to the safety of the witness or related person.

(ii) The nature of the proceedings in which the witness has given evidence or may be required to give evidence.

21. The importance, relevance and nature of the evidence, etc, in European countries such as Italy, Germany and Netherlands, the Witness Protection Programme covers organised crimes, terrorism, and other violent crimes where the accused already know the witness/victim.

22. But it would not be proper to give any general directions for witness protection. It would primarily depend upon the fact situation of each case. Practical difficulties in effectively implementing any witness

protection scheme cannot be lost sight of. We are considering that aspect focusing on the fact situation of the present cases.

23. The need for setting up separate victim and witness protection units in the trial of mass crimes has been acknowledged in the setting up of international tribunals to deal with them. The International Criminal Tribunal for Rwanda has formulated rules for protection of victims and witnesses. Similar provisions exist in the Statute for the creation of an International Criminal Court (in short 'ICC'). In most of the cases, witnesses are the victims of the crime. Most vulnerable amongst them are women and children. Under the existing system they are mere pawns in a criminal trial and there is very little concern for protecting their real interests. The protection is necessary so that there is no miscarriage of justice; but protection is also necessary to restore in them, a sense of human dignity.

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

25. This is essentially to obliterate the apprehension that the public prosecutor is not fair in court or is not conducting the prosecution in the proper manner. The State of Gujarat shall appoint public prosecutors in each of the cases in consultation with the SIT which opinion shall be final and binding on the State Government.

26. It needs to be emphasized that the rights of the accused have to be protected. At the same time the rights of the victims have to be protected and the rights of the victims cannot be marginalized. Accused persons are entitled to a fair trial where their guilt or innocence can be determined. But from the victims' perception the perpetrator of a crime should be punished.

They stand poised equally in the scales of justice.

27. In order to ensure that the trials are conducted in a fair manner and within the realm of protecting the rights of the victims it is important that the decorum of the court is maintained at all times. In order to balance the need for a public trial with the need to ensure that victims/witnesses are not intimidated within the court rooms, it is necessary for the court to impose reasonable restrictions on the entry of persons into the court room.

28. The role of public prosecutors in ensuring a fair trial is of paramount importance.

29. This Court in S.B. Shahane and Ors. v. State of Maharashtra and Another, 1995 Supp (3) SCC 37 had stressed on the desirability of separation of prosecution agency from investigation agency. It was observed that such Assistant Public Prosecutors could not be allowed to continue as personnel of the Police Department and to continue to function under the control of the head of the Police Department. State Governments were directed to constitute a separate cadre of Assistant Public Prosecutors by creating a separate prosecution Department making its head directly responsible to the State Government.

30. Many commonwealth countries like Australia have a Commonwealth Director of Public Prosecutions, which was set up by the Director of Public Prosecutions Act 1983 and started operations in 1984. The nine States and territories of Australia also have their own DPPs. Ultimate authority for authorizing prosecutions lies with the Attorney General. However, since that is a political post, and it is desired to have a non-political (public service) post carry out this function in most circumstances, the prosecutorial powers of the AG are normally delegated to the DPP. However, in South Australia the AG may direct the DPP to prosecute or not to prosecute. This is a very rare occurrence. It is common for those who hold the office of Commonwealth or State DPP later to be appointed to a high judicial office. In Canada, each province’s Crown Attorney Office (Canada) is responsible for the conduct of criminal prosecutions. In Ontario, local Crown Attorney in the Criminal Law Division is in charge of criminal

cases. Only British Columbia, Nova Scotia and Quebec (a civil code jurisdiction) have a Director of Public Prosecutions office. Recent legislation passed by Parliament split the conduct of federal prosecutions from the Department of Justice (Canada), and created the Office of the Director of Public Prosecutions (officially to be called as Public Prosecution Service of Canada). This legislation came into effect December 12, 2006.The Director of Public Prosecutions of Hong-Kong, China heads the prosecutions Division of the Department of Justice, which is responsible for prosecuting trials and appeals on behalf of the Hong Kong Special Administrative Region, providing legal advice to law enforcement agencies, acting on behalf of the Secretary for Justice in the institution of criminal proceedings, and providing advice and assistance to bureaux and departments in relation to any criminal law aspects of proposed legislation. The DPP is superintended by the Secretary for Justice, who is also accountable for the decisions of the DPP. The Director of Public Prosecutions in the Republic of Ireland has been responsible for prosecution, in the name of the People, of all indictable criminal offences in the Republic of Ireland since the enactment of the Prosecution of Offences Act 1974. Before 1974, all crimes and offences were prosecuted at the suit of the Attorney General. The DPP may also issue a certificate that a case should be referred to the Special Criminal Court; a juryless trial court usually reserved for terrorists and organized criminals. In South Africa public prosecutions are conducted by an independent National Director of Public Prosecutions (NDPP). The NDPP is supported by a Chief Executive Officer, Marion Sparg, Deputies, regional Directors of Public Prosecutions (DPP’s), and several Special Directors. The National Director is also head of the controversial Directorate of Special Operations (DSO) - commonly known as the Scorpions - which deals with priority and organized crime. In 2005, the unit instituted proceedings against the country’s Deputy President, Jacob Zuma, leading to his dismissal. In England and Wales, the office of Director of Public Prosecutions was first created in 1880 as part of the Home Office, and had its own department from 1908. The DPP was only responsible for the prosecution of a small number of major cases until 1986 when responsibility for prosecutions was transferred to a new Crown Prosecution Service with the DPP as its head. He/she is appointed by the Attorney General for England and Wales. In Northern Ireland a similar

situation existed, and the DPP now heads the Public Prosecution Service for Northern Ireland.

31. The Law Commission in 1958 had recommended that a Director of Prosecutions be set up having its own cadre, though this recommendation was not included in the Code then. Again in 1996 the Law Commission in its 154th report identified as Independent Prosecuting Agency as one of the several areas within the Code which required redesigning and restructuring. The Law Commission supported most of the proposed amendments to the Code as contained in the proposed Code of Criminal Procedure Amendment Bill 1994. Recommendations related to the structure of a Directorate of Prosecutions at the State level, to be adopted by a State Government in the event it decided to set up a cadre of prosecutors. The Law Commission further recommended that the structure of State level Directorates of Prosecution be given statutory status through an amendment to the Code.

32. Despite the absence of such a requirement and inadequacy of the Provisions in the Code a number of states mainly, Delhi, Andhra Pradesh, Bihar, Goa, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Orissa, Tamil Nadu and Uttaranchal, established a Directorate of Prosecution.

33. By an amendment in 2006, Section 25A was inserted in the Code, which categorically legislated for the creation of a Directorate of Prosecution in every state.

"25-A. Directorate of Prosecution.-(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.
(2) A person shall be eligible . to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.
(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of Section 24 to conduct cases in the High. Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.

34. As noted above, the role of victim in a criminal trial can never be lost sight of. He or she is an inseparable stakeholder in the adjudicating process.

35. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, was adopted by the General Assembly through a resolution 40/34 of 29th November 1985. Articles 4 and 5 of the above mentioned United Nations Declaration categorically states:

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

36. The appointment of Prosecutors to these trials has to be made in

consultation with SIT, whose opinion would be binding on the state government.

37. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly through a resolution 40/34 of 29th November 1985categorically through Section 6 (b) provides:

"6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".

38. In the United States of America, the existing Crime Victims Rights Act of 2004, categorically through section 3771(4) from chapter 237 provides for "the right to be heard at any public proceeding involving release, pleas or sentencing".

39. This Court had held in U.P.S.C. v. S. Papiah (1997) 7 SCC 614 that a closure report by the Prosecution cannot be accepted by the court without hearing the informant.

Para 9-There can therefore, be no doubt that when, on a consideration of the report a made by the officer-in-charge of a police station under Section 2(i) of Section 173 the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom the report is forwarded under sub section (2) (i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of the consideration of this report."

40. This position was illuminatingly stated in Abhinandan Jha and Ors. v. Dinesh Mishra (AIR 1968 SC 117).

41. In J.K. International v. State Government of NTC (2001)3 SCC 462, this Court had held that:

"A person at whose behest an investigation is lunched by the police is not

altogether wiped out of the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them."

42. Since the protection of a witness is a paramount importance it is imperative that if and when any witness seeks protection so that he or she can depose freely in court, the same has to be provided. It is therefore directed that if a person who is examined as a witness needs protection to ensure his or her safety to depose freely in a court he or she shall make an application to the SIT and the SIT shall pass necessary orders in the matter and shall take into account all the relevant aspects and direct such police official/officials as it considers proper to provide the protection to the concerned person. It shall be the duty of the State to abide by the direction of the SIT in this regard. It is essential that in riot cases and cases involving communal factors the trials should be held expeditiously. Therefore, we request the Hon'ble Chief Justice of Gujarat High Court to designate court(s) in each district where the trial of the concerned cases are to be held. The Designated Courts shall take up the cases in question. Taking into account the number of witnesses and the accused persons and the volumes of evidence, it is open to the High Court to designate more than one court in a particular district. Needless to say that these cases shall be taken up by the Designated Court on a day-to-day basis and efforts shall be made to complete the trial with utmost expedition. The SIT shall furnish periodic reports if there is any further inquiry/investigation. The State of Gujarat shall also file a status report regarding the constitution of the courts in terms of the directions to be given by the Hon'ble Chief Justice of the High Court within three months. The matter shall be listed further as and when directed by this Court.

43. It appears that in these petitions, which sought various reliefs including the transfer of some of the ongoing trials, and a reinvestigation/further investigation into the various incidents on the basis of which charges had been filed in these trials, this Court, in the first instance, granted a stay of these ongoing trials.

44. The matter was then heard from time to time and an order was

then made on 26th March 2008 directing the establishment of the SIT, and for a further investigation into these matters. The matters under investigation were those arising out of

(a) Crime No. 9/02

(b)Crime No. 100/02 (c) Crime No. 23/02 (d) Crime No. 98/02 (e) Crime No. 46/02

(f) Crime No. 67/02 (g) Crime No. 60/02 (h) Crime No. 26/02

(i) Crime No. 27/02

45. The reports of the SIT, in respect of each of these cases have now been received. We have considered the submissions made by Mr. Harish N. Salve, learned amicus curiae, Mr. Mukul Rohtagi, learned counsel for the State, Ms. Indira Jaisingh and other learned counsel.

46. The following directions are given presently:

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

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

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

i) Ahmedabad (Naroda Patia, Naroda Gam)

ii) Ahmedabad (Gulbarg).

iii) Mehsana (for two cases).

iv) Saabarkantha opened(British National case)

v) Anand

vi) Godhra Train Case (at Sabarmati Jail, Ahmedabad).

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

(v) Experienced lawyers familiar with the conduct of criminal trials are to be appointed as Public Prosecutors. In the facts and circumstances of the present case, such public prosecutors shall be appointed in consultation with the Chairman of the SIT. The suggestions of the State Government indicate acceptance of this proposal. It shall be open to the Chairman of SIT to seek change of any Public prosecutor so appointed if any deficiency in performance is noticed. If it appears that a trial is not proceeding as it should, and the Chairman of the SIT is satisfied that the situation calls for a change of the public prosecutor or the appointment of an additional public prosecutor, to either assist or lead the existing Public Prosecutor, he may make a request to this effect to the Advocate General of the State, who shall take appropriate action in light of the recommendation by the SIT.

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

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

(viii) The stay on the conduct of the trials are vacated in order to enable the trials to continue. In a number of cases bail had been granted by the High Court/Sessions Court principally on the ground that the trials had been stayed. Wherever considered necessary, the SIT can request the Public Prosecutor to seek cancellation of the bails already granted.

(ix) For ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court:

In case of witnesses following steps shall be taken:

(a) Ensuring safe passage for the witnesses to and from the court precincts.

(b) Providing security to the witnesses in their place of residence wherever considered necessary, and

(c) Relocation of witnesses to another state wherever such a step is necessary.

(x) As far as the first and the second is concerned, the SIT shall be the nodal agency to decide as to which witnesses require protection and the kind of witness protection that is to be made available to such witness.

(xi) In the case of the first and the second kind of witness protection, the Chairman, SIT could, in appropriate cases, decide which witnesses require security of the paramilitary forces and upon his request same shall be made available by providing necessary security facilities.

(xii) In the third kind of a situation, where the Chairman, SIT is satisfied that the witness requires to be relocated outside the State of Gujarat, it would be for the Union of India to make appropriate arrangements for the relocation of such witness. The Chairman, SIT shall send an appropriate request for this purpose to the Home Secretary, Union of India, who would take such steps as are necessary to relocate the witnesses.

(xiii) All the aforesaid directions are to be considered by SIT by looking into the threat perception if any.

(xiv) The SIT would continue to function and carry out any investigations that are yet to be completed, or any further investigation that may arise in the course of the trials. The SIT would also discharge such functions as have been cast upon them by the present order.

(xv) If there are any matters on which directions are considered necessary (including by way of change of public prosecutors or witness protection), the Chairman of the SIT may (either directly or through the Amicus Curiae) move this Court for appropriate directions.

(xvi) It was apprehension of some learned counsel that unruly situations may be created in court to terrorise witnesses. It needs no indication that the Court shall have to deal with such situations sternly and pass necessary orders. The SIT shall also look into this area.

(xvii) Periodic three monthly reports shall be submitted by the SIT to this Court in sealed covers.

47. List after four months.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P.SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi,
May 01, 2009