# Jodha Khoda Rabari and Vs State of Gujarat and etc.

## Criminal Appeal No''s. 8, 58, 88 and 89 of 1988

**Court:** Gujarat High Court

**Date of Decision:** March 6, 1992

**Acts Referred:**
Arms Act, 1959 â€" Section 25, 25(1)#Bombay Police Act, 1951 â€" Section 135#Criminal Procedure Code, 1973 (CrPC) â€" Section 109, 162, 167#Evidence Act, 1872 â€" Section 157, 25, 26, 27, 40#Penal Code, 1860 (IPC) â€" Section 114, 120B, 143, 147, 148#Telegraph Act, 1885 â€" Section 25

**Citation:** (1992) CriLJ 3298

**Hon'ble Judges:** K.R. Vyas, J; K.G. Shah, J

**Bench:** Division Bench

**Advocate:** K.J. Shethna and B.K. Parikh, for the Appellant; Indrasinh A. Zala, K.B. Anandjiwala and Ashok D. Shah and S.R. Divetia, Assistant Public Prosecutor, for the Respondent

## Judgement

K.G. Shah, J.
On 20th September 1984 the people of Mangadh, a small village of Bhavnagar District experienced a horrifying nightmare

when there was a carnage resulting in ten brutal murders in a span of less than two hours, committed by a Group of assailants by their wanton firing

and use of other weapons at unarmed innocent victims. According to the prosecution, the accused did this with a view to settling the scores with

the Patels, who were acquitted in a case, arising from the incident of 1982 where three Darbars (Rajputs) had lost their lives. Of course, in

between, there were many criminal cases between them. Thus, in the present proceedings, we are required to deal with a case where revenge or

vendetta is alleged to be the sole motive. The present appeals arise out of the judgment and order of conviction and sentences rendered in Sessions

Case No. 5 of 1985, with which was consolidated, Sessions Case No. 124 of 1985, by the learned Sessions Judge, Bhavnagar, who at the end of

the trial convicted the accused for various offences and inflicted various sentences.

2. It may be stated that there were twelve accused who were charged for the offences under Sections 120B, 143, 147, 148, 302 read with

Sections 149, 302 read with Section 114, 302 read with Sections 34, 302 read with Sections 120B, 307 read with Sections 149, 307 read with

Sections 34, 307 read with Sections 114 and 307 read with Section 120B, I.P.C. Some of the accused were also individually charged for the

offence of murder and attempt to commit murder punishable under Sections 302 and 307 of the Indian Penal Code and all the accused were also

charged for offence punishable u/s 25 of the Arms Act.

3. At the end of trial, the learned Judge by his judgment and order dated 14th December 1987, convicted accused No. 11 for committing the

murder of Diwaliben. For the murder of Diwaliben the rest of the accused were convicted on the principle of vicarious liability u/s 149, IPC.

Similarly, all the accused were convicted u/s 302 read with Section 149, IPC for committing the murders of Jairam Bhagwan and Odhayji

Bhagwan. Accused No. 11 was further convicted for committing the murder of Parshottam Jaga and Popat Lakha. Accused Nos. 8, 10, 11 and

12 together with accused Nos. 1, 5, 7 and 9 were convicted for the murder of Gordhan Lakha. Similarly, in respect of death of Babu Bechar,

accused Nos. 5, 8, 11 and 12 together with accused Nos. 1, 2, 7, 9 and 10 came to be convicted. In respect of death of Madhu Khoda and

Nagji Khoda accused No. 11 came to be convicted for murder and in respect of those deaths the remaining accused came to be convicted with

the aid of Section 149, IPC.

It may be stated that in the main incident, not only the three persons were done to death but some four others had been injured. In respect of the

injury to Pragji Mavji -- the complainant, all the accused came to be convicted for an offence u/s 324, IPC. In respect of injury to Madhu Naran

accused No. 12 principally and the other accused with the aid of Section 149 came to be convicted for an offence u/s 307, IPC. In respect of

injury to Parshottam Mulji accused No. 8 principally and the other accused with the aid of Section 149 came to be convicted for an offence u/s

307, IPC. In respect of injury to Dhanji Bhagwan accused No. 11 principally and the other accused with the aid of Section 149 came to be

convicted for an offence u/s 307, IPC. Accused Nos. 1, 2, 5, 8, 9, 11 and 12 also came to be convicted for an offence under the Arms Act and

all the accused also came to be convicted for an offence u/s 120B of the Indian Penal Code. For the offence of murder all the accused have been

ordered to suffer imprisonment for life, and for other offences various terms of imprisonment and sentences of fine have been imposed upon them.

4. The said judgment of convictions and sentences, imposed upon the accused, is the subject matter of the present four appeals. Accused No. 4,

challenging the convictions and sentences imposed upon him has filed Criminal Appeal No. 8 of 1988. The remaining accused have jointly filed

appeal No. 58 of 1988. Against accused Nos. 8, 11 and 12 the State has filed two appeals being Nos. 88 of 1988 and 89 of 1988 whereby the

State canvasses that the sentence of imprisonment for life imposed upon those three accused is grossly inadequate, and that those three accused

should have been sentenced to death. All these appeals have been heard together, and they will stand disposed of by this common judgment.

5. Before we narrate the prosecution case, certain undisputed facts may be noticed. For the sake of convenience we will refer to the accused who

were before the trial Court as the accused for the purpose of present appeals as well. It may be mentioned that accused No. 2 Dhruwansinh,

accused No. 3 Anirudhsinh and accused No. 11 Jasubha are the sons of accused No. 1 Bharatsinh. Similarly, accused No. 7 Kuvarsinh and

accused No. 8 Nirubha are the sons of accused No. 9 Ajitsinh. Accused No. 12 Mohansinh is a friend of accused No. 11 Jasubha, and the

prosecution evidence discloses that he was residing with accused No. 11 and accused No. 1 at their village Chomal since a number of years prior

to the present incident. Accused No. 11 as well as accused No. 12 were in the Indian Army, however, accused No. 12 has retired, while accused

No. 11 has deserted the Army service since around October 1982. Accused Nos. 5 and 6 are Darbars or Rajputs of village Chomal, so also,

accused Nos. 1, 2, 3, 7, 8, 9 and 11 are the Darbars or Rajputs of that very village. Accused No. 4 is a Rabari or a cowherd of a nearby village

Ganesh Ghad while accused No. 10 is again a Darbar or Rajput from another neighbouring village Sandh Khakhara. It may be stated that village

Chomal and village Manghad are adjoining villages and there is only a small distance between the two. The population of Manghad is about 2500

people. We may mention here that many of the prosecution witnesses and the victims are interrelated, and their relationship shall be referred at an

appropriate stage.

6. As far as the prosecution case is concerned, the incident in question is the result of deep rooted enmity between Patels of Manghad on one side

and the Darbars of Chomal village on the other. In the year 1982 certain Patels had committed the murders of three Darbars. Bhimdevsinh son of

accused No. 9, Sarajubha-brother of accused No. 1 and one Khengubha alias Khengarji Chandubha a relative of accused No. 5 were done to

death. Nineteen Patels were charged for having committed those murders, however, they were acquitted by the Court. The accused of the present

case, in order to take revenge of the incident of 1982, conspired on 20th September 1984. It is the prosecution case, that, on 19th September

1984 one Gomtiben of village Manvillas, the Aunt of complainant Pragji Mavji had expired in that village. Having come to know about the death of

Gomtiben, the Patels of Mangadh gathered at the village well, and as per their custom took bath and also decided to go to village Manvillas the

next day i.e. on 20th September 1984 to offer condolences. A group of about 25 persons (12 males and 13 females) went to Manvillas by means

of a trailer attached to a tractor belonging to one Bhikhabhai Meghjibhai at about 6-00 a.m. on 20th September 1984. They reached Manvillas at

about 7 O''Clock and having stayed there for an hour and a quarter, started their return journey to Manghad. At about 9-00 or 9-30 a.m. when

they were returning in the trailer/tractor and they came near the field of Devji Koli accused No. 11 came out from the hiding, behind the hedge, and

fired a gun shot at the wheel of the tractor, deflating the wheel. The other accused followed accused No. 11, and they also came on the road from

the hiding behind the hedge. Many of those other accused were also armed with firearms and some of them were armed with lethal weapons like

axe, spear, dharia etc. According to the prosecution, soon after firing the first shot at the wheel of the tractor, accused No. 11 fired another gun

shot on the persons who were occupying the trailer/tractor and that gun shot virtually decapitated Diwaliben who was one of the persons in the

trailer. At the same time, according to the prosecution, the other accused who were having firearms with them, also joined accused No. 11, and

opened fire from their respective firearms, quite indiscriminately and wantonly. As a result of this firing, witnesses Madhu Naran, P.W. 17,

Parshottam Mulji, P.W. 18, Dhanji Bhagwan, P.W. 19 and the complainant Pragji Mavji, P.W. 16 received firearm injuries. Parshottam Mulji and

Dhanji Bhagwan tumbled in the trailer itself while Madhu Naran and the complainant Pragji Mavji jumped from the trailer and ran in different

directions. Even other persons in the trailer, who at that time had not received firearm injuries, also jumped out of the trailer and ran in different

directions. According to the prosecution, the accused chased those innocent persons, some of whom had been injured, and some of whom had

escaped injuries, and it is the ease of the prosecution that Mohansinh accused No. 12 chased Madhu Naran, who was running away after having

received some minor firearm injuries, and ignoring the entreaties made by Madhu Naran, Mohansinh fired a shot from a firearm which he had, at

Madhu Naran. It is further the prosecution case that Jairam Bhagwan and Odhavji Bhagwan who were in the trailer, also jumped out of the trailer,

and they ran to save their lives, but they were chased by the accused. Both of them came to be belaboured by the accused by means of different

weapons and both of them died on the spot.

It is the prosecution case, that not having been satisfied, even after killing three persons and injuring four, the accused entered the village Mangadh

and there they killed, one after the other, Parshottam Jaga, Popat Lakha and Gordhan Lakha. All those three persons were murdered by means of

a firearm. The prosecution further alleges that even with this, the thirst for blood of the accused was not quenched, and they rampaged in the

nearby fields, and on the roads leading to the fields, and there they did to death, one Nagji Khoda and severely injured his servant Madhu Khoda,

by the use of firearms. They also killed one Babu Bechar by means of firearm, and they severely injured one Ganesh Naran also by means of

firearm. Madhu Khoda and Ganesh Naran succumbed to their injuries later, on the same day.

7. According to the prosecution, Pragji Mavji, P.W. 16 who was in the trailer, at the time accused No. 11 and other accused opened fire at the

passengers in the trailer, received a minor firearm injury on the left elbow, but he could manage to escape from the trailer. He virtually ran for his

life, and went to a nearby village Paravadi. At Paravadi he requested one Vallabhbhai to give him lift in the latter''s car and he reached the town of

Gariadhar and straightway went to the Primary Health Centre (P.H.C. for short) at Gariadhar. At the P.H.C. he was examined by Dr. Parikh,

P.W. 4, who also rendered him the necessary treatment. Finding that Pragji Mavji, P.W. 16 had received gun shot injury, Dr. Parikh wrote an

Yadi Exh. 53 to the Police Sub-Inspector of Gariadhar Police Station. That Yadi was received by the Police Station Officer Madarsing P.W. 34

who made an entry in the station diary, and deputed Head Constable Sarvaiya, P.W. 45 to go to the P.H.C. to know as to what the matter was

about. Sarvaiya came to the P.H.C. and recorded the information Mark ""A"" given to him by Pragji Mavji, and after recording that information,

Sarvaiya prepared the Panchnama Exh. 100 about the physical condition of Pragji Mavji. The Panchnama was prepared between 10-45 a.m. and

11-05 a.m. As Madarsing the Police Station Officer had received the Yadi Exh. 53, informing him about Pragji Mavji having received an injury by

means of firearm, he deputed Head Constable Mansingh P.W. 35 to go to Mangahad to maintain Bandobust. Mansing left Gariadhar at about 10-

45 a.m. by means of a jeepcar, taking some policemen with him. After Mansing left the Police Station, Sarvaiya submitted the information Mark

A"" and the Panchnama Exh. 100 to Madarsing, and thereupon Madrsing sent those papers along with a direction to Mansing to investigate into

the matter. Those papers were sent by Madarsing through Head Constable Bharatsing. Mansing who had left Gariadhar for Mangadh at about 10-

45 a.m. reached Mangadh, almost 10 Kms. away from Gariadhar, at about 11-00 a.m. He found that quite a large number of persons had

gathered at Mangadh Bus Stop, and at the bus stop Mansing came to know that, the accused had resorted to firing and had run away towards the

West. Mansing deputed two Constables to go towards the West, and he himself, having come to know about some injured persons lying in sim

went towards the sim of Mangadh and he found Parshottam Mulji, Dhanji Bhagwan and Madhu Naran in the sim of Mangadh. They were

seriously injured. Parshottam Mulji and Dhanji Bhagwan were lying in the trailer while Madhu Naran was lying some distance away. Mansing

therefore arranged to send all those three injured by means of his jeep car to Gariadhar for treatment. Mansing found that Bai Diwaliben was lying

dead in the trailer. He also found the dead bodies of Odhavji Bhagwan and Jairma Bhagwan in the sim. After sending Parshottam Mulji, Dhanji

Bhagwan and Madhu Naran, by means of his jeep car, to Gariadhar for treatment, Mansing searched other areas and found that in one field dead

body of Nagji Khoda was lying and Madhu Khoda was lying nearby in an injured condition. Mansing therefore arranged to have Madhu Khoda

sent by means of S.T. Bus to Gariadhar for treatment. At 1-15 p.m. P.S.I. Bhutaiya, P.W.48 came to Mangadh and took over investigation from

Mansing. P.S.I. Bhutaiya prepared inquest Panchnamas of the dead bodies. He also prepared Panchnama of the scene of offence. At about 10-00

p.m. on that day, P.S.I. Bhutaiya handed over the investigation to P.S.I. Simpi, P.W.47. It is also the prosecution case that one Ganesh Naran was

seriously injured by the accused by means of firearm. It appears that on receipt of the firearm injuries, Ganesh had fallen in the field of one Meghji

Rana. Wife of Meghji Rana on seeing Ganesh Naran lying in the field, in a seriously injured condition, brought him by means of a bullock cart to

the bus stand of Mangadh. It is also the prosecution case that both Madhu Khoda and Ganesh Naran, who were severelly injured on account of

the firearm injuries were almost unconscious, however, they were put on S.T. bus, and they came to be taken to Gariadhar, P.H.C. Thus, at

Gariadhar, P.H.C. there came six persons who had been injured, four of them were conscious while two, that is Ganesh Naran and Madhu Khoda

were almost unconscious. The Doctor at the P.H.C. Gariadhar rendered emergency treatment to those injured, and transferred them to Sir T.

Hospital, Bhavnagar. Ganesh Naran died during the treatment at Sir T. Hospital while Madhu Khoda had already died before he reached Sir T.

Hospital. The death toll thus increased to ten.

After the Inquest Panchnamas on the dead bodies were prepared by P.S.I. Bhutaiya at Mangadh those dead bodies were sent to Gariadhar for

post mortem examination. The Post Mortem on the dead bodies of Ganesh Naran and Madhu Khoda were performed by the Doctor at Sir T.

Hospital, Bhavnagar. At Sir T. Hospital, Bhavnagar, the Executive Magistrate recorded the statements of Pragji Mavji, Dhanji Bhagwan,

Parshottam Mulji and Madhu Naran. Then on the same day, Parshottam Mulji, Madhu Naran and Dhanji Bhagwan were transferred to Civil

Hospital, Ahmedabad for further treatment. However, Pragji Mavji left Sir T. Hospital and went to Manghad. He reached Manghad at about 9-00

p.m. on September 20, 1984. Parshottam Mulji, Dhanji Bhagwan and Madhu Naran were surgically treated at Civil Hospital, Ahmedabad and

certain foreign metallic objects were removed from their bodies. We may mention here that P.I. Asnani, P.W. 52 recorded their statements at Civil

Hospital, Ahmedabad on September 28, 1984.

It is clear that ten persons were done to death, and four were seriously injured on the same day in a small village like Mangadh. Thereupon, there

was a lot of uproar not only in Mangadh but in the adjoining villages, and quite a lot of police force was required to be rushed in that area, with a

view to maintaining law and order situation. The cremation of the ten dead bodies was done on September 21, 1984 and it was attended by a

strong crowd of about 40,000 persons. Some 1200 or 1300 strong police force was required to be deployed to maintain law and order situation.

It is also the prosecution case that highly placed police officers were summoned from Ahmedabad and elsewhere. The Investigation was handed

over to P.I. Asnani of Crime Branch at 8-00 p.m. on September 21, 1984. On September 25, 1984 accused Nos. 1, 2, 3 and 4 came to be

arrested. Accused No. 5 was arrested on September 30, 1984. Accused No. 6 was arrested on October 2, 1984. Accused No. 7 was arrested

on October 11, 1984. Accused No. 8 was arrested on October 12, 1984. Accused No. 9 was arrested on October 15, 1984 and accused No.

10 was arrested on November 18, 1984. According to the prosecution, though vigorous search was made by the various Police Officers, accused

Nos. 11 and 12 had made themselves scarce. On October 20, 1984 Nirubha accused No. 8 made a statement which led to the discovery of a

hand gun. As and when the accused came to be arrested as aforesaid, certain Test Identification Parades were held. The various articles which

were recovered during the course of the investigation were then sent to the Forensic Science Laboratory for analysis and report. As in spite of

vigorous search accused Nos. 11 and 12 could not be apprehended, charge-sheet was laid against accused Nos. 1 to 10. On the basis of that

charge-sheet accused Nos. 1 to 10 came to be committed to the Court of Session. When the matter against accused Nos. 1 to 10 was pending

before the court of session, information was received by the police about accused Nos. 11 and 12 having been arrested at Sangroor in Punjab.

After obtaining necessary orders from the Court of Session, therefore, the Police Officers went to Sangroor, and under the transfer warrants, on

July 11, 1985 obtained the custody of accused Nos. 11 and 12 and they were brought to Gujarat, and were arrested on July 15, 1985. On July

24, 1985 accused No. 12 made a statement which led to the discovery of a single barrel gun from a cave in Kadamgiri Hillock. On August 1,

1985 upon the statement made by accused No. 11 a double barrel gun, certain cartridges, pellets etc. were discovered from a hillock of village

Pa"". These articles were also sent to the Forensic Science Laboratory for examination and report. In due course a supplementary charge-sheet

was laid against the accused Nos. 11 and 12 which gave rise to Sessions Case No. 124 of 1985 which, as said above, came to be consolidated

with the main sessions case, being Sessions Case No. 5 of 1985.

8. It is an undisputed fact, that, on account of the incident dated September 20, 1984 Diwaliben Lakhabhai, Odhavji Bhagwan, Jairam Bhagwan,

Parshottam Jagabhai, Popat Lakha, Gordhan Lakha, Nagji Khoda, Madhu Khoda, Ganesh Naran and Babu Bechar died homicidal deaths. Out

of them Odhavji Bhagwan and Jairam Bhagwan died on account of the injuries sustained by them by the use of sharp and pointed weapons while

the other eight died on account of injuries sustained by them by the use of firearms. It is also an undisputed fact that out of the ten deceased, eight

died on the spot, while two, namely, Madhu Khoda and Ganesh Naran died during treatment, on the same day. Similarly, again it is not disputed

that complainant Pragji Mavji, P.W. 16, Dhanji Bhagwan, P.W. 19, Parshottam Mulji, P.W. 18 and Madhav Naran, P.W. 17 sustained firearm

injuries. In view of this admitted position, it is clear that ten persons died homicidal deaths, and therefore, we do not propose to deal with in detail,

the medical evidence in this case. However, as and when necessary we shall refer to some portions of the medical evidence.

9. It is the prosecution case that, the present incident in which ten persons came to be killed, and four came to be injured, was a sequel to long

drawn enmity between the Darbars (Rajputs) of village Chomal and Patels of Mangadh. As noticed hereinabove. the two villages are adjoining

villages, and as evidence shows the distance between the two is very short. The two villages are divided only by bund or embankment. The learned

Sessions Judge has in para 24 of his judgment given a detailed account of the various criminal cases filed between the parties i.e. Darbars of

Chomal on one hand and Patels of Mangadh on the other. That account given by the learned Judge is taken from the various FIR"s and other

papers pertaining to those cases produced on the record of the present case. That material shows the following facts :

In respect of an incident that happened on September 15, 1980 Odhavji Parshottam Patel of Mangadh who happens to be the brother of Premji

Parshottam, lodged an information at Gariadhar Police Station against Bhimdevsinh the son of accused No. 9 and Dhruvansinh present accused

No. 2 for offences under Sections 324, 323, 504 and 34 of the Indian Penal Code. On the basis of that FIR a charge-sheet was filed against

Bhimdevsinh and Dhurvansinh and ultimately there was compounding of the offences between the parties.

10. In respect of an incident that happened on December 1, 1980 Mohan Bechar (The brother of Babu Bechar who died in the present incident)

filed a First Information Report at Gariadhar Police Station against accused Nos. 5 and 8 for offences under Sections 447, 426, 326, 114 of the

Indian Penal Code etc. Thereafter security proceedings were initiated on December 4, 1980 against accused Nos. 1, 2, 3, 7, 8, 9 and some

others. At the instance of those accused, on December 10, 1980 cross security proceedings were initiated by the police against thirteen Patels of

Manghad, Babu Bechar who died in the present incident and Parshottam Mulji and Pragji Mavji who sustained injuries in this case were amongst

the thirteen persons against whom security proceedings were started. In the security proceedings started against the Darbars i.e. accused Nos. 1,

2, 3, 7, 8, 9 and others, they were bound over for maintaining peace, by the orders passed by the concerned authority.

11. On June 28, 1982 three Darbars of Chomal came to be murdered. They were Bhimdevsinh son of present accused No. 9, Sarajubha brother

of the present accused No. 1 and one Khengubha alias Khengarji Chandubha are relative of accused No. 5. In respect of that incident dated June

20, 1982 Nirubha, the present accused No. 8 lodged an information with the police and named therein some seventeen Patels of Manghad as the

persons responsible for the deaths of the aforesaid three Darbars. It appears that in respect of those three deaths, the seventeen persons named by

the accused No. 8 in his FIR and two more persons came to be tried for offences punishable under Sections 302, 324, 436, 147, 148, 149 and

34 of the Indian Penal Code, and all those nineteen accused, at the end of the trial were acquitted. It is also clear that Parshottam Mulji, P.W. 18

of the present case was one of the accused in that case. It is also clear that out of the other eighteen accused in that case some twelve or thirteen

were the near relatives of the persons who have either died or received injuries in the present incident, and some others out of the nineteen accused

of that case, were the relatives of the persons who were travelling in the trailer at the time the present incident happened. It may be mentioned here

that Jivraj Jairam and Bhavan Jairam who were the accused in that case are the sons of Jairam Bhagwan who died in the present incident. Nagji

Odhavji who was the accused in that case happens, to be the son of Odhavji Bhagwan also died in the present incident. Popat Mavji the brother,

and Valji Pragji the son of Pragji Mavji, the complainant in the present case, were also the accused in that case. One Bai Jiji was travelling in the

trailer at the time of the present incident. Her husband Valji Khoda and her son Bhagwan Valji were also the accused in that case. One Bai Jivi

was also travelling in the trailer at the time of the incident. Her son Manhar was the accused in that case of 1982. It appears that trailer and tractor

by means of which the Patels were travelling belonged to Bhikha Meghji. That Bhikha Meghji and his brother Nagji Meghji were also the accused

in that case of 1982 and their mother was travelling in the trailer at the time of the present incident. One Manji Mulji was the accused in that case of

1982 and he happens to be the brother of Parshottam Mulji, P.W. 18 who sustained firearm injuries in the present incident. Thus, quite a large

number of Patels who are concerned with the present case, either because they lost their lives or sustained injuries or their relatives were travelling

in the trailer at the time of the incident were the accused in that case of 1982. As said above, all those nineteen Patels, who were the accused in

that 1982 case, at the end of the trial, came to be acquitted.

It appears that in respect of the very incident which resulted in the deaths of three Darbars as aforesaid, on June 28, 1982 one Bhikha alias Parbat

Meghji Patel of Manghad lodged an information at Gariadhar Police Station against Bhimdevsinh and Khengarji who had died during that incident,

for offences under Sections 506, 326, 504 and 34 of the Indian Penal Code. It is also in evidence that after the nineteen Patels of Manghad came

to be acquitted from the charge of murder of three Darbars, committed on June 28, 1982, once again security proceedings against them were

initiated, but those Patels were discharged from that case.

12. In respect of an incident dated April 30, 1983 one Shambhubhai Valji Patel of Manghad lodged an information Exh. 247, against the present

accused Nos. 2, 7, 11 and 12, as also against Ranvirsinh Ajitbha the son of present accused No. 9 for the offences under Sections 147, 504 and

506 of the Indian Penal Code.

13. On November 5, 1983 one Nirubha Jamsinh Garasia (Darbar or Rajput) of Chomal lodged an information Exh. 217 at Gariadhar Police

Station against three Patels of Manghad, two of whom appear to be the sons of Pragji Mavji the complainant in the present case for offences under

Sections 323, 504, Indian Penal Code. etc.

14. It was in the background of the aforesaid criminal cases, that, some incident happened on July 21, 1984. In relation to that incident, Nanji

Meghji, P.W. 25 lodged ah information at the Police Station against the present accused Nos. 8, 11 and 12 as also against Ranvirsinh the son of

the present accused No. 9 for the offences under Sections 307, 34, 506 of the Indian Penal Code and Section 25 of the Arms Act. That case led

to the institution of Sessions Case No. 115 of 1985 against those four persons, and the learned Additional Sessions Judge in that case No. 115 of

1985 convicted those four persons and sentenced them to certain terms of imprisonment. We may mention here that at the hearing of the present

appeals, the learned Advocates for the convicts made a statement at the Bar, and it was accepted by the learned Addl. P.P. that appeal being

Criminal Appeal No. 295 of 1986 filed by the accused of that Sessions Case No. 115 of 1985 has been allowed by this High Court, and the

accused of that case have been acquitted of the charges levelled against them.

In respect of that very incident, dated July 21, 1984, Bai Leeliba Amarsinh a Darbar of Chomal lodged a First Information Report at Gariadhar

Police Station against Patel Bhikha Meghji, Patel Shambhu Baji and seven unknown Patels of Manghad, for offences under Sections 147, 148,

504, 506 and 307 of the Indian Penal Code and Section 25(1) of the Arms Act.

15. Thus, what was a chain of enmity, and cross criminal cases, between the Darbars of Chomal on one hand and the Patels of Manghad on the

other earned one more link on account of the incident that happened on July 21, 1984.

16. According to the prosecution, as three Darbars of Chomal had been done to death on June 28, 1982, and nineteen Patels of Manghad came

to be tried for those murders but came to be acquitted, the Darbars of Chomal had nurtured a deep rooted enmity against the Patels of Manghad,

and they wanted to eliminate as many Patels of Manghad as possible. Towards that goal, according to the prosecution, on July 21, 1984, Nirubha

the present accused No. 8, Jasubha present accused No. 11 and Mohansinh present accused No. 12 together with Ranvirsinh the son of present

accused No. 9 launched a murderous assault on Parshottam Premji and Nagji Meghji both Patels of Manghad. Further, according to the

prosecution, after launching the aforesaid murderous assault on Parshottam Premji and Nagji Meghji, Nirubha accused No. 8, Jasubha accused

No. 11 and Mohansinh accused No. 12 made themselves scarce but Ranvirsinh the son of accused No. 9 was immediately apprehended.

According to the prosecution, not having remained successful, in a large measure, in the mission of eliminating Patels of Manghad, Jasubha accused

No. 11 and the other accused of the present case, were seeking an opportunity to indulge in a massacre, of Patels of Manghad, and that

opportunity came their way, albeit very unfortunately, on September 20, 1984.

17. The history of previous enmity, as reflected in the various documents brought on record and the evidence of witnesses examined on that point

is largely not in dispute. Of course, the accused have denied their complicity in the incident that happened on July 21, 1984, and they have laid

stress on the fact that though the accused of Sessions Case No. 115 of 1985, meaning thereby, present accused Nos. 8, 11 and 12 and Ranvirsinh

the son of present accused No. 9 were convicted by the learned Additional Sessions Judge, that conviction has been set aside in the High Court.

Nonetheless, the accused also admitted that, there was a long drawn enmity between the Patels of Manghad on one hand and the Darbars of

Chomal on the other.

18. It is the prosecution case to which there is no serious challenge by the accused that Gomtiben who was a near relative of quite a large number

of Patels of Manghad expired at village Manvillas on September 19, 1984. It appears that Manvillas is a village near village Manghad. There is

evidence to show that on September 19, 1984 Patels of Manghad who were related to deceased Gomtiben, offered their ablusions to the

deceased, at the village well of Manghad, and they decided to go to village Manvillas on the next morning for offering condolences to the family

members of Gomtiben. For going to Manvillas, they arranged for getting the tractor and the trailer of Bhikha Meghji in the early morning of

September 20, 1984. Some twelve or thirteen females, and about twelve males by means of the tractor and the trailer went to village Manvillas.

They offered their condolences to the family members of Gomtiben, and at about 9-00 a.m. they started their return journey to Manghad. For a

while, on their way, they halted at village Surnagar and then resumed their onward journey to Manghad. The tractor was being driven by one Vijay

Gogha. When the tractor and the trailer, on the return journey to Manghad, came near the field of Koli Devji Shamji, the accused of this case who

were hiding behind the hedge of the field of Koli Devji Shamji came out on the road, led by Jasubha accused No. 11. Jasubha accused No. 11

fired a shot from his double barrel gun and deflated the tyre of the tractor on account of which the tractor and the trailer turned on the side. Soon

thereafter Jasubha fired another shot from his double barrel gun which beheaded Bai Diwaliben; who was one of the passengers in the trailer.

Jasubha fired some other shots from his gun and some of the other accused also fired gun shots. As a result of these gun shots, Pragji Mavji

complainant, P.W. 16, Madhu Naran, P.W. 17, Parshottam Mulji, P.W. 18 and Dhanji Bhagwan, P.W. 19 received injuries, Parshottam Mulji

and Dhanji Bhagwan tumbled in the trailer itself, while Pragji Mavji and Madhu Naran jumped out of the trailer. According to the prosecution,

Mohansinh, accused No. 12 chased Madhau Naran and fired one more shot at Madhu Naran. It is also the prosecution case that Odhavji

Bhagwan and Jairam Bhagwan jumped from the trailer and ran for their lives but they were chased by the accused, and belaboured by means of

sharp cutting and pointed weapons like dharia, spear, axe etc. and were done to instantaneous death. It is also the prosecution case that even on

Jairam Bhagwan and Dhanji Bhagwan firearms were in fact used or at least attempted to be used. The prosecution then proceeds further to say

that thereafter the accused entered village Manghad, where they did to death Parshottam Jaga, Gordhan Lakha and Popat Lakha by using firearms

and they rampaged the fields and the village tracks where they killed Nagji Khoda and Babu Bechar also by means of firearms and assaulted

Madhu Khoda and Ganesh Naran who died, later in the say during treatment. Thus, according to the prosecution, the accused knew very well that

on September 20, 1984 a large number of Patels from Manghad would have to go to Manvillas to offer condolences and their return journey

would provide to the accused an opportunity to indulge in a massacre of Patels of Manghad. With that knowledge, according to the prosecution,

the accused entered into a criminal conspiracy to kill a number of Patels of Manghad and in order to carry into effect that agreement the present

accused lay in wait behind the hedge of the field of Koli Devji Shamji at about 9-30 a.m. awaiting the arrival of the Patels from Manvillas. No

sooner the accused saw the tractor and the trailer bringing the Patels of Manghad, according to the prosecution, accused No. 11 Jasubha came

out from the hiding and he was followed by the other accused, Who according to the prosecution shared a common object to kill the Patels of

Manghad and in the alternative they shared a common intention to do so, and Jasubha accused No. 11 took the lead. He opened fire, deflating the

tyre of the tractor. This is the starting point of the incident. We will hereafter refer to the other parts of the incident in course of this judgment.

However, it is necessary to bear in mind that, according to the prosecution, all the ten persons who came to be murdered at Manghad on

September 20, 1984 were murdered by the accused in pursuance of the criminal conspiracy to murder the Patels of Manghad and in furtherance

of the common object of the similar type.

19. In order to prove its case the prosecution has examined nine eye-witnesses. They are Pragji Mavji, P. W. 16, the complainant or the first

informant in the case, Madhu Naran, P.W. 17, Parshottarn Mulji, P.W. 18, Dhanji Bhagwan, P.W. 19, Ganesh Jhaver, P.W. 20, Thakersi

Parshottarn, P.W. 21, Gangaben, P.W. 22. Liliben, P.W. 23 and Ghanshyam Nagji, P.W. 53. Out of them, the first four are injured eye

witnesses, while the last mentioned witness Ghanshyam Nagji, P.W. 53 is not of much use to the prosecution. P.Ws. 16, 17, 18, 19 and 20 are the

five eye-witnesses who have spoken to the incident that happened near the tractor and the trailer. P.Ws. 21 and 22 have spoken about the

murders of Parshottarn Jaga, Popat Lakha and Gordhan Lakha. P.W. 23 has spoken about the murder of her husband Babu Bechar. Ofcourse,

there is no direct evidence about how Ganesh Naran came to be murdered.

20. Corning to the first part of the incident as said just now, there are five eyewitnesses. The prosecution case, as regards the first part of the

incident has been unfurled in greater details by witness Ganesh Jhaver, P.W. 20. It has also been unfurled in its main aspects by P.W. 16 Pragji

Mavji the complainant. We will therefore take the evidence of Pragji Mavji, P.W. 16, first for consideration. Pragji Mavji has given the names of

the members of his family. He has also stated that he has 21 Bighas of land in the West of village Chomal and in between the two villages Chomal

and Manghad there is a bund or embankment. According to Pragji Mavji, the way to his field is on this bund and that way passes from near the

field of Bharatsinh accused No. 1 and the house of Bharatsinh is just adjacent to Bharatsinh''s field. According to Pragji Mavji his uncle Jhaverbhai

has four sons, and out of those four, Meghji resides at village Sand Khakhara. Deceased Gomtiben was the father''s sister of this witness. This

witness has then spoken about the death of Gomtiben, and about the village people having offered their ablusions to the deceased at the well of

village Manghad, and then according to the witness, the relatives of the deceased Gomtiben decided to go to village Manvillas to offer their

condolences to the family members of deceased Gomtiben. For that purpose, they engaged the tractor of Bhikha Meghji. The witness has said that

at about 6-00 a.m. on Thursday (and that would be the day of the incident), some ten or twelve males and thirteen females went to Manvillas by

means of the tractor and the trailer. He has given the names of twelve males which include the names of himself, Ganesh Jhaver, P.W. 20, Madhu

Naran, P.W. 17, Dhanji Bhagwan, P.W. 19 and Parshottarn Mulji, P.W. 18 as also the names of two deceased Jairam Bhagwan and Odhavji

Bhagwan. He has also given the names of some of the females who had accompanied him in this trailer. According to him, Diwaliben the wife of

Lakha Jhaver was one of those females. Then he has spoken about the party having gone to Manvillas, and on their return journey having stopped

for a while at Surnagar.

According to this witness at about 9-15 a.m. when they were returning to Manghad, the tractor was being driven just by the side of the hedge, on

the village track. As stated by the witness, after they passed from near the portion of the hedge, from behind the hedge there came out Jasubha

accused No. 11 and he fired a shot from his gun, on the wheel of the tractor, with the result that, the tractor turned on the Eastern side. Then the

witness has deposed that soon then, Mohansinh accused No. 12, Bharatsinh accused No. 1, Bhikhubha accused No. 5, Ajitbha accused No. 9,

Nirubha accused No. 8 and Kuvarsinh accused No. 7 came out and started firing shots on the tractor. According to Pragji, out of these seven

persons i.e. accused Nos. 1, 5, 7, 8, 9, 11 and 12, Bharatsinh had a gun with him, Mohansinh, had also a gun with him and Jasubha had also a gun

with him. Nirubha had a small gun with him. He has stated that he has no idea as to what the remaining accused out of these seven had in their

hands. Pragji Mavji has said that while he was sitting in the trailer, he received a bullet injury or a firearm injury on his left elbow. He has then

stated that Madhu Naran and Odhavji Bhagwan jumped out of the trailer and he (the witness himself) also jumped out of it. The witness has said

that after jumping out of the trailer, he ran towards village Timba. Dharamsinh Mavji, Popat Mavji and Batuklal Gaur who were in the trailer also

jumped out of it, and ran towards village Timba. Vijay Gogha the driver of the tractor ran away towards Manghad. According to this witness, after

he ran towards village Timba up to some distance, he noticed that four other persons were also near the tractor. According to him, he has no idea

about the names of those other four persons whom he saw while he was running away towards Timba. As stated by him, he reached village

Paravadi and went to the house of his relative Manji and as there was no male member at the house of Manji, he immediately went to the outskirts

of village Paravadi and there he found one Vallabhbhai who was standing with his motor car. He did not know that Vallabhbhai, however, he

requested Vallabhbhai to give him a lift for going to Gariadhar. Vallabhbhai acceded to his request and by means of his car took him to Gariadhar,

P.H.C. At. Gariadhar, P.H.C. the Doctor Incharge, rendered treatment to this witness and then, as stated by the witness the Head Constable

arrived there and recorded his complaint or First Information. That complaint or First Information is at Mark ""A"" on the record of the case. Pragji

Mavji has proved the said FIR. The learned trial Judge has treated that Mark ""A"" as the FIR. Though, it appears that some amount of effort was

made by the learned Advocates for the accused, before the trial Court, to contend that Mark ""A"" cannot be treated as the FIR in the case for Dr.

Parikh of Gariadhar Primary Health centre had sent an Yadi Exh. 53 to the Police Station, on the basis of which an entry was made at the Police

Station, and that entry being earlier in point of time would be the First Information Report, the learned Judge has very rightly negatived that

contention. Even the learned Advocates for the accused, who appeared before us, have taken no exception to that finding of the learned Judge. As

we will presently point out, the learned Judge''s view that Mark ""A"" is the FIR in the case is unexceptionable.

21. Proceeding further with the deposition of Pragji Mavji, we find that he has stated that after the Head Constable who recorded the First

Information left the P. H. C., Parshottam Mulji, Madhu Naran and Dhanji Bhagwan were brought to the P.H.C. as they had also been injured. He

has said that a little while later, Madhu Khoda and Ganesh Naran were also brought to the Gariadhar, P.H.C. and thereafter all the injured were

taken to Bhavnagar by means of S.T. Bus. The witness has stated that they reached Bhavnagar at about 3.00 p.m. They were taken to the

Government Hospital at Bhavnagar and were rendered treatment. While this witness Pragji Mavji was at the Bhavnagar Hospital, the Executive

Magistrate recorded his statement Exh. 136. As said by this witness, Madhu Khoda and Ganesh Naran expired at Bhavnagar Hospitals while

Dhanji Bhagwan, Madhu Naran and Parshottam Mulji were removed to. Civil Hospital, Ahmedabad for treatment, The witness has said that he

was also offered to be taken to Ahmedabad for treatment, but he refused the offer, and expressed his desire to go to Manghad. He was therefore

discharged from the hospital at Bhavnagar and he went to Manghad by means of S.T. bus and reached Mangadh at about 9-00 p.m. The witness

has explained that through slip of pen of the writer, in Mark ""A"" the First Information Report, the name of Dhanji Bhagwan has been shown as

Dhanji Mavji and the name of Shamji Odha has been shown as Odha Shamji.

22. According to Pragji Mavji, he knows accused No. 1 since a number of years for his way passes from near the field of accused No. 1 and

secondly accused No. 1 came to his village Manghad for shopping. He has further stated that he knows Ajitbha and his family members, so also,

he knows Bhikhubha who is the agnate of Ajitbha. According to the witness, accused Bhupatsinh is also the agnate of Ajitbha. Thus, he knows all

of them. He has said that accused Mohansinh resides at Chomal since about six years and he used to move about in the company of Jasubha for

the purpose of shopping, and therefore he knew accused Mohansinh as well. He has stated that Mohansinh used to put up with Bharatsinh at

Chomal.

In Para 4 of his deposition this witness Pragji has spoken about the enmity and certain criminal cases between the Darbars of Chomal on one hand,

and the Patels of Manghad on the other. We have earlier referred to those cases. It is therefore not necessary for us to refer to in detail to the.

statements of Pragji made in Para 4 of his deposition on that line.

23. Then he has spoken about his participation at the Test Identification Parade. It may be noted that this witness Pragji on October 1, 1984, at a

T.I. Parade identified Anirudhsinh accused No. 3 and at the other T.I. Parade held on November 24, 1984 he identified Bablubha accused No.

10. He has stated that at the T.I. Parade he was asked to identify the persons who opened fire and he identified accused No. 3, who, according to

him, is the son of Bharatbha but he did not know the name of accused No. 3 earlier and accused No. 3 on being asked at the T.I. Parade gave his

name as Anirudhsinh. Speaking about the identification of accused No. 10, at the Identification Parade, the witness has stated that he identified

accused No. 10, however, he earlier did not know his name to be Bablubha. According to him, he had identified that Bablubha of Sandh

Khakhara.

This, in substance is what this witness Pragji has stated in his Chief-examination. Cross-examined, the witness has stated that Bharatsinh has four

sons. Jasubha accused No. 11, Dhruwansinh accused No. 2, Anirudhsinh accused No. 3 and the fourth being Pradumnasinh. According to this

witness Jasubha was formerly serving in the Army and Pradumnasinh son of Bharatsinh is also in the Army. Those two brothers Pradumnasinh and

Jasubha, according to the witness were coming every year and he knew all the four sons of Bharatsinh by name since childhood. He has stated that

he knows Ajitsinh and his four sons. Bhimdevsinh out of those four sons has expired. Kuvarsinh is accused No. 7 and Nirubha is accused No. 8.

Ranvirsinh, the fourth son to Ajitbha was in jail on the day of the present incident. In para 7 of his deposition the witness was put question as

regards murders of three Darbars of Chomal in 1982 and in that connection he has stated that Khengarsinh one of the three Darbars who died was

the agnate of Bharatsinh. Referring to the incident the witness has stated that the accused came out from behind the hedge and soon they opened

fire. According to him six or seven assailants came near the tractor and started firing. He has said that the field from which the accused came out

was four or five feet higher in level than the level of the road, however, according to him, the hedge was not thick and it had openings in it.

According to him, the assailants came running from behind the hedge. He has said that the first shot was fired from a distance of 5 ft. to 6 ft. He

has deposed that it was in the subsequent fire that he came to be hurt. However, he has no idea as to who out of the assailants had fired the shot

which caused injury to him. As stated by the witness he saw all the accused coming near the tractor and he gave their names in his complaint.

When he saw, he noticed seven persons, however, he hastened to add that while running away, after he had run about 50 to 60 paces he looked

back and then he noticed, other four persons as well. Out of those other four persons he had seen the faces of two while he could not see the faces

of the remaining two. His say is that he could not remember the names of those two whose faces he saw out of the four persons from a distance of

about 50 to 60 paces, but he had got an idea that one out of those two was from Chomal and the other was from Sandh Khakhara. In para 11 of

his deposition he has stated that the four persons whom he saw near the place of the incident, while he was running away, had with them weapons

like dharia and axe. According to him, he had seen Madhu Naran and Odhavji Bhagwan running away towards the East, when he was running

away, however, he has no idea if he had seen Jairam Bhagwan running away. He has stated that in his FIR he has given the names of only seven

accused and has not mentioned therein the fact about he having spotted or seen other four accused. As stated by the witness, at first he had seen

seven assailants, and then while he was running away he had spotted four more. He has denied the suggestion that he had not been able to identify

any of the assailants, and that, out of previous enmity he has roped in accused Ajitsinh and accused Bharatsinh and their family members.

24. This witness Pragji Mavji was in the trailer at the time when the assailants fired at the passengers in the trailer. Undisputedly as a result of the

firing, he sustained an injury on his left elbow. The incident happened at about 9-30 a.m. As stated by the witness soon then he ran to village

Paravadi, went to the house of a relative, but as there was no male member at the house of that relative he came to the outskirts of village Paravadi

and requested one Vallabhhhai for a lift and in the car of Vallabhbhai, came to Gariadhar, P.H.C. Dr. Parikh, P. W. 4 examined this witness at 10-

15 a.m. and found that the witness had a punctured firearm wound on the left side of the upper one-third of the forearm on the posterior side with

the presence of gunpowder. The dimension was 3/4"" in dimater. Dr. Parikh sutured the injury, and rendered primary treatment. As Dr. Parikh

found that this witness had sustained firearm injury, he immediately wrote a Yadi Exh. 53 to the Police Sub-Inspector, Gariadhar Police Station.

The evidence of Madarsinh, P.W. 34 shows that the distance between the P.H.C. at Gariadhar and the Police Station could be covered on foot

within about five minutes. The evidence of Madarsinh the Police Station Officer further shows that on receipt of the Yadi Exh. 53 from Dr. Parikh,

he made an entry in the station diary at 10-30 a.m. and immediately deputed Head Constable Sarvaiya, P.W. 45 to go to the P.H.C. Sarvaiya,

accordingly went to the P.H.C. and recorded the information given by Pragji. That information is Mark ""A"" in the case. Soon after the completion

of the recording of the information Mark ""A"", Sarvaiya drew the Panchnama Exh. 100 about the physical condition of Pragji Mavji. That

Panchnama was drawn between 10-45 a.m. After recording that Panchnama, Sarvaiya returned to the Police Station and handed over the

information Mark ""A"" and the Panchnama Exh. 100 to Madarsinh, the Police Station Officer. The evidence of Madarsinh further shows that on the

basis of these documents he registered the offence at 11-15 a.m. and sent a copy of the FIR Mark ""A"" to the concerned Judicial Magistrate at

Palitana through a personal messenger. Madarsinh has deposed about the timings of the State Transport Buses plying between Gariadhar and

Palitana and in that connection he stated that one bus leaves at 11 a.m. and the other leaves at 12-30 noon. According to Madarsinh, it was by

12-30 bus that he sent the copy of the FIR to the Magistrate at Palitana. That copy of the FIR is at Exh. 216 in the case and it shows that it was

received by the Judicial Magistrate First Class at Palitana on September 20, 1984 at 1-40 p.m. There is evidence to show that the distance

between Gariadhar and Palitana is about 25 to 30 Kms. These facts would go to show that soon after the incident that happened near the tractor

and the trailer, Pragji Mavji ran for his life, went to village Paravadi and enquired about his relative but as the male relative was not at his house, he

went to the outskirts of village and requested and obtained from Vallabhbhai lift to Gariadhar and reached Gariadhar, P.H.C. at about 10-15 a.m.,

received treatment from Dr. Parikh and then upon the Yadi Exh. 53 sent by Dr. Parikh when Sarvaiya came to the P.H.C., this witness gave

information which has been recorded as Mark ""A"" in the case. After recording this information, Sarvaiya prepared the Panchnama Exh. 100

between 10-45 and 11-05 a.m. These facts are apparent on the unchallenged evidence of witnesses referred to by us. These facts would show

that before 10-45 a.m. Mark ""A"" was recorded. To put it differently it was recorded within about an hour and a quarter from the time of incident.

In between the incident and the recording of Mark ""A"", Pragi the injured had run for some distance, had obtained a lift by means of a car, had

reached Gariadhar, P.H.C. and there had received treatment from Dr. Parikh upon whose Yadi, Sarvaiya came there and recorded the FIR. Thus,

Mark ""A"" has been recorded without any delay whatsoever, after the first part of the incident happened near the tractor and the trailer. There was

no wastage of time by anybody after the incident near the tractor and the trailer in the matter of recording information Mark ""A"". As indicated

hereinabove, before the trial Court some argument was made to treat Exh. 53 the Yadi sent by Dr. Parikh to the Police Station as the FIR. The

learned Sessions Judge has for cogent reasons not accepted that argument. Before us that argument was not repeated and it was almost conceded

that the FIR in the case would be mark ""A"" and not Exh. 53. Exh. 53 does not disclose the commission of a cognizable offence. It is a criptic

document which merely speaks that Pragji Mavji aged 35 resident of Manghad having received an injury as a result of firing has been brought to

the P.H.C. for treatment and he needs to be sent to Sir T. Hospital at Bhavnagar for further treatment and for that purpose the request was to do

the needful. This is all what Dr. Parikh wrote to the Police Sub Inspector, Garidahdar in Exh. 53. This, by no stretch of reasoning can be said to be

the information about the cognizable offence. It firstly does not disclose whether the injury was intended injury or an accidental injury. It does not

disclose the place where firing took place. Except saying that it was Pragji Mavji aged 55 of Manghad who had received the injury as a result of

firing, and that he was brought for treatment and needed further treatment and for that purpose was required to be sent to Sir T. Hospital,

Bhavnagar, this Yadi speaks nothing further. Such a document, in our opinion, can never be treated as a First Information Report. The learned

Sessions Judge in his judgment has elaborated on this point with reference to the decided authorities and in view of the fact that no contention was

raised before us on the question of Mark ""A"" being treated as FIR in this case, we do not feel called upon to dilate on that question any further.

Suffice it to say, that Mark ""A"" is the FIR in the case. Now, coming to Mark ""A"" we find that therein Pragji Mavji has at first stated about the party

having gone to Manvillas for offering condolences. He has enumerated the names of most of the male members of that party. While enumerating

those names, he has given the names of Dharamsinh Mavji, Popat Mavji, Dhanji Mavji (Dhanji Bhagwan as explained by him in his chief-

examination), Odhavji Bhagwan, Parshottam Mulji, Odha Shamji (Shamji Odha as explained by him in his chief-examination), Ganesh Jhaver,

Madhu Naran and Lakha Jhaver. He has stated that besides these named males the party consisted of other females as well. He has stated that

after finishing the offerings of candolences, the party started for the return journey to Manghad. According to him, when the party, on its return

journey came near a ravine way (Vankhara) from behind the shelter of the cactus Bharatsinh, Jasubha Bharatsinh and Mohansinh as also, Nirubha,

Ajitbha, Kuvarsinh and Phikhubha Shivbha etc. of Chomal stood up and started firing by means of guns in their hands. This firing was done by

Jasubha, Bharatsinh, Mohansinh and Nirubha by means of guns which they had and they fired shots and (some of) those shots hit him on the left

elbow and they, meaning thereby the assailants had overreached two or three others. In this Mark ""A"" Pragji has further stated that he, Dharamsinh

Mavji, Popat Mavji and Batuklal ran towards Paravadi and at the outskirts of Paravadi he talked to Vallabhbhai who was there with his car and

Vallabhbhai had brought him and. Dharamsinh Mavji to Gariadhar, P.H.C. where he had obtained the treatment from the Doctor. In this statement

mark ""A"" he has stated that he has no idea as to what happened to the remaining males and females who where there in the trailer. In the

penultimate para of the statement Mark ""A"" he has stated that the reason for the incident is that earlier, Patels of his village, and the Darbars of

chomal had quarrels and there were murders and it was as a revenge upon them for that that the present incident has happened.

25. Thus, the First Information Report Mark ""A"" made by Pragji who was himself injured, without any waste of time whatsoever, and within about

an hour and a quarter of the incident, at a place which is about 10 Kms. from the place of incident, clearly reveals the names of accused Nos. 1, 5,

7, 8, 9, 11 and 12 as being amongst the assailants who launched an assault by means of firearms on the persons who were returning to village

Manghad by means of trailer and tractor. In the First Information Report Mark ""A"", besides naming seven accused i.e. accused Nos. 1, 5, 7, 8, 9,

11 and 12 the expression ""etc."" or ""others"" is also used to describe or given an idea about the assailants. The use of this expression ""etc."" or

others"", which follows the seven names of the aforesaid accused, clearly goes to show that Pragji had clearly intended to say that besides the

seven named accused there were others also who were the assailants. In the FIR while describing the seven named assailants as aforesaid he had

stated that they were from Chomal. In the FIR he also gave the names of some of the male members of the party which was returning from

Manvillas. Amongst those names, we find the names of the other prosecution witnesses, namely, Dhanji Bhagwan, Madhu Naran, Parshottam

Mulji and Ganesh Jhaver. We also find in that list the name of Odhavji Bhagwan who died on the spot. We also find in this FIR Mark ""A"" that

Pragji had stated that he was hit by a gun shot on his left elbow and the assailants had reached or overreached some two or three others. That

certainly gives an idea that the assailants had chased some of the victims.

26. From Gariadhar, P.H.C., this witness Pragji Mavji was taken to Sir T. Hospital at Bhavnagar. At the hospital at 3-45 p.m. Mr. Mehta, the

executive Magistrate, P.W. 11 recorded his statement Exh. 136. Pragji Mavji having survived that statement cannot be used as dying declaration

but it can certainly be used u/s 157 of the Indian Evidence Act to corroborate him. In that statement he has spoken about having gone to Manvillas

and about the return journey by means of a tractor. He has also stated that when they were on their way to Manghad, behind the cactus hedge

were hiding Bharatbha and his son Jasubha, the Darbars of Chomal and Mohansinh who stays with them, and when the tractor came near they

opened fire from their guns, therefore, the driver of the tractor ran away. Pragji in this statement Exh. 136 has also stated that he also came out of

the tractor and ran. He has stated that the tractor turned towards a pit. He has also stated that Madhu Naran and Odhavji Bhagwan ran towards

the East and they were fired at from behind and assaulted, and Odhavji Bhagwan had died on the spot. He has also stated that Jairam ran forward,

but was overreached, and was assaulted and had also died on the spot. He has further stated that Ajitbha, Nirubha, Kuvarsinh, Bhikhubha

Shivbha, all these were firing, and besides them there were four other unknown persons having spears, dharias and axes with them.

Thus, soon after reaching Sir T. Hospital at Bhavnagar, Pragji made a statement before Mr. Mehta, P.W. 11, Executive Magistrate; wherein also

he gave the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12 as the assailants who had opened fire on the persons who were travelling by means of

the trailer and the tractor. He also stated in that statement that Mohansinh who resides with Bharatsinh and Jasubha the Darbars of Chomal was

also amongst the persons who opened fire. He has also stated about Madhu Naran and Odhavji Bhagwan having run towards the East and they

having been fired at from behind and Odhavji Bhagwan having died on the spot. He has also stated about Jairam having run in the front, that is,

towards Mangadh and having been overreached and killed. He has also stated that besides the seven named assailants there were four others with

them and those assailants had with them weapons like spears, dharias and axes.

27. This statement Exh. 136 certainly corroborates the statements made by Pragji before the Court. We will presently come to the criticism made

by the learned Advocates for the accused against the evidence of witness Pragji Mavji. However, for the present, it is required to be noted that

Pragji''s deposition before the Court receives substantial corroboration by the statements made by him in the First Information Report lodged

within an hour and fifteen minutes of the incident. The statements made by Pragji in the FIR Mark ""A"" are further amplified in the statement Exh.

136 before the Executive Magistrate made at 3-45 p.m. on the same day. Both these statements mark ""A"" as well as Exh, 136 can be used for the

purpose of contradicting or corroborating Pragji. We will take up the aspect of contradiction a little later.

28. Having seen the substance of what Pragji deposed before the Court and his statement Mark ""A"" and the statement Exh. 136, we now go to

the evidence of other eye witnesses.

29. The second eye-witness examined by the prosecution as regards the first part of the incident which happened near the tractor and the trailer is

Madhu Naran, P.W. 17. As indicated above, his name appears in the F.I.R. (Mark ""A"") as one of the male members of the party which was

returning from Manvillas. During the first part of the incident, that happened near the tractor and the trailer he received firearm injuries. He has

stated that he has 19 Bighas of land at the West of Manghad and his way for going to his fields passes from near the field of accused No. 1. He,

therefore, knows Bharatsinh, since his childhood. Bharatsinh has four sons --Jasubha, Pradyumnabapu, Dhruvanbha and the fourth one whose

name he does not know. He has further stated that he knows Ajitbapu accused No. 9 since childhood. Ajitbapu has four sons -- Nirubha,

Kuvarbha, Bhimdevbha and Ranvir. Out of them Bhimdevbha has expired. He has also stated that he knows Bhikhubha Shivubha of Chomal as he

happens to be an agnate of the other accused. He has stated that there is S.T. Bus-stand on the outskirts of village Manghad, and the residents of

Chomal have also to come to that S.T. Bus-stand, if they want to take up S.T. Bus. Then he has spoken about the death of Gomitiben -- his

father''s sister and about he having gone to Manvillas. According to him, he, Lakha Jhaver, Ganesh Jhaver, Dhanji Bhagwan, Odhavji Bhagwan,

Jairam Bhagwan, Parshottam Mulji, Pragji Mavji, Popat Mavji, Dharamsinh Mavji, Shamji Odha, Kukadiya and Batuklal Gor had gone to

Manvillas. Out of these named persons who had accompanied this witness to Manvillas, Ganesh Jhaver, Dhanji Bhagwan, Parshottam Mulji and

Pragji Mavji (complainants) have also been examined as witnesses in this case while Odhavji Bhagwan and Jairam Bhagwan died during the

incident. As stated by this witness, besides these males whom he named, there were some females in the party and his Aunt (MOTABA)

Diwaliben was also a member of this party. According to him, there were about 12 females in the party. Then he has spoken about the incident,

and in that connection he has stated that when they were passing from near the Wadi of one Koli, from that Wadi emerged Jasubha, and Jasubha

fired a shot at the tractor, and soon then, emerged six others from that Wadi. Those six others were Mohansinh-accused No. 12, Ajitbapu-

accused No. 9, Bharatbapu-accused No. 1, Nirubha-accused No. 8, Kunverbha-accused No. 7 and Bhikhubha-accused No. 5. He has stated

that Jasubha had with a double barrel gun, while out of the six persons who followed Jasubha, Mohansinh-accused No. 12 also had a gun with

him, Nirubha-accused No. 8 had also a gun with him, Ajitbapu-accused No. 9 had a tamancha with him, Bhikhubha-accused No. 5 had also a

tamancha with him, and Kunverbha-accused No. 7 had a spear with him. The witness has deposed that thereafter, meaning thereby, after Jasubha

fired the first shot at the tractor, Jasubha fired a second shot which hit his Aunt (MOTABA) Diwaliben, on her head, and then all (all the accused)

started, firing from guns. Madhu Naran has stated that at that time, he was standing on the tractor holding the hood of the tractor. As a result of the

shot having been fired at it, the tractor, according to Madhu, turned Eastwards and came to a halt. Then the males and females from the trailer

came out and started running away. According to Madhu, he also ran away eastwards, and going some distance away he discarded his sandals

(presumably with a view to run faster) and then he looked back and found that Mohansinh-accused No. 12 had overtaken him. According to

Madhu, he entreated with Mohansinh and said that he was unprotected or without shelter and that he be let off. Still, however, he (Mohansinh)

fired a shot from his gun at him (Madhu) and that shot hit Madhu on the right side of his abdomen. On receipt of that injury, Madhu fell down and

Mohansinh ran away from the scene. Madhu has said that after having been felled down, he started crying for water. He has also said that he

received injuries on the chest, right arm and right buttock as also on his lips. All these injuries he sustained on account of having been hit by the

pellets or bullets fired from the guns when he was on the tractor. He has stated that after having been felled down, as he was crying for water,

Lakha Jhaver came to him, and said that water was not available anywhere near. According to Madhu, he kept lying at that place for about 1 hour

or 1 1/2 hours, and then there came the policemen with vehicle and thereupon, he, Parshottam Mulji and Dhanji Bhagwan were placed in that

motor vehicle. Lakha Jhaver also boarded that motor vehicle and the motor vehicle was then taken to Manghad. At Manghad, Lakha Jhaver got

down from the motor vehicles, and Keshu the son of Dhanji Bhagwan boarded the motor vehicle. According to Madhu, Parshottam Mulji and

Dhanji Bhagwan were in the trailer, and from there they were taken in the motor vehicle, as they had been hit by the pellets fired from guns, and

their condition was serious. According to Madhu, by means of the motor vehicle, all of them were taken to Gariadhar. He has stated that Lakha

Jhaver has not received any injury. Madhu has stated that they reached Gariadhar, P.H.C. at about 11.30 a.m., where the doctor treated them.

According to Madhu, Pragji had reached the P.H.C., at Gariadhar, earlier than him, and some time after be (Madhu) reached the P.H.C., Ganesh

Naran and Madhu Khoda were brought there as they had been hit by bullets. According to Madhu, all the injured persons, after they were

rendered treatment at the P.H.C., were removed by means of S.T. Bus to Bhavnagar Government Hospital, and they reached the hospital

between 2.00 p.m. and 3.00 p.m. at Bhavnagar Government Hospital, the Executive Magistrate Mr. Belim (P.W. 12) recorded the statement of

this witness Madhu. That statement is Exh. 139 in the case, Madhu has stated that thereafter he was removed to Ahmedabad for further treatment.

At Ahmedabad Hospital he was surgically treated, and one bullet was removed from his body. Madhu has stated that he had later on come to

know that even then one more bullet had been allowed to remain in his chest. In paragraphs of his deposition Madhu has said that he knows

Mohansinh-accused No. 12 for he resided with Jasubha-accused No. 11 since about 7 or 8 years prior to the incident.

In cross-examination, Madhu has stated that even while he was running away from the trailer eastwards, he was hearing sounds of shots fired from

guns. He has stated that he had received pellet injuries while he was on the tractor. According to him, Parshottam Mulji and Dhanji Bhagwan were

sitting in the trailer, and Diwaliben was also sitting in the rear portion of the trailer. He has said that when Diwaliben was getting up, she was hit by

a bullet. He has stated that he does not know as to who had fired the shot or the bullet which hit him while he was on the tractor. He has also

stated that he does not know if it was as result of one shot or more than one shot that he was hit by means of pellets. But he is positive that

accused Mohansinh had aimed a shot at him and fired at him. According to him, it was Mohansinh-accused No. 12 alone who had chased him. He

has said that he had covered a distance of about 40 to 45 feet by the time Mohansinh overtook him. His case is that, it was from a distance of

about 5 ft. that Mohansinh fired the shot at him. He clearly stated that at Gariadhar, P.H.C. he had not met Pragjibhai, nor had he seen him.

However, he has admitted that on their way from Gariadhar to Bhavnagar in the bus Pragji was with him.

In paragraph 10 of his deposition, Madhu is positive that so far as he is concerned, he had not seen more than seven assailants. He had not seen

anybody except seven assailants named by him in his chief-examination. He has stated that out of those seven, four had guns, two had tamanchas,

and one had a spear. He has stated that at the spot, 10 or 12 shots were fired. He has denied the suggestion that before his statement was

recorded by the Executive Magistrate, he had a talk with Pragjibhai. He has also denied the suggestion that Pragjibhai had given him the names of

the seven persons, and it was, therefore, that he gave the names of seven persons before the Executive Magistrate.

30. This brings us to the statement of Madhu Naran before the Executive Magistrate.

When Madhu Naran was at Sir T. Hospital, Bhavnagar, Mr. Belim, the Executive Magistrate (P.W. 12) recorded his statement Exh. 139. In that

statement, speaking about the incident, Madhu has stated that when they were returning from Manvillas, Darbars of Chomal obstructed their way

and fired gun shots at them. Then he has given the names of those Darbars and in that list he has named accused Nos. 1, 5, 7, 8, 9, 11 and 12.

31. The third eye witness as regards the first part of the incident is Parshottam Mulji, P.W. 18. This witness Parshottam Mulji has in paragraph 1 of

his deposition, traced the pedigree of his family, and that pedigree inter alia shows that Jairam Bhagwan and Odhavji Bhagwan who died in this

incident and Dhanji Bhagwan, P.W. 19, who received injuries in this incident happened to be his uncle''s sons. In paragraph 2 of his deposition, the

witness has stated that the way to his fields from Mangadh passes at the back of the field of Bharatsinh. He has stated that he knew Bharatbha and

Ajitbha since his childhood. According to him, both Bharatbha and Ajitbha were his co-students. The witness is aged about 60 years. According

to him, he knows all the four sons of Bhartbha. Similarly, he knows all the four sons of Ajitbha. He stated that he knew Mohansinh since last ten

years as Mohansinh used to come to Mangadh in company of Jasubha.

Referring to the incident, he has stated that when the tractor and the trailer came near the field of a koli, out of the Darbars of Chomal, who had

been hiding in that field, Jasubha came out and fired, a shot on the tractor and he was followed by six persons who also emerged or came out from

the field. Those six persons according to him were Mohansinh (accused No. 12), Bharatsinh (accused No. 1), Nirubha (accused No. 8), Ajitsinh

(accused No. 9) Bhikhubha (accused No. 5) and Kunvarsinh (accused No. 7).

As said by this witness, all those six persons also started firing on the trailer of the tractor. He has said that as a result of the first shot fired by

Jasubha on the tractor, the tyre of the tractor was punctured and the driver of the tractor jumped out from the tractor and ran away. Parshottam

has stated that Jasubha had a gun with him, and out of the remaining six, Bharatsinh, Mohansinh, and Bhikhubha had guns with them, while Ajitsinh

had a handgun or a tamancha with him and Nirubha also had a gun with him. He has stated that he has no idea as to what the other assailant had

with them. He has said at that time Diwaliben stood up and a bullet fired by Jasubha hit her on her head. Parshottam has further stated, that another

bullet fired by Jasubha hit Dhanji Bhagwan. According to Parshottam, the shot fired by Nirubha hit him on his left side. The witness has deposed

that at that time, the passengers from the tractor (trailer) started running away. Obhavji Bhagwan and Madhu Naran also similarly started running

away, but they were chased by the accused. According to Parshottam, both he had Dhanji Bhagwan fell down on the trailer, on account of having

received bullet injuries or firearm injuries. The witness has stated that Ganesh Jhaver, Pragji Mavji, Popat Mavji, Dharamsinh Mavji, Shamji Odha,

Batuklal and other females also jumped out from the trailer and ran away. He has stated that besides receiving an injury on his left side on account

of a bullet fired by Nirubha, he had also received four or five other injuries on his left arm. Then this witness has adverted to the facts about a

police vehicle having come there, and having taken him, Madhu Naran, Dhanji Bhagwan etc. to the P.H.C. He has also spoken about Ganesh

Naran and Madhu Khoda having been brought to the P.H.C. He has then said that from Gariadhar, P.H.C. they were taken to Bhavnagar

Government Hospital by means of S.T. Bus. At Bhavnagar Hospital, the Executive Magistrate recorded his statement Exh. 137. He has also

spoken about Ganesh Naran and Madhu Khoda having expired during treatment. He has then said that he was then removed to Ahmedabad

Hospital where he was surgically treated and a bullet was removed from his body.

Again reverting to the main part of the incident, he has stated that over and above the seven persons named by him, two other persons had also

come out from the southern end of the Wadi of the Koli and those persons had with them dharia and axe, but he does not know the names of

those persons. In paragraph 9 of his deposition, he has stated that some two months prior to the present incident, the incident against Premji

Purshottam had happened and therein Mohansinh, Jasubha, Nirubha and Ranubha were the accused, and whereas Ranubha was arrested, the

other three were absconding. In paragraph 10 of his deposition, he has referred to the incident of murders of three Darbars of Chomal, which were

committed in 1982, and in that paragraph he has given the names of some of the persons out of the 19 Patels who had been put up for trial in

connection with the murders of those three Darbars. While giving the names of those some of the Patels who were the accused in that case of

1982, he has also adverted to the relationship of those Patels with some of the victims of the present incident, and some of the persons who were

travelling in the trailer at the time of the incident.

Cross-examined, this witness has said that the two other persons besides the seven named assailants whom he had seen, were noticed by him

when the shots were being fired. But those two persons were at some distance and they had an axe and a spear with them. According to witness

Parshottam, Jasubha was only two to three feets away from the trailer when the shot was fired on Divaliben. Similarly, according to him, Nirubha

when he fired a shot at him, was 4 to 5 feet away from the tractor, and the shot filed by Nirubha hit this witness on his left side. He has denied the

suggestion that they were merely the pellets which hit him. According to him, he was hit both by a bullet as also by pellets and the bullet that hit him

was fired by Nirubha. According to him, Nirubha had fired only one shot at him. He has no idea as to who had fired the shots which caused injury

on his arm. However, he is positive that the injuries that he received on the arm were also caused by the assailants from a nearby place. In para 16

of his deposition, the witness has stated that he had seen Odhavji Bhagwan and Jairam Bhagwan running away and being chased by Darbars, who

had guns with them. However, he has no idea if the guns were fired at Odhavji Bhagwan and Jairam Bhagwan. In para 17 of his deposition, the

witness has stated that accused No. 1 Bharatsinh did not have any weapons in his hands. In the last lines of his deposition, the witness has said that

though he had not seen Odhavji and Jairam being actually injured, he had seen them lying (on the ground).

32. As said above, while Parshottam Mulji was at Bhavnagar Civil Hospital, his statement Exh. 137 came to be recorded by Executive Magistrate

Mr. Mehta (P.W. 11). In that statement Exh. 137, while referring to the incident, he has stated that the Darbars of Chomal obstructed their way,

and when the tractor came near, they opened fire. According to him, as stated by him in the statement Exh. 137, Mohansinh, Nirubha, Bharatbha,

Ajitbha, Jasubha, Kunverbna as also Bhikhubha and two strangers, whose names he did not know, were the assailants. According to him, those

strangers had a spear and an axe with them. He has stated that he was beaten and one Darbar had assaulted him by means of a knife. Divaliben

was also beaten and she died on the spot. Odhavji Bhagwan ran away and was beaten and died on the spot. Similarly, Jairam Bhagwan ran on the

road leading to Mangahd, but he also died. Madhu was assaulted on the other side of the road and was wailing, and he was also brought to the

hospital. In this statement Exh. 137, Parshottam has also stated that Dhanjibhai, who was with him in the tractor, was also assaulted and was at the

hospital. Besides, Pragijbhai was also assaulted and others ran away. In this statement, Parshottam has also referred to the motive of the assailants

and in that connection, he has stated that on the 21st day of the 7th month, Darbars named in the earlier part of the statement had fired at the

persons in the sim.

33. The last injured eye-witness in the case is Dhanji Bhagwan, P.W. 19. He has said that Odhavji and Jairam who died in the present incident

were his brothers. He has also spoken about the way to his fields passing from near the field of accused No. 1. He knows Bharatsinh accused No.

I since long. He also similarly knows Ajitbha-accused No. 9 since long. He knows that Bharatsinh has four sons as also Ajitsinh has four sons. He

has also given the names of the sons of Bharatsinh and Ajitsinh. About the incident he has said that when the tractor was going from the side of the

hedge, all of a sudden Jasubha came out and fired a shot from his gun. That shot had an impact on the wheel of the tractor, with the result that the

tractor turned on the side and stopped and the driver ran away, and thereafter others, all of a sudden came out and started firing shots from the

guns. Those others were, according to him, Nirubha, Bhikhubha, Mohansinh, Ajitbha, Bharatbha and one person who looked like a Rabari or a

cow-herd, whom he does not know. According to Dhanji, at that time, he had not noticed anything with Bharatsinh-accused No. 1 while the rest

had guns with them. His say is that as a result of the gun shot having been fired by Jasubha, the skull (head) of Diwaliben was smashed and she fell

in the tractor (trailer). Witness Dhanji has said that thereafter Jasubha fired one more shot which hit him (the witness) on the left side. The witness

was at that time sitting in the trailer and on account of being hit as aforesaid, he tumbled in the trailer. He has said about others having run away. He

has also deposed about Madhu having run, but having been felled. He has also said about his brothers Odhavji and Jairam having run away. He

has also stated that Parshottam Mulji was also hit on account of the gun firing and was with him in the trailer. Then he has spoken about the police

men having come there, and he having been taken to Gariadhar in company of Parshottam, Madhu and others. He has also spoken about he

having been taken to Bhavnagar Hospital where his statement was recorded. He has then stated about, he, Madhu and Parshottam having been

taken to Ahmedabad and about Madhu Khoda and Ganesh Naran having died during treatment. He has also spoken about the surgical treatment

rendered to him at Ahmedabad and a bullet having been removed from his body. In para 5 of his chief-examination, the witness has stated that he

knows Mohansinh as he sometimes came to his village in company of Bharatsinh. According to him, about a year after the present incident, he was

operated for cataract at both the eyes. Therefore, he was not in a position to identify the accused before the Court.

In cross-examination, he has stated that the operation of cataract of his eyes was done as the cataract was ripe for removal. However, he has

emphatically denied the suggestion that as at the time of the incident, he was suffering from cataract, he was not in a position to see anything clearly.

According to this witness, he was hit after Diwaliben came to be hit. His say is that all the three shots, meaning thereby the first fired on the tractor

wheel, the second on Diwaliben and the third on him, were fired by Jasubha. The witness has stated that thereafter Madhu Naran had gone out of

the tractor (trailer). He had gone towards Nahera, meaning thereby, the way on which the tractor had come, and it was then that Mohansinh fired

a shot. He has admitted that before the Executive Magistrate, he had not given the names of the assailants. His case is that when the Executive

Magistrate came to him at Bhavnagar Hospital, he was suffering on account of acute pain, but he had not stated that fact in his statement before the

Executive Magistrate. He has categorically denied the suggestion that as he was hit, he was not in a position to identify any of the persons

(assailants).

34. At the Sir, T. Hospital, Bhavnagar, Mr. Mehta, the Executive Magistrate (P.W. 11) recorded Exh. 135 the statement of this witness Dhanji at

3.35 p.m. In that statement he has stated that Darbars who were hiding themselves fired 10 or 12 shots from the guns. He has also stated that he

was also fired at; so also Odhavji Bhagwan and Madhu Naran were fired at. Similarly Diwaliben was also fired at and had died on the spot. He

has stated that as he was perplexed, therefore, he was not in a position to comprehend the names. He has also said that the reason for the incidents

was that about two months earlier there was a firing.

35. So far as the first part of the incident is concerned, the last eye witness on that point is Ganesh Jhaver, P.W. 20. He was also in the trailer at

the time of the incident. His name as a co-passenger in the trailer has been given by Pragji Mavji in the F.I.R. Mark ""A"", to which we have made a

reference hereinabove. He was a relative of deceased Gomtiben, on whose death, the party had gone to Manghad for offering condolence. In view

of all these facts, the presence of Ganesh Jhaver at the time of the incident not only could not be disputed, but in fact it was not disputed before us

by the learned Advocates for the accused. In other words, that Ganesh Jhaver was also travelling along with the victims of the first part of the

incident is a fact over which there is I no dispute. It is in the background of this fact that we now examine the evidence of Ganesh Jhaver. He has

stated that his elder brother deceased Meghjibhai was staying at Sandh Khakhara, and had agricultural land there, and even the family of deceased

Meghjibhai resides at Sandh Khakhara. The witness has some agricultural land at Mangadh, and the way for going to his field passes from near the

fields of Bharatbha. He has said that he knows both Bharatbha and Ajitbha since his childhood, and he also knows their sons. Coming to the

incident, he has stated that when the tractor and the trailer came after the field of a koli, and was proceeding just by the side of the hedge of the

field of that koli, out of the persons who had been hiding behind the hudge, Jasubha obstructed the way of the tractor, and fired a shot from a gun

on the wheel of the tractor, and thereupon the driver of the tractor jumped out and ran away. However, the tractor turned on the Eastern side and

came to a halt. According to Ganesh, soon thereafter, Mohansinh, Nirubha, Kunverbha, Ajitbha, Bharatbha. Anirudh, Dhruvanbha, Bhikubha,

Bablubha and Bhupatbha had also emerged or came out and they started firing on the trailer attached to the tractor. He has deposed that, in that,

the first shot fired by Jasubha hit on the head of Diwaliben, as a result of which Diwaliben fell down. He has also stated that at that time he was on

the trailer. According to him, Pragji Mavji who was with him, was also hit on his hand, and thereupon Batuk Gor, Popat Mavji, Pragji Mavji,

Dharamsinh Mavji and Shamji Odha jumped out from the trailer and ran towards the east. According to him, Madhu Naran was also fired at, but

he does not know who fired at him. At that time, according to this witness, Madhu Naran was standing on the joint between the tractor and the

trailer. The witness has deposed that some of the accused chased Odhavji and some chased Madhu. This witness has stated that thereafter he also

jumped out from the trailer and went towards the West. He entered the field from which the assailants-Darbars had come out, and he just

prostrated himself in the bajra crop which then was about the height of a human being or human head. In some other part in the field, there was Til

crop. The witness has stated that Parshottam Mulji and Dhanji Bhagwan had been hit while they were in the trailer. But the witness does not know

who assaulted them. He has said that while he was in the bajra crop, he had been Jairam Bhagwan running towards Mangahd village. According to

him, all the Darbars tried to search him, but could not spot him. This witness has said that after the sound of the footsteps of those persons abated,

he came out and at that time, the accused were running towards Manghad. The witness has said that he then went to Paravadi. From Paravadi he

took a Palitana bound bus, and by means of that bus, he went to Mangadh. He first went to the mother of Madhu Naran and told her that Madhu

was crying for water, but he would not come to receive much- harm and with this statement, this witness requested the mother of Madhu Naran

not to wail. According to this witness, at the time of the incident, accused Mohansinh had a gun with him while Ajitbha had a tamancha with him.

According to him, Bharatsinh had a gun with him, Anirudh had dharia with him, Dhruvansinh had a tamancha with him and Kunvarasinh had a

spear with him. Nirubha had a gun with him and Bhikhubha had a tamancha with him, Bhupatsinh had a spear with him and Bablubha had an axe

with him.

In paragraph 3 of the deposition, the witness has said that he knows Mohansinh as he (Mohansinh) resides at the house of Bharatsinh, and

Jasubha. He also knows Bhikhubha who happens to be the agnate of Bharatsinh. He also knows Bhupatsinh since his childhood. As the brother of

this witness was residing at Sandh Khakhara, he also knew Bablubha, who is a resident of Sandh Khakhara. He has stated that Bablubha has a

field near the road.

According to this witness, from the place of the incident, he went to Mangadh. He approached the mother of Madhu Naran, and then he went

home. He was severely shocked, therefore, he retired or slept. At 4.00 p.m. some policemen summoned him for the purpose of identifying the

dead body of Diwaliben. He therefore went to the place where the tractor was lying. There, in his presence some Inquest Panchnamas were

drawn, and he pointed out to the Police officer preparing the Panchnama, the scene of the offence. On that very evening, the witness went to

Gariadhar P.H.C. where dead bodies were already brought, and two more dead bodies were then brought there from Bhavnagar. He has stated

that he remained at the Gariadhar P.H.C. till the next day. At about 12.00 noon on the next day, the dead bodies were handed over by the

authorities to the relatives. Those bodies, according to this witness were brought to his village Mangadh, and thereafter at about 5.00 p.m. on that

day creamation of the dead bodies was done. He has stated that in the funeral procession of the ; dead bodies, there were about 40,000 persons

and some 1200 to 1300 S.R.P. personnels and P.S.I."s were also present. It may be mentioned here that the incident happened on September 20,

1984 which was a Thursday. The witness has stated that on Saturday, meaning thereby, on September 22, 1984 at about 6:00 p.m. at Mangadh

Panchayat office his statement was recorded by some officer from the C.I.D. Branch. He has identified all the accused whom he had named before

the Court.

36. Cross-examined, the witness has stated that it was at about 12.00 noon that he reached home and it was at about 4.00 p.m. that the policemen

summoned him. He has stated that when the Panchnama of the scene of offence was prepared in his presence the P.S.I. had not asked him the

names of the assessee and the weapons they carried. He has also admitted that he, on his own, had not told the P.S.I. the names of the assailants.

According to him, the Panchnama of the scene of the offence in which he participated took one hour for its preparation. After that Panchnama, he

and the P.S.I. and others went to village Mangadh. However, he had not accompanied the P.S.I. at other places at Manghad. At about 8.00 p.m.

on that day, he left for Gariadhar. According to him, even when he went to the P.H.C. at Gariadhar, Police officers were present there. However,

he did not tell anything to the Police officers at that time for Pragji Mavji, according to him, had already lodged an information. He had come to

know that fact from the policemen. He has said that as Pragji had lodged that information, he thought it fit not to open his mouth, till he was

questioned or interrogated by the police. According to him, till about 6.00 p.m. on Saturday, and that would be September 22, 1984, he on his

own, did not approach any police officer for getting his statement recorded.

In paragraph 9 of his deposition he has been cross-examined at length as regards the actual incident and in that connection, he has stated that some

four or five out of the accused had chased Odhavji. However, he has no idea as to how many persons had chased Madhu. He has said that though

he has no idea about the persons who had chased Odhavji, according to him, those persons who had chased Odhavji had with them guns, axe,

spear and similar weapons. He has stated that he had not seen anybody firing upon Odhavji. Similarly, he has not seen anybody firing upon Jairam.

He has hastened to add that Jairam was assaulted at a place which was about 1 km. away from the place of the main incident. With reference to

his police statement, suggestion was made that in his police statement, he had stated that Odhavji Bhagwan and Jairam Bhagwan had fallen down

on account of having been hit by the bullets, the former in the fields and the latter near the step-well. We may mention here that during the

deposition of the Investigating officer it has been established that this witness had made such a statement before the Investigating Officer. Before

the Court this witness gave the names of eleven persons as the assailants. It appears that in his statement before the Investigating Officer, he had

given the names of twelve persons, and the twelth man was Jodha Khoda, accused No. 4. Questions have been put to this witness as regards that

aspect of the matter. We do not think it is necessary for us to refer to that aspect of the matter right now for we will have an occasion to take up

that matter while considering the appeal filed by Jodha Khoda. Proceeding further, in the cross-examination, the witness has stated that after

Jasubha fired a shot on Diwaliben, he loaded his gun by means of cartridges once again, and the empty cartridges which were taken out by him

from the gun at the time of re-loading the gun were consigned by Jasubha to his pocket.

According to this witness, the accused had come for searching, to the field where he had hidden himself, and had taken a round in the field. He has

denied the suggestion that as the Bajra crop was scanty, he would have been noticed by the accused who, according to him, had come to the field

for searching him. He has stated that he knows by name all the accused named by him. He has admitted that in his statement before the

Investigating Officer he had not stated that the persons who chased Odhavji, had with them spear, axe and dharia. He has explained this omission

by saying that he had no idea as to who were the persons who were chasing Odhavji. However, according to him, some of the accused had with

them such weapons. He has denied the suggestion that he had not seen anything during the incident, as he was first amongst the persons who took

to their heels.

37. As stated by us, while narrating the outline of the prosecution case, after the first part of the incident was over, the accused entered village

Mangadh and there, according to the prosecution, they killed by means of firearms three persons within a matter of few minutes. Those three

unfortunate persons were Parshottam Jaga, Popat Lakha and Gordhan Lakha. On the point of this part of the incident, the prosecution has

examined two witnesses. They are Thakkarsi Purshottam, P.W. 21 and Gangaben P.W. 22. Thakarsi happens to be the son of deceased

Parshottam Jaga. According to Thakarsi, he belongs to Goyani family and deceased Popat Lakha and Gordhan Lakha were his near relatives. He

knows Jasubha accused No. 11 and some other accused since long. He has stated that he had not gone to offer condolence on the death of

Gomtiben because she was very distantly related to him. Speaking about the incident (which we will refer to as the second part of the incident) he

has stated that his father Parshottam Jaga had, on the day of the incident, brought boulders by means of bullock-cart and he was unloading near his

house the boulders from the bullock-cart. He has stated that at about 10.00 a.m. he returned from the Pan Shop where he had gone for consuming

pan, and he entered the dehla of his house. Soon, then he heard a gun shot. On hearing the gun shot, he came out of the dehla, and ran towards his

khadki. When he went to the khadki, he found that his father had fallen down, and the bullock-cart was standing outside the khadki. At that time

he also noticed that in the West, Jasubha-accused No. 11 was standing with a double barrel gun with him. According to Thakarsi, around that very

time from the west came the bullock-cart of Popat Lakha. Popat Lakha himself was driving the bullock-cart. The witness has stated that towards

the west of his khadki, 30 to 40 feet away, there is an electric pole and towards the east of that electric pole was standing Jusubha at that time.

The witness has stated that when the bullock-cart of Popat Lakha came near the electric pole, Jasubha fired a gun shot at Popat Lakha, as a result

of which Popat Lakha fell down and the bullocks of the bullock-cart of Popat Lakha having been scared retreated. The witness has stated that

then Jasubha unloaded the gun and threw the two empty cartridges from his gun, and loaded the gun by means of other two cartridges. On seeing

this, according to the witness, he was scared. Therefore, he retreated into his khadki. Within about two minutes he heard two more gun shots while

he was standing in his khadki and two or three minutes later he found that the bullock-cart of Gordhan Lakha came there. That bullock-cart was

loaded with maize cob. The witness has stated that Gangaben, the wife of Gordhan Lakha was on the bullock-cart and she had held the head of

Gordhan Lakha into her lap and the bullocks of the bullock-cart were walking on their own. Gangaben was weeping, while Gordhan Lakha had

been rendered unconscious and had thrown his head into the lap of Gangaben. The bullock-cart of Gordhan Lakha went to the house of Gordhan

Lakha, which is to the east of the house of this witness. According to this witness, his father Parshottam Jaga had fallen dead in his bullock-cart

and the bullocks of the bullock-cart, on their own followed the bullocks of Gordhan Lakha. According to him, his father had gun-shot injuries on

his body. He had thereupon once again entered his house and sent his sister Amrut to bring back his bullock-cart. His sister brought the bullock-

cart and then he, his sister and his mother removed his father Parshottam Jaga from the bullock-cart and laid him in the Osri of the house.

According to him, all his family members were weeping and mourning and at about 2.30 p.m. the police came and prepared the Inquest

Panchnama. Thereafter, the dead body of his father was taken to the P.H.C. He has stated that at about 7.00 p.m. or 7.30 p.m. once again police

came to his house and prepared the Panchanama near his house and collected some earth and other things from the bullock-cart. A pellet was

recovered from the bullock-cart which was attached by the police. A cartridge-wad was recovered from the bullock-cart and was attached. He

showed to the police the place where his father was shot at. According to the witness, in his presence the police attached two empty cartridge

cases from the place of the incident. He has stated that one more cartridge case was found from near the bund or embankment which is at a

distance of about 80 to 90 feet from his house.

Though this witness has been cross-examined at length, nothing substantial has been taken out during his cross-examination. According to him, he

knows Jasubha since a number of years. He has stated that to his mother he had stated that it was Jasubha who had fired the gun at his father.

However, he has denied the suggestion that to his mother he had not given the name of Jasubha as the person who had fired a gun at his father, and

that he had simply told his mother that a person with khakhi clothes and who had beard, had fired a gun at his father. Having denied that

suggestion, the witness has hastened to add that Jasubha at that time had grown beard. He has also denied the suggestion he had not brought his

mother to the Court on the day of his deposition though she was served with a summons, for if his mother came to the Court for giving deposition,

his theory of having identified Jasubha would be falsified. He has stated that when at 2.30 p.m. on the day of the incident, police came to his house,

they did not interrogate or question him, nor did he say anything to the police. Once again, at the evening time, when the police came to his house

(and that would be for preparing the Panchnama of the scene of offence) also, the police had not questioned him.

38. The second eye witness of the second part of the incident is Gangaben, P. W. 22, the widow of Gordhan Lakha. According to her, deceased

Popat Lakha was the brother of her husband Gordhan Lakha. She belongs to Goyani family. She has five Bighas of agricultural land. Besides,

tilling that land, she did stray labour work. Her way to her field passes from behind the wada or field of accused No. 1. She knew Jasubha

accused No. 11 and Bharatsinh-accused No. 1. She also knew Ajitbha-accused No. 9 and his son Nirubha-accused No. 8. She also knew

Bhikhubha-accused No. 5 and she also knew Mohansinh-accused No. 12, for according to her, Mohansinh resided with Bharatsinh. She also

knew Bablubha accused No. 10, a resident of Sandh Khakhara for according to her, Bablubha was also attending the scarcity relief labour work

along with her.

About the incident she has stated that at about 10.00 or 10.15 a.m., she and her husband were returning in their bullock-cart, which was loaded

with maize-cob. She has said that she was sitting on the heap of the maize-cob. When the cart came near the place of Leelapir, Jasubha asked her

husband to stop the cart and in compliance of the command of Jasubha, her husband stopped the bullock-cart, and at that time, Jasubha fired a

gun shot at her husband. She has deposed that at that time there were two or four persons including Jasubha who had come just near the bullock-

cart, and Mohansinh, Bablubha and Nirubha were those persons besides Jasubha. She has further said that besides those four persons, some other

four persons were standing at some distance, but she had not been able to identify those other four persons who were at some distance. According

to her, her husband received a bullet injury and then she took the head of her husband into her lap, and her husband immediately died, and the

bullocks on their own pulled the bullock-cart into their Dehli. According to the witness, thus, when after her husband was short dead and the

bullocks were taking the cart to their dehli, she saw Popat Lakha, the elder brother of her husband lying dead near the dehli of Odhavji and the

bullock-cart of Popat Lakha was found standing to the east of the bund or embankment. The witness has said that then, as the bullocks of her

bullock-cart, yoked to the cart proceeded further, she found Parshottam Jaga who had sustained a bullet injury lying in his bullock-cart. After her

bullock-cart went into her dehli, some females who were there, took out the dead body of her husband from the bullock-cart and placed it on the

ground and then some females brought the dead body of Popat Lakha who was lying on the road also into the dehli. In paragraph 3 of the

deposition, she has spoken about her participation at the Test Identified Parades where she had identified accused Nos. 1 and 5 at one parade and

accused Nos. 7 and 9 at the other parade. In cross-examination, she has reiterated her chief examination stand that she had not been able to

identify the four persons who were standing at a distance from her bullock-cart, and she has stated that she has no idea as to with what weapons

those four persons were armed. She has stated that she knows Bharatbha and his son Jasubha, but she does not know the other sons of

Bharatbha. Similarly she knows Ajitbha and she knows Nirubha the son of Ajitbha. According to her, she has no idea if she had seen the faces of

the four persons who were standing at a distance from her bullock-cart for she was then engaged in weeping and wailing. Her say is that she

knows Bablubha since about 10 or 12 years. According to her, Bablubha was just at the back of Jasubha and that Bablubha was one of the three

persons who had come just near the bullock-cart. According to her, those three persons, meaning thereby, Bablubha, Mohansinh and Nirubha,

accused Nos. 10, 12 and 8 had not launched any assault on them, and after Jasubha fired the shot, all of them ran away from the spot.

39. According to the prosecution case, on the day of the incident, the accused also killed one Babu Bechar, while he and his wife Liliben were

returning from the field. That Liliben has been examined as P.W. 23. She belongs to Goyani family. She and her husband had 30 Bighas of land in

the sim of Ganesh-Ghad and Pachhegam villages. One of the roads which leads to her fields from her house passes from near the fields of

Bharatsinh-accused No. 1 and Ajitsinh-accused No. 9. According to her she knows both Bharatsinh and Ajitsinh. She also knows Jasubha and

Dhruvanbha-accused Nos. 11 and 2 respectively, the two sons of Bharatsinh while she does not know the remaining two sons of Bharatsinh.

Similarly, she knows Kunvarsinh-accused No. 7, and Nirubha accused No. 8, the two sons of Ajitsinh. But she does not know the other sons of

Ajitsinh. She also knows Bhikhubha, accused No. 5. Referring to the incident, she has stated that at about 11.00 a.m., she and her husband were

returning from their field. They were on their bullock-carts which were loaded with maize cob. Her husband was driving the bullock-cart and she

herself was sitting on the heap of maize-cob. When the bullock-cart came near the field of Govind Kanji, some 8 or 10 persons came out from the

standing juvar crop in that field. Jasubha accused No. 11, Bhikhubha accused No. 5, Nirubha accused No. 8 and Mohansinh accused No. 12

were amongst those 8 or 10 persons who emerged from the standing juvar crop in the field of Govind Kanji. Further, according to her, besides the

four named persons whom she had identified, she did not know the names of other six or seven. Her say is that out of those persons who emerged

from the field, Jasubha had a gun with him. Jasubha fired three gun shots on her husband and one gun shot was fired at her husband by Mohansinh.

Liliben has deposed that she tried to give cover to her husband and thereupon Jasubha gave filthy abuses to her, pointed a gun at her, pushed her

and threw her away from the bullock-cart. Those persons, according to Liliben, then went away towards the side of Ganesh Ghad. She has said

that then she brought the bullock-cart to her house. But before the bullock-cart came to her house, her husband had expired. She left the dead

body of her husband in the bullock-cart and according to her, then the police came and prepared the Inquest Panchnama and took the dead body

to the P.H.C. Then, she has spoken about her participation at the T.I. Parade, where she identified accused Nos. 1 and 5 at one parade, accused

Nos. 7 and 9 at the other parade and accused No. 10 at the third parade. She has stated that all the eight assailants whom she had identified at the

time of the incident were the accused before the court. Referring to the last identification parade at which, according to the prosecution, she had

identified accused No. 10, in the chief-examination itself she has said that at that parade, she had identified one person whose name she does not

know, and she was not in a position to identify that person even before the Court for the reason that, according to her, a long time had elapsed.

She has stated that the bullock-cart of Premji Parshottam of her village was ahead of her bullock-cart, and Jasubha, by a show of his hand, had

allowed that Premji Parshottam to go. Her say is that Mohan Bechar, the elder brother of her husband Babu Bechar was beaten by the Darbars

about five years ago and in that connection, there were cross cases between the parties.

In cross-examination, she has stated that out of the assailants that she saw, six had guns with them. However, she does not have any idea as to

with what weapons were the others armed. She has then said that out of those six gunmen, two had fired shots. Her case is that Jasubha accused

No. 11 had come just near the wheel of her bullock-cart and then he had fired three gun shots one after the other. Jasubha then moved aside and

then Mohansinh accused No. 12 came near the wheel of the cart and fired one gun shot. According to her, when Jasubha threw her away from the

bullock-cart, the other assailants were there nearby. But those other assailants did not assault her. She has said that when Jasubha pointed a gun at

her, she had made entreaties not to assault her and thereupon Jasubha left the place without speaking anything. She has stated that she knew

Ajitbha, accused No. 9 by name. Similarly, she knew Kunversinh accused No. 7 also by name. She also knew Bharatsinh and Dhruvansinh by

name. However, she has admitted that in her statement before police she had not given the names of those four accused. Her explanation for this

omission is that at the time her police statement was recorded, she did not have the clear idea about their names. But she got clear idea about the

names of those four accused when she participated at the T.I. parade. She has said that she has no idea if those four accused, meaning thereby,

accused Nos. 1, 2, 7 and 9 had any weapons with them.

According to the prosecution, on the day of the incident the present accused also murdered three more Patels of village Mangadh and those

murders were committed in two different fields. Of course, the prosecution has not been able to lead any clear direct occular evidence about the

actual murders of these three persons whose names are Nagji Khoda, his servant Madhu Khoda and one Ganesh Naran. But, there is evidence to

show that Nagji Khoda and his servant Madhu Khoda were, at the time, they came to be assaulted, in the field of Nagji Khoda. Ghanshyam, P.W.

53, the son of Nagji Khoda has been produced by the prosecution as a witness. But he does not throw any light as to who the assailants of his

father, and his father''s servants were. According to Ghanshyam, P.W. 53 on the day of the incident, his father Nagji Khoda was in the field, so

was in the field his servant Madhu Khoda. They were harvesting the Bajra crop with the assistance of the agricultural labourers. According to

Ghanshyam, his father Nagji and his servant Madhu were at that time sitting in that part of the field where there was standing ground-nut crop.

Ghanshyam was at that time at a place where Bajra crop was being harvested. The time was about 10.30 a.m. At that time according to

Ghanshyam, he heard a gun shot and his attention was drawn to his father. He found that his father Nagji had tumbled down. The witness

Ghanshyam saw one man who had put on black clothes. But Ghanshyam was not in a position to see the face of that man. According to

Ghanshyam, on seeing his father having tumbled down, he immediately went home and informed his mother that his father was fired at. He has said

that he does not know Jasubha, nor does he know any other accused before the Court. Thus, the evidence of Ghanshyam does not help the

prosecution at all in establishing the identity of the assailants of his father Nagji Khoda and his father''s servant Madhu Khoda. However, his

evidence establishes one thing, and that is, that it was at about 10.30 a.m. that Nagji Khoda and Madhu Khoda were shot at. His evidence which

is almost unchallenged, further establishes that at the time Nagji Khoda came to be shot at they were sitting in that part of the field where there was

standing ground-nut crop.

40. According to the prosecution, on September 20, 1984, ten persons were killed, some of them in village Manghad itself, and some other in

fields and at the outskirts of Manghad. The first three victims were done to death while they were returning by means of a tractor and a trailer. In

respect of the murders of Diwaliben, Odhavji Bhagwan and Jairman Bhagwan, the prosecution mainly relies upon the evidence of P.Ws. 16, 17,

18, 19 and 20. In respect of the murders of Parshottam Jaga, Popat Lakha and Gordhan Lakha, reliance is mainly placed on the oral evidence of

PWs. 21 and 22. In regard to its case for the murders of Babu Bechar, reliance is placed upon the deposition of P.W. 23. In regard to the death

of Nagji Khoda and Madhu Khoda, besides the other pieces of evidence, reliance is placed on the deposition of P.W. 53. However, the

prosecution has not been able to produce any direct evidence as regards the death of Ganesh Naran. But the evidence shows that Ganesh Naran,

a Patel of Manghad was injured by means of a firearm when he was in the field of one Meghji Rana, and the wife of that Meghji Rana having come

to know about Ganesh Naran having sustained injury, approached him, and finding them to be in a very serious condition, put him in a bullock-cart

and brought him to the bus stand of village Manghad. The evidence of Kalubhai Dahyabhai, P.W. 24, who happens to be the Sarpanch of village

Manghad shows that on the day of the incident, at about 10.30 a.m. when he was at the bus stop of Gariadhar, he found crowds of persons

gathering there, and from them he learnt that murders were committed at Manghad. He, therefore, by means of a fiat car of somebody came to

Manghad. Having learnt that Nagji Khoda and Madhu Khoda , had been fired at, and having heard the names of the accused, he went to the field

of Nagji Khoda, and he found that Nagji Khoda had already died, but his servant Madhu Khoda, who was seriously injured, was still alive. He

also found some policemen present there. He then brought a bullock-cart, and took Madhu Khoda, who was lying in the ground nut crop in the

field, by means of that bullock-cart, to S.T. bus stand of Manghad. According to Kalubhai, P.W1 24, the ground-nut crop was of the height of

about 1 1/2 ft. The evidence of this witness Kalubhai further shows that having brought the injured Madhu Khoda to the bus stand, he managed to

send that Madhu Khoda by means of a S.T. bus to Gariadhar, P.H.C. but he did not accompany Madhu Khoda to the P.H.C. Further his

evidence shows that just when that S.T. bus was about to leave the bus stand, the wife of Meghji Rana brought in a bullock-cart Ganesh Naran,

who was in a seriously injured condition, and that Ganesh Naran was also put on that S.T. Bus for being taken to Gariadhar, P.H.G. It is further

the say of Kalubhai, P.W. 24, that after that S.T. Bus carrying Madhu Khoda and Ganesh Naran left, he found that from the road going towards

Chomal was coming a bullock-cart of Babu Bechar. In that bullock-cart he noticed the wife of Babu Bechar and he also noticed that Babu Bechar

was lying dead in the bullock-cart in which were stacked maize-cob. Witness Kalubhai accompanied that bullock-cart up to the house of Babu

Bechar. He then learnt about some murders having been committed near a tractor on the way leading to Timba.

Thus, though we do not have any direct evidence as to how Ganesh Naran came to be injured, this scanty evidence of Kalubhai, P.W. 24, does

show that Ganesh Naran was brought to the bus stand by means of a bullock-cart by the wife of Meghji Rana, and at that time Ganesh Naran was

in a seriously injured condition. Madhu Khoda who was fired at in the field of Nagji Khoda was brought to the bus stand by Kalubhai. Madhu

Khoda was also then in a seriously injured condition, and the medical evidence shows that when these two injured, that is Madhu Khoda and

Ganesh Naran were taken to the Gariadhar, P.H.C., both of them were unconscious.

41. Thus, the prosecution contends that the present accused committed the aforesaid 10 murders and injured four others. According to the

prosecution, this the accused did in pursuance of their conspiracy to kill a large number of Patels from Manghad with whom they had long standing

enmity, and in order to canvass for the conviction of the accused, the prosecution relies not only upon the oral evidence of the witnesses referred to

by us hereinabove, but it also relies upon certain circumstances. As said above, though Ghanshyam does not enlighten as to who the assailants of

Nagji Khoda and Mahdu Khoda were, and though, we have no direct evidence on the question as to who killed Ganesh Naran, the prosecution

contends that from the totality of the circumstances, there is no other inference possible to be drawn than the one, viz., that they are the present

accused who are responsible for the murders of Nagji Khoda, Madhu Khoda and Ganesh Naran.

42. We have noticed hereinabove the relevant parts of the evidence of the eye-witnesses and the statements of the four injured eye-witnesses

recorded by the two Executive Magistrates when those injured eye-witnesses were at the Sir T. Hospital, Bhavnagar between 3.35 p.m. and 4.00

p.m.

43. Pragji Mavji, P.W. 16 the complainant or the first informant in the case has clearly given the names of the males who were travelling along with

him in the trailer at the time of the incident. That list includes the names of injured eye-witnesses Madhu Naran, P.W. 17, Parshottam Mulji, P.W.

18 and Dhanji Bhagwan P.W. 19. The list also includes the names of Ganesh Jhaver, P.W. 20, who of course had not been injured. Pragji Mavji,

it may be noticed was 55 years of age at the time of his deposition which came to be recorded in June 1987. The incident happened at about 9.30

a.m. on September 20, 1984. This witness Pragji knew accused Nos. 1, 5, 7, 8, 9, 11 and 12 very well. Pragji Mavji came to sustain a gun shot

injury on his left elbow during this very incident. He sustained that injury while he was in the trailer. His injury as the medical evidence shows was of

course not a very severe injury. The injury was a punctured firearm wound on the left side of the upper one-third of the forearm on the posterior

side with the presence of gun powder. The dimension was 3/4"" in diameter. In view of the fact that Pragji Mavji came to receive this injury his

presence in the trailer at the time of the incident could not be, and before us has not been, disputed. It appears that his presence in the trailer was

not disputed on behalf of the accused even before the trial Court. In view of the previous enmities as indicated herein-above, he would obviously

know accused Nos. 1, 5, 7, 8, 9, 11 and 12. In his deposition he has stated that he knows accused No. 1 since a number of years. He has given

reasons for that knowledge. He has also stated that he knows Mohansinh accused No. 12. He has given the reasons for that statement. According

to him, Mohansing resides at Chomal since six or seven years and he used to come to his village in the Company of Jasubha for the purpose of

shopping. According to him, Mohansinh used to put up at the house of Bharatsinh. According to this witness, he knows the entire family of

accused No. 9 including accused Nos. 7 and 8. Thus, this witness knew accused Nos. 1, 5, 7, 8, 9, 11 and 12 very well before the incident. The

incident happened at about 9.30 a.m. in board daylight. According to the witness, at first accused No. 11 fired shots from his gun and soon then he

was followed by other accused Nos. 1, 5, 7, 8, 9 and 12 in the assault that the assailants launched at the passengers who were travelling by means

of the trailer. The assault was launched from a very close quarter. Pragji Mavji would therefore have been clearly in a position to identify the

assailants who were very well known to him. According to him, he had identified accused Nos. 1, 5, 7, 8, 9, 11 and 12 who assaulted the

passengers in the trailer. Further, according to him, at the time of the assault, accused Nos. 1, 11 and 12 had guns with them while accused No. 8

had a small gun in his hand and as stated by the witness all those four accused being accused Nos. 1, 8, 11 and 12 started firing from their

respective firearms at the passengers in the trailer. He has stated that he came to be hit. The medical evidence shows that he had sustained fire-arm

injury. He has also deposed to the facts about the injuries having been sustained by some other passengers in the trailer. As shown above, within

less than about one hour and fifteen minutes from the incident he has lodged the F.I.R. Mark ""A"" at Gariadhar a place about 9 or 10 Kms. away

from the place of the incident and that too he having covered some distance on foot and some distance by the motor car of Vallabhai and after he

had received treatment at the Gariadhar, P.H.C. in the F.I.R. also he has clearly named these seven accused being accused Nos. 1, 5, 7, 8, 9, 11

and 12 as the assailants and after giving the names of these seven accused, he has ended the list with the word ""etc."" or ""others"" which is very

significant. The use of this word ""etc."" or ""others"" is very important. The use of this word ""etc."" or ""others"" with which the list of the names of the

aforesaid accused ends clearly indicates that this witness Pragji, even when he made the statement Mark ""A"" had in his mind some other persons

besides these seven accused as being the assailants. The learned Advocates who argued the matter for the accused before us contended that in the

F.I.R. Pragji Mavji has given the names of only seven persons as the assailants, and therefore, he cannot be believed when he tries to say before

the Court that persons besides these seven accused were also amongst the assailants. The argument cannot be accepted. As shown just now, the

list of the names of the assailants given by Pragji in F.I.R. Mark ""A"" is not exhaustive and that fact is clearly indicated by the use of the words ""etc.

or ""others"" appearing at the end of that list.

In this F.I.R. Pragji has also stated that the assailants; the list of whose names ending with the word ""etc."" he has given, started firing from their

guns. Then he had stated that Jasubha accused No. 11, Bharatsinh accused No. 1, Mohansinh accused No. 12 and Nirubha accused No. 8 had

guns with them and they started firing shots by means of those guns. He has then stated in the F.I.R. that he was hit on the left elbow. He has also

further stated that they, meaning thereby, the assailants had overreached two or three others and he has also stated as to how he came to village

Paravadi and then to Gariadhar, P.H.C.

44. Thus, in the F.I.R. lodged by Pragji within less than about one hour and fifteen minutes of the incident, he has clearly indicated active

participation of accused Nos. 1, 8, 11 and 12 in the crime and he has also spoken about the presence of accused Nos. 5, 7 and 9 in the company

of the earlier referred four accused. In the earlier part of this Mark ""A"" he has given the names of the persons who were travelling along with him in

the trailer.

It is thus clear that when there was no time or opportunity to manipulate the things, Pragji, at the earliest opportunity, within a very short time after

the incident, made a clear statement giving the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12 and others as the assailants. He has clearly

indicated that accused Nos. 1, 8, 11 and 12 fired shots from their guns.

45. The learned Advocates for the accused submitted before us that in this F.I.R. Mark ""A"", Pragji has not stated about Jasubha accused No. 11

having fired a shot at the tyre of the tractor nor has he spoken about Diwaliben having been killed as a result of a shot fired at Jasubha from his

gun. It was contended on behalf of the accused on this basis that Pragji had perhaps not witnessed the entire incident, and no sooner the firing

started he jumped out of the trailer and ran for his life, and therefore, he could not have seen the entire incident and he should not be believed when

he implicates the seven accused Nos. 1, 5, 7, 8, 9, 11 and 12 and further he should not be believed when he implicates some other accused as

well. This argument is required to be rejected for it is now well settled that a First Information Report is not supposed to be a detailed document.

The F.I.R. is a document which sets the criminal law into motion and it has to be appreciated keeping in mind the facts and circumstances of each

individual case. Here, we have to bear in mind that there was an all of a sudden assault by a large number of persons armed with firearms on a

party of about 25 persons travelling in a trailer about 13 of whom were females. We have also to remember that there is consistent evidence to

show that the first shot was fired by Jasubha accused No. 11 on the tyre of the tractor as a result of which the tyre was deflated and the tractor

took a turn and came to a stop. There is again consistent evidence to show that the second shot was also fired by Jasubha accused No. 11 and

that shot almost decapitated or beheaded Bai Diwali who was in the trailer. It was thereafter that other shots were fired and one of those other

shots hit Pragji on his elbow. One has to visualise the mental condition of Pragji Mavji, under those circumstances. He had with his own eyes seen

Jasubha having fired a shot on the tyre of the tractor. He had seen Bai Diwali being decapitated by another shot fired by Jasubha, and it was

thereafter that he was hit. He must have been to an extent dumbfounded, but life being dearest to everyone, so it was to Pragji, and therefore,

Pragji, jumped out of the trailer and ran for his life towards village Timba, that is, towards North. But, then even while running away towards the

North, out of human curiosity, he looked back, when he had already run about two or three rope lengths equivalent to about 50 or 60 paces as

stated by him in Para 9 of his deposition, and then he saw four other persons besides the seven named assailants. As stated by him, in Para 9 of his

deposition, he had identified by their faces, two out of the four other persons but he had not been able to see the faces of the remaining two.

According to him, one of those two was of Chomal and the other of Sandh Khakhara. Thus, it is clear that at the time he made the statement Mark

A"", he must have been under some shock, he having witnessed a ghastly incident and he himself having been injured. Therefore, the omission on

his part to state in the F.I.R. about Jasubha having fired a shot on the tyre of the tractor, and about Diwaliben having been killed on the spot is in

our opinion not of any significance. That omission could certainly be explained on the argument that at the time Pragji made this statement Mark

A"" he must have been under some shock. But even when making that statement he has given sufficient details about, the incident. The facts about

Jasubha having fired the first shot at the tyre of the tractor and the second shot fired by Jasubha having decapitated Bai Diwali have been clearly

deposed by the witness, and there is clear evidence, that Pragji came to be hit after these first two shots were fired by Jasubha. He must have,

therefore, witnessed these two facts. Mere omission on his part to mention these two facts in the F.I.R. cannot render his evidence in any manner

infirm.

46. In his deposition this witness has clearly stated that at first he had seen seven persons, and while running away he had seen four more persons.

47. Pragji Mavji is supported on his deposition not only by the F.I.R. Mark ""A"", but also by his previous statement Exh. 136 recorded by the

Executive Magistrate Mr. Mehta, P.W. 11 at about 3.45 P.M. on the day of the incident while he was taking treatment at Sri T. Hospital,

Bhavnagar. In that statement also he has clearly given the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12 as the names of the assailants. He has

also stated that Madhu Naran and Odhavji Bhagwan ran towards the East and they were fired at from behind and Odhavji Bhagwan died on the

spot. In that statement Exh. 136 he has also stated about Jairam having run and having been overreached and having died. In that statement he has

also stated that the assailants were firing shots and had with them weapons like spears, dharias, axes etc. and they had with them four other

unknown persons.

48. Thus, in this statement also he has given the main aspects of the prosecution case and they lend credence to what he has stated from the

witness box. In this statement Exh. 136 he has also spoken about Odhavji Bhagwan and Jairam Bhagwan having run and having been chased and

having been assaulted and they having died. He has also referred to four persons besides the seven named persons as the assailants and he has

also spoken about the assailants being armed with spears, dharias, axes etc. besides the fire arms. This statement Exh. 136 has been made by

Pragji within, about 6 hours or 6 1/2 hours from the incident. Soon after the incident, he went to Gariadhar, P.H.C. and received primary

treatment. Thereafter along with other injured persons he was by means of a bus, taken to Bhavnagar Sir T. Hospital where he reached at about

2.00 P.M. or 3.00 P.M. and the Executive Magistrate, P.W. 11 being summoned he made this statement Exh. 136 which can certainly be used u/s

157 of the Evidence Act to corroborate him and that statement sufficiently corroborates him on the points that he has deposed from the witness

box.

49. As regards this statement Exh. 136 also the defence contended that it does not contain a statement that Jasubha fired shot on the tyre of the

tractor and that Dwaliben died on the spot as a result of having received a gun shot injury. The argument is just the same as was advanced by the

defence in connection with the F.I.R. Mark ""A"". The argument should not detain us any longer for we have dealt with the argument earlier and

show that it has no merit whatsoever. However, we may note one thing here and that is like this: In this statement Exh. 136 though Pragji has not

spoken about Jasubha having fired a shot on the tyre of the tractor, he has categorically stated about Jasubha and others having fired gun shots

when the tractor came nearer and he has also stated that the tractor turned on the side and went into a pit. Now, this statement made by Pragji in

Exh. 136 would clearly show that it was as a result of the gun shot having been fired on the tyre of the tractor that the tractor turned on the side

and went into the pit. Viewing the matter from this angle the omission on the part of Pragji about the fact of Jasubha having fired a gun shot at the

tyre of the tractor would pale into insignificance.

50. It was argued on behalf of the defence that this statement Exh. 136 is the result of a conference held by Pragji with other injured witnesses and

therefore it should not be taken at its face value. We are not in a position to accept this argument. Though six injured persons were brought from

Gariadhar to Bhavnagar by means of S.T. bus and though there may have been some talks inter se amongst those injured persons we are not

prepared to go so far and say from the evidence as it stands that Pragji had conferred with the other injured witnesses and that he made statement

Exh. 136 after arranging his thoughts so as to be in line with the facts which came to his knowledge on being told to him by other injured eye-

witnesses. As we have shown earlier Pragji received the injury after the tyre of the tractor was deflated and Diwaliben was decapitated. The firing

was made all of a sudden, and the shots must have been fired by the assailants in quick succession. It would not have been that the assailants acted

leisurely in the matter of firing shots. The incident near the tractor must have been over within few minutes. Pragji after he received the injury must

have run for his life, but even before he jumped out from the tractor, he must have seen the facts about which he has deposed. Even while he was

running away, as stated by him, from a distance of about 50 or 60 paces, he looked back and that would be quite in conformity with human

curiosity and when he looked back he found that besides the seven accused named by him there were four others with them. He had been able to

identify the faces of two out of those four while he was not able to see the faces of the remaining two. That he had seen four more persons besides

the seven named accused is a fact stated by him in Exh. 136. We have no reason to disbelieve that statement of his. That statement made by him

clearly corroborates him on the facts stated on that line by him from the witness box.

51. Then we have the evidence of Test Identification Parades. In all, in this case, five T.I. Parades were held. The first one was held on October 1,

1984. The second one was held on October 3, 1984. The third one was held on October 19, 1984. The fourth one was held on November 24,

1984 and the last one was held on July 20, 1985. Out of these five T.I. Parades the evidence about the second one held on October 3, 1984 and

the fifth one held on July 20, 1985 is not required to be considered at all for the simple reason that the witnesses who participated in those two T.I.

Parades have not been produced in the Court. It is now well settled that the evidence about the identification at the T.I. Parade would be only

corroborative evidence and it would corroborate the testimony of the witness from the witness box where he identifies a particular person before

the Court as the culprit. In this case, the witnesses who participated at the second and the fifth T.I. Parades having not been produced as witnesses

in the Court, we are not required to consider the evidence of these two T.I. Parades.

52. The first T.I. Parade, as stated herein-above was held on October 1, 1984. We have noticed earlier that accused Nos. 1, 2, 3 and 4 had been

arrested on September 25, 1984 and accused No. 5 was arrested on September 30, 1984. At the first T.I. Parade accused Nos. 1, 2, 3, 4 and 5

were brought for being identified by the eye-witnesses. Pragji Mavji was one of the identifying witnesses. When he participated for the purpose of

identification at the T.I. Parade accused Nos. 2, 3 and 4 were lined up along with six others and out of those total nine persons who were standing

in the line, he identified Anirudhsinh accused No. 3. Though accused Nos. 1 and 5 were very much present for being lined up at that Parade they

were not mixed with the other persons and asked to stand in line, when Pragji participated for the T.I. Parade for the simple reason that Pragji

knew both accused Nos. 1 and 5 very well and he had given their names both in the F.I.R. as also in his statement Exh. 136. It was therefore not

at all necessary for the Executive Magistrate to mix up accused Nos. 1 and 5 along with others in the line when Pragji participated for the T.I.

Parade. It was therefore, that when Pragji participated at the first T.I. Parade, only accused Nos. 2, 3 and 4 with six others were lined up and out

of them Pragji identified accused No. 3 Anirudhsinh as one of the assailants.

53. Accused No. 10 was arrested on November 18, 1984. On November 24, 1984 the fourth T.I. Parade was held at which Baldev alias

Bablubha accused No. 10 along with six others was lined up and Pragji identified accused No. 10 at the T.I. Parade. As stated by Pragji from the

witness box, besides, the seven accused whose names he gave, he had spotted four others near the scene of the offence when he was running

away, and was at a distance of about 50 to 60 paces from the tractor. Out of those four persons he had seen the faces of two and so far as the

remaining two were concerned, their faces he had not seen. Thus, he had clearly seen the faces of nine, out of the eleven assailants. Out of nine, he

knew seven very well, therefore, he gave their names in the F.I.R. Mark ""A"". To show that besides, seven there were others also amongst the

assailants, he used the word ""etc."" or ""others"" in the F.I.R. In his statement Exh. 136 he made the position more clear, by saying that besides the

seven named assailants there were four more and he has elaborated in his deposition as to how he saw the four others besides the seven named

assailants. While he was running away he saw those four and he saw the faces of the two out of those four. Their names he did not know. It had

therefore become necessary to have the other assailants identified by Pragji at the T.I. Parade if he could identify them. According to Pragji, at the

first T.I. Parade, he identified Anirduhsinh, accused No. 3 who happens to be the son of Bharatbha and when he identified that accused his name

was enquired and he gave his name as Anirudhsinh. According to Pragji at that time, he did not remember the name of that accused and it is clear

from his deposition that he came to know the name of accused No. 3 as Anirudhsinh only when Anirudhsinh gave his name after he was identified

by Pragji at the T.I. Parade. Similarly, he did not know the name of Bablubha accused No. 10 and he came to know the name of that accused

Bablubha (accused No. 10) only after he identified him at the fourth T.I. Parade. Thus, these pieces of evidence put together would clearly go to

show that Pragji knew accused Nos. 1, 5, 7, 8, 9, 11 and 12 quite well even before the date of the incident. He knew them over a period of years.

In his deposition he has clearly stated that he knew those accused Nos. 1, 5, 7, 8, 9, 11 and 12 since before the date of the incident. He has given

their names in the F.I.R. as also in his statement Exh. 136. He did not know the names of the other four persons who were with the seven named

assailants. However, he had seen the faces of the two out of those other four. He identified those two at two different T.I. Parades. Those other

two are accused Nos. 3 and 10. He has identified those accused Nos. 3 and 10 even before the Court. That identification by him of those accused

Nos. 3 and 10 would derive corroboration from the evidence of the T.I. Parade discussed hereinabove. Thus, the evidence of Pragji clearly

establishes the presence of accused Nos. 1, 3, 5, 7, 8, 9, 10, 11 and 12 at the scene of the offence. His evidence clearly proves the active

participation of accused Nos. 1, 8, 11 and 12 in the crime. His evidence proves the use of the firearms. His evidence also proves that besides the

firearms the assailants were armed with other sharp and pointed weapons like spears, axes etc.

54. The Learned Advocates, for the accused contended before us that Pragji had enmity with the accused, and therefore, he has falsely implicated

the accused in this case. The argument cannot be accepted. True, enmity there was, between the Patels of Manghad and this would include Pragji

as well, on one hand, and the Darbars of Chomal on the other, but then enmity is a double edged weapon. Just as it might give a cause to the

complainant to lodge a false complaint against the accused, it might also provide to the accused a motive to assault the complainant or his

partymen. Therefore the evidence of a witness who has enmity with the accused is required to be examined with care and caution. However, his

evidence cannot be thrown away merely because he has enmity with the accused. On the contrary, as the reported judgments show, a person who

has received an injury in an incident or a person whose relative has been murdered in an incident will not like to allow the real assailant to go scot-

free and implicate his enemies merely on account of his enmity. In this connection, reference may be made to the judgment in the case of Swaran

Sing v. State of Himachal Pradesh, (1984) 3 Crimes 12 (Paragraph 21) : 1984 Cri LJ NOC 147 wherein it has been held that :

There is no rule either of law or prudence which requires that the evidence of injured persons with respect to the cause of their injuries should not

be believed and acted upon simply because it has not been corroborated by some independent witnesses of the occurrence. As in the instant case,

independent witnesses may not be present at all at the time of the occurrence, that would not mean that the prosecution case, however, true,

should be thrown out simply for the reason that the prosecution has not procured an independent eye-witness. Again, it is pertinent to remember

that though the injured person examined at the trial is hostile to the assailants and interested in the prosecution, it is most unlikely that he would

deliberately spare the true assailants and substitute in their place the names of the other enemies out of malice or enmity. This is all the more unlikely

in cases where the victim had full opportunity to identify his assailants. The desire to punish assailants is so powerful in a human being that he would

unhesitantly name the real culprits without thinking of substituting them by others who may be inimical to him. After all a victim can have no better

sympathy with his real assailants then his other enemies and this applies all the more in case of an offence involving the very life of the victim. A

person may falsely implicate his enemy in place of the real culprit but this is likely only when he is not sure about the identity of his assailant, for

example, where the offence is committed under the cover of darkness and the culprit manages to escape. It is also not improbable that while

naming the assailants, the victims may add some innocent persons out of malice and enmity, which factor the Courts must bear in mind while

appreciating the evidence of such interested persons.

55. The learned Sessions Judge has quite rightly relied upon this judgment of Himachal Pradesh High Court in Para 58 of his judgment, while

appreciating the contention taken before him by the defence, like the one which was also repeated before us by the learned Advocates for the

accused based on the factum of previous enmity and relationship of the victims.

56. In this connection reference may also be made to the decision in the case of State of Punjab Vs. Wassan Singh and Others, of that report this

is what the Supreme Court has said :

It is true that both these witnesses are related to the deceased and, as such, are interested witnesses. Their antecedents, also are of a questionable

nature. But their antecedents or mere interestedness was not a valid ground to reject their evidence. Persons with such antecedents are not

necessarily untruthful witnesses. Nor mere relationship with the deceased was a good ground for discarding their testimony, when, as we have

already held, their presence at the scene of occurrence was probable. All that was necessary was to scrutinise their evidence with more than

ordinary care and circumspection, with reference to the part or role assigned to each of the accused. An effort should have been made to sift the

grain from the chaff; to accept what appeared to be true and to reject the rest. The High Court did not adopt this methodology in appreciating their

evidence. Instead, it took a short cut to disposal, and rejected their evidence wholesale against all the accused, for reasons which as already

discussed, are manifestly untenable.

This judgment shows that merely because the witnesses were relatives of the deceased, that would be no good ground for discarding their

evidence. In such a case what is required to be done is to scrutinise the evidence of witnesses with more than ordinary care and circumspection

with reference to the part or role assigned to each of the accused and to sift the grain from the chaff. The learned Sessions Judge in his judgment in

this case has referred to some other judgments of the Supreme Court also on this point. We do not think it is necessary for us to burden the

present judgment by referring to all those judgments. Suffice it to say that we fully agree with the view taken by the learned Sessions Judge that the

evidence of the eye-witnesses in the present case cannot be discarded merely because they are either relatives of the deceased or they are

interested in the deceased or even on the ground of enmity. However, we note here that the decisions in the case of Dalip Singh and Others Vs.

State of Punjab, and Sadhu Singh alias Surya Pratap Singh Vs. State of U.P., also lend support to our view as aforesaid.

57. The evidence of Pragji was also criticised on the ground that he ran away immediately from the scene, leaving his wife and brother to their luck.

According to the learned Advocates for the accused such a conduct of Pragji is unnatural. This argument levelled by the learned Advocates for the

accused cuts at the very root of the earlier argument that Pragji must have left the place soon on having received the injury and he would then have

no opportunity to witness the other parts of the incident. What Pragji has done in running away from the place of incident, he has done. Merely

because he left the place, leaving his wife, brother and other relatives to their luck for that he cannot be faulted. It is to be noted here that the

instinct of self preservation is paramount in the mind of every human being. Under ordinary circumstances, one would like to take care of his wife

and other relatives if there is a cloud of danger on their head. But if the person himself is under a danger, as when there is likelihood of his losing his

life, he could not be faulted if he takes to his heels and does not care for his wife, brother and other relatives who might also be in similar danger.

58. The evidence of Pragji was also criticised on the ground that he did not disclose the full details of the incident to Vallabhbhai who gave him lift

for going to Gariadhar. This argument also cannot be accepted. Pragji has stated in his deposition that on the outskirts of village Paravadi he found

one person standing with his motor car. He did not know that person, but then he came to know that he was Vallabhbhai. He requested that

Vallabhbhai to take him to Gariadhar, P.H.C. and while making that request, he told Vallabhbhai that he was hit as a result of firing and the firing

was done by the Darbars of Chomal. The comment on behalf of the accused is that to Vallabhbhai, Pragji has not given the names of the assailants.

That comment should be rejected for it is dear that Vallabhbhai was not a person known to this witness. He requested for a lift to Vallabhbhai

because he was in a hurry to go to Gariadhar. In order to persuade Vallabhbhai to give him lift the only thing that was required to be told by this

witness to Vallabhbai was that he was hit as a result of firing. Even so he did tell Vallabhbhai that firing was done by the Darbars of Chomal. The

conduct of Pragji in not disclosing to Vallabhbhai the details of the incident and the names of the assailants cannot be faulted as being unnatural.

59. Having read the deposition of Pragji very minutely in light of the F.I.R. Mark ""A"" and his previous statement Exh. 136, we are convinced that

though he may be, to an extent, said to be an interested witness, and though he had previous enmity with the accused, there is nothing in his

evidence which would require us to take any exception to the statements made by him from the witness box. Of course, a small contradiction as

regards the statement of this witness before the Investigating Officer has been proved on record. That contradiction, in our opinion, is insignificant.

That contradiction in the shape of omission shows that in his further statement recorded by the Investigating Officer Shri Asnani, he had not stated

that he had identified two out of the four persons whom he had seen while running away. This omission in our opinion is quite insignificant. That

would be more so in view of the fact that in his statement before the Executive Magistrate Exh. 136 he has clearly spoken about four persons

besides the seven named assailants.

The other contradiction relied on by the defence, so far this witness is concerned, relates to the fact that in this further statement before Shri

Asnani, this witness has stated that while he was at Gariadhar, P.H.C. he had come to know from Parshottam Mulji and Dhanji Bhagwan about

Odhavji Bhagwan and Jairam Bhagwan having jumped out from the tractor and having been fired at and having died. This contradiction was sought

to be relied on for the purpose of arguing that the statement before the Executive Magistrate Exh. 136 made by this witness was made by him after

he had opportunity to confer with Parshottam Mulji, Madhu Naran and Dhanji Bhagwan. We have dealt with this aspect earlier in connection with

statement Exh. 136 of this witness. We would at this juncture only say that this contradiction has no impact upon the probative value of the

deposition of Pragji from the witness box nor has it any impact on the probative value of the corroborative evidence Exh. 136. Thus, the evidence

of Pragji clearly proves the active participation of accused Nos. 1, 8, 11 and 12 in the crime. It also proves that accused Nos. 5, 7 and 9 were

with accused Nos. 1, 8, 11 and 12 when those accused fired shots from their guns. His evidence also proves the presence of accused Nos. 2 and

10 as the members of the assembly constituted of the seven accused specifically named by him.

60. This takes us to the other eye-witnesses Ganesh Jhaver, P. W. 20. He is the eyewitness who has unfurled the first part of the incident in greater

details. Of course, he had not been injured during the incident, but then his presence at the scene of the first part of the incident cannot be, and has

not been doubted. What is doubted is the naturalness of his conduct, and what he could have seen during the incident. Deceased Gomtiben, to

condole the death of whom, the party had gone to Manvillas was the father''s sister of this witness Ganesh. His going to Manvillas to condole the

death of Gomtiben was therefore obvious. That he was a member of the party which had gone to Manvillas is a fact stated by Pragji in his

deposition and the statement made by Pragji Mavji on that line is supported by the F.I.R. Mark ""A"". It is therefore clear that Ganesh Jhaver was a

member of the party which was returning from Manvillas by means of the trailer. According to Ganesh Jhaver, P. W. 20, Madhu Naran who has

been injured in the present incident is the son of his brother. The family members of Meghji the deceased elder brother of this witness resides at

Sandh Khakhara the place from where Bablubha alias Balwantsinh accused No. 10 hails. Ganesh the witness is aged 60 years and he knew

Bharatbha accused No. 1 and Ajitbha accused No. 9 and their family members since his childhood. He has stated that he knows the sons of

Bharatsinh and Ajitbha as well. Ganesh has spoken about the first part of the incident in sufficient details, and he has in that connection stated that

Jasubha obstructed the way of the tractor and fired shot on the wheel of the tractor, with the result that the tractor swered on the East and halted.

He has then given names of accused Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12 who according to him came out from the hiding behind the hedge. Then,

he has spoken about Jasubha having fired a shot which beheaded Diwaliben. He has also stated about Pragji having been injured on his hand. He

has given the names of some others who ran away from the trailer. He has stated that Madhu Naran was also fired at by someone, but he does not

know the name of that person who fired at Madhu Naran. He has stated that when Madhu Naran was fired at, he was standing on the joint

between the tractor and the trailer. He has also spoken about some of the accused having chased Odhavji and some having chased Madhu.

According to him, thereafter he jumped from the trailer and took shelter in the Bajra crop in the field from which the accused Darbars had

emerged. In some part of that field there was something like Til crop. He has also spoken about Parshottam mulji and Dhanji Bhagwan having

been injured but he has no idea as to who injured them. He had also seen Jairam Bhagwan running towards Manghad. According to him, then all

the Darbars tried to search for him but he was not spotted by them. After the sound of the footsteps of the miscreants stopped, he came out of the

field and found that the accused were running towards Manghad. He therefore ran towards Paravadi and from there he took a bus and went to

Manghad. He has in his deposition clearly indicated the reasons for his knowing all the eleven accused whose names he has given. He has stated

that Bablubha accused No. 10 resides at Sandh Khakhara where his brother also resides and he had also occasions to go to Sandh Khakhara. He

therefore knew bablubha. Further, according to him, the field of Bablubha is on the side of the road. After reaching Manghad, according to him, he

went to his brother"s wife, the mother of Madhu Naran the injured, and told her that Madhu Naran was crying for water, however, there would be

no much harm to Madhu Naran and with these words he requested the mother of Madhu not to weep and raise a hue and cry. According to him,

as he was severely shocked, he then went home and retired or slept. He has then spoken about having been summoned by the police for the

preparation of Panchnama and his participation in the Panchnama. He has stated that he pointed out the place of the incident and that part of the

preparation of the Panchnama took about one hour. He then accompanied the P.S.I. and went to village Manghad but further on he did not

accompany the P.S.I. and at 8.00 P.M. he went to Gariadhar. From Gariadhar, on the next day he returned taking all the ten dead bodies with him

and attended the cremation of those dead bodies.

Thus, this witness Ganesh has unfurled the prosecution case about the first part of the incident in sufficient details. This witness has been cross-

examined at length. Certain contradictions in the evidence of this witness with reference to the police statement have been brought on record. We

will refer to them when we will take up the appeal by Jodabhai Khodabhai Rabari accused No. 4. However, at this juncture it is required to be

noticed that in his chief-examination he has implicated all the accused except Jodabhai Khodabhai accused No. 4. He has attributed the possession

of guns to accused Nos. 1, 8, 11 and 12 and Tamanchas to accused Nos. 2, 5 and 9. According to him, accused No. 3 had a dharia with him,

accused Nos. 6 and 7 had spears with them and accused No. 10 had axe with . him. In cross-examination this witness stated that four or five

assailants had chased Odhavji but he does not know the names of those who chased Odhavji. However, according to him, those who chased

Odhavji had with them guns, spears and axes. In further cross-examination it was elicited that in his statement before the police he had not stated ,

that the persons who chased Odhavji had with them spears, axes, dharia etc.

61. The evidence of this witness Ganesh has been severely criticised by the learned Advocates for the accused. They contended that the conduct

of this witness Ganesh is wholly improbable. That Ganesh would take shelter in the same field from which the accused had emerged, would

according to the learned Advocates for the accused be highly improbable. It was contended that if Ganesh had seen the accused emerging from

the Wadi of Koli Devji Shamji, he would not venture to enter that field or Wadi for the purpose of taking shelter. We are not impressed by this

argument. We have to remember that a party of 24 or 25 persons was returning by means of a tractor/trailer and was going from North to South.

In the trailer itself there were some 12 or 13 females and about 12 males. Madhu Naran of course was standing on the joint between the tractor

and the trailer. But even so, the trailer must have been packed with human beings. All of a sudden, about 11 persons attacked the passengers in

the trailer. Each of the passengers in the trailer would therefore be thinking of running for his or her own life. There is evidence to show that

different persons ran in different directions. According to Ganesh he jumped out from the trailer and ran towards the West. The Wadi of Devji

Shamji, from which the accused emerged, is proved to be on the West of the road. Having jumped out of the trailer, Ganesh states that he entered

that Wadi and fell flat in the Bajra crop with a view to hide himself. We see nothing unnatural in this conduct of Ganesh. In which direction one

would run under such circumstances would depend upon several factors. One would obviously run in the direction which he finds most convenient.

If Ganesh was on the Western side in the trailer, he would obviously jump from the Western side of the trailer and in that event the most convenient

direction for him to run would be the West and he says he ran towards the West. Merely because he had seen the assailants emerging from the

field towards West would be no ground for him not to enter that field for the purpose of taking shelter. As stated by him it was after all the accused

named by him came out from the field and they started firing that he jumped from the trailer and ran towards the West. It was after Pragji and

Madhu Naran, while they were on the trailer, came to be injured that this witness Ganesh jumped out of the trailer. By that time all the accused

were on the road. They had come out of the field. After running towards the West entering the field on the West would be convenient to Ganesh.

After he jumped out of the trailer, he could not be faulted of having displayed any unnatural conduct in having entered the field of Koli Devji

Shamji, even though a short while ago he had seen as many as eleven assailants emerging from that field. It was argued by the learned Advocates

for the accused that Ganesh, under Circumstances, would not have surely been able to rule out some other persons having remained in the field.

This argument, in our opinion has no merit. The evidence shows that Jasubha accused No. 11 first came out of the field and he was immediately

followed by his associates. In all, as stated by this witness Ganesh, eleven persons came out of the field. Then, after a while, the witness jumped

out of the trailer and with a view to saving himself took the most convenient direction that is the West and entered the field. We do not find any

unnaturalness in the conduct of Ganesh.

62. It was submitted by the learned Advocates for the accused that after Ganesh had hid himself in the Bajra crop, he would not have been able to

see what happened after he so hid himself in the Bajra crop and he should be disbelieved when he says that he saw Odhavji Bhagwan and Madhu

Naran being chased by the accused. There again, we are not in a position to agree with the learned Advocates for the accused. We have to

remember that the field of Devji is about 5ft. higher than the level of the road on which the tractor was proceeding. Ganesh, even while hiding

himself in the Bajra crop, would have been in a position to see what was happening on the road which was at a lower level. There are certain

photographs of the field of Devji Shamji on the record of the case. We have examined these photographs they show that the hedge of this field is

not a thick hedge but it is a scanty hedge. Even the Bajra crop was not a thickly grown crop. Therefore, even while hiding himself in the Bajra

crop, it would not have been impossible for Ganesh to see Odhavji Bhagwan and Madhu Naran being chased by some of the accused. Similarly, it

would not have been impossible for him to see that Jairam Bhagwan was running towards Manghad. The argument of the learned Advocates that

having hid himself in the Bajra crop, Ganesh would not have been able to see some of the facts deposed by him, therefore, cannot be accepted. It

was nextly contended by the learned Advocates for the accused that whereas Madhu Naran is said to have run towards the East, this witness

Ganesh claims to have run towards the West. Therefore Ganesh could not have seen Madhu Naran being chased by the accused and he could not

have heard Madhu Naran crying for water. This argument also does not appeal to us. The evidence of Ganesh shows that after the sounds of the

footsteps of the assailants stopped, he came out and at that time he noticed that the accused were running towards Manghad and it was thereafter

that he ran towards Paravadi. Now, this would again be natural on the part of Ganesh for village Paravadi is towards the North of the place of the

incident while village Manghad is towards South of the place of the incident. After the sound of the footsteps of the assailants stopped, the natural

conduct on the part of Ganesh would be to come out from the field where he had hid himself, and to go towards more safe a direction. Having

found that the accused were running towards Manghad i.e. towards South he would obviously run towards North and that he did. Now, there is

evidence to show that Madhu Naran was first hit by some pellets fired from the firearms when he was standing on the joint between the tractor and

the trailer. Thereafter, Madhu Naran jumped out from the trailer and ran towards the North-East. There is also evidence supplied by the

Panchanama the scene of incident, the deposition of the Panch witness and the deposition of Bhutaiya which shows that the place where Madhu

Naran was ultimately felled down was at a distance of 135 ft. towards the North-East from the place where the tractor was found lying after the

incident. The deposition of Madhu Naran shows that while he was running away he had discarded his sandals or slippers. At the time the

Panchnama of the scene of offence was prepared those sandals or slippers were found at a distance of 135 ft. towards the North East from the

place where the tractor was found lying. According to Madhu Naran, it was at the place where he discarded his sandals, that he was overtaken by

Mohansinh accused No. 12 who fired a shot at him and thereupon he fell there. Thus, Madhu Naran was felled down at a place which was only

135 ft. towards the North East from the place where the tractor was lying. Ganesh as shown earlier came out from the field of Koli Devji Shamji

and ran towards the North for going to Paravadi. He would certainly have passed from near the place where Madhu Naran was lying and he

would obviously have heard Madhu Naran crying for water. The fact that Madhu Naran was crying for water has been deposed not only by

Ganesh but also by Madhu Naran and by Mansing the Police Head Constable. Thus, the fact that Madhu Naran was crying for water is fully

proved and there is no reason to disbelieve Ganesh when he says that he heard Madhu Naran crying for water. The argument that Ganesh could

not have heard Madhu Naran crying for water therefore cannot be accepted.

63. Against Ganesh, it was also argued that his conduct in not having disclosed to the mother of Madhu Naran, the full details of the incident is

unnatural. This argument is also not acceptable to us. The mother of Madhu Naran happens to be the brother''s wife of this witness Ganesh. The

witness had seen that Madhu Naran was seriously injured. The witness ran for his life and managed to reach Manghad by means of a bus. Madhu

Naran being his brother''s son he would obviously go to the mother of Madhu Naran and tell her that Madhu Naran was injured and was crying for

water. At the same time, looking to the relationship of this witness and the mother of Madhu Naran, it would be obvious that the witness would

also be anxious not to scare the mother of Madhu Naran unnecessarily. He, therefore, in short, told the mother of Madhu Naran about Madhu

Naran crying for water and at the same time consoled her not to worry saying that Madhu Naran would not come to any seriousness. He also

requested the mother of Madhu Naran not to weep and raise hue and cry. Under the circumstances, in which the witness was put, if he reacted in

the manner he reacted, we do not think his conduct should be said to be unnatural. He has stated that he himself was severely shocked and that

would be quite obvious. He had seen a ghastly incident. It was sheer providence, that he was saved unscathed. Under those circumstances, he

would obviously have been shocked and in the state of such a shock, if he did not think it proper to disclose the full details to the mother of Madhu

Naran, he cannot be faulted. It was also argued on behalf of the defence that the conduct of Ganesh in having gone home and having retired or

slept is also unnatural. For the same reasons as given by us just now, the argument is required to be rejected. Ganesh Jhaver must have been

terribly shocked. In such a state of shock if he thought of taking rest or sleeping, we do not think, his conduct could be branded as unnatural. It is

often said, and with truism, that different persons react differently to the same situation. There cannot be any straight jacket formula about how a

man would react to a given situation. In the same circumstances in which Ganesh was put someone else perhaps would have reacted differently.

He would have narrated the entire episode to the mother of Madhu Naran. He would have collected persons from Manghad to do something if

something was possible to be done. Yet another man would have reacted still differently, and Ganesh Jhaver reacted in the manner he says he

reacted. Unless the conduct of Ganesh as displayed from his evidence is found to be wholly improbable, we would not be prepared to brand his

conduct as unnatural.

64. Then, it was submitted on behalf of the defence that though Pragji, and some other witnesses implicated only seven accused in the case,

Ganesh implicates eleven accused, and therefore, as regards the four accused (11 minus 7), the deposition of Ganesh should not be accepted.

Firstly, factually, the argument is not wholly correct. Pragji as we have indicated hereinabove has implicated not only seven persons but he has

implicated (7+4 =11) persons. It is a different matter that he has not been able to identify two out of those eleven for he had not seen their faces,

but he positively proves the presence of eleven persons at the scene of offence. Parshottam Mulji speaks of the presence of seven persons named

by him and two others. Of course, Madhu Naran speaks of the presence of only seven persons. But from these facts Ganesh cannot be

disbelieved when he speaks about the presence of eleven persons. It is required to be noticed that whereas Pragji Mavji, Madhu Naran and

Parshottam Mulji as also Dhanji Bhagwan were injured, this witness Ganesh had fortunately escaped unscathed. On account of having been hit, the

power of perception of witness Madhu Naran, Pragji Mavji and Dhanji Bhagwan might have been, to some extent impaired while for Ganesh there

were no such reason for impairment of his power of perception. Therefore, when Ganesh speaks about the presence of eleven persons, he cannot

be discarded on the argument that Parshottam Mulji and Madhu Naran speak about the presence of only seven persons. In this connection,

reference may be made to the decision in the case of Shiv Charan Vs. State of Haryana, . That was a case of a running train dacoity by six dacoits.

Three of the witnesses produced at the trial were not able to identify the appellant Shiv Charan, of that case and each one of the other dacoits,

while the fourth witness Allabux had recognised all the accused. Of course, Allabux after the incident had participated at the T.I. Parade where he

had identified all the five accused to be the dacoits but merely on the ground that some other witness had not identified Shiv Charan, Allabux was

not disbelieved when he identified Shiv Charan as one of the dacoits. Of course, there was an additional feature that Allabux had participated at

the T.I. Parade where he had identified Shiv Charan. The Supreme Court confirmed the conviction of Shiv Charan. Applying the same logic here

merely because some other witnesses spoke about only seven accused and Ganesh speaks about eleven, Ganesh cannot be disbelieved. In this

case, it was not at all necessary for Ganesh to participate at T.I. Parade for all the accused named by him were very much known to him since

much prior to the incident. What we emphasize is that merely because Parshottam Mulji and Madhu Naran have spoken about the presence of

seven accused, Ganesh cannot be disbelieved when he speaks about the presence of eleven accused.

65. A very serious grievance was made by the learned Advocates for the accused on the ground that though Ganesh claims to be the eye-witness

to the incident his statement came to be recorded by P.I. Asnani for the first time at about 6-00 p.m. on September 22, 1984. In this connection, it

is required to be noticed that in a small village like Manghad, having a population of about 2500 souls, within less than two hours, at 4 or 5

different places, 14 persons came to receive injuries in a brutal and ghastly assault launched, at first, on a group of about 25 persons who were

travelling in a trailer, and thereafter, on individuals. Eight out of those 14 died on the spot. Ganesh Naran and Madhu Khoda died later during the

course of the day, and four who have been examined as witnesses were fortunate enough to survive the injuries sustained by them. There was

history of enmity and criminal cases and cross cases, and as the evidence shows, this incident which happened between about 9-30 A.M. and 11-

00 a.m. on the outskirts of Manghad, and in the village Mangadh had aroused a lot of commotion and uproar not only in the population of village

Manghad, but even in quite a large number of villages nearby. Ganesh Jhaver has stated that in the funeral procession of the ten deceased, some

40,000 people had joined, and a strong force of 1200 or 1300 S.R.P. men was required to be deployed. There is also evidence to show that right

from the time of the incident, the news about the massacre spread in the nearby villages like a wild fire. The evidence Kalubhai P.W. 24 -- the

Sarpanch of Village Manghad shows that at about 10-30 or 11-00 a.m. on the day of the incident, he was at Gariadhar Bus Stand and there

people had started assembling and the talk of the assembly was about murders at Manghad. Mansing, the Head Constable, P.W. 35 tells us that

when he reached Manghad at about 11-00 a.m. he found that at the bus stop of Manghad, quite a large number of persons had collected and they

were talking about the firing. Mansing reached Manghad at about 11-00 a.m. on the day of the incident. From the persons who had gathered at

the bus stop of Manghad he learnt about the firing, and about the assailants having gone towards West. He learnt that persons with injuries were

lying on the outskirts. He therefore immediately, by means of the jeep car went towards the outskirts and arranged to send Parshottam Mulji,

Dhanji Bhagwan and Madhu Naran for medical treatment. He made inquiries at Manghad, but he found that the doctor was not present at

Manghad. He therefore directed that those three injured be taken to Gariadhar by means of the jeep car. He sent two of his Constables along with

those three injured. When he went near the tractor and removed the aforesaid three injured persons for medical treatment, he also noticed that Bai

Diwali was lying dead in the trailer. He further notice that one man was lying dead at a distance of about 300 to 400 paces from the tractor and

that would be Odhavji Bhagwan, and the other man was found lying dead on the side of the road leading to Manghad and that would be Jairam

Bhagwan. He moved about on the outskirts with a view to making inquiries and found Nagji Khoda lying dead, and Madhu Khoda lying in an

injured condition, and he therefore, arranged to send Madhu Khoda by means of a bullock-cart to the bus stand so that he could be taken to

Gariadhar by means of a bus. By that time, the jeep car which he had sent to Gariadhar for taking the injured for treatment, returned to Mangadh.

By means of that jeep car, he moved about on the outskirts with a view to find out the assailants, if he could. But he was unsuccessful. He

therefore, once again came to the village site of Mangadh, and there Constable Bharat who was sent by Madarsingh from Gariadhar met him and

then he was supposed to take over the investigation of the case. Upto that time, he was only asked to maintain bandobust. However, only a short

while later, P.S.I. Bhuthaiya came to Mangadh and took over the investigation from Mansingh. There is evidence to show that it was at 1-15 p.m.

on September 20, 1984 that PSI Bhuthaiya took over the investigation from Mansingh. Thus, within about two hours and few minutes of Mansinh

having come to Mangadh, he handed, over the investigation to Bhuthaiya. In fact, he must have been in charge of the investigation only for few

minutes or at any rate less than one hour. When he came to Mangadh and came to know that persons had been injured, his first concern would be

to see to it that the injured persons were rendered proper treatment. With that end in view, he managed to send Purshottam Mulji, Dhanji

Bhagwan, and Madhu Naran, who were found near the place of the first part of the incident, by means of a jeep car for treatment. With a view to

see that those persons were rendered treatment, he made inquiries and found that at Mangadh, the doctor was not present. He therefore, used his

discretion and sent the three injured abovenamed by means of his jeep car to Gariadhar. He had learnt that there was a massacre. He therefore,

moved about at other places and noticed in the field of Nagji Khoda that though Nagji Khoda had died, Madhu Khoda was lying in the field with

severe injuries, but was surviving. The immediate concern of Mansingh therefore, would be to see to it that Madhu Khoda got some treatment. He

sent for a bullock-cart and arranged to send Madhu Khoda to the bus stand so that he could be taken by means of bus to Gariadhar. It was

thereafter that he received orders to take up the investigation. But before he could take up effective investigation, P.S.I. Bhuthaiya came there and

took over the investigation from him. Therefore, there was no scope for Mansingh to take any investigation whatsoever. It was argued by the

learned advocates for the accused that, Mansingh has not cared to find out the eye-witnesses and record their statements. In the facts and

circumstances of the case, the argument is required to be stated merely for being rejected.

66. P. S. I. Bhuthaiya took over the investigation at about 1-15 p.m. on September 20, 1984. He has stated that before he took over the

investigation, Mansingh had not started investigation and that would be a correct statement of fact for, as indicated hereinabove, Mansingh had no

time to start the investigation, though he was asked to do so for, his first concern was to render medical treatment to the injured, and that duty he

discharged quite well within the time available to him. And no sooner he was free from that duty and was ordered to investigate, he was required to

hand over the investigation to P.S.I. Bhuthaiya. Mr. Bhuthaiya, immediately on taking over the investigation, prepared the inquest panchnamas on

the five out of the eight dead bodies. The inquest panchnamas on the other dead bodies were prepared by P.S.I. Adatrao. In preparing the Inquest

Panchnamas on the five dead bodies, Bhuthaiya took time between 1-30 p.m. and 4-45 p.m. Thereafter he set himself on the task of preparing the

panchnama of the scheme of offence. For preparing that panchnama, witness Ganesh Zaver was summoned. As seen hereinabove, Ganesh Zaver

has stated that at about 4-00 p.m., a policeman came to call him and he went to the scene of the offence. The panchnama of the scene of offence

Exh. 122 covers not only the place where the first part of the incident happened, but also the place near the house of Babu Bechar, as also the

places where Purshottam Jaga, Popat Lakha and Gordhan Lakha were done to death. It, also covers the field of Nagji Khoda and other places.

The preparation of that panchnama was commenced at 5-00 p.m. and was completed at 9-00 p.m. There is evidence to show that as it was

getting dark during the preparation of the panchanama, a petromax light was brought and with its help, the panchnama was completed. The

evidence of Ganesh Zaver shows that he pointed out various places where the first part of the incident had happened. Thereafter when Bhuthaiya

went to Mangadh, of course, Ganesh Zaver accompanied him, but beyond that, Ganesh Zaver did not accompany Bhuthaiya. The places near the

house of Babu Bechar, and the places where Purshottam Jaga, Popat Lakha and Gordhan Lakha were done to death, as also the place near the

field of Nagji Khoda, were pointed out by persons other than Ganesh Zaver. Thus, Ganesh Zaver acted as the person who pointed out certain

places only as regards the first part of the panchnama Exh. 122 is concerned. According to Ganesh Zaver, his participation for pointing out the

various places in that part of the panchnama took about one hour. The recording of the panchnama was commenced at about 5-00 p.m.

Participation of Ganesh Zaver in the matter of preparation of that panchnama would have been over by about 6-00 p.m. Ganesh Zaver has stated

that after he, in company of the P.S.I. went inside Mangadh, he parted company from the P.S.I., and his unchallenged statement is that at 8-00

p.m. he went away to Gariadhar. From Gariadhar he returned on the next day after 12-00 noon, taking the dead bodies with him, and bringing the

10 dead bodies to Mangadh, he attended to the cremation thereof. The funeral procession, as stated earlier, was attended by about 40,000

persons and some 1200 to 1300 S.R.P. force was required to be deployed. P.S.I. Bhuthaiya, has stated that preparation of the panchnama of the

scene of incident was completed at about 9-00 p.m. According to Bhuthaiya, an eye-witness was brought to him at 5-00 p.m., but he did not ask

him any facts, nor did he record his statement, but that eye-witness pointed out to him, the places upto where Jairam Bhagwan was lying dead,

meaning thereby, the place where the incident commenced upto the place through where the assailants went to Mangadh. P.S.I. Bhuthaiya has

deposed that when he was preparing the further panchnama, that eye witness had left and gone away. Thus, the evidence of Ganesh Zaver, and

P.S.I. Bhuthaiya is consistent. Ganesh Zaver pointed out the places at which he had seen the incident happening. As his job about pointing out

those places was over, he left the place. At about 8-00 p.m., he left for Gariadhar. When the recording of the panchnama was completed, at 9-00

p.m., Ganesh Zaver was not available to Bhuthaiya for giving his statement. As stated by Bhuthaiya, after completing the panchnama at 9-00 p.m.,

and before he handed over the investigation to Mr. Shimpi at 10-00 p.m., he sent persons for finding out eye witnesses from the Village, but no

eyewitness was available in the Village at that time. He has categorically stated that while making search for eye-witnesses between 9-00 p.m. and

10-00 p.m., he had specifically concentrated on getting at Ganesh Zaver and others who were the passengers in the trailer. But within that period

of about one hour between 9-00 p.m. and 10-00 p.m., no such witness was available to him for recording the statement of such a witness.

67. Then we have the evidence of P.S.I. Shimpi, who under the orders of the District Superintendent of Police, took over the investigation from

Bhuthaiya at 10-00 p.m. on September 20, 1984. According to Shimpi, P.W. 47, soon on taking over the investigation from Bhuthaiya, he made

inquiries about the witnesses, but he came to learn that the witness had all gone to Gariadhar. There was a meeting and no witness could be

contacted. Of course, on September 21, 1984, Shimpi recorded the statement of two witnesses at Village Timba, but those statements are

immaterial. The point to be noted here is that Ganesh Zaver, the eye-witness was not available to Bhuthaiya after 8-00 p.m. He was not available

to Shimpi, when Shimpi took over the investigation. There is evidence to show that Shimpi handed over the investigation to Mr. Asnani, Police

Inspector, C.I.D. (Crimes), at 8-00 p.m. on September 21, 1984. Ganesh Zaver had left Mangadh by about 8-0 p.m. on September 20, 1984.

He had gone to Gariadhar It was after 12-00 noon on September 21, 1984, that he returned with ten dead bodies, and attended to the cremation

thereof in an atmosphere which was surcharged with uproar, irritation and excitement. There is also evidence to show that during the funeral

procession, some members of the irate mob and tried to snatch away the revolver of Mr. Trivedi of C.I.D. (Crimes), who was deployed for

maintaining law and order situation. There is also evidence to show that highly placed Police Officers had been summoned to Mangadh in view of

the magnitude of the crime. P.I. Asnani of the Crime Branch, though he was on leave, in cancellation of his leave, was summoned to report for

duty. He reached Gariadhar at 6-00 p.m. on September 21, 1984, contacted the D.I.G., and in his company went to Mangadh. Under the orders

of D.I.G. at 8-00 p.m. he took over the investigation and went to Palitana in company of the D.I.G. to attend a meeting. He, of course, left with his

subordinates, instructions to apprehend the assailants, if traced out. Holding the meeting of such highly placed Police Officers was inevitable, in

view of the uproar, excitement and commotion that was built up in Mangadh and nearby villages. The evidence shows that on September 22,

1984, when Asnani tried to enter Village Mangadh, the irate and excited villagers blocked his way and deflated the tyre of his vehicle. His request

to that irate mob to permit him to go to Mangadh and carry on the investigation fell on deaf ears. He therefore, returned to Gariadhar. At

Gariadhar, at that time, the leaders of Patel community had assembled and they were carrying on an agitation in protest against the massacre of the

persons of their community. Asnani approached, those leaders, and asked for their good offices so that he can enter Mangadh and carry on the

investigation. Some wiser counsel prevailed on some of the leaders of the community with whose help Asnani could enter Mangadh, at about 2.00

p.m. on September 22, 1984. There is also evidence to show that in view of the agitation and excitement, the highly placed Police Officers parked

their vehicles about a kilometre away from Mangadh. Asnani has stated that after he reached Mangadh, he was once again called by the D.G. and

D.I.G. at a place about one Kilometre away from Mangadh for, the situation was apprehended to be quite explosive, in view of the misbehaviour

of some of the irate persons with Mr. Trivedi of C.I.D. Crimes, whose revolver was sought to be snatched away during the funeral procession.

After conferring with the higher police officers, Asnani once again returned to Mangadh and thereafter he recorded the statement of Ganesh Zaver

at about 6-00 p.m. on September 22, 1984.

68. We have narrated hereinabove, the relevant facts in sufficient details, in order to appreciate the argument of the learned advocates for the

accused that there was inordinate delay in recording the statement of Ganesh Zaver, the star eye-witness of the prosecution.

69. In the facts and circumstances narrated hereinabove, we are not in a position to agree with the submission of the learned advocates for the

accused. The facts clearly show that Ganesh Zaver who had seen the incident was shocked. He went to Mangadh, contacted the mother of

Madhu Naran and then went home and retired or slept for a while as he was shocked. He went to the place where the tractor was lying. He

helped Bhuthaiya for about one hour in drawing the panchnama Exh. 122. He accompanied Bhuthaiya to Mangadh Village and then at 8-00 p.m.

he went to Gariadhar, where the dead bodies of his relatives were lying. After the post mortem examination, the dead bodies were returned to the

relatives after 12-00 noon on September 21, 1984. Taking the dead bodies, Ganesh Zaver and others returned to Mangadh. They attended to the

cremation, which was held, under circumstances narrated by us hereinabove. Under these circumstances, Ganesh Zaver was just not available to

Bhuthaiya or even to Shimpi, so as to enable them to record his statement. Asnani took over the investigation at 8-00 p.m. on September 21,

1984, but he had to make to and fro from Mangadh, Gariadhar and Palitana to meet the higher police officers who were pouring in, in quite a large

number. He had to face the wrath of irate mob, which went to the extent of deflating the tyre of his jeep. He had learnt that at the time of the

cremation, the irate mob had misbehaved with Mr. Trivedi of C.I.D.. (Crime) to the extent that the mob tried to snatch away the revolver of Mr.

Trivedi. The earlier part of the day of September 22, 1984, was just lost to Asnani for, the irate mob did not permit him to enter the village. Under

the circumstances, the earliest he could have recorded the statement of Ganesh Zaver was, at the time, it came to be recorded. In our opinion,

though it could be said that there has occurred delay in the matter of recording the statement of Ganesh Zaver, that delay is amply explained.

70. There could not be any hard and fast rule as to the time limit during which the Investigating Officer should record the statement of material eye-

witness. Each case would depend upon its own facts and circumstances. In a given case, the delay of number of days in the matter of recording his

statement may not have any adverse impact to the probative value of a particular eye-witness, while in another case, the delay of even few hours in

that matter, may prove damaging or even fatal to the probative value of the witness.

The principle, it appears to us, is that there should not be unexplained delay in the matter of recording the statement of a material witness. If the

delay is properly explained, the matter would end there, and the evidence of that particular witness would not stand to suffer any adverse criticism.

In Lalli alias Chiranjib Bhowmick Vs. State of West Bengal, , there was a delay of 56 days in recording the police statement of the eye-witness

Haradhan Das. The courts below had not considered the delay of that 56 days in any manner adversely affecting the probative value of the

deposition of that witness Haradhan Das Before their Lordships of the Supreme Court, on behalf of the defence, the argument was that on account

of the delay of 56 days in recording the statement of Haradhan Das, the evidence of that witness should be rejected. The Supreme Court did not

accept the argument as, in the evidence led by the prosecution, a clear, cogent and satisfactory explanation had been given why the statement of

Haradhan Das was recorded after a lapse of about 56 days.

In Sanjay Gandhi Vs. Union of India (UOI) and Others, , the delay of 20 days in recording the statement of an eyewitness was not considered to

have any adverse effect on the deposition of that witness.

Thus it is clear that the evidence of a witness Cannot be rejected merely on the ground that his police statement was recorded belatedly. What is

required to be done by the prosecution, is to explain that delay. If the delay is properly explained, it will have no adverse effect on the probative

value of the deposition of that particular witness.

71. We have carefully considered the evidence, and we have found that the delay in the matter of recording the statement of Ganesh Zaver has

been more than amply explained. In the circumstances in which witness Ganesh Zaver as also the Investigating Officers were put, it was just not

possible for any of the Investigating Officers to record the statement of Ganesh Zaver, before the time it came to be recorded at 6-00 p.m. by

Asnani on September 22, 1984.

72. The learned advocates for the accused submitted that Mr. Bhuthaiya should have recorded the statement of Ganesh Zaver before starting to

prepare the panchnama of the scene of the incident. The argument cannot be accepted. In such a case, preparing the inquest panchnamas

obviously would have the first priority because the dead bodies would have to be sent for post mortem examination. After the inquest panchnamas

were recorded, recording of the panchnama of the scene of offence would be again of prime importance for, if that process is delayed, some vital

material evidence which could be collected during the preparation of the panchnama might be lost. For example, during the preparation of the

panchnama of the scene of the incident Exh. 122, some empty shells of fired cartridges, some fired meteallic projectiles and other articles have

been recovered. As between the recording of the statement of an eye-witness (Ganesh Zaver) and preparing the panchnama of the scene of the

offence, obviously, the preparation of the panchanama of the scene of offence would have a priority. At any rate, recording of the panchnama of

the scene of offence could not have been, under the facts and circumstances of the case, considered to be of any less importance than recording of

the statement of Ganesh Zaver. Bhuthaiya gave precedence to the recording of the panchnama. Ganesh Zaver for about one hour participated in

the process of preparation of the panchnama and pointed out various places where he had seen the incident happening. He then accompanied

Bhuthaiya to Mangadh Village, and then parted company from Bhuthaiya, and went to Gariadhar. When Bhuthaiya completed recording of

Panchnama Exh. 122, he found that Ganesh Zaver was not available. He sent for Ganesh Zaver, but Ganesh Zaver could not be traced. On these

facts, it could never be said that Bhuthaiya had deliberately given precedence to the preparation of Panchnama Exh. 122 over recording of the

statement of Ganesh Zaver. As we read the deposition of Bhuthaiya, the need to record the statement of Ganesh Zaver was very much in his mind,

but that he wanted to do after completing the panchnama of the scene of offence. When the preparation of the panchnama was completed, Ganesh

Zaver was not available. Under these circumstances, we see no force in the argument that there has been unexplained delay in the matter of

recording of the police statement of Ganesh Zaver, the star eyewitness.

73. This takes us to the other three injured eye-witnesses in the case. They are Madhu Naran, P.W. 17, Purshottam Malji, P.W. 18 and Dhanji

Bhagwan, P.W. 19. We have hereinabove given the substance of the statement made by these witnesses before the court. Broadly speaking, the

depositions of these three witnesses stand in line with the deposition of Pragji Mavji, P.W. 16. The only difference is that whereas Pragji Mavji,

Madhu Naran and Purshottam Mulji have consistently given the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12, witness Dhanji Bhagwan has

given the names of six out of those seven persons. He does not give the name of accused No. 7. According to Madhu Naran, Jasubha -- accused

No. 11, had a double barrel gun, Mohansinh -- accused No. 12 also had a gun, Nirubha -- accused No. 8 also had a gun and Bharat Bapu --

accused No. 1 had also a gun with him. Ajitbapu -- accused No. 9 had a tamancha. So also accused No. 5 Bhikhubha had a tamancha with him,

while Kunvarsinh --accused No. 7, had with him a spear. Then he has described the incident as referred to by us earlier. According to him, while

he was standing on the joint between the tractor and trailor holding the hood of the tractor in his hand, he received fire-arm injuries. He therefore,

jumped and ran. Mohansinh -- accused No. 12 chased him and overtook him and, in spite of entreaties made by Madhu Naran. Mohansinh fired a

shot from his gun at this witness, which hit the witness on his abdomen. Thus, this witness received fire-arm injuries both while he was on the trailor

as also when he was taking to his heels. The medical evidence shows that when he was at Ahmedabad Civil Hospital, by surgical intervention, one

deformed Order 32 lead bullet weighing about 6-28 gms. was removed from his body. The Forensic Science Laboratory report shows that it was

a fired lead bullet not usually used in a shotgun cartridge. There is also evidence to show that the gall bladder of Madhu Naran was ruptured with

haematoma over the heptic flexure. Dr. Mayatra of the Civil Hospital, Ahmedabad, has stated that a bullet was found by the side of superior

medentric vein. The gall-bladder was removed and the bullet was also removed. Thus, the bullet described above was removed from the internal

organ of Madhu Naran. The evidence of this doctor further shows that the x-ray showed gas shadow on diaphragm, and a bullet in the thorasic

cavity on the right side. The X-ray of abdomen showed radio opaque shadow of the bullet shape at the level of 12 anteriorly. According to this

doctor, the bullet from the abdominal cavity was taken out while bullet from the thorasic cavity could not be removed, and therefore, it has been

kept as such.

74. The learned advocates for the accused argued that the bullet which has been recovered from the body of Madhu Naran has not been proved

to have been fired from any of the fire-arms said to have been discovered on the statements made by accused Nos. 8, 11 and 12 and therefore,

Madhu Naran cannot be believed when he states that accused No. 12 fired a shot at him. The argument is misconceived for, there is evidence to

show that though one bullet from the body of Madhu Naran has been recovered by surgical intervention, the other bullet was required to be kept in

the body and the same has been retained in the body. Even when Madhu Naran deposed, that bullet was inside his body. That is his evidence.

Therefore, if Madhu Naran"s evidence is otherwise acceptable, it cannot be rejected merely on the ground that one of the two bullets recovered

from his body has not been proved to have been fired from the fire-arm discovered on the statement of accused No. 12.

75. Madhu Naran has stated that after he was hit by the bullet fired by accused No. 12, he fell down and then he was crying for water. This

statement made by Madhu Naran is corroborated by the deposition of Ganesh Zaver, as also by the deposition of Mansingh. That Madhu Naran

had sustained as many as 9 gun shot injuries -- big and small -- is proved by the medical evidence in the case, which is not seriously challenged.

Therefore, Madhu Naran is amply corroborated in his statement that at first he was his hit on account of the shots having been fired at him, when

he was on the trailor and then he was shot at by accused No. 12 -- Mohansinh. Madhu Naran has stated that while he was running away from the

trailer, after going some distance away, he discarded his sandals. His sandals have been recovered at the time when the panchnama of the scene of

offence was prepared. Madhu Naran is therefore, corroborated on that point as well. He has stated that he kept lying at that place for one hour or

1 1/2 hours, and then a policeman came and he was removed by means of a police vehicle to Gariadhar. On this point he is supported by

Mansinh. He has stated about Odhavji Bhagwan having run alongwith him.

76. Madhu Naran has been supported by his statement Exh. 139 recorded by P.W. 12, the Executive Magistrate, at 3-40 p.m. on the same day,

while he was at Bhavnagar Sir T. Hospital. Therein also, he has given the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12 as the assailants. Of

course, he has not described the incident in details in that statement. But that would hardly be material for, we have to remember that at the time he

made that statement Exh. 139, he must be under excruciating pain, and though he was in full consciousness, he would not be in that good a health

as to enable him to make a detailed statement about the incident. That the incident had happened, that some persons had died and that some,

including this witness Madhu Naran, sustained injuries in the incident, are facts which are not in dispute. The question is, who were the assailants?

On that question, Madhu Naran gets complete corroboration from his statement Exh. 139. In that statement, Madhu Naran gave the names of the

aforesaid seven accused and said that they opened fire on them, and that is the crux of the matter.

77. Coming to Purshottam Mulji, his evidence is on the same lines. The evidence of Purshottam Mulji stands in complete conformity with the

evidence of Pragji Mavji, and Madhu Naran. According to Purshottam Mulji, it was a shot fired by Nirubha, accused No. 8 which hit him. This

witness Purshottam Mulji has stated that besides the aforesaid seven accused being accused Nos. 1, 5, 7, 8, 11 and 12, there were two other

persons amongst the assailants. Of course, he has not been able to give the names of those two other persons. But he has stated that those two

persons had with them a dharia and an axe. Thus, Purshottam Mulji gives the names of seven accused being accused Nos. 1, 5, 7, 8, 9, 11 and

12, and implicates two more unknown persons as the assailants. According to him, one of the bullets fired by Jasubha, hit Dhanji Bhagwan. He has

also stated that Odhavji Bhagwan, and Madhu Naran ran, and the accused chased them. He has said that Nirubha, accused No. 8 fired only one

shot at him. Purshottam Mulji is corroborated by his statement Exh. 137 recorded by P.W. 11, Mr. Mehta, Executive Magistrate at Bhavnagar Sir

T. Hospital at 4-00 p.m. on the day of the incident. In that statement also, he has given the names of accused Nos. 1, 5, 7, 8, 9, 11 and 12 as the

assailants, and there he has also spoken about other two unknown persons being amongst the assailants. It was argued on behalf of the accused

that Purshottam Mulji was one of the accused in the case that arose from the murders of three Darbars, committed on June 20, 1982; therefore, he

falsely implicates the accused in this case. We have hereinabove, dealt with the argument about enmity. Merely because a witness is inimical to the

accused, that would be no ground to disbelieve him. If the presence of the witness at the scene of the incident could not be disputed, and if he

himself has been injured in the incident, it would be most unlikely that he would like the real culprit to go scot-free, and falsely implicate his other

enemy. Here in this case, the presence of Purshottam Mulji at the scene of the incident could not be, and has not been disputed. He had sustained

as many as eight firearm injuries as revealed by the medical evidence, which is not challenged. When he was taking treatment at the Civil Hospital,

Ahmedabad, by surgical intervention, from his body, one 0. 32 deformed lead bullet weighing about 6.17 gms. was removed. Of course that bullet,

according to the Forensic Science Laboratory expert, though was a fired lead bullet, such a bullet is not ordinarily used in a shotgun cartridge. The

fact remains that he received as many as eight firearm injuries. Such a person who has received such extensive injuries would hardly think of

allowing the real culprit to escape and implicate his other enemies.

78. The last of this first group of witnesses is, witness Dhanji Bhagwan, P.W. 19. He was 69 years of age at the time of his deposition. He has

implicated accused Nos. 1, 5, 8, 9, 11 and 12 as the assailants. Of course, he has also spoken about the presence of one person who looked like

a Rabari, besides the aforesaid six persons. He has described the incident almost on the same lines as has been described by the other witnesses.

It is required to be noticed that he knows accused No. 1 Bharatbha and accused No. 9 Ajitbha since a long time. He also knows their sons. He

has given the names of those sons. His evidence shows that about a year after the incident, he was operated upon for cataract at both the eyes. On

account of having been operated upon for cataract, he has not been able to identify the accused before the court. But that, in our opinion, would

not diminish the probative value of his evidence for, he has described the six accused above referred from his acquaintance. Ordinarily, it will be

true that the identification by the witness of an accused before the court would be the substantive evidence. But under exceptional circumstances

even if the witness is not in a position to identify the accused before the court as the assailants, that by itself would not be sufficient to throw the

evidence of that wit over-board. Take for example, this very case. At the time, the incident happened, this witness Dhanji Bhagwan was in a

position to see properly. He knew the accused named by him since a number of years. The incident happened in Broad day light. The assault was

launched by the assailants from a close quarter. Under that set of circumstances, Dhanji Bhagwan would certainly have been able to identify the

assailants quite correctly. Thereafter, however, he developed cataract, and he was required to be operated upon at both the eyes for cataract, and

that impaired his eye-sight. The result was that he could not identify the accused before the court as the assailants. In our opinion, from that fact

alone, the probative value of his evidence could not be diminished. To take an illustration, supposing a witness has seen the assailants who were

quite well known to him before the incident. After the incident, the witness lost his eye-sight totally, with the result that he is not in a position to see

at all. Could it then be said that the evidence of such a witness, when he speaks about the named persons as the assailants, should be totally

thrown away? in our opinion, the answer should be in the negative. It is the ring of truth in the evidence of the witness which is most material. If the

court is inclined to accept the evidence of a witness on overall consideration of his evidence, the mere fact that on account of the intervening

circumstance, he has not been able to identify the accused before the court as his assailants, would not be a ground for throwing away his

evidence. There is evidence to show that from the body of Dhanji Bhagwan, by surgical operation at the Civil Hospital, Ahmedabad, one 0. 32

bore bullet weighing 6.27 gms. was removed. It was found by the Forensic Science Laboratory expert to be a fired lead bullet. Of course,

according to the laboratory report, such bullets are not used in shotgun cartridges.

79. When this witness Dhanji Bhagwan was at Sir T. Hospital, Bhavnagar, at about 3.35 p.m., his statement was recorded by the Executive

Magistrate, P.W. 11. Of course, in that statement Exh. 135, Dhanji Bhagwan has not given the names of his assailants. However, he has stated

that Darbars, who were hiding, fired 5 or 10 shots from guns. He has said that shots were fired, also on Odhavji Bhagwan, Madhu Naran and one

Diwaliben and Diwaliben died on the spot. He has said that as he was hit unawares, all of a sudden, he was perplexed. Therefore, he was not

having any sense about the names.

Thus, though he has spoken about Darbars who were hiding having fired, and about Odhavji Bhagwan, Madhu Naran and Diwaliben also having

been hit, he has not been able to give the names of the assailants, in his statement Exh. 135, and he has explained why he was not able to give the

names. According to him he was perplexed. He was, at the time of the incident, about 66 years of age. He was himself hit very badly. Under that

state of situation, the explanation offered by him, must be accepted as true.

80. Thus, as regards the first part of the incident, which happened near the tractor and trailer, we have five eye-witnesses, whose evidence we

have discussed and appreciated hereinabove. Pragji Mavji, speaks about accused Nos. 1, 5, 7, 8, 9, 11 and 12 plus four others as the assailants

and has identified at the T.I. Parade, accused Nos. 3 and 10. Madhu Naran speaks about only 7 accused, being accused Nos. 1, 5, 7, 8, 9, 11

and 12 while Purshottam Mulji speaks about those very seven accused plus two others, and Dhanji Bhagwan speaks about accused Nos. 1, 5, 8,

9, 11 and 12. Ganesh Zaver speaks about all the accused except accused No. 4.

81. Thus so far as the participation in the crime that was committed near the tractor and the trailer, accused Nos. 1, 5, 7, 8, 9, 11 and 12 are fully

proved to have been the assailants. Their presence and participation has been spoken about by the aforesaid five witnesses, subject to the

exception that Dhanji Bhagwan does not speak about accused No. 7.

82. That takes us to the case of the prosecution against other accused as regards the first part of the incident. So far as accused No. 2

Dhruvansinh is concerned, his presence amongst the assailants has been spoken by Ganesh Zaver. Accordingly to Ganesh Zaver, Dhruvansinh had

a tamancha with him. So far as the first part of the incident is concerned, barring the deposition of Ganesh Zaver, there is no other evidence against

this accused No. 2, Dhruvansinh. So far as accused No. 3, Aniruddhsinh is concerned, his presence near the tractor and trailer is spoken to by

Ganesh Zaver, who has said that accused No. 3 had a dharia with him. Furthermore, this accused Aniruddhsinh has been identified by Pragji Mavji

at the T.I. Parade. We have discussed the evidence of Pragji Mavji; hereinabove. Besides the seven persons named by him, he had seen four more

persons at the place of the first part of the incident. Faces of two out of those four, he had not been able to see. But he had seen the faces of

remaining other two, while he was at some distance away from the tractor and trailor, and had looked back. There is no reason to disbelieve Pragji

Mavji, when he had identified accused No. 3 before the court as the assailant, when he is supported by the evidence of T.I. Parade. Thus, against

accused No. 3, Aniruddhasinh, there is clear evidence supplied by Ganesh Zaver and Pragji Mavji. Ganesh Zaver has clearly stated that accused

No. 3 Aniruddhsinh had a dharia with him. According to Pragji Mavji, besides the seven accused named by him, there were four others, and they

had with them weapons like dharia, axe, etc. Thus Pragji Mavji, in a way supports the deposition of Ganesh Zaver that accused No. 3

Aniruddhsinh was not only one of the assailants, but he was armed with a dharia.

83. So far as accused No. 4 Jodha Khoda is concerned, we will deal with his case separately while we will take up his appeal for consideration.

84. Coming to accused No. 6 Bhupatsinh, against him, there is evidence of Ganesh Zaver. Ganesh Zaver knows accused No. 6, Bhupatsinh since

his childhood. According to Ganesh Zaver, Bhupatsinh had with him a spear. Ganesh Zaver has no enmity against Bhupatsinh. He has no reason

falsely to implicate Bhupatsinh. He being a natural witness to the incident, would have no reason falsely to implicate Bhupatsinh.

85. Then comes the case against accused No. 10 Baldevsinh alias Bablubha. He is a resident of Sandh Khakhra. Ganesh Zaver clearly implicates

this accused No. 10. He had, with him an axe. Ganesh Zaver knows this accused Baldevsinh very well. Pragji Mavji, though he did not include this

accused No. 10 Baldevsinh in the group of seven accused named by him, had identified this accused No. 10 at the T.I. Parade. According to

Pragji Mavji, there were seven accused named by him, and four more amongst the assailants. So far as this accused Baldevsinh is concerned, the

deposition of Pragji Mavji would stand on the same footing as it stands as regards accused No. 3 Aniruddhsinh. Pragji Mavji has stated that the

four others had with them weapons like axe, dharia, etc. Ganesh Zaver has said that accused No. 10 had an axe with him, and Pragji Mavji in a

way, therefore, corroborates Ganesh Zaver. The presence of accused No. 10 near the tractor and trailor is therefore, completely proved.

86. Thus, so far as the first part of the incident is concerned, except the presence of Jodha Khoda, accused No. 4, the presence of remaining 11

accused has been completely proved. Participation of Jasubha, accused No. 11, being the leader of the gang, is fully proved. It was he, who

opened the attack. It was he who deflated the tyre of the tractor. It was he who fired the second shot which beheaded Diwaliben. Shots fired by

him also hit Dhanji Bhagwan. During the first part of the incident, even the other accused opened fire. Accused No. 12 Mohansinh chased Madhu

Naran and fired a shot at him. There is clear medical evidence to show that Jairam Bhagwan and Odhavji Bhagwan were done to death by the

injuries that could be caused by sharp cutting weapons of heavy type like axe, dharia, and the blunt portions of the weapons like axe, if used with

full force. They had also sustained injuries which could be caused by sharp cutting heavy instrument like a spear. Thus Odhavji Bhagwan and

Jairam Bhagwan died as a result of use on them of sharp cutting and pointed heavy weapons like axe, dharia and spear. There is also evidence to

show that there was some use of fire-arm on them too for, from near the dead body of Odhavji Bhagwan, a fired projectile was recovered, while

from near the dead body of Jairam Bhagwan, a fired lead projectile and one 12 bore K.F. cartridge case was recovered, and the clothes put on by

Jairam Bhagwan, at the time of the incident, showed some holes which could have been caused due to fire-arm discharge. Of course, the medical

evidence does not show that Jairam Bhagwan and Odhavji Bhagwan had sustained fire-arm injuries. But the above aspects of the matter clearly go

to show that besides using sharp cutting and pointed heavy weapons at them, the assailants also attempted to use fire-arms at them. One thing is

certain that Jairam Bhagwan and Odhavji Bhagwan died as a result of use of sharp cutting and pointed heavy weapons like axe, dharia and spear

on them. The evidence discussed hereinabove also shows that Anirudhsinh -- accused No. 3 had a dharia while Baldevsinh, accused No. 10 had

an axe with them. The evidence also shows that accused No. 7 Kunvarsinh had with him a spear.

87. In the above view of the evidence, no exception can be taken to the finding of the learned Judge when he holds the presence of accused Nos.

1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 proved at the time of the first part of the incident. No exception can also be taken to the finding of the learned

Judge about the participation of those accused in the crime.

88. On the evidence as it stands, it cannot be disputed, and no attempt was made before us to dispute the proposition that the assailants who

assaulted the party returning from Manvilas, near the field of Koli Shamji, were the members of an unlawful assembly. As many as 11 persons

armed with different weapons, most of them with fire-arms were lying in wait behind the hedge. On seeing the tractor and trailer returning, they

come out of their hiding. Jasubha, accused No. 11 took the lead and others joined him. This would, therefore, clearly be a case for saying that all

those who were present near the tractor incident, were the members of an unlawful assembly, the common object of which was to kill quite a large

number of persons from the party which was returning from Manvilas. The totality of the evidence shows that they had hatched a criminal

conspiracy to kill them. The findings on this line, recorded by the learned Judge, in our opinion, are unexceptionable.

88A. We will, now go to the murders of Purshottam Jaga, Popat Lakha and Gordhan Lakha. In regard to those three murders, there are two main

witnesses -- Thakershi Purshottam, P.W. 21, the son of deceased Purshottam Jaga and Gangaben, P.W. 22, the widow of, deceased Gordhan

Lakha. At about 10.00 a.m. on the day of the incident, deceased Purshottam Jaga had brought boulders by means of his bullock-cart and he was

unloading those boulders near his house. Thakershi, P.W. 21, the son of Purshottam Jaga, around that time, returned from the market place and

entered the Dehla of the house of Purshottam, and soon then, Thakershi heard the report of a gun fire. He immediately, therefore, came to the

entrance of the Dehla and he found that his father had fallen down in the bullock-cart. According to Thakershi, at a distance of about 30 to 40 feet

towards the west of the entrance of his Dehla, there is an electric pole, and when he came near the entrance of the dehla, he noticed that Jasubha,

accused No. 11 was standing towards the east of that electric pole, and he had at that time, a double barrel gun in his hands. It is the say of

Thakershi that soon then, he found that Popat Lakha was coming driving his bullock-cart, and no sooner the bullock-cart of Popat Lakha came

near the electric pole, Jasubha fired a shot from his gun at Popat Lakha, with the result that Popat Lakha fell down from his bullock-cart, while the

bullocks of the bullock-cart of Popat Lakha retreated. It is further the say of Thakershi that then Jasubha removed and discharged the two empty

shells of cartridges from his gun and reloaded the gun by means of two other cartridges. On seeing this, Thakershi was mortally afraid, and he

therefore, immediately retreated into his dehla. But within about a minute or two, he heard another report of gun fire, and within two to three

minutes, he noticed that the bullock-cart of Gordhan Lakha was coming and in that bullock-cart, Gangaben was sitting taking the head of Gordhan

Lakha into her lap. Gangaben was wailing. Gordhan Lakha was unconscious and the bullock-cart of Gordhan Lakha was pulled by the bullocks

on their own, in the direction of the house of Gordhan Lakha, which is situated to the East at some distance away from the house of witness

Thakershi. According to Thakershi, he found that his father was lying dead on his bullock-cart and had a gun shot injury on his body. He once

again entered his house and told his mother that Jasubha had fired a gun shot at his father as also at Popat Lakha and Gordhan Lakha.

Though Thakershi has been cross-examined, nothing has been taken out therein which would affect his statements made by him in his chief-

examination. His deposition clearly proves that Jasubha -- accused No. 11, whom he knew since a long time prior to the incident, fired a gun shot

at Popat Lakha, and that event was witnessed by Thakershi with his own eyes. On receipt of the gun shot injury, Popat Lakha fell down from the

bullock-cart. The medical evidence shows that Popat Lakha had a fire-arm wound on the rights side of his chest. That was the entry wound. There

was blackening and tattooing and singeing of hair near that injury. There was another fire-arm wound on the left side of the loin. That was also an

entry wound, with the presence of blackening and tattooing. The third injury was a fire-arm wound over the left palm. That was an entry wound at

which there was found presence of blackening and tattooing, and on the dorsal aspect of the left palm there was an exhit wound. Both the lobes of

the liver were lacerated, and at the time of the post mortem examination, a bullet was found with a wall (buch) from the left lobe of the liver. That

bullet as per the report of the forensic science laboratory expert is a fired lead projectile. The rectum was ruptured at the proximal part. The cause

of death was shock and haemorrhage due to injury to liver and rectum.

Thus, Popat Lakha died as a result of gun shot injuries. Thakershi saw Jasubha, accused No. 11 firing a gun shot at Popat Lakha. According to

Thakershi, it was when the bullock-cart of Popat Lakha came near the electric pole that Jasubha -- accused No. 11 fired a shot at him. The

shooting was done from a close range and that is also proved by the medical evidence which speaks of tattooing, blackening, singeing, etc. The

electric pole is at a distance of 30 to 40 ft. towards the west of the entrance door of the dehla of Thakershi''s house. The existance of that electric

pole has been deposed to also by panch witness Kalubhai, P.W. 6, in whose presence the panchnama of the scene of the incident Exh. 122 was

prepared by P.S.I. Bhuthaiya. According to Thakershi, when he first came out of his dehla and came near the entrance door, he noticed Jasubha,

accused No. 11 standing to the east of that electric pole, holding a double barrel gun in his hands. Thakershi, therefore, had a clear opportunity to

see Jasubha who was standing at a distance of less than 30 to 40 feet. The distance between Thakershi and Jasubha at that time would certainly be

less than 30 to 40 feet for the reason that the electric pole was about 30 to 40 feet towards the west, while Jasubha was standing to the east of that

electric pole. Jasubha was very much known to this witness Thakershi. The incident happened at about 10-0 a.m. or 10-15 a.m. Thakershi

therefore, would never have made a mistake in identifying the assailant who fired a shot at Popat Lakha. Only a minute or so ago, on hearing the

first report of gun fire, he came out of his dehla and found his father Purshottam Jaga lying in the bullock-cart with a gun shot injury and at that very

time, he saw Jasubha accused No. 11 standing to the east of the electric pole, carrying a double barrel gun with him, and then, immediately

thereafter, Jasubha fired a second shot at Popat Lakha. Now, if we put all these facts together, though Thakershi had not seen a gun shot being

fired at his father Purshottam Jaga, it would be obvious that it was Jasubha -- accused No. 11 -- who had fired a gun shot at Purshottam Jaga.

After Jasubha fired the shot at Popat Lakha, he opened his gun, removed therefrom the empty shells of two cartridges which he had earlier fired,

and discarded, them. He loaded two fresh cartridges in the gun. On seeing this Thakershi would obviously be mortally afraid. Though he had seen

his father lying on the bullock-cart, his own life would be more precious to him. He therefore, retreated into his dehla, and within a minute, he heard

two further reports of gunfire, and within two or three minutes, he saw the bullock-cart of Gordhan Lakha on which he found Gangaben taking the

head of Gordhan Lakha into her lap and he also found that Gangaben was wailing and Gordhan Lakha was unconscious. Thus, though Thakershi

had not actually seen the gun-shot being fired at Gordhan Lakha, his deposition, even if there be no other evidence, would be sufficient to say that

it was Jasubha who had fired the gun-shots at Gordhan Lakha.

The medical evidence shows that Purshottam Jaga had a fire-arm injury. The entry wound was at the right side back, on the lateral aspect at sixth

intercostal space, 4"" away from the base of the right axilla. There was blackening and tattooing, near that injury. The exit wound was on the right

side chest on the fourth intercostal space 1"" away from the midline. The right lobe of right lung was lacerated. The cause of death was due to shock

and haemorrhage due to injury to the right lung. Thus, purshottam Jaga was fired at from his back. The bullet had passed through and through from

his body. Gordhan Lakha was found to have a fire-arm injury with separate entry and exit wounds. The entry wound was on the left side back,

below the interior angle of the scapula. There was blackening and tattooing. The exit wound was on the right side at the fourth intercostal space.

There was also an abrasion on the right side of the chest near the exit wound at the fourth intercostal space. The right side fourth rib was ruptured.

The cause of death was shock and haemorrhage due to injury to the right lung and the heart. Thus, even Gordhan Lakha was fired at from his

back.

89. Thakershi is the son of deceased Purshottam Jaga. Of course, he is a Patel of Village Mangadh. But none of his family members is shown to be

in any manner concerned with the earlier enmity between the Darbars of Chomal on one hand, and the Patels of Mangadh on the other. None of

his family members was an accused in the case relating to the murders of three Darbars which were committed on June 28, 1982. Thakershi is

therefore, not at all inimical to Jasubha. His father having been killed in the incident and his two neighbours also having been killed in the incident,

he would have no reason falsely to implicate Jasubha and let the real culprit to go scot-free. Thakershi''s deposition gets corroboration from the

medical evidence referred to hereinabove.

90. Thakershi has stated that after the incident, the dead body of his father was taken by them inside his house and all of them were weeping. At

about 2-30 p.m. the inquest panchnama on the dead body of his father was prepared and at about 7-00 p.m. or 7-30 p.m. the police prepared the

panchnama of the scene of the incident and at that time, the police attached from near the scene, some earth, a bullet from the bullock-cart, a wad

of a cartridge from the bullock-cart, etc. Thakershi had pointed out to the police, the places where his father was fired at, as also where Popat

Lakha was fired at. He has stated that during the preparation of the panchnama the police recovered the two empty cartridge cases from the place

at which Popat Lakha was fired at. One more empty cartridge case was found from near the bund. All these articles were attached by the police.

According to him, the bund is about 80 to 90 ft. away from his house, and that is a bund dividing Village Chomal from Village Mangadh. Now, on

the point of the police having recovered these articles, Thakershi is supported by the panch witness Kalubhai Limbabhai, P. W. 6, who in turn, is

supported by the panchnama Exh. 122. Thakershi is also supported by the evidence of the Investigating Officer on that line. The shirt and the

baniyan which Purshottam Jaga had put on at the time of the incident were examined by the forensic science laboratory experts and those apparels

also showed holes which were caused due to fire-arm discharge. As seen above, three empty cartridge cases were recovered during the

preparation of the panchnama of the place near the house of Thakershi; two were recovered from the place where Popat Lakha was shot at, and

the third one was recovered from near the bund at a distance of 80 to 90 feet from the entrance door of the house of Thakershi. All those three

empty cartridge cases were 12 bore Shaktiman shotgun cartridge cases with indentation mark on the percussion cap. One of the two empty

cartridge cases found from the place were Popat Lakha was shot at, as per the laboratory report, was not fired from any of the three fire-arms

which were discovered during the course of the investigation. We will refer to this discovery evidence a little later. But, for the present we may

state that according to the prosecution, upon the statement made by Nirubha, accused No. 8, a tamancha or a hand-gun was discovered. Upon

the statement made by Jasubha, accused No. 11, a double barrel gun and some cartridges, bullets/pellets, etc. were discovered and upon the

statement made by Mohansinh, accused No. 12, a single barrel gun was discovered. One of the two empty cartridge cases found from the place

where Popat Lakha was shot at, when examined by the forensic science laboratory experts was found not to have been fired from any of these

three weapons. The order of those two cartridge cases which were found from the place where Popat Lakha was shot at was found by the

forensic science laboratory experts to have been fired from the left barrel of the double barrel gun, which was discovered upon the statement made

by Jasubha -- accused No. 11. Similarly, the empty cartridge case which was found from near the bund was also found to have been fired from

the left barrel of the very same double barrel gun. That empty cartridge case was recovered from the place where Gordhan Lakha was shot at.

Thus, Thakershi"s deposition about Jasubha accused No. 11 having fired a gun shot at Popat Lakha is corroborated by the recoveries of empty

cartridge cases proved to have been fired from the left barrel of the double barrel gun, discovered upon the statement made by Jasubha. Similarly,

that evidence also connects Jasubha with the firing made on Gordhan Lakha.

91. These pieces of evidence leave no room for doubt that Thakershi"s evidence should be accepted in toto. His evidence directly proves that

Jasubha, accused No. 11 fired a gun shot at Popat Lakha. He saw his father Purshottam Jaga lying with a gun shot injury at a short distance away.

He found Jasubha -- accused No. 11 carrying a double barrel gun with him. He noticed that Jasubha opened the gun and discarded the empty

cartridge cases and reloaded the gun by fresh cartridges, and soon then, he heard some further reports of gun firing. Therefore, though Thakershi

may not have, by his own eyes, witnessed the firing made on Purshottam Jaga and Gordhan Lakha, his evidence clearly proves the prosecution

case about Jasubha -- accused No. 11 -- having fired shots even on Purshottam Jaga and Gordhan Lakha.

92. The evidence of Thakershi was criticised on the ground that his mother Prembai has not been examined as a witness. The argument was that

though Thakershi, has said before the court that he had, after the incident, told his mother about Jasubha having fired shots at his father as also at

Popat Lakha and Gordhan Lakha, Prembai has given a different version in her police statement and if Prembhai had been examined as a witness,

her deposition would have falsified the deposition of Thakershi, who has said before the court that he had told his mother that Jasubha had fired the

shots at his father and also at Popat Lakha and Gordhan Lakha.

True, Prembai, mother of Thakershi was cited as a witness. Equally true, she has been dropped and has not been examined. The learned Special

Public Prosecutor, filed a statement Exh. 174, wherein he gave a list of some 23 witnesses whom he did not propose to examine, and the reason

given by him for the non-examination of those witnesses is that those witnesses do not throw any further light for the proof of the prosecution case

than has been made out by the witness till then examined, and examing those witnesses would be merely duplication and their examination was not

necessary for unfolding of the prosecution case. The name of Prembai is in the list of those 23 witnesses. Thus Prembai has not been examined for

the reason that if examined, she would not have thrown any further light on the prosecution case that was made out by the witnesses till then

examined, and it would have been mere duplication, and her examination was not necessary for unfolding of the prosecution case. Below this

statement Exh. 174 the learned advocate for some of the accused, endorsed his objection in the following words :

Witness at Item No. 3, witness No. 76 (and the reference here is to Prembai) is a witness, if examined destroys the case of witness Thakershi

Purshottam. She is therefore, dropped for oblique motive.

This statement Exh. 174 was filed by the learned Special Public Prosecutor, not only for dropping the 23 witnesses listed therein, but also for the

purpose of dropping three other witnesses, Premji Purshottam Mohan Bechar and Kurji Naran. Thus by this statement, the Spl. Public Prosecutor

stated to the court that he did not propose to examine any of the 26 witnesses referred to in that statement. The learned advocate for some of the

accused entered objection only as regards non-examination of Prembai, by the aforesaid endorsement.

Now, there is no evidence to show that Prembai was the actual eye-witness to the incident, wherein her husband was shot at. True, she must have

been inside her house at the time of the incident. But just as Thakershi had not actually seen his father being shot at, Prembai also does not seem to

have witnessed with her own eyes, the actual shooting at her husband. She is therefore, not an actual eyewitness to the incident. Her evidence

would, obviously therefore, not be very necessary for unfolding the prosecution case. The statement Exh. 174 was filed by the Spl. Public

Prosecutor in the court, on June 30, 1987. On that statement, on the same day, the learned advocate for some of the accused made the aforesaid

endorsement. However, after the prosecution evidence was closed, the learned advocates for the accused filed an application Exh. 316, wherein

they extracted a portion of the statement said to have been made by Prembai, before the Investigating Officer. With reference to that statement, it

was sought to be contended that in that statement, Prembai has stated that her son Thakershi had told her that the person who fired a shot at his

father and at Popat Lakha was a man with beard who had put on blackish clothes. Relying upon this statement said to have been made by

Prembhai before the Investigating Officer, it was sought to be contended, both before the trial court as also before us, by the learned advocates for

the accused that, whereas Prembai has said before the Investigating Officer that her son Thakershi had told her that the person who had fired shots

at his father and at Popat Lakha was a man with beard, who had put on blackish clothes, Thakershi from the witness box has stated that he had

told his mother that it was Jasubha, who had fired shots at his father as also at Popat Lakha and Gordhan Lakha. The submission is that there is

contradiction between what Thakershi has stated from the witness box, and what Prembai in her police statement said about Thakershi having told

her.

Firstly, such an approach on the part of the learned advocates for the accused is impermissible. Thakershi cannot be contradicted with reference to

the police statement said to have been made by Prembai before the Investigating Officer during the course of the investigation. The statement made

by the witness during the course of the investigation is governed by Section 162 of the Code of Criminal Procedure and only the limited use of such

a statement is to contradict the maker of the statement, when he is examined as a prosecution. For no other purpose, that statement can be used.

One witness cannot be contradicted with reference to the police statement of another witness.

93. It was sought to be contended that if Prembai had been examined as a witness, she would have made statements which could not have been

reconciled with the statement made by Thakershi from the witness box. In our opinion, the submission has no merit whatsoever. As indicated

hereinabove, Prembai''s police statement cannot be used for contradicting Thakershi''s evidence. Even if it were to be assumed that for drawing an

adverse inference against the prosecution, in the matter dropping Prembai, her police statement could be looked at, the portion of her statement

which is sought to be relied upon by the defence, in our opinion, in no way is contradictory to what Thakershi has stated from the witness box.

Therefore, there is no case for drawing any adverse inference in the matter of non-examination of Prembai. Even according to Thakershi, Jasubha

had, at the time of the incident, grown beard. There is evidence to show that Jasubha deserted the Army around October 1982, and soon before

deserting the army, he had obtained a permission from the army to grow beard.

94. Having carefully gone through the evidence of Thakershi and having examined it, in light of the other pieces of the evidence discussed

hereinabove, we do not see any reason, even slightly to doubt the statements made by Thakershi from the witness box. He clearly proves the fact

that Jasubha accused No. 11 fired gun shots at Purshottam Jaga, Popat Lakha and Gordhan Lakha.

95. Them we have the evidence of Gangaben, P.W. 22. She is the widow of Gordhan Lakha. Out of the three persons, i.e. Purshottam Jaga,

Popat Lakha and Gordhan Lakha, in the sequence of shooting, Gordhan Lakha was the last to be shot at. He was shot at when he with his wife

Gangaben was returning home from his field, by means of his bullock-cart. Gangaben was sitting on the heap of maize-cob at that time, and

Gordhan Lakha was driving the bullock-cart. The place where Gordhan Lakha was shot at is to the north of the house of Thakershi, and is at a

distance of about 80 to 90 feet from his house. According to Gangaben who, at the time of her deposition in June, 1987, was about 35 years of

age and who had the married life with Gordhan Lakha for about 20 years and as a result of which she has two sons and a daughter of whom the

eldest is the son aged about 15 -- 16 years, knew Bharatbha --accused No. 1, and Jasubha -- accused No. 11. She has five bigas of land and she

also worked on scarcity relief work. Her way for going to her field passes from near the ghouse of Bharatbha -- accused No. 1. She also knows

Ajitbha -- accused No. 9 -- and his son Nirubha -- accused No. 8. She knows Bhikhubha -- accused No. 5. She also knows Bablubha --

accused No. 10 for, that accused No. 10 used to attend the scarcity relief work along with her. She also knows Mohansinh, accused No. 12.

Speaking about the incident, she has stated that, when she and her husband were returning by means of their bullock-cart, and when they came

near Lilapir by the side of the bund, Jasubha asked her husband to stop the bullock-cart. Her husband therefore, stopped the bullock-cart and

then Jasubha fired a gun shot at her husband. As stated by Gangaben, at that time, some 2 or 4 persons including Jasubha had come near her

bullock-cart. Those persons were Jasubha, Mohansingh, Bablubha and Nirubha. Further according to her, other four persons were standing at

some distance, but she had not been able to identify those four other persons. She has stated that the bullet which hit her husband came out on the

right side and then she took the head of her husband into her lap, and her husband died instantaneously. Thereafter when her bullock-cart was

proceeding further, and the bullocks on their own, were pulling the bullock-cart, she first noticed that Popat Lakha was lying near the dehla of one

Odhavji, and he had sustained a bullet injury. Similarly, she also noticed Purshottam Jaga lying in his bullock-cart with a bullet injury.

Thus, according to Gangaben, when she and her husband were returning from the field, Jasubha stopped the bullock-cart of her husband and then

Jasubha -- accused No. 11, Nirubha -- accused No. 8, Bablubha --accused No. 10, and Mohansinh -- accused No. 12, came near the bullock-

cart and Jasubha fired a gun shot at her husband. Her husband died instantaneously. These statements made by Gangaben have got to be accepted

at their face value for, she is a natural eye-witness to the incident. Of course, some of her relatives had been arrested in connection with the earlier

murders of three Darbars of Chomal. But that fact would not be a ground for discarding her evidence. She would never like to allow the real

culprits of the murder of her husband to be let off and instead to implicate the present accused. She knew accused Nos. 8, 10, 11 and 12, even

before the incident. All those four accused had come very near to the bullock-cart and Jasubha fired a shot from a close range. That it was a close

range firing is proved by the medical evidence, to which we have adverted to while discussing the deposition of Thakershi. The incident happened

in broad daylight. Gangaben, a woman of about 39 years at the time of the incident, would have clearly identified the assailants. She having no

reason to let the real culprits to go away, her statements implicating accused Nos. 8,, 10, 11 and 12 in the crime have got to be accepted.

According to her, besides accused Nos. 8, 10, 11 and 12 who had come just near the bullock-cart, some other four persons were standing at a

distance, but she had not been able to identify those four persons, who were standing at a distance. This statement, she has made, in her chief-

examination, and the same has been repeated by her during the cross-examination. In view of this categorical statement made by her, the evidence

about test identification parade, at which she had identified accused Nos. 1, 5, 9 and 7, would have to be kept out of consideration. Her evidence

in our opinion, clearly proves that accused No. 11 fired a gun shot at her husband Gordhan Lakha, and at that time, accused Nos. 8, 10 and 12

were by the side of accused No. 11 and at some distance away from these four accused were standing some four other persons, whom

Gangaben, the witness was not able to identify.

96. Thus, so far as the murders of Purshottam Jaga, Popat Lakha and Gordhan Lakha are concerned, it is clearly proved that those murders were

committed by Jasubha --accused No. 11, by means of a double barrel gun. The evidence further indicates that though accused Nos. 8, 10 and 12,

and their other associates whom Gangaben has not been able to identify, were not spotted by Thakershi, accused Nos. 8, 10 and 12 and other

associates of accused No. 11, must be somewhere near the very place of the incident. Accused Nos. 8, 10 and 12 therefore, would be equally

guilty with Jasubha -- accused No. 11 -- in respect of the murders of Purshottam Jaga and Popat Lakha, on the principle of vicarious liability,

emerging from Section 149 of the I. P. Code. They are certainly vicariously liable in respect of the death of Gordhan Lakha because they were just

by the side of Jasubha when Jasubha fired the shot at Gordhan Lakha.

97. This takes us to the murder of Babu Bechar. It appears that Babu Bechar"s murder was the last in the sequence of events. Liliben, the widow

of Babu Bechar has been examined by the prosecution as P.W. 23. In June, 1987, when she was examined, she was 32 years of age. She has two

daughters and a son, the eldest being the son aged about 14 years. According to her, she knew accused Nos. 1, 2, 5, 7, 8, 9 and 11. Her say is

that at about 11.00 a.m. on the day of the incident, she and her husband were returning from the field by means of a bullock-cart, which was

loaded with maize-cob. When they came near the field of Govind Kanji, in the juvar crop in that field, she noticed some 10 to 15 persons, out of

which 8 or 10 came out. She identified Jasubha, accused No. 11, Bhikhubha, accused No. 5, Nirubha, accused No. 8, and Mohansinh, accused

No. 12 out of those 8 or 10 persons who came from the field of Govind Kanji. According to her, besides those four accused, she had seen 6 to 7

others who had come out. But she does not know the names of those 6 or 7 others. She has said that out of those persons, Jasubha fired three

shots from a gun on her husband and Mohansinh fired one gun shot at her husband. She tried to provide cover to her husband, but Jasubha gave

filthy abuses to her, pointed a gun at her, and threw her away from the bullock-cart, and then the assailants went towards Ganeshghad. Her

husband, according to her, died. During the course of the investigation, she participated at three test identification parades. At the first one held on

October 1, 1984, accused Nos. 1, 2, 3 and 4 along with six others were lined up, and from that she identified accused Nos. 1 and 2, as the

assailants. At the other test identification parade held on October 19, 1984, accused Nos. 7 and 9 were lined up with nine others, and she

identified both accused Nos. 7 and 9, and at yet another test identification parade held on November 24, 1984, accused No. 10 was put up in a

line along with six others and she identified accused No. 10 as the assailant. Thus, at the T. I. Parades, she identified accused Nos. 1 2, 7, 9 and

10 as being the persons, who were with Jasubha and Mohansinh at the time both of them fired upon gun shots at her husband. As said by her, she

knew accused Nos. 1, 2, 7 and 9 even prior to the date of the incident. Thus, her deposition proves the presence of accused Nos. 1, 2, 5, 7; 8, 9,

11 and 12 at the time of the incident. She identified all those accused Nos. 1, 2, 5, 7, 8, 9, 11 and 12 before the Court. Though she had identified

accused No. 10 at the T. I. Parade, she has not stated a word in her chief-examination about accused No. 10 being present at the place of the

incident. Not only this, but in her chief-examination, she has stated that she does not remember the name of the person whom she had identified at

the last T. I. Parade, and as long time had elapsed, she was not in a position to identify that person in the Court. Now, a reference to this person is

the reference to accused No. 10. Thus, in her chief-examination, she has not stated a word about accused No. 10 being present at the scene of the

offence, and she was not in a position to identify accused No. 10 before the Court. Her identification of accused No. 10 at the T. I. Parade would,

therefore, be of no use to the prosecution. But then, her deposition clearly proves the firing of gun shot at her husband by Jasubha, as also by

Mohansinh. It also proves that at, that time, accused Nos. 1, 2, 5, 7, 8 and 9 were also in company of Jasubha and Mohansinh. All those 8

accused had emerged from the juvar crop in the field of Govind Kanji, and soon then, at first Jasubha -- accused No. 11, and immediately

thereafter, Mohansinh -- accused No. 12, fired gun shots at her husband. The medical evidence shows that Babu Bechar had sustained three fire-

arm injuries each with a separate exit and entry wounds. He had sustained injuries to his left lung which was torn. Heart was also torn. The death

was instantaneous. The medical evidence also shows that the distance of fire-arm must have been within the range of about 3 feet. Thus, Babu

Bechar was fired at from a very close range. Liliben had clear opportunity to see the assailants. She knew the assailants named by her even prior

to the incident. She would have no reason falsely to implicate the accused. She would never like to substitute the accused for the real culprits, and

allow the real culprits to escape punishment.

98. We have said hereinabove that so far as the assailant of Nagji Khoda and Madhu Khoda is concerned, the only witness examined is

Ghanshyam, P. W. 53. His evidence does not throw much light on the question as to who the assailants of Nagji Khoda and Madhu Khoda were.

However, as indicated hereinabove, his evidence proves that at the time Nagji Khoda and Madhu Khoda were assaulted, they were sitting in that

part of the field where there was groundnut crop. His evidence further proves that at that time, he saw one man in the field, who had put on black

clothes. The evidence of Kalubhai Dahyabhai, P. W. 24, shows that on the day of the incident, the groundnut crop in the field of Nagji Khoda was

about 1 1/2 feet high. The evidence of Dayal Khoda, P.W. 26, the brother of Nagji Khoda shows that on October 25, 1984, when the harvest of

the groundnut in the field of Nagji Khoda was going on, from the thick groundnut crop, he could trace three empty cartridge cases. Taking those

empty cartridge cases, he approached the Police Officer, and produced those cartridge cases before the Police Officer in the presence of panch

witnesses. Ranchhodbhai, P.W. 9, is the panch witness on the point, and the panchnama under which the police officer attached those empty

catridge cases is at Exh. 128. The Police Officer Mr. K.M. Yadav, before whom Dayal Khoda produced those three empty cartridge cases has

been examined as P.W. 49. These pieces of evidence clearly prove that one month and 5 days after the incident, Dayal Khoda, traced out from

the field of Nagji Khoda, three empty cartridge cases. There is medical evidence to show that from the dead body of Nagji Khoda, one large

metallic piece weighing 7.8 gms. was recovered during the post mortem examination. The laboratory report shows that that metallic piece is a fired

lead projectile. Similarly, from the dead body of Madhu Khoda about 40 metallic pieces totally weighing 8.8 gms. were recovered during post

mortem examination, and the laboratory report shows that they are fired lead projectiles. The three empty cartridge cases, recovered by Dayal

Khoda from the field of Nagji Khoda one month and five days after the incident were, during the course of investigation, sent to Forensic Science

Laboratory. One out of those three empty cartridge cases, as per the laboratory report, is not proved to have been fired from either of the three

firearms, about which there is discovery evidence to which we will advert presently. However, the remaining two empty cartridge cases, as per the

laboratory report are the cartridge cases of 12 bore Shaktiman shotgun cartridges having identification marks on the percussion caps, and they are

proved by the laboratory report to have been fired from the left barrel of the double barrel gun, which according to the prosecution was

discovered upon the statement made by accused No. 11 Jasubha. Thus, though there is no direct evidence as to who killed Nagji Khoda and

Madhu Khoda, this indirect evidence shows that it was Jasubha, who had fired shots from his double barrel gun, which proved fatal to Nagji

Khoda and Madhu Khoda. Ghanshyam"s evidence shows that at the time of the incident, Nagji Khoda and Madhu Khoda were sitting near the

groundnut crop. The evidence of Kalubhai, the Sarpanch and the evidence of Dayal Khoda shows that, that groundnut crop was thickly grown

which was of the height of 1 1/2 feet. It would therefore, not be unnatural or improbable that whosoever fired the gunshots at Nagji Khoda and

Madhu Khoda just threw away the empty cartridge cases and those empty cartridge cases were lost in the thick groundnut crop. However, they

came to be recovered when the groundnut crop was harvested. The laboratory report shows that two out of those three empty cartridge cases

were fired from the left barrel of the double barrel gun discovered upon the statement made by Jasubha, accused No. 11. If we put all these facts

together, the only irresistible inference would be that it was Jasubha, accused No. 11 who killed Nagji Khoda and Madhu Khoda. We have to

remember that Jasubha was the leader of the team of the assailants, who opened the attack on the passengers in the trailer at about 9.30 a.m. on

the day of the incident. At that place, Diwaliben was killed as a result of the gun shot fired by Jasubha. Dhanji Bhagwan was seriously wounded by

the shot fired by Jasubha. Jasubha had also, at that place fired some other shots. Soon then, at about 10.00 a.m. Jasubha did to death Purshottam

Jaga, Popat Lakha and Gordhan Lakha, and as a last limb of his operation massacre, Jasubha did to death Babu Bechhar. If we compare the

various timings given by the witnesses, it appears that Babu Bechhar was the last to be shot at and Nagji Khoda and Madhu Khoda were shot at

after Purshottam Jaga, Popat Lakha and Gordhan Lakha were done to death.

99. Though there is no direct evidence as to who killed Ganesh Naran, in the facts and circumstances of the case, it has got to be said that Ganesh

Naran in all probabilities must have been done to death by someone out of the accused who were on a mission massacre. Ganesh Naran

undoubtedly was killed by means of a firearm. The medical evidence shows that when he was brought to Gariadhar P.H.C., he was unconscious

and gapsing. He had a perforated open wound on the left side lower half of the abdomen, 2 1/2"" away from umbilicus. Intestines were protruding

out through that wound. The injury was possible by a firearm. From Gariadhar P.H.C., Ganesh Naran was transferred to Bhavnagar hospital,

where he died at 2.30 p.m. during treatment. The post mortem examination shows that the fatal injury was possible to be caused by pellets. Use of

firearm at him would be evident if we refer to the deposition of Dr. Vora, P.W. 1, who carried out the post mortem examination on the dead body

of Ganesh Naran.

Thus even though there is no direct evidence as to who killed Ganesh Naran, during post mortem examination, two small and two large metallic

pieces in all weighing 25 gms. were recovered from his body and the laboratory report shows that they are the fired lead projectiles. Thus Ganesh

Naran died a homicidal death, on account of use of firearm at him before 11.0 a.m., in the field on the outskirts of village Mangadh. Ganesh Naran

was a Patel from Mangadh. Putting all the facts and circumstances of the case together, the only inference that could be drawn is that he must have

been killed by someone out of the accused who were the members of an unlawful assembly and who, armed with firearms and lethal weapons,

were, on a mission massacre.

100. The learned advocates for the accused submitted before us that the prosecution has, with ulterior motive, not examined witnesses Prembai,

Premji Purshottam and Mohan Bechhar. Hereinabove, we have referred to the aspect of non-examination of Prembai. We therefore, are not

required to repeat the case as regards non-examination of Prembai. By the statement Exh. 174, filed on June 30, 1987, by the learned Spl. P.P.,

he proposed to drop as many as 26 witnesses. One of them was Mohan Bechhar. Below that purshis, as indicated hereinabove, the only objection

which was entered by the learned advocates for the accused was as regards the non-examination of Prembai. In the endorsement below that

purshis, no protest was entered by the learned Advocates for the accused, in the matter of non-examination either of Premji Purshottam or of

Mohan Bechhar. However, by their application Exh. 316 dated August 20, 1987, the accused made a grievance about the non-examination of

Prembai, which aspect of the matter we have dealt with hereinabove and they also made a grievance about the non-examination of Premji

Purshottam or also of Mohan Bechhar, the brother of Babu Bechhar. The grievance made by the accused through their advocates about the non-

examination of Mohan Bechhar is wholly untenable. In the statement Exh. 174, the learned Spl. P.P. specifically stated that the mental condition of

Mohan Bechhar is bad, he is not in a position to depose, and it was not necessary to examine him for the purpose of unfolding the prosecution

case and therefore, he has not been examined. Though in that statement, a specific averment as above was made by the learned Spl. P.P., the

defence did not enter any demur as regards that statement. Even that apart, the deposition of witness Kalubhai Dahyabhai, P.W. 24, the Sarpanch

of Village Mangadh clearly shows that Mohan Bechhar, the brother of Babu Bechhar has gone mad and was not in the village. The statement made

on this line by Kalubhai Dahyabhai has not at all been challenged on behalf of the accused. That statement clearly proves that Mohan Bechhar has

become insane. The reason advanced by the learned Spl. P.P. in Exh. 174 for non-examination of Mohan Bechhar, is clearly supported by the

statement of Kalubhai Dahyabhai P.W. 24. It would be interesting to note that Kalubhai Dahyabhai was examined as a witness in the Court on

June 30, 1987. On that day, in his deposition, he made a statement about Mohan Bechhar having become instance and being not in the village. On

the same day, the learned Spl. P.P. filed the statement Exh. 174, incorporating therein the unsound mental state of Mohan Bechhar, as one of the

reasons for not examining him, and yet, the learned advocates for the accused, who made the endorsement below that statement Exh. 174

protesting against the non-examination of Prembai, did not enter any protest against the non-examination of Mohan Bechhar. In view of the clear

evidence about Mohan Bechhar having gone mad, and not being available in the Village, no adverse comment can be permitted to be made on

behalf of the accused as regards non-examination of Mohan Bechhar.

101. As regards non-examination of Premji Purshottam a grievance was voiced before us. A similar grievance was advanced before the trial Court

in Exh. 316, the application filed on behalf of the accused. The reason given by the learned Spl. P.P. for not examining Premji Purshottam is that he

has joined hands with the accused, and though he himself was injured in the incident that happened in July, 1984, he had turned hostile in the

sessions case which arose in respect of that incident, and therefore, he is not proposed to be examined. Thus, according to the prosecution, Premji

Purshottam has been won over by the accused, and it is therefore, that the prosecution has not examined him. We see no ground for taking any

exception in the matter of non-examination of Premji Purshottam. That, Premji Purshottam, in all probabilities, has been won over by the accused,

would be clear from what Liliben P.W. 23, has stated in her deposition. According to Liliben, when just before the incident, she and her husband

were going in their bullock-cart, the bullock-cart of Premji Purshottam was ahead of their bullock-cart. Premji Purshottam was himself driving his

bullock-cart, and Jasubha -- accused No. 11 by show of his hand, allowed Premji Purshottam to go. Now, there is evidence to show that Premji

Purshottam was one of the victims of the incident that happened on July 21, 1984, wherein Jasubha, accused No. 11, Mohansinh, accused No.

12, Nirubha, accused No. 8, and Ravirsiah son of accused No. 9, were the accused. The charge against them was for offences punishable u/s 307

read with Section 34 and Section 506 of the I.P. Code. The incident giving rise to that case, as stated just now, had happened two months prior to

the present incident from which the case before us arose, and yet, Jasubha, accused No. 11, as stated by Liliben, gave a green signal to Premji

Purshottam, who was going in his bullock-cart ahead of the bullock-cart in which Liliben and her husband Babu Bechhar were going. Whereas

Jasubha and his associates killed Babu Bechhar, Jasubha gave a green signal to Premji Purshottam. This would clearly show that something must

have transpired and some understanding must have have been arrived at by and between Premji Purshottam on one hand, and accused Jasubha

and his associates on the other, after the incident that happened on July 21, 1984, as a result of which Jasubha showed a soft corner for Premji

Purshottam, on the day of the present incident. These facts clearly support the prosecution case that Premji Purshottam had been won over by the

accused, and that is why, the prosecution dropped that witness. If there is some material going to show that the prosecution witness has been won

over by the accused. then the non-examination of that witness by the prosecution can certainly not be a matter of criticism. In this connection,

reference may be made to the decision in the case of Dalbir Singh v. State of Punjab AIR 1987 SC 1328 (at page 1332, paragraph 13) : 1987 Cri

LJ 1065 where Their Lordships of the Supreme Court have observed :

As regards the non-examination of one of the eye witnesses Bakhshish Singh the judgment of the Sessions Court indicates that this witness was not

examined as having been won over and therefore, it could not be said that this witness was not examined without giving any reasons.

In this connection, reference may also be made to the decision in the case of Allauddin Mian v. State of Bihar. of that judgment, it has been

observed as under :

It was next submitted by learned counsel for the accused that some of the prosecution witnesses, namely, Jallaluddin, Bhikhari Mian and Ram

Chandra Prasad who were admittedly present at the scene of occurrence according to the prosecution and had witnessed the entire incident were

deliberately dropped with a view to suppressing the truth. We cannot accept this contention for the simple reason that apart from both P.W. 5 and

P.W. 6 having deposed that they were pressurised by the defence, the High Court has found in paragraph 36 of its judgment that efforts were

made by the defence to scare away the witnesses from giving evidence, There is ample material on record to conclude that considerable pressure

was exerted on the prosecution witnesses to stay away from the witness box. Some succumbed to the threats and pressure while some others did

not and displayed courage to give evidence and state the truth. In this backdrop, if the prosecution did not examine Jallaluddin, Ram Chandra

Prasad and Bhikhari Mian on learning that they were won over, it cannot be said that the prosecution was unfair to the accused persons. Mr. Garg

submitted that there was nothing to show that the accused persons were in any way guilty of pressurising or threatening the witnesses. That is

besides the point. What is relevant is the fact it so happened. Therefore, the non-examination of the aforesaid witnesses cannot affect the probative

value of the evidence of other prosecution witnesses.

These two judgments of the Supreme Court, clearly lay down that if the prosecution has not examined a particular witness on the ground that he

has been won over, it cannot be said that the prosecution has not given proper reasons for not examining that particular witness. In the present

case, as indicated hereinabove, the statement made by Liliben, clearly point to the fact that some understanding must have been arrived at between

accused Jasubha and his associates on one hand, and Premji Purshottam on the other, after the incident that happened on July 21, 1984, as a

result of which Jasubha showed soft corner to Premji Purshottam, even during the present incident. Under these circumstances, there is ample

material to show that the apprehension of the prosecution that Premji Purshottam has been won over by the accused, cannot be said to ill-founded.

The non-examination of Premji Purshottam, in our opinion, therefore, did not detract the probative value of the evidence of other witnesses

examined in the case.

102. According to the prosecution, accused Nos. 8, 11 and 12, on different dates, while they were in police custody, made statements which led

to the discovery of a hand-gun a double barrel gun with some cartridges, bullets, etc. and a single barrel gun. It is the case of prosecution that

Nirubha accused No. 8 was arrested on October 12, 1984. On October 20, 1984, while he was in police custody under police remand, he made

a statement in presence of panch witnesses and he led the police party and the panch witnesses near his house at village Chomal and near the

hedge at the back of his house, he dug out some earth and brought out from the pit, a handgun or a tamancha. In support of this story, the

prosecution has examined Vallabh Mavji, P.W. 27, the panch witness. He has said that he was taken to the Guest House where there were some

policemen, and one person who gave his name as Nirubha was also present there. That person stated in his presence that he had concealed a

handgun or a tamancha behind his house and that he would show it. Thereafter he led the panches and the police party to Chomal and dug some

soil near the hedge at the back of his house, and brought out from the soil, a tamancha which was attached by the police in his presence. In cross-

examination, he has stated that that person had said ''come on, we would go and would bring the weapon'' This panch witness Vallabh Mavji has

been supported by panchanama Exh. 184. He has also been supported by the evidence of P.I. Mr. Asnani, on the point. There is evidence to

show that this handgun was sent by the Investigating Officer to the Forensic Science Laboratory, When it was examined at the laboratory,

however, it was found that the handgun was a country made breech loading gun and the barrel washing thereof showed the residues of fired

ammunition nitrite. These facts showed that the gun had been used for firing prior to its receipt in the laboratory. That gun was capable of

chambering 12 bore cartridges. At the laboratory, it was found that the gun was not in working condition. The striking force of the hammer was not

sufficient to fire a cartridge. Therefore, 12 bore cartridges were test fired from that gun by giving external blow on the hammer.

Relying upon this laboratory evidence, the learned advocates for the accused contended that this gun was found not to be in working condition

when it was examined at the laboratory, and therefore, the prosecution story about Nirubha-accused No. 8-having fired this gun during the

incident, cannot be accepted. We are not in a position to accept this submission. It is to be remembered that the incident happened on September

20, 1984. This gun was recovered on October 20, 1984. Thus, it was discovered after one month of the incident. There is no evidence to show as

to how it was handled by the person in possession thereof, during this period of one month. Further, there is evidence to show that it was

concealed in the soil and and covered by earth. May be, because of having been so concealed, some defect might have developed therein reducing

the striking force of the hammer of that weapon. There is positive evidence supplied by Purshottam Mulji, P.W. 18, that Nirubha-accused No. 8,

fired a gun, and the bullet or pellet fired from the gun hit him on his left side. Even Pragji Mavji, P.W. 16, has stated that at the time of the incident,

Nirubha had in his hand a small gun. This statement made by Pragji Mavji indicates the possession of a small gun or a tamancha in the hands of

Nirubha-accused No. 8 at the time of the incident. Madhu Naran, P.W. 17, has also stated that Nirubha, accused No. 8, had a gun with him.

Ganesh Zaver, P.W. 20, has also said that Nirubha, accused No. 8, had a gun with him. All these witnesses, Pragji Mavji, Madhu Naran,

Purshottam Mulji and Ganesh Zaver have consistently deposed about the use of firearm by Nirubha-accused No. 8. There is no reason to

disbelieve their evidence. Merely because at the laboratory, the gun discovered upon the statement made by Nirubha, was found to have

insufficient hammer power, the positive evidence of the witnesses referred to hereinabove, cannot be discarded.

103. So far as the discovery of gun by accused No. 8 is concerned, the evidence referred to above is quite acceptable. Having scanned that

evidence, we do not find any infirmity therein. We have discussed hereinabove, the fact that from the body of the injured witness Purshottam Mulji,

a fired lead bullet was recovered. Taking the evidence in its totality, we have no reason to discard the evidence about discovery of the gun by

Nirubha.

104. Of course, the laboratory reports does not connect any of the fired projectiles recovered from the bodies of the deceased, and the bodies of

the injured, and other projectiles recovered from the places of the incident with this gun discovered upon the statement of Nirubha. But that would

also not be sufficient to discard the positive evidence of the witness which points to the fact that Nirubha had fired shots from the gun which he had

with him, at the time of the incident. After all, laboratory report is a corroborative evidence and it cannot dislodge the positive eye-witnesses"

account, if it is otherwise reliable.

105. Then the prosecution contends that accused No. 12, Mohansinh, while he was in police custody under police remand, on July 24, 1985,

expressed his desire, in presence of panch witnesses to discover a gun, and in presence of panch witnesses he stated that he had concealed a

weapon, which he was prepared to point out. He then led the panchas and the police party to Kadambgiri hillock and from a cave, brought out a

gun, which was attached by the police in presence of the panches. In order to prove this story, the prosecution has examined panch witness

Pravinkumar, P.W. 30. It may be remembered that Mohansinh-accused No. 12-was also involved in the incident that had happened on July 21,

1984, wherein firearms are said to have been used. Mohansinh, accused No. 12, and Jasubha, accused No. 11, had gone away to Punjab, and

they were apprehended by the Sangrur police on the night between July 4 and July 5, 1985. Sangrur police then sent an information to Bhavnagar

police and the police officer then, obtaining the necessary permission from the Sessions Court, went to Sangrur and obtained the custody of

Mohansinh, and Jasubha on July 11, 1985, and brought them to Bhavnagar on July 15, 1985. Then they were produced before the Magistrate at

Palitana, on the same day, and were remanded to police custody. While in police custody, Mohansinh on July 24, 1985, led to the aforesaid

discovery of a gun from a cave in Kadambgiri hillocks. It appears that the prosecution wanted to prove the use of that gun also in regard to the

incident that had happened on July 21, 1984. In Sessions Case No. 115 of 1985, which arose from that incident of July 21, 1984, which it

appears was heard before the present case was heard, Pravinkumar, P.W. 30 came to be examined. But he did not support the prosecution story

in that case. He was therefore, declared hostile in that case. The learned advocates for the accused before us contended that Pravinkumar''s

version now put forward by him, as a witness in this case, about accused No. 12 having made a statement and having led to the discovery of a

gun, in view of his deposition in the other Sessions Case No. 115 of 1985, should not be accepted. We are not in a position to accept that

argument. Pravinkumar has stated that as in that earlier case, meaning thereby, Sessions Case No. 115 of 1985, the complainant had turned

hostile, he had also followed the suit. Merely because this witness did not support the prosecution case in the earlier Sessions Case, that would be

no ground for rejecting his testimony in the present case. As a matter of caution, the Court would have to scrutinise his evidence in the present

case, with greater care. We have scrutinised the evidence of panch witness Pravinkumar with that caution in mind, and we find that he is a witness

for the truth, when he has deposed in the present case, though in the earlier case, for the reason assigned by him, he had made statements contrary

to those made in the present case. In this connection, reference may be made to the decision in the case of Zile Singh v. The State (Delhi Admn.),

1979 Cri LR (SC) 703, where the Supreme Court has said :

Normally a witness who makes two inconsistent statements is not reliable but where the Court is satisfied that the earlier statement was true that

would not debar the Court from acting on such evidence.

Applying the same principles here, if the evidence of panch witness Pravinkumar given in the present case is found otherwise acceptable, the same

cannot be discarded on the ground that in the earlier Sessions Case, he had not supported the discovery about which the evidence has been led in

the present case.

106. The gun discovered by police during the investigation, upon the statement made by Mohansingh accused No. 12 was sent to the forensic

science laboratory, and the laboratory report shows that the barrel washing of that gun showed residues of fired ammunition nitrite, the washing

having been taken prior to the laboratory test firing, and that fact showed that that single barrel gun had been used for firing prior to its receipt in

the laboratory. Four 12 bore cartridges were successfully test fired from that gun during the test firing, and the gun was found to be in working

condition. Of course, none of the empty shells of the fired cartridges or the fired projectiles recovered by police during the course of the

investigation either from the place of the incident or from the bodies of the injured persons or dead bodies, were found to have been fired from this

gun. But that would, as we will presently point out, hardly be sufficient for discarding. the positive eyewitnesses" account, which goes to show that

Mohansinh, at the time of the incident, had with him, a gun and that he had fired shots therefrom during the incident. There is positive evidence of

Madhu Naran that Mohansinh had fired a gun shot at him. There is evidence to show that even after surgical operation, one bullet in the thoracic

cavity could not be removed, and was therefore, allowed to remain where it had been lodged in the body. We have indicated hereinabove that that

bullet would be the bullet fired by Mohansinh from his gun at Madhu Naran. Similarly, there is evidence supplied by Liliben that Mohansinh had

fired a shot at her husband. Thus, there is positive ocular evidence about Mohansinh having used a firearm during the incident. He discovered this

gun, which at the laboratory was found to be in a working condition, and it was found to have been used prior to its receipt in the laboratory.

These pieces of evidence, in our opinion, would certainly lend assurance to the eye-witnesses" account about Mohansinh having fired gun shots

during the incident.

107. According to the prosecution, Jasubha accused No. 11, while he was in police custody, on August 1, 1985, made a statement about he

having concealed a gun in a hillock named "PA", and expressed his desire to discover that gun. He had the panchas and the police party near a

cave which was behind a big rock on the hillock named "PA", and after removing a big stone by means of which the cave had been covered, took

out from the cave, a gunny bag from which were recovered a double barrel gun, 13 filled cartridges, one, half filled cartridge, one empty cartridge

case and four pellets of bullets. To prove this discovery, the prosecution has examined panch witnesses Manwarmiya, P.W. 31 (wrongly stated as

P.W. 28 in the paper-book at page 860), and Kanji, P.W. 32. Just as in the case of Mohansinh, so also in the case of Jasubha, the prosecution, in

the earlier Sessions case No. 115/85, which arose from the incident that happened on July 21, 1984 relied upon the evidence about discovery of

the double barrel gun upon the statement made by Jasubha, and for that purpose, in the earlier Sessions Case also, the prosecution had examined

these two panch witnesses Manwarmiya, P.W. 31 and Kanji P.W. 32 as prosecution witness, but they had not supported the prosecution on the

point of the double barrel gun having been discovered upon the statement made by Jasubha. Relying upon that fact, the learned advocates for the

accused contended before us that the evidence of these two panch witnesses Manwarmiya and Kanji should not be accepted in support of the

prosecution case about discovery of double barrel gun, upon the statement made by Jasubha, accused No. 11. The argument is almost similar to

the one which was levelled by the learned advocates for the accused while attacking the evidence of panch witness Pravinkumar, P.W. 30, whose

evidence we have dealt with just now. We have noticed that Pravinkumar has stated before the Court in the present case that as, in the earlier

case, the complainant had turned hostile, he had followed the suit. Now, so far as the discovery of the double barrel gun upon the statement of

Jasubha is concerned, Kanji, P.W. 32, the panch witness has stated that in the earlier Sessions Case he had not deposed on the same lines on

which he has deposed in the present case, and he has given the reason for he having done so. According to him, while he had an occasion to

depose in the earlier case, having noticed that the complainant of that case had been perplexed he (this witness Kanji) was also perplexed, and

therefore, in that earlier case, he deposed differently than the lines on which he has deposed in the present case. While dealing with the evidence of

Pravinkumar, we have referred to the judgment in the case of Zile Singh v. The State (Delhi Admn.), 1979 Cri LR (SC) 703. It is, therefore, not

necessary for us to make that discussion over here again. We have carefully read the deposition of Manwarmiya, P.W. 31 and Kanji, P.W. 32,

and we find that when they deposed in the present case, they have made statements of truth. We accept those statements.

108. These two panch witnesses Manwarmiya and Kanji have been supported by the contents of the discovery panchanama Exh. 197. They have

also been supported by the deposotion of Investigation Officer Mr. Asnani. From these pieces of evidence, we have no doubt whatsoever in our

mind that on August 1, 1985, Jasubha, accused No. 11, while he was in police custody, made a statement that he had hidden a gun in a hillock of

village ''PA'', and that he expressed his willingness to discover that gun. He led the panches and the police party near a rock on that hillock,

removed the stone slab or the stone by means of which the cave was covered, took out from the cave a gunny bag from which were recovered a

double barrel gun, some filled cartridges, a half filled cartridge, an empty cartridge case and four bullets or pellets.

109. The learned Advocates for the accused very strenuously contended before us that the evidence about this discovery said to have been made

upon the statement made by Jasubha, accused No. 11, is wholly illegal for he was detained in police custody for a period exceeding 15 days after

his arrest, and it was beyond the period of 15 days from his arrest that he is said to have made the statement leading to the discovery. According

to the learned advocates for the accused, u/s 167, Cr.P.Code, the accused could not legally be remanded to police custody for a period exceeding

15 days, while here in the present case, accused No. 11 Jasubha was taken in police custody by Mr. Jhala, the Sub-Divisional Police Officer,

P.W. 55 on July 11, 1985 at Sangrur in Punjab, and he was produced before the learned Judicial Magistrate First Class at Palitana in Bhavnagar

District on July 15, 1985, and on the same day, he came to be remanded to police custody for a period of 25 days, and it was during such police

remand that Jasubha was in police custody, on August 1, 1985, when he is said to have made a statement leading to the discovery of the double

barrel gun. According to the learned advocates for the accused, therefore, when Jasubha is said to have made a statement leading to the discovery,

he was not legally in custody, as he could not have legally been remanded in police custody for a period exceeding 15 days from July 15, 1985;

the period of 15 days from July 15, 1985 would expire on July 30, 1985; from July 30, 1985 onwards. Jasubha should be treated to have been

detained illegally in police custody and if during such illegal detention, he has made any statement leading to the discovery of the double barrel gun,

the evidence about the discovery would also be illegal, and should be kept out of consideration.

110. The other line of argument was that though Jasubha has not complained about any physical torture while he was in police custody, it should

be presumed that he must have been consistently and presistently questioned by the Police Officer, before he made the statement leading to the

discovery and that would amount to mental torture, and therefore, the statement, if at all Jasubha is proved to have made, leading to the discovery,

cannot be treated as a statement voluntarly made by him, and therefore also the evidence about discovery should be kept out of consideration.

111. True, Jasubha was produced before the learned Judicial Magistrate, First Class at Palitana on July 15, 1985, and was remanded to police

custody for a period of 25 days. Equally true, under law as would apply to the present case, an accused could not be legally remanded to police

custody for a period exceeding 15 days. Here in this case, the learned Judicial Magistrate has, in a way passed an order for police remand, which

would not, strictly be in conformity with the requirement of law. But then, the question is, what would be the effect of that illegality or irregularity

committed by the learned Judicial Magistrate First Class in remanding Jasubha to police custody for a period exceeding 15 days? In other words,

the question would be, whether that illegality or irregularity committed by the learned Judicial Magistrate, in remaining Jasubha to police custody for

a period exceeding 15 days would vitiate the discovery evidence relied upon by the prosecution? In our opinion, the answer should be in the

negative.

Section 27 of the Indian Evidence Act permits reception of evidence about information, whether amounting to confession or not, in consequence of

which a fact is discovered, if the information was received from the person accused of an offence, in the custody of the police officer. Thus, this

section speaks of the receipt of information from a person who is accused of an offence, and who is in the custody of the police officer at the time

he gave that information. The important words in the section so far as the present argument is concerned are "in the custody of the police officer".

What is the content of this expression "in the custody of the police officer" was the subject matter of debate before us. The learned advocates for

the accused contended that the custody spoken of in the section must be legal custody and if the custody is tainted with illegality or irregularity, the

section would have no application. On the other hand, Mr. Divetia, the learned Addl. Public Prosecutor very strenuously argued that it is merely

the physical custody which is spoken of in this section and it has no relevance to the custody being either legal or illegal or irregular or anything of

the sort. According to Mr. Divetia, the section speaks of the information received from the person accused of an offence while he is in the physical

custody of the police officer, and the section has no reference to the character of the custody.

112. Mr. Divetia, the learned A.P.P. relied upon the decision in the case of Ram Babu Jadav v. Emperor, AIR 1938 Pat 60 : 1938 (39) Cri LJ

302. In that case, the accused Ragho Prasad had been injured in the explosion which led to that case. Ragho Prasad was therefore, admitted in the

hospital for the treatment of his injury, and the police officer had arranged to post four constables and a Havildar to guard Ragho Prasad who was

an indoor patient in the hospital. Thereafter the police officer requested the concerned Magistrate that Ragho Prasad be treated as being in the

court"s custody and the arrangements made for his guard may be approved. The Magistrate accepted that request. The police officer"s report was

clearly intended as a compliance of the provisions of the Code of Criminal Procedure directing that an arrested person should be made over to the

Magistrate within 24 hours. Thereafter while Rgho Prasad was in the hospital, and was being guarded by police constables, he made a statement

regarding discovery of stone slabs on which were traces of certain explosive. On behalf of Ragho Prasad, the evidence of discovery of the stone

slabs was objected to, on the ground that when he made the statement leading to the discovery, he was not in police custody, but he was in judicial

custody. Negativing the contention of Mr. Manmatha Nath Mukharji, the learned advocate for Ragho Prasad, the Division Bench of the Patna

High Court said as follows (at p. 65 of AIR) :

Although Section 27 is restricted to persons in custody of the police, I do not see why it should not apply to cases of persons who are in actual

police custody although that custody had been ordered by the Magistrate. There is nothing in such a case to offend against the principle of the

section, namely that portions of a confession to the police leading to the actual discovery of facts can safely be proved as their truth has been

independently guaranted.

Thus, though in that Patna case, accused Ragho Prasad, when he made the statement leading to the discovery was technically in judicial custody,

nonetheless the police were guarding him while he was taking treatment in the hospital and he was therefore, in police custody, which was

authorised by the Magistrate, and in that context of facts, the learned Judges of the Patna High Court negatived the contention referred to by us

hereinabove.

113. Applying the principle emerging from that decision, to the facts of the case before us, though in law, the learned Judicial Magistrate First

Class, Palitana should not have and could not have remanded Jasubha to police custody for a period exceeding 15 days, in fact he had so

remanded Jasubha. Therefore, so far as the Investigating Officers are concerned, they held the custody of Jasubha under the orders of the

Magistrate and it was while so holding the custody of Jasubha, that Jasubha made the statement leading to the discovery of the double barrel gun.

114. In Re Ramachandran, AIR 1960 Madras 191 : (1960 Cri LJ 616) the accused, after committing the murder of one Pappal, appeared before

the Judicial Sub Magistrate and surrendered himself before the Sub Magistrate, after making a statement about his complicity in the crime. It was

thereafter that the Police Officer came to know about the accused having committed the murder of Pappal, and thereafter the police investigation

followed. The Judicial Sub Magistrate remanded the accused to Sub Jail where he was interviewed by the Circle Inspector, P.W. 16 of that case

to whom the accused gave some information. It was before the Judicial Sub Magistrate passed the formal order deliveing the accused into police

custody that the accused had given the information to the Circle Inspector P.W. 16 of that case. After giving that information, the accused

discovered the dead body of Pappal. The evidence about this discovery was objected to on behalf of the accused. The two learned Judges of the

Madras High Court in that connection considered one of the important questions before them which was whether the statement which was made

by the accused to zthe Circle Inspector, admittedly made at the time when the accused was in magisterial custody, but was not in formal police

custody, should be excluded from the application of Section 27. While considering that question, the learned Judges of the Madras High Court

referred to a number of judgments, and the two distinct trends appearing from the judgments, one taking a strict view of the matter, and the other

taking not so strict view of the matter. While referring to the earlier judgments, the learned Judges of the Madras High Court also referred to the

case of Chhotey Lal Vs. State of Uttar Pradesh, , where it was held with reference to Section 27 that ''custody'' did not mean formal custody, but

included any kind of surveillance or restriction or restraint by the police. The Madras High Court also referred to the judgment in the case of Mt.

Jamubai Pratap v. Emperor, AIR 1936 Nagpur 200 : (1936) (37) Cri LJ 1047, where it was observed that even if the accused in the case had not

been formally arrested at the time when she gave the information, she was for all practical purposes in police custody and that Section 27

therefore, applied. The Madras High Court also referred to the case of Rambabu Jadav v. Emperor, AIR 1938 Patna 60 : 1938 (39) Cri LJ 302),

to which we have made a reference hereinabove.

After referring to the various judgments, in paragraph 15 of the judgment, the learned Judges of the Madras High Court observed as under:

We do not think it is necessary to examine other cases of other High Courts bearing upon the matter, for the trend of the wider interpretation that

we have referred to, become clear from an examination of the authorities already cited.

In that very paragraph, the Madras High Court further observed as follows (AIR 1960 Mad 191 : 1960 Cri LJ 616 para 15) :

Apart from this, we see no reason at all why the expression relating to police custody occurring in Section 27 of the Indian Evidence Act should be

rigidly interpreted. After all what the spirit of the language employed appears to imply is that where a person submits himself to the custody of a

police officer, with the consciousness that temporarily at least he is in such custody, or such control, whether formally authorised in some manner or

otherwise, the information given by him to such officer, leading to the discovery of a relevant fact, may be proved within the scope of the section.

To limit the meaning of the expression further, by imposing conditions as to the time of arrest, the existence or absence of a formal magisterial order

authorising police custody or interrogation etc. does not see to be justified either by the context, or by any inherent feature of the scheme of

Sections 25 and 26 to which Section 27 clearly constitutes a proviso or exception.

(Emphasis supplied)

This Madras decision makes it amply clear that what is conveyed by the word ""custody"" in Section 27 of the Indian Evidence Act is the actual or

physical custody, even if it is not backed by any formal magisterial order authorising the police custody or interrogation, etc.

115. Though not directly bearing on Section 27 of the Evidence Act, the judgment in the case of R.M. Malkani Vs. State of Maharashtra, also

furnishes a good guideline for resolving the dispute raised before us by the learned advocates on the point about the legality or otherwise of the

custody. In that case, it was contended on behalf of the accused that the tape recorded conversations which was relied upon by the prosecution

was obtained by illegal means in as much as Section 25 of the Indian Telegraphs Act was violated. In that connection while holding that there was

no violation of Section 25 of the Indian Telegraphs Act in the facts and circumstances of the case, Their Lordships of the Supreme Court said

(para 24) :

There is warrant for proposition that even if the evidence is illegally obtained, it is admissible.

While making this proposition, the Supreme Court referred to more than a century old English case of Jones v. Owens, (1870) 34 JP 759, where

a constable searched the appellant illegally and found a quantity of offending article in his pocket and in that case it was held that ""it would be a

dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means it could not be used against a

party charged with an offence.

The Supreme Court also referred to the case of Kuruma. Son of Kaniu v. R., 1955 AC 197, where the Judicial Committee dealt with the

conviction of an accused of being in unlawful possession of ammunition which was discovered in consequence of a search of his person by a police

officer below the rank of those who were permitted to make such searches. The Judicial Committee held that ""if evidence was admissible it matters

not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if

the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

In paragraph 25 of the report the Supreme Court referred to the case of Magraj Patodia Vs. R.K. Birla and Others, , which dealt with the election

matter wherein it was held that ""the document which was procured by improper or even by illegal means could not bar its admissibility provided its

relevance and genuineness were proved.

After referring to several judgments their Lordships of the Supreme Court in Malkani''s case (1973 Cri LJ 228) observed (para 26) :

The Court will take care in two directions in admitting such evidence. First, the Court will find out that it is genuine and free from tampering or

mutilation. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the Police. The reason is that, the Police Officer is

more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position

of the accused, the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding

circumstances.

Thus, this judgment in the case of R.M. Malkani clearly postulates that if the evidence is otherwise relevant, it cannot be shut out merely because it

has been obtained by improper or even by illegal means.

116. In the present case, though the learned Judicial Magistrate First Class has committed some illegality in remanding Jasubha to police custody

for a period exceeding 15 days, that would have no adverse impact on the probative value of the evidence about discovery of gun upon the

statement made by Jasubha. Merely because Jasubha was not in custody, which could be said to be have been legally allowable, he did not cease

to be in physical custody of the police while he made the statement leading to the discovery. The Investigating Officer could not be blamed for

having asked for police remand. It was for the learned Judicial Magistrate to decide the period for which the police remand should have been

granted. If the learned Magistrate while passing the order of police remand, somehow came to ignore the provisions contained in Section 167,

Cr.P.Code, that would not render the custody of Jasubha with police, illegal custody. At the most, it may be irregular custody. Even if it was illegal

custody, the evidence about discovery which is otherwise relevant, would not be tainted because of the illegality or irregularity and could not be

shut out on that score.

117. The Patna High Court and the Madras High Court judgments referred to by us hereinabove, and the Supreme Court judgment in the case of

R. M. Malkani (1973 Cri LJ 228), clearly negative the contention of the learned advocates for the accused that the evidence about discovery of

the double barrel gun, should be excluded from consideration.

118. The second line of argument was that the statement of Jasubha leading to the discovery of the double barrel gun should be treated to be not a

voluntary statement for, he was in prolonged custody and he must have been interrogated persistently and that would amount of mental torture. We

are not in a position to accept this contention. The learned advocates for the accused referred to the deposition of P.I. Asnani. In paragraph 34 of

that deposition, Mr. Asnani has stated that accused No. 8 Nirubha was arrested on October 12, 1984 and that he had recorded his statement on

October 13, 1984. Mr. Asnani has further stated that as and when it was found necessary, that accused No. 8 was questioned or interrogated

from day to day. Relying upon this statement made by Mr. Asnani, the learned advocates for the accused argued that just as the Investigating

Officer was interrogating Nirubha, accused No. 8, from day to day, he must have been interrogating Jasubha, accused No. 11 also from day to

day right from July 15, 1985 up to August 1, 1985, and such persistent interrogation by the police, in itself would amount to mental torture. Having

perused the evidence, we are not in a position to accept this argument. One of the purposes of remanding the accused to police custody is to

enable the police to effectively investigate the case and for that purpose, if need be, to question the accused from time to time. Merely because the

Investigating Officer might have interrogated or questioned the accused, a number of times, during the course of the investigation, that would not

render the statement made by the accused before the Investigating Officer involuntary or a statement extracted from the accused by mentally

torturing him. The submission on this line made by the learned advocates for the accused, therefore, deserves to be rejected.

119. The double barrel gun and the other ammunition which was discovered upon the statement made by Jasubha were sent to the Forensic

Science Laboratory. We may mention here that in the paper book at page 1008, on account of printer''s devil the description of this double barrel

gun being content of parcel No. 64 has been omitted to be printed. We have, therefore, checked the original laboratory report Exh. 242. That

report shows the following facts :

The gun was a double barrel breech loading shotgun having barrels of the length of about 76 cms. The barrel washing of the gun was taken before

test firing and that washing showed residues of fired ammunition nitrite, indicating that the gun had been used for firing prior to its receipt in the

laboratory.

Four 12 bore cartridges were successfully test fired from the barrels of that gun, and both the barrels were found to be in working condition.

The laboratory report further shows that one 12 bore Shaktiman cartridge case having an indentation mark on the percussion cap, which was

found from the place where Popat .Lakha was shot at, was fired from the left barrel of this double barrel gun. Similarly, one 12 bore Shaktiman

cartridge case having an indentation mark on the percussion cap, which was found from the place where Gordhan Lakha was fired at, was also

fired from the left barrel of this double barrel gun. Similarly, two out of the three empty cartridge cases, which were recovered by Dayal Khoda,

which were the cartridge cases of Shaktiman shotgun cartridges having indentation marks on the percussion caps, were fired from the left barrel of

this double barrel gun. Thus, the evidence produced by the prosecution clearly establishes that at least four empty cartridge cases, which were re-

covered by police during the course of investigation, were proved to have been fired from the left barrel of the double barrel gun, which came to

be discovered upon the statement made by Jasubha, accused No. 11. Of course, the evidence about discovery by itself, cannot be treated to be

substantive evidence. It can be used as corroborative evidence. Here, in the present case, there is direct occular evidence given by the witnesses

referred to by us hereinabove, about Jasubha having fired a number of gun shots from his double barrel gun. At least four empty cartridge cases

have been found by the police during the investigation, which have been positively connected with the double barrel gun discovered at the instance

of Jasubha. This discovery evidence therefore, lends assurance to the occular evidence supplied by the eye-witnesses about the participation of

Jasubha in this dastardly crime.

120. It was submitted by the learned advocates for the accused that the laboratory report submitted by the ballistic expert shows that some of the

fired projetiles which were recovered by police during the investigation were not fired from any of the three firearms, viz. one discovered at the

instance of Nirubha, the other discovered at the instance of Mohansingh and the third discovered at the instance of Jasubha, and therefore, the

eyewitness'' account of the eye-witnesses would become infirm on that ground. The argument is required to be stated merely for being rejected.

We have hereinabove, stated that in the body of Madhu Naran even now, a bullet has been allowed to remain, and in view of that, the laboratory

report which shows that the other bullet which was recovered from the body of Madhu Naran is not proved to have been fired from the gun

discovered upon the statement of Mohansinh would have no adverse impact upon the evidence of Madhu Naran. It is also required to be noticed

that besides Jasubha-accused No. 11, Mohansinh-accused No. 12 and Nirubha-accused No. 8, the evidence clearly points out that some other

accused also had with them fire-arms, and they used those fire-arms during the incident. The fired projectiles recovered during the incident, which

are not proved to have been fired from the fire-arms discovered upon the statements made by accused Nos. 8, 11 and 12 as above referred may

well have been fired from the fire-arms wielded by the accused other than accused Nos. 8, 11 and 12. This is one way of looking at the matter.

The other way of looking at the matter is that when the eye-witnesses'' account is reliable and acceptable, some discrepancies here or there in the

expert evidence, whether it be in the shape of medical evidence or it be in the shape of the evidence supplied by the ballistic expert, will have no

adverse impact on the eye-witnesses'' account. In Bajwa and Others Vs. State of U.P., , the accused were acquitted by the Sessions Court. The

High Court reversed that acquittal, and convicted the ten accused, who ultimately were the appellants before the Supreme Court. The High Court

found that the evidence of the eye-witnesses was fully trustworthy and that of the medical evidence was shaky. The High Court said that shaky

medical evidence did not throw any doubt on the trust-worthiness of the prosecution witnesses as to the place, time and circumstances in which

Ramrathan was killed. The Supreme Court approved the approach of the High Court and said that the evidence was not rendered untrustworthy

because of the inconsistency with the medical evidence, which was also scrutinised by the High Court with greater care and anxiety.

121. In Solanki Chimanbhai Ukabhai Vs. State of Gujarat, , it has been observed as follows (para 12) :

Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing

more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner

alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all

possibilities whatsoever of injuries taking place in the manner alleged by eye-witnesses, the testimony of the eye-witnesses cannot be thrown out on

the ground of allegro inconsistency between it and the medical evidence.

Of course, the aforesaid two judgments of the Supreme Court are with reference to the medical evidence. But the same principle would apply to

the laboratory report of the ballistic expert. We have carefully considered the eye-witnesses" account, and we are sure that merely because, all the

fired projectiles recovered by the police during the course of investigation are not proved to have been fired from the three fire-arms discovered

upon the statements made by the accused, the eye-witnesses" account about accused Nos. 8, 11 and 12 having fired fire-arm shots cannot be

discarded. The evidence on that line supplied by the eye-witnesses does not at all become untrustworthy on such a ground.

122. The learned advocates for the accused submitted that there is inordinate delay in the matter of recording the police statements of eye-

witnesses therefore, the evidence of eye-witnesses is rendered infirm. While considering the evidence of Ganesh Zaver, we have considered this

aspect and have pointed out that there is no straight-jacket formula about the time duration in which the Investigating Officer should record the

statements of witnesses. Each case would depend upon its peculiar facts. We have referred to two judgments which would go to show that the

delay of 20 days and 56 days in recording the statements, has not been considered to be, in any manner, weaking the probative value of the

evidence of the particular witness. In the present case, the police statements of Ganesh Zaver and Thakershi Purshottam were recorded on

September 22, 1984. The case of Thakershi Purshottam would stand almost on the same lines as that of Ganesh Zaver. It would be rather on a

better footing for, he had lost his father. It was argued that at about 2.30 p.m. on the day of the incident, when the police came to his house for the

purpose of inquest panchnama, and again at 7.30 p.m. on the same day for the purpose of preparing the panchnama of the scene of the incident,

Thakershi did not narrate the facts deposed by him from the witness box to the police officers and therefore, Thakershi"s evidence from the

witness box should be discarded. We do not agree with this submission. It has to be remembered that Thakershi has stated that when at 2.30 p.m.

the police came to his house, he and his family members were weeping and wailing and that would be obvious. After the inquest panchnama was

made, the dead bodies of his father and others were taken to Gariadhar P.H.C. At the time, the panchnama of the scene of the offence was

prepared, P.S.I. Bhuthaiya was busy preparing panchnama and there is evidence to show that after preparing that panchnama, Bhutiaya tried to

find out the eye-witnesses. But no eye-witness was available. This would be obvious because all the eye-witnesses must have gone to Gariadhar,

where the dead bodies have been taken. The police statement of Gangaben was recorded on September 24, 1984, and that of Liliben was

recorded on September 25, 1984. We have indicated hereinabove that up to September 22, 1984, and even thereafter, there was a lot of

commotion and uproar not only in Mangadh, but in the nearby villages. The Investigating Officer had to fight on various fronts. Gangaben and

Liliben have lost their respective husbands before their own eyes. They must obviously be wailing and mourning. If, in the background of all these

facts, their statements came to be recorded on the dates indicated hereinabove, we do not think that there was any inordinate delay in the matter of

recording those statements.

123. The police statements of Madhu Narain, Purshottam Mulji and Dhanji Bhagwan were recorded by Mr. Asnani on September 28, 1984 at

Civil Hospital, Ahmedabad. It is clear that on the day of the incident itself, these three witnesses were transferred to Ahmedabad Civil Hospital. At

the Civil Hospital, Ahmedabad, they were operated upon and certain fired projectiles were removed from their bodies. This is one. On the other

hand, Mr. Asnani was busy investigating other parts of the matter. He, on September 26, 1984 got the statements of these three witnesses

recorded by the Executive Magistrates at Bhavnagar Sir T. Hospital. It was thereafter that Mr. Asnani proceeded to Ahmedabad, and recorded

the statements of the aforesaid three witnesses. In the facts and circumstances of the case, we do not think, there was any unreasonable delay in

recording the statements of these three witnesses. The facts and circumstances of the case clearly explains a small delay in recording the statements

of the eye-witnesses as discussed hereinabove.

124. Having gone through the evidence very carefully and having heard the learned advocates for both the sides, we are convinced that the

prosecution has proved beyond reasonable doubt, the presence and participation of accused Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 as per its

case. We will presently indicate the manner in which those accused should be convicted.

125. This takes us to the case of accused No. 4 Jodha Khoda, who has filed Criminal Appeal No. 8/88. Of course, the learned trial Judge has

convicted him as well along with other accused. But we are constrained to say that the learned trial Judge has gone absolutely wrong in convicting

accused No. 4. The only two aspects which weighed with the learned trial Judge in convicting accused No. 4, are-- (1) that accused No. 4 is a

Rabari by caste, and (2) Dhanji Bhagwan, P.W. 19, while giving the names of six assailants has also stated that besides those six assailants, there

was one person with them, who looked like a Rabari, whose name he did not know. According to the learned Judge because accused No. 4 is

Rabari by caste, and because Dhanji Bhagwan has spoken about one Rabari being a member of the unlawful assembly, that Rabari must be

accused No. 4. We think no much argument is necessary to say that the approach of the learned Judge cannot be endorsed.

126. We may mention here that none of the witnesses examined by the prosecution has, from the witness box, stated about either the presence or

participation of accused No. 4 in the crime. However, the learned Judge has by a queer and impermissible process of reasoning found accused

No. 4 also guilty. It is required to be noticed that not even Ganesh Zaver, from the witness box, has stated about the presence or participation of

accused No. 4 in the crime. However, during his cross-examination, questions were put to him with reference to his police statement. He denied

having made certain statement, when he was examined by the Investigating Officer. During the evidence of Mr. Asnani, it was proved by way of

contradiction that in his police statement, Ganesh Zaver had made those statements. In those statements, Ganesh Zaver has, of course implicated

accused No. 4 as one of the assailants. Now, it is well settled that the police statement of a witness has a very limited utility. It can be used only for

the purpose of contradicting him if he comes to be examined as a prosecution witness. His police statement cannot be used as a substantive

evidence. The learned trial Judge has used the police statement of Ganesh Zaver on this point as substantive evidence, and has convicted Jodha

Khoda, accused No. 4. The approach of the learned trial Judge, to say the least, is wholly illegal.

127. Barring the statement of Dhanji Bhagwan that one of the assailants looked like a Rabari, and what Ganesh Zaver stated to the police officer

during the course of investigation implicating accused No. 4 in the crime, there is nothing on the record to connect accused No. 4 with the present

crime. Under these circumstances, the conviction and order of sentence recorded against accused No. 4 cannot be sustained. His appeal, being

Criminal Appeal No. 8 of 1988, shall therefore, have to be allowed.

128. The accused have been charged inter alia for an offence of criminal conspiracy to commit murder punishable u/s 120-B of I.P. Code. They

have also been charged for an offence punishable u/s 302/149 of I. P. Code and also for an offence punishable u/s 302/34 of I. P. Code. It could

not be disputed that criminal conspiracy is hatched in secrecy and there could hardly be any direct evidence about that. On the facts and

circumstances of the present case, we are convinced that the accused, other than accused No. 4 had hatched a criminal conspiracy to commit

murders of a large number of Patels of Mangadh. Though all the 11 accused (excluding accused No. 4) are, not by positive evidence, proved to

be present at all the places where the murders came to be committed, it is abundantly clear that all the ten murders came to be committed by those

11 accused (except accused No. 4) as a part of the same plan and design, during the course of less than 1 1/2 hours. There is evidence to show

that when, from the trailer, Jairam Bhagwan ran towards south, he was chased by the accused. He was belaboured at a distance of about 1 km.

from the place where the tractor and tailer were the first target of the attack. Ganesh Zaver has stated that when he came out of the field of Koli,

he found the accused running towards the south. Gangaben has stated that Jasubha, accused No. 11, in company of Nirubha, accused No. 8,

Bablubha, accused No. 10, and Mohansinh, accused No. 8, Bablubha, accused No. 10, and Mohansinh, accused No. 12, and some four others

were present when Gordhan Lakha was killed by Jasubha. That place is just near the place where Popat Lakha and Purshottam Jaga were killed.

Of course Thakershi has spoken about the presence only of Jasubha, and he has not referred to the presence of any of the other accused, but that

would hardly make any difference for, Gangaben has clearly spoken about the presence of accused Nos. 8, 10 and 12 besides the presence of

accused No. 11, and she has definitely stated that besides those accused, at some distance, she noticed some four persons, whom of course, she

has not been able to identify. Taking these facts in their totality, it has got to be said that even when Purshottam Jaga, Popat Lakha and Gordhan

Lakha came to be murdered, not only Jasubha, accused No. 11, but Nirubha, accused No. 8, Bablubha, accused No. 10, Mohansinh, accused

No. 12 with some four others whom Gangaben could not identify, were present. The total strength of the assailants there was more than five.

Where Babu Bechar was done to death, the presence of Jasubha, accused No. 11, Mohansinh, accused No. 12, Bhikhubha, accused No. 5 and

Nirubha, accused No. 8 has been clearly deposed by Liliben. According to Liliben, there were 8 to 10 persons. Liliben has further identified

accused Nos. 1, 2, 7 and 9 at the test identification parades. She has identified those accused before the Court. Therefore, at the place where

Babu Bechhar was done to death, the presence of accused Nos. 1, 2, 5, 7, 8, 9, 11 and 12 is duly proved. In the matter of death of Babu Bechar,

Jasubha has been proved to be the leader, who fired three shots, and Mohansinh also fired a shot, as stated by Liliben. Thus at that place, the

presence of 8 out of 11 accused (excluding accused No. 4) is proved, and the active participation of Jasubha and Mohansinh is proved. Going by

the deposition of Ghanshyam, of course, it has to be said that when Madhu Khoda and Nagji Khoda were shot dead, Ghanshyam had seen only

one assailant.

129. However, the evidence of the find of three empty cartridge cases, two out of which are proved to have been fired from the gun, discovered

by Jasubha would clearly connect Jasubha with the murders of Nagji Khoda and Madhu Khoda. Of course, so far as the murder of Ganesh Naran

is concerned, there is no direct evidence, nor is there other circumstantial evidence connected with his murder. The only circumstance is that he

died as a result of having been fired at by means of a firearm. However, in view of the fact that he was a Patel from Mangadh and taking the

totality of the evidence into consideration, the inference inevitable would be that someone out of the unlawful assembly made up of 11 accused in

this case (excluding accused No. 4) must have killed him by use of a firearm. All the 11 accused referred to hereinabove would, in the facts and

circumstances of the case, have therefore to be convicted for the murder of Ganesh Naran with the aid of Section 149 of I. P. Code.

Even if this last stated finding is, some day, held to be unsustainable, that would hardly make any difference for, as regards the other murders, there

is clear evidence implicating the 11 accused above referred.

130. As a result of the foregoing discussion, we would now indicate as to how the accused should stand convicted.

(a) All the accused (excluding accused No. 4) stand convicted for an offence punishable u/s 120B of I. P. Code.

(b) As regards murder of Bai Diwali, Jasubha, accused No. 11 is convicted for an offence punishable u/s 302 of I. P. Code, and the other ten

accused (excluding accused No. 4) are convicted for an offence punishable u/s 302/149 of I. P. Code.

(c) As regards murders of Odhavji Bhagwan and Jairam Bhagwan, all the 11 accused (excluding accused No. 4), are convicted for an offence

punishable u/s 302/149 of I. P. Code.

(d) For the murders of Purshottam Jaga, Popat Lakha and Gordhan Lakha, Jasubha, accused No. 11 is convicted for an offence punishable u/s

302 of I. P. Code, while Nirubha, accused No. 8, Bablubha, accused No. 11 and Mohansinh, accused No. 12 are convicted for an offence

punishable u/s 302/149 of I. P. Code.

(e) For the murders of Nagji Khoda and Madhu Khoda, Jasubha, accused No. 11 is convicted for an offence punishable u/s 302 of I. P. Code.

(f) For the murder of Babu Bechhar, Jasubha, accused No. 11 is convicted for an offence punishable u/s 302 of I. P. Code, while Bharatsinh-

accused No. 1, Dhruvansinh-accused No. 2, Bhikhubha-accused No. 5, Kunvarsinh-accused No. 7, Nirubha-accused No. 8, Ajitsinh-accused

No. 9, and Mohansinh-accused No. 12, are convicted for an offence punishable u/s 302/149 of I. P. Code.

(g) For the murder of Ganesh Naran, all the 11 accused (excluding accused No. 4) are convicted for an offence punishable u/s 302/149 of I. P.

Code, subject of course, to what we have stated as regards murder of Ganesh Naran, hereinabove.

(h) So far as causing injuries to the four injured eye-witnesses is concerned, for causing injury to Pragji Mavji, all the accused (except accused No.

4) are convicted for an offence punishable u/s 324/149 of I. P. Code.

(i) For causing injury to Madhu Naran, Mohansinh accused No. 12 is convicted for an offence punishable u/s 307, I. P. Code, and the remaining

10 accused (except accused No. 4) are convicted for an offence punishable u/s 307/149 of I. P. Code.

(j) For causing injury to Purshottam Mulji, Nirubha-accused No. 8, is convicted for an offence punishable u/s 307 of I. P. Code, and the remaining

10 accused (except accused No. 4) are convicted for an offence punishable u/s 307/149 of I. P. Code.

(k) For causing injury to Dhanji Bhagwan, Jasubha-accused No. 11 is convicted for an offence punishable u/s 307 of I. P. Code, while the

remaining 10 accused (except accused No. 4) are convicted for an offence punishable u/s 307/149 of I. P. Code.

131. We have hereinabove modified some parts of the order of conviction recorded by the learned trial Judge against the accused as aforesaid.

The other parts of the order of conviction against the accused, except accused No. 4, would remain as they are.

132. This takes us to the enhancement appeals filed by the State.

133. The State has filed Criminal Appeals Nos. 88 of 1988 and 89 of 1988, and has prayed for the enhancement of the sentence, for the offence

of murders against accused Nos. 8, 11 and 12.

134. In this connection at the outset we may notice that even before the trial Court, a similar request was made on behalf of the prosecution, and it

was contended that accused Nos. 8, 11 and 12 should be sentenced to death. However, it appears from the judgment of the trial Court that in the

alternative on behalf of the prosecution it was strenuously contended that if not all the three accused, being accused Nos. 8, 11 and 12, in any view

of the matter, accused No. 11 should be sentenced to death. Before us, the learned Addl. Public Prosecutor Mr. Divetia adopted the same

approach as was adopted by the learned Spl. Public Prosecutor before the trial Court. Mr. Divetia firstly submitted that looking to the gravity of

the offences, and the part played by accused Nos. 8, 11 and 12, each one of the them should be sentenced to death. He alternatively submitted

that in any view of the matter, at least accused Nos. 11 and 12 should be sentenced to death.

135. After hearing the learned advocates on all these appeals, we were convinced that in so far as Nirubha-accused No. 8 is concerned, this

cannot be said to be a case where he should be sentenced to death. However, at that stage, we were tentatively of the opinion that accused Nos.

11 and 12 may have to be sentenced to death. We therefore, thought it fit to hear those accused Nos. 11 and 12 personally. They were called

from jails. We have heard them. They have filed their written submissions. The oral submissions made by them are all covered in those written

submissions. Their learned advocates M/s. K.J. Shethna and A.D. Shah, were also heard at length, once again even after we heard those accused

Nos. 11 and 12.

136. It was not disputed before us that in law, this Court can enhance the sentence of imprisonment for life imposed by the trial Court upon the

accused and convert it into one of death. In other words, this Court"s jurisdiction to enhance the sentence, was not challenged before us.

137. The constitutional validity of death sentence was also, in view of a number of judgments of the Supreme Court, not at all challenged before us.

On behalf of the State, Mr. Divetia, the learned A.P.P., vehemently contended that the act of accused Nos. 11 and 12 is of unprecedented

brutality and in view of the fact that 10 innocent persons have been killed in a fiendish manner, it must be held that so far as Jasubha and

Mohansinh are concerned, this is the rarest of rare cases, as contemplated by the various judgments bearing on the point. According to Mr.

Divetia, Jasubha-accused No. 11 was the moving spirit behind this massacre, witnessed by small village Mangadh on September 20, 1984. In the

submission of Mr. Divetia, the participation of Mohansinh accused No. 12 was also of no lesser magnitude. Mr. Divetia argued that there was long

drawn enmity between Darbars of Chomal on one hand, and Patels of Mangadh on the other. On June 28, 1982, Sajubha, the uncle of Jasubha;

Bhimdevsinh, the son of Ajitsinh-accused No. 8, and one Khengubha, a relative of Bhikhubha, accused No. 5 were murdered, and 19 Patels of

Mangadh were put up for trial. Those Patels came to be acquitted some 15 or 16 months prior to the present incident. According to Mr. Divetia,

right from the time of murders of those three Darbars of Chomal, Jasubha anyhow wanted to avenge upon the Patels of Mangadh. He, therefore,

on July 9, 1982, obtained leave of absence from his army service. Leave was granted to him from July 9, 1982 up to August 27, 1982. On expiry

of that leave, he reported for duty, and requested for a special permission to grow beardhead, and that permission was granted. Of course, the

request for growing beardhead was made by him, according to Mr. Divetia, under the pretext of ""Maa Durga Puja"". That request was made by

him in September, 1982, and he obtained the permission to grow beardhead for a period of one month. Then he applied for 30 days advance

leave commencing from September 23, 1982 and ending with October 22, 1982. He proceeded on that leave, but thereafter, he deserted the

army, and never returned to duty. Since then, he has been declared as a deserter. Mr. Divetia drew our attention to these facts from the military

record Exh. 300. According to Mr. Divetia, Jasubha-accused No. 11, must have come to know about the murders of three Darbars, committed

on June 28, 1982, and soon then, from July 9, 1982, he proceeded on leave from army service. After resuming duties in August, 1982, he in

September, 1982, requested for a permission to grow beard, and once again obtained leave for the period between September 23, 1982, and

October 22, 1982. But having obtained that leave and proceeded on leave, he deserted the army. Mr. Divetia further submitted that since then

Jasubha was thinking of eliminating the existence of as many Patels of Mangadh as possible. Though, around September/October, 1982, the case

against 19 Patels of Mangadh had yet not begun, in the Court of Session, it was avowedly with that objective that, according to Mr. Divetia,

Jasubha deserted the army service. According to Mr. Divetia, as is clear from Exh. 247, on April 30, 1983, Jasubha-accused No. 11, his brother

Dhruvansinh-accused No. 2, Kunvarsinh-accused No. 7, his brother Ranvirsinh and Mohansinh-accused No. 12, were required to be prosecuted

for offences punishable under Sections 147, 504 and 506 of the I. P. Code and for that Shambhubhai Valjibhai Patel of Mangadh was required to

lodge an information for those offences. Further according to Mr. Divetia, on July 21, 1984, Jasubha, Mohansinh, Nirubha and Ranvirsinh

launched a murderous assault on Manji Meghji and Premji Purshottam. Sessions Case No. 115/85 came to be instituted against those four

accused and they were convicted by the Court of Sessions for offences punishable u/s 307/34 of I.P. Code, and came to be sentenced to rigorous

imprisonment for 10 years. Of course, as fairly conceded by Mr. Divetia, that judgment of the sessions case has not been upheld by this High

Court in Criminal Appeal No. 295 of 1986. Nonetheless, according to Mr. Divetia, the fact remains that Jasubha did assault Patels of Mangadh on

July 21, 1984, avowedly with an objective of killing them, but he could not achieve his mission. He, therefore, was in search of an opportunity to

kill as many Patels of Mangadh as possible, and he got the opportunity he desired on September 20, 1984. According to Mr. Divetia, thus the

present case is not the result of a sudden fit of revenge, in the mind of Jasubha. Jasubha, according to him, all throughout contemplated and

pondered to murder as many Patels of Mangadh as possible. Towards that end in view, he deserted the army service, after growing beard after

obtaining permission to grow beard. Coming to the incident, Mr. Divetia, submitted that Jasubha took the lead he came out of the field of Devji

Shamji, opened the attack, deflated the tyre of the tractor, and then fired the second shot on the passengers in the trailer which smashed the head

of Divaliben. Jasubha then fired further shots from his double barrel gun, one of which hit Dhanji Bhagwan. According to Mr. Divetia, besides firing

the three shots as above, Jasubha also fired some further shots from his double barrel gun. But as others had also opened fire, it is not possible to

say if the further shots fired by Jasubha caused injuries to anybody else. But the fact remains that Jasubha fired a number of shots from his double

barrel gun near the trailor. In the submission of Mr. Divetia, Jasubha just want only killed Purshottam Jaga, Popat Lakha and Gordhan Lakha.

Against Purshottam Jaga, he had no enmity whatsoever, and yet he killed him. Of course, Gangaben"s evidence shows that some of her relatives,

and that would also be the relatives of Gordhan Lakha and Popat Lakha, were amongst the 19 accused who were put up for trial for the murders

of three Darbars. Jasubha, according to Mr. Divetia, therefore, killed Popat Lakha and Gordhan Lakha also. Jashbha then killed Nagji Khoda and

Madhu Khoda. Jasubha then killed Babu Bechhar, ignoring the entreaties for mercy made by his wife Liliben. Thus according to Mr. Divetia,

Jasubha killed (i) Divaliben, (ii) Purshottam Jaga, (iii) Popat Lakha, (iv) Gordhan Lakha, (v) Nagji Khoda, (vi) Madhu Khoda, and (vii) Babu

Bechhar. In the submission of Mr. Divetia, there is clear evidence to show that Jasubha killed at least seven persons out of the ten who lost their

lives on the unfortunate day of the incident. Jasubha, very severely injured Dhanji Bhagwan. Jasubha gave filthy abuses to Liliben and threw her

away from the bullock-cart, when she tried to cover her husband. In the submission of Mr. Divetia, all these facts show that Jasubha was the

moving spirit behind this massacre. He had tried to kill some Patels of Mangadh on July 21, 1984, but he remained unsuccessful in that attempt.

On the day of the present incident, he therefore, came down with a greater vendetta, and indulged in merciless killing of many persons. All the

victim of this massacre were unarmed and innocent. Even if the history of previous enmity is not kept in mind, that will not take out the case of

Jashbha out of the category of the rarest of rare cases, when he killed so many persons on a single day in a fiendish manner. He therefore, should

be visited with the extreme penalty provided by law. According to Mr. Divetia, though the legislative concept about imposition of death penalty has

undergone a metamorphosis in as much as death penalty, at one time was considered to be rule, and the lesser penalty of imprisonment for life was

an exception to be resorted to for special reasons, the instant is a fit case for imposing death penalty on Jasubha. Mr. Divetia invited our attention

to the criminal behaviour of Jasubha. He referred to the deposition of Mansinh, which shows that in 1980, Jasubha was convicted for an offence

punishable u/s 135 of the Bombay Police Act, and was sentenced to 10 days" imprisonment. Further, as stated by Mansinh, in October, 1981,

when he went to Chomal, Jasubha had assaulted him by means of a hockey stick. Thus, even before the starting point of the chain of criminal cases

between Darbars of Chomal on one hand, and the Patels of Mangadh on the other, Jasubha displayed criminal propensities, and even while he was

serving in the army, when he returned to his native place on leave of absence, he indulged in a career of crime. Thus Jasubha, according to Mr.

Divetia is a person who has, over a period of time, gone from bad to worse, and even while he continued in army service, whenever he came to his

native place on leave, he committed offences.

138. Mr. Divetia then submitted that after committing the crime on July 21, 1984, Jasubha and his companion Mohansinh made themselves scare,

and since that date, they were at large, and they came to be apprehended by the Sangrur Police in Punjab for the first time since July 21, 1984, on

the night between July 4 and July 5, 1985, and the only inference, according to Mr. Divetia, should be, that Jasubha and Mohansinh were

absconding after committing crime on July 21, 1984, and they must be hiding somewhere in Gujarat for, according to Mr. Divetia, they appeared

on the scene once again on September 20, 1984, and indulged in the massacre. Even after committing ten murders on the day of the incident,

Jasubha and Mohansinh again vanished in thin air, and despite vigorous search on the part of the police, they were not traceable, and it was a

fortuitous circumstance, that they came to be arrested by the police in Punjab for proceedings u/s 109 of the Cr. P. Code. According to Mr.

Divetia, as the record shows, even at that time, they were found to be residing under assumed names. According to Mr. Divetia thus, not only at

the time of the commission of the present offence, but both prior thereto and subsequent thereto, Jasubha has displayed a conduct which would

warrant a finding that he is a person who could never be reformed, and in whose favour no argument of leniency could ever be entertained.

139. About Mohansinh also Mr. Divetia submitted that his part in the present crime is not less than that of Jasubha. Even in the earlier incident,

Mohansinh had participated and subsequent to the present incident, Mohansinh also absconded. Mohansinh also should be visited with death

penalty, submitted Mr. Divetia. One additional argument Mr. Divetia made against Mohansinh was that Mohansinh chased Madhu Naran and

inflicted a gun shot injury to him. It was, however, providence that saved Madhu Naran. According to Mr. Divetia, therefore, in the matter of

assault on Madhu Naran, Mohansinh may not be visited with death penalty, but inasmuch as he had associated himself with Jasubha in the matter

of the killings on the day of the incident, he should be visited with death penalty.

140. Mr. Divetia submitted that Nirubha, accused No. 8 should also be similarly sentenced to death.

141. Mr. A.D. Shah, the learned advocate for Jasubha and Mohansinh as also Mr. K.J. Shethna, the learned advocate for those two accused,

opposed the enhancement appeals, and firstly contended that in view of the fact that the trial court has chosen not to inflict the extreme penalty on

any of the accused, this court should not take a different view. The learned advocates, however, did not pitch their argument so high as to contend

that this court could, in no case, enhance the imprisonment for life to death penalty. However, they contended that the trial court having taken one

view on the question of sentence, this court should not disturb that finding unless this court finds that the view on the question of sentence taken by

the trial court is perverse and absolutely unsustainable. They further submitted that though Jasubha and Mohansinh were convicted by the learned

Addl. Sessions Judge, Bhavnagar, in Sessions Case No. 115 of 1985 for offence punishable u/s 307/34, I. P. Code, and were sentenced to 10

years" R.I., that judgment having been set aside by this court, the facts as regards that incident dated July 21, 1984 cannot be taken into

consideration while deciding the enhancement appeals against the convicts. It was also submitted on behalf of Jasubha that Bharatsinh, his father is

70 years of age and is in jail since a number of years and his health has deteriorated. Similarly Bhavkunverba, the mother of Jasubha has been

rendered helpless. It has also been submitted that Baluba, the wife of Jasubha is about 33 years of age and their children, three in number aged 12,

10 and 8 years respectively have also to live like orphans. Sajubha, one of the Darbars who was murdered in 1982 happened to be doubly related

to Jasubha. He was, on one hand, his uncle, and on the other hand, he was the husband of the sister of his mother. Prabhatba, the widow of

Sajubha has been rendered helpless on the death of Sajubha. Similarly, the children of Sajubha have also been rendered helpless. Dhruvansinh,

accused No. 2 and Aniruddhsinh, accused No. 3 have been sentenced to imprisonment for life in this case, and they are serving out their sentence

while Pradyumansinh, the other brother of Jasubha is serving in Army. Jasubha has an unmarried sister Annapurna, aged 18 years, and as Jasubha

has been sentenced to imprisonment for life by the trial court, it is difficult to find out a match for Annapurna. Rasikba, the widowed sister of

Jasubha and her son aged 1 year have been rendered helpless.

The above facts were placed for our consideration, on behalf of Jasubha, for not enhancing the sentence imposed upon him. It was further

contended that even while undergoing the sentence of life imprisonment inflicted upon him, Jasubha was twice released, once on parole and once

on furlough leave, and during those periods of release, he had not shown any criminal tendencies, and had surrendered to jail custody within time.

It was also submitted that in the jail, Jasubha had been elected as a member of the representative body of the convicts for a period of one year

from December, 1990. According to Jasubha, he has, out of his spirit of helping the nation, deposited Rs. 1,000/ - in Narmada Vikas Bond, out of

his earnings from the jail. He has stated that on account of successive droughts, and the various other circumstances pleaded by him in the written

submissions, his family members have almost been ruined, and all his lands have been lost. It was also submitted on behalf of Jasubha that from

1971 till 1982 he has served Indian Army with all sincerity and faithfulness. In his written submissions, Jasubha has also submitted that if he is

allowed to complete his term of life imprisonment, at the end of that term, he would give any sacrifice for the nation as may be demanded of him.

He has stated that he is not afraid of death, but on account of his premature death, his family members would be ruined. In his written submissions,

Jasubha has also stated that after he came to be sentenced to imprisonment for life, the Patels of Mangadh have been abusing and threatening his

family members.

142. Mr. A.D. Shah, the learned advocate for Jasubha strenuously contended that accused Jasubha has been convicted in the present case by the

judgment dated December 14, 1987, and since then he has been serving out his sentence of imprisonment for life, and he has thus served out about

4 years and 2 months of that sentence, and now, if death penalty is imposed upon him, that would be imposing double penalty on him. Further

according to Mr. Shah, since the time, the enhancement appeal has been admitted and notice thereof served to Jasubha, he has been under

constant mental pressure. On these twin grounds also, Mr. A.D. Shah submitted that the enhancement appeal against Jasubha should not be

allowed. Mr. A. D. Shah, further submitted that Jasubha must, in all probabilities, be under the influence of extreme mental and emotional

disturbance" on account of his near relatives having been murdered by the Patels of Mangadh, and that would be a mitigating fact. Further

according to him, in the facts and circumstances of the case, Jasubha, with justification, would believe that he would morally be justified in

committing the murders of Patels of Mangadh. It was also submitted by Mr. A.D. Shah that Jasubha must have acted in duress or domination of

the other members of his family who must, all throughout, be taunting him that though three Darbars had been done to death, the Patels of

Mangadh had been acquitted, and the Darbars of Chomal could do nothing.

143. As regards Mohansinh, the learned advocates representing him submitted that his part in the crime is minimal and in all probabilities, he must

have acted under the influence of Jasubha, and he is not proved directly to be responsible for any of the deaths in the present case. His is,

therefore, not the rarest of rare cases, which would warrant death penalty, Mohansinh has also filed written submissions, but in the view of the

matter that we are inclined to take, it is not necessary for us to refer to those written submissions.

144. Coming to Nirubha, the learned advocates representing him submitted that at the time of the incident, and even long prior thereto, he was

suffering from tuberculosis. His participation in the crime is very small and he is not directly responsible for any of the deaths. He also should,

therefore, not be visited with death penalty.

145. After having heard the learned advocates on the enhancement appeals, we think that so far as Mohansinh and Nirubha are concerned, there

is no case for enhancing the sentence of imprisonment for life awarded to them, to one of death. As said above, even before the trial court, though

initially the attempt was to argue for death penalty in respect of Jasubha, Mohansinh and Nirubha, the alternative argument was that in any view of

the matter, at least Jasubha should be visited with the extreme penalty of law. Even that apart, before us the learned Addl. Public Prosecutor, was

not in a position to convince us that the case in relation to Mohansinh and Nirubha could be said to be the rarest of rare cases, within the meaning

of that expression, as has now come to be familiar as a result of a number of judgments of the Supreme Court in connection with imposition of

death penalty. There is evidence to show that Nirubha, soon before the date of the incident and even thereafter, had been suffering from

tuberculosis.

When he was arrested, he was found to be in possession of certain medicines which according to him, he was taking for the treatment of

tuberculosis. Of course, there is positive evidence to show that he fired a tamancha shot or a gun shot which hit Purshottam Mulji, and looking to

the injuries sustained by Purshottam Mulji, Nirubha has been convicted for an offence punishable u/s 307, I. P. Code. So far as the first part of the

incident is concerned, there is no clear evidence about any other part having been played by him thereat. If is equally true that Nirubha accused

No. 8, was just by the side of his brother Jasubha, accused No. 11, when the later fired a gun shot at Gordhan Lakha, and Gordhan Lakha died

as a result of that gun shot. But then, at that time, no further participation of Nirubha has been proved. He was physically present by the side of

Jasubha, his brother when the later fired the fatal shot at Gordhan Lakha. As discussed hereinabove, Nirubha would, therefore, certainly, be liable

to be punished for an offence punishable u/s 302/149, I. P. Code. But then, he is not proved to be directly responsible for the death of Gordhan

Lakha. Similarly, there is no proof about he being directly responsible for the deaths of Purshottam Jaga and Popat Lakha.

Similarly, though Nirubha -- accused No. 8, was present by the side of accused No. 11 when the later fired a gun shot at Babu Bechhar, accused

No. 8 at that time also is not proved to have indulged in any overt act. Therefore, in respect of the death of Babu Bechhar also, he is liable to be

convicted for an offence punishable u/s 302/149 of I. P. Code.

146. Thus, though Nirubha is certainly guilty of an offence punishable u/s 307, I. P. Code, and though he is guilty of an offence punishable u/s

302/149 of I. P. Code, he is not proved to be directly responsible for any of the ten deaths with which we are concerned in this case. This is not to

say that a person who comes to be convicted for an offence u/s 302/149 of I. P. Code could never be, and should never be visited with death

penalty. What we intend to say is that each case would depend on its own facts, and looking to the principles of penology and more particularly,

bearing on the question of capital punishment, as have emerged as a result of a series of decisions of the Supreme Court and various High Courts,

death penalty is to be inflicted in the rarest of rare cases, a concept which we will presently examine. As said above, Nirubha was suffering from

tuberculosis. In March, 1987, when his plea was recorded he was about 27 years of age. At the time of the incident, he must therefore, be about

24 years of age. Jasubha -- accused No. 11 is his elder brother. As we see the evidence, Jasubha was the moving spirit behind the crime, and the

possibility of Nirubha having acted under the influence of his elder brother also cannot be ruled out. Having devoted our anxious attention to the

matter, we are not in a position to say that the case of Nirubha in the matter of sentencing him, by any sense of reasoning, can be said to be ""the

rarest of rare cases"". His cannot be said to be a case of an exceptional depravity. In the result, the enhancement appeal so far as Nirubha is

concerned cannot succeed.

147. Coming to Mohansinh, though he chased Madhu Naran and fired at him, for that he would be liable to be punished for an offence punishable

u/s 307 of I. P. Code, so far as the murders in this case are concerned he is not proved to be directly responsible for any of the murders. Of

course, the evidence clinchingly proves his presence by the side of Jasubha at the time the later fired gun shots at Gordhan Lakha and Babu

Bechhar. As indicated hereinabove, he must be somewhere near the place from where Jasubha fired gun shots at Purshottam Jaga and Popat

Lakha. Of course, Liliben has stated that Mohansinh had fired one gun shot at her husband. But there is no clear evidence to show whether the gun

shot fired by Mohansinh had hit Babu Bechhar. There is also evidence to show that Mohansinh was living with Jasubha and his father Bharatsinh at

Chomal since a number of years prior to the present incident. It appears that he hails from village Vadtal in Kheda District. But for some years

prior to the incident, he had settled at Chomal in Bhavnagar District. He had got his military pension account also opened in a bank at Bhavnagar.

The witnesses have stated about their having seen him moving about in company of Jasubha, accused No. 11 and his father Bharatsinh, accused

No. 1. Under these circumstances, we think that Mohansinh acted in this case, under the influence of Jasubha, and as he is not proved directly to

be responsible for any of the murders, his case also cannot be said to be a case of exceptional depravity. His case is not of the category of ""rarest

of rare cases"". Therefore, the enhancement appeal against him also should not succeed.

148. That takes us to the enhancement appeal against Jasubha, accused No. 11.

149. We have indicated hereinabove the contentions advanced by Mr. Divetia, the learned Addl. Public Prosecutor, who very strenuously

contended that in any view of the evidence, at least Jasubha should be sent to gallows, and Messrs. A.D. Shah and K.J. Shethna, the learned

advocates for Jasubha, contended to the contrary. Having paid our anxious attention to the matter, we think that the enhancement appeal against

Jasubha should succeed, and in respect of at least seven murders in this case for which he is proved to be directly responsible, as also-on the

principle of vicarious liability in respect of the other three deaths, i.e. of Odhavji Bhagwan, Jairam Bhagwan and Ganesh Naran, flowing from

Section 149 of I. P. Code, he should be sentenced to death.

150. We have noticed hereinabove, the history of previous enmity between Darbars of Chomal on one hand, and Patels of Mangadh on the other.

Jasubha is a Darbar of Chomal. Of course, he was in army service between December, 1971 and October, 1982. But there is evidence to show

that even during those years, he came to his native place, and as discussed hereinabove, during his visits to his native place, he displayed criminal

tendencies. Once he was convicted for an offence u/s 135 of the Bombay Police Act, which of course, would be a minor offence. Thereafter, once

he had assaulted Mansinh, P.W. 35 by means of a hockey stick on October 19, 1981. There is unchallenged evidence of witness Nanji Meghji,

P.W. 25 that in the incident that happened some two months prior to the present incident, and that would be the incident that happened on July 21,

1984, Jasubha had fired a gun shot at him, and he was injured on his left side. The statement to this effect made by P.W. 25 in paragraph 2 of his

deposition has, not at all, been challenged in cross-examination, though the witness has been subjected to cross-examination. We are conscious of

the fact that in respect of that incident which happened on July 21, 1984, though Jasubha, Mohansinh, Nirubha and Ranvirsinh had been convicted

by the learned Addl. Sessions Judge, their conviction has been set aside by the High Court in Criminal Appeal No. 295 of 1986. Nonetheless, the

fact remains that when, in the present case Nanji Meghji, P.W. 25, while describing that incident dated July 21, 1984 stated that during that

incident Jasubha had fired a gun shot at him, and that he was hit on his left side, that statement has not at all been challenged in cross-examination.

It may be mentioned here that when Nanji Meghji, P.W. 25 deposed in this case on July 1, 1987, the judgment dated February 17, 1986,

rendered by the learned Addl. Sessions Judge, Bhavnagar convicting Jasubha, Mohansinh, Nirubha and Ranvirsinh, principally for an offence

punishable u/s 307 r.w. Section 34 of I. P. Code and sentencing each one of them to 10 years" R.I., was in force. It had then not been set aside,

and yet when Nanji Meghji deposed in this case on July 1, 1987, his statement about Jasubha having fired a gun shot at him, and he having been hit

on his left side, was not at all challenged during cross-examination, on behalf of Jasubha. That would mean that when Nanji Meghji, P.W. 25 made

that statement before the court in this case on July 1, 1987, Jasubha did not think it fit to challenge that statement. In other words, he accepted that

statement as a statement of truth. It is a different matter that Criminal Appeal No. 295 of 1986 filed by Jasubha, Mohansinh, Nirubha and

Ranvirsinh has been allowed by this Court and the convictions recorded by the learned Addl. Sessions Judge against them in Sessions Case No.

115 of 1985 have been set aside. We have been told that Criminal Appeal No. 295/86 was allowed by this court on September 30, 1988. Thus,

when Nanji Meghji P.W. 25, deposed in this case on July 1, 1987, Jasubha had already been convicted in respect of the incident that happened

on July 21, 1984, and he was serving out the sentence imposed upon him. The mere fact that Criminal Appeal No. 295 of 1986 has been allowed,

and the convictions recorded against Jasubha and his co-accused in that case have been set aside, would be no ground for not believing the

unchallenged testimony of Nanji Meghji, P.W. 25, that it was Jasubha who had fired a gun shot at him and that, as a result thereof, he had been hit

on his left side. That judgment in Criminal Appeal No. 295/86 has not been produced before us. Even otherwise, under the group of sections,

being Sections 40 to 44 of the Indian Evidence Act, that judgment would not be relevant in the case before us. We have to decide this case, on the

basis of the evidence adduced in this case, and the unchallenged evidence supplied by Nanji Meghji P.W. 25, shows that Jasubha had fired a gun

shot at him, as a result of which he had been hit on his left side. That fact has got to be accepted as a fact proved on the record of this case. That

fact would show that Jasubha along with Mohansinh, Nirubha and Ranvirsinh, whose names have been spoken of by P.W. 25 had launched an

assault on Nanji Meghji, P.W. 25 on July 21, 1984. These pieces of evidence clearly show that even prior to this incident, Jasubha had criminal

propensities and tendencies. We will presently point out that since the judgment in the case of Bachan Singh v. State of Punjab, AIR 1980 SC 898

: 1980 Cri LJ 636, it has been well settled that in a case like this, while deciding the question of sentence to be imposed upon the convict, focus

has to be, both, on the crime, as also on the criminal. Focussing our attention on the criminal, i.e., convict Jasubha, as discussed just now, even

before the present crime, he had criminal propensities, and criminal tendencies.

151. There is evidence to show that since July 21, 1984, Jasubha was absconding, and he could not be arrested in connection with the incident

that happened on July 21, 1984. On September 20, 1984, he again appeared on the scene, and led the assault on innocent persons in which ten

lives have been lost, and four persons have been injured. Perpetrating that crime, he once again vanished in thin air, and though the police made all

out efforts to trace him out, he was nowhere to be found. The Investigating Officers have deposed about the attempts in vain, made to find him out.

Thus, after committing the present crime also, he has tried to escape from the hands of law. It was a sheer fortuitous circumstance for the

prosecution that he, in company of Mohansinh came to be arrested by the police at Sangrur in Punjab, on the night between July 4 and July 5,

1985, and proceedings u/s 109, Cr. P. Code were required to be initiated against them by Sangrur police. During those proceedings, Sangrur

police came to know about the probable real identity of Jasubha and Mohansinh. They, therefore, sent a wireless message to Bhavnagar police

and that is how, Jasubha could be brought to Bhavnagar, to stand his trial in connection with the present case. The present incident happened on

September 20, 1984. For more than nine months Jasubha kept himself away from law. That would also show that Jasubha is not an ordinary

simple man. He just does not care for law. Not only that he took law into his hands, and committed the crime, but after committing the crime, he

tried to see to it that police could not lay their hands on him. This, then, is the type of man Jasubha is.

152. Coming to the present crime scene, it is abundantly clear that it was he who took the lead. He led ten others, some of whom are his family

members and some other Darbars of Chomal, and Mohansinh was, as indicated hereinabove, under his patronage. He led, the party of 11

persons. Looking to the fact that the distance between Chomal and Mangadh is only a short distance, and the two villages are divided only by a

bund, and looking to the fact that Nagji Khoda''s field is just adjacent to his father''s Wada, it would only be reasonable to infer that Darbars of

Chomal must have come to know about the death of Gomtiben for, on September 19, 1984, the relatives of Gomtiben being the Patels of

Mangadh had gone to the village well to offer ablution to the deceased. Jasubha must have seen in this, an opportunity to fulfill his desire, of

eliminating as many Patels of Mangadh as possible. Easy it would have been for him to anticipate that quite a large number of Patels of Mangadh

would be going to Manvilas to offer condolences to the family members of deceased Gomtiben. In this background, Jasubha, we are sure, hatched

a conspiracy with the other accused (excluding accused No. 4) to eliminate as many Patels of Mangadh as possible. He led the party of his

associates, many of whom were armed with fire-arms and some, by means of lethal weapons like axe, spear and dharia. All of them hid themselves

behind the hedge of the field of Devji Shamji, which would be on the way of the party of Patels on their return journey from Manvilas, and on

seeing the tractor and trailer coming, Jasubha, first came out and fired a shot at the tyre of the tractor, deflated the tyre, fired another shot which

beheaded Diwaliben and then fired quite a number of gunshots indiscriminately on the passengers travelling in the tractor and the trailer. After

having struck terror near the tractor and trailer, and after seeing that his associates had done to death Dhanji Bhagwan and Jairam Bhagwan,

Jasubha entered village Mangadh. He first killed by means of a fire-arm Purshottam Jaga who was unloading boulders from his bullock-cart. Soon

then, within a matter of about a minute, he similarly killed Popat Lakha, and within a minute or two thereafter, he killed Gordhan Lakha. As

discussed hereinabove, there is evidence to show that it was he who was responsible for the murders of Nagji Khoda and Madhu Khoda. The

evidence shows that he killed Babu Bechhar. Thus he indulged in a massacre. The only obvious inference in view of the previous enmity and his

proved criminal tendencies and earlier conduct, would be that he was determined to kill as many Patels of Mangadh as possible. He opened fire by

means of a double barrel gun on 25 innocent passengers who were travelling in the trailer. Except Purshottam Mulji, P.W. 18, none of those other

passengers in the trailer was himself or herself, an accused in the earlier case, which arose in respect of the murders of three Darbars. None-the-

less, quite a large number of passengers travelling by the trailer were the near relatives of quite a number of the persons who were accused in that

earlier case of 1982. These facts would show that Jasubha had no compunction in assaulting persons who were relatives of the persons who were

accused in the earlier case of 1982. Mr. A.D. Shah, the learned advocate for Jasubha, argued that Jasubha would have been labouring under

emotional disturbance on account of three of his relatives having been murdered, and the persons accused for those murders having been

acquitted. For the present, even if that argument is accepted, Jasubha opened fire upon the passengers in the trailer, many of whom were

themselves not the accused in that case of 1982, but were the near relatives of those accused. This would show the exceptional depravity on the

part of Jasubha. This would show that he was determined to inflict as much harm on the Patels of Mangadh, as possible. We have seen earlier that

Purshottam Jaga was in no way connected with any of the persons accused in that earlier ease of 1982, and yet, Jasubha killed him merely

because he happened to be a Patel of Mangadh. Similarly, he killed Nagji Khoda, quite an innocent person. The only thing as regards him was that

he was a Patel of Mangadh. Jasubha also killed Madhu Khoda, the servant of Nagji Khoda, again a Patel of Mangadh. Even Babu Bechhar,

whom he killed was not an accused in the earlier case of 1982. Thus, it is clear that Jasubha, wantonly, yet in a dastardly manner, killed a number

of persons, in execution of his design to kill as many Patels of Mangadh as possible.

153. In Tapinder Singh Vs. State of Punjab and Another, , the facts were that deceased Kulwant Singh was the husband of the elder sister of the

wife of Tapinder Singh, the accused-appellant in that case. The accused-appellant suspected that deceased Kulwant Singh was carrying on illicit

intimacy with his wife. For that reason, the accused-appellant bore a grudge against deceased Kulwant Singh. On August 13, 1968, Kulwant

Singh and his associate Ajitsinh had attacked Tapinder Singh, the accused and had caused him some injury. In respect of that incident, Tapinder

Singh had lodged an information and a criminal case was pending against Kulwant Singh. When that case was pending, on October 8, 1968,

Tapinder Singh, the accused-appellant of that case went near the place where Kulwant Singh was sitting, and fired at Kulwant Singh five shots

from his pistol. On receipt of three shots, Kulwant Singh broke down, and thereafter, Tapinder Singh fired two more shots at him. Kulwant Singh

died during treatment on that very night. The learned Addl. Sessions Judge, convicted Tapinder Singh for the murder of Kulwant Singh and

sentenced him to death. The High Court upheld the conviction and confirmed the sentence. Before the Supreme Court, as a last resort, on behalf

of Tapinder Singh, it was contended that if the motive alleged by the prosecution is accepted, then the sentence imposed would appear to be

excessive. Rejecting that contention, their Lordships of the Supreme Court said that in their view, the manner in which five shots were fired at the

deceased clearly showed that the offence committed was deliberate and preplanned. In that view of the matter Tapinder Singh''s appeal was

dismissed.

It is clear that in that case, Tapinder Singh had some grievance against deceased Kulwant Singh, who happened to be the husband of the sister of

his wife, and whom he suspected of carrying on illicit intimacy with his wife, and who had, on August 13, 1968, i.e. little less than two months

before the murder, assaulted him. Even with these facts, their Lordships refused to interfere with the sentence of death for, the manner in which five

shots were fired by Tapinder Singh on deceased Kulwant Singh, was held to be indicative of a deliberate and pre-planned murder.

In the present case before us also, even assuming that on account of the murders of three Darbars in 1982, Jasubha could have some amount of

grievance against some Patels of Mangadh, the dastardly and fiendish manner in which Jasubha did to death several persons in this case, would

steal the heart of law, as is the expression used by the Supreme Court in certain judgments, and require the Court to say that so far as Jasubha is

concerned, this is "the rarest of rare cases" warranting imposition of death penalty on Jasubha.

154. In Balwant Singh Vs. State of Punjab, , it has been observed by the Supreme Court as follows (para 4) :

It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now under the new Code and only

special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor

is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But to indicate just a few,

such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless

child or a woman or the like.

Thus, as indicated by the Supreme Court in this judgment, it is not possible to give an exhaustive list of facts or grounds, which would constitute

special reasons for which death penalty could be imposed. But brutality of the manner in which the crime has been committed, and the helplessness

of the victim would certainly be relevant factors, while finding out whether any special reasons exist in the case or not.

In the instant case before us, as indicated hereinabove, Jasubha has acted in a most brutal, dastardly and wanton manner. He killed persons as one

would kill insects like flies or mosquitoes. The victims were all unarmed. The victims had not given him any provocation. These facts, in our

opinion, would constitute special reasons for which death penalty should be imposed upon him.

155. In Lajar Masih Vs. State of U.P., , the appellant had illicit connections with Nikki, for about two years preceding the occurrence. The

appellant was anxious to marry her. But her parents did not agree to that matrimonial proposal on the ground that there was a disparity in age. The

appellant then persuaded Mehlus father to marry Mehlu to Nikki. Mehlu and her father were of course, aware of the illicit relations between Nikki

and the appellant. They agreed to the matrimonial proposal on the understanding that the appellant would thenceforth discontinue his illicit intimacy

and visits to Daah Farm. About 1 1/2 months before the occurrence, however, the appellant in violation of that understanding, went to Mehlu''s

house and insisted on going to bed with Nikki. Thereupon a sharp quarrel took place between the appellant and Mehlu. Mehlu''s father also

warned the appellant not to misbehave, in future. About 15 days before the occurrence in question, the appellant again visited Mehlu''s house and

attempted to molest Nikki and upon that there was some quarrel between the appellant and Mehlu. It was in that background that the incident

which led to the murder of Nikki took place. On the night of occurrence, the accused went to the house of Mehlu where the inmates of the house

were sleeping. He first stabbed David, the brother of Nikki. Simultaneously he stabbed Mehlu who was sleeping by the side of David. The

appellant then gave stab blows to Nikki, and then he also gave stab blows to Smt. Siraji, the mother of Nikki. Nikki succumbed to the injuries. In

the Sessions Court, the appellant was convicted for murder and sentenced to death. He was also convicted for offences under Sections 307 and

324 of I.P.C. and was sentenced to certain term of imprisonment. The High Court dismissed his appeal and confirmed the death sentence. The

Supreme Court said that ""the crime was committed in a dastardly fashion. No less than four unarmed persons were indiscriminately stabbed when

most of them were lying asleep, unawares and helpless. The crime was pre-meditated and pre-planned. The injury to the deceased''s husband was

dangerous to life. But for timely medical aid, the injury would have proved fatal. Even the mother of the deceased was not spared.

After referring to these facts which emerged from the case, their Lordships of the Supreme Court referred to the decision in the case of Ediga

Anamma Vs. State of Andhra Pradesh, , where it has been held that ""the horrendous features of the crime, the hapless, helpless state of the victim

and the like, steal the heart of the law for a sterner sentence.

While deciding the case of Lajar Masih, their Lordships said that the abovequoted observation appearing in Ediga Anamma''s case was apposite

and applied in full force to the facts of that case.

156. In the instant case before us also, the crime committed by Jasubha is horrendous. He murdered hapless and helpless persons and did them to

death by a double barrel gun by wantonly and indiscriminately firing shots at them.

157. In Javed Ahmed Abdulhamid Pawala Vs. State of Maharashtra, , the appellant was convicted for multiple murders. He killed his sister-in-law

aged about 23 years, his little niece aged about 3 years, and his baby nephew aged about 1 1/2 years, and a child servant aged about 7-8 years.

Of course, the motive for the murders was gain. However, their Lordships of the Supreme Court found that the appellant acted like a demon

showing no mercy to this hapless victims, three of whom were helpless little children and one, a woman. The motive was gain, and the murders

were perpetrated in a cruel, callous and fiendish fashion. Therefore, there was no way to show any mercy to the appellant.

The argument that the appellant was aged only 23 years also did not appeal to their Lordships of the Supreme Court for reduction of death

sentence to one of imprisonment for life.

158. In Machhi Singh and Others Vs. State of Punjab, , His Lordships Mr. Justice M.P. Thakkar, speaking for the Court has given illustrative

cases as to when, it can be said that the case is of the ''rarest of rare type'', which would warrant infliction of the extreme punishment of death.

Such illustrative cases have been catalogued at paragraph 32 of the report. There, under the head ""Manner of Commission of Murder"", it is said

that when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme

indignation of the community, that would bring the case within the rarest of rare variety.

When the crime is enormous in proportion, for instance, when multiple murders, say, of all or almost all the members of a family or a large number

of persons of a particular caste, community or locality are committed, that would also be a case of the rarest of rare variety on the ground of

magnitude of crime, described in that paragraph 32, in Machi Singh"s case (1983 Cri LJ 1457).

159. Applying these illustrative tests, as found in Machhi Singh"s case (1983 Cri LJ 1457) to the facts of the case before us, it has got to be said

that Jasubha murdered innocent persons, in an extremely brutal, diabolical, revolting or dastardly manner so as to arouse intense and extreme

indignation of the community. That the community at large was extremely shocked at these murders is clear from the fact that a large number of

Patels and others from Mangadh and nearby villages, totalling to about 40,000, as deposed by Ganesh Zaver, attended the funeral procession.

Not only this, but the community as a whole revolted against these murders. They staged road block agitation, and even refused to permit Police

Officers to enter into their village. During the funeral procession, some irate members of the mob tried to snatch away the revolver of Mr. Trivedi

of C.I.D. (Crime). When Asnani, the Police Inspector and others tried to enter the village, the tyre of his jeep was deflated by the disturbed mob.

These facts speak for themselves about the indignation that the incident had aroused in the community. So far as the magnitude of the crime is

concerned perhaps in the history of this State of Gujarat, spreading over about 30 years, it is unparalleled. We have not even heard of any case in

Gujarat where on a single day, as a part of the single conspiracy ten persons belonging to the same caste from a single small village came to be

murdered, brutally like this (communal riots not considered). Applying the tests in Machhi Singh"s case also we are convinced that Jasubha

deserves to be visited with the extreme penalty provided by law.

160. In Lok Pal Singh Vs. State of M.P., , from the facts, it appeared that according to the prosecution case the accused inspired by unholy spirit

of revenge and retaliation entered the house of the deceased persons at 2.00 a.m. and killed as many as six persons in the house and one in the

field. Of course, Lok Pal Singh, the appellant before the Supreme Court was then accompanied by certain other assailants. Murders were

considered to be most cruel and heinous. The Sessions Court had acquitted these accused except Lok Pal Singh and Charli Raja. The High Court

while maintaining the conviction and sentence of death of Lok Pal Singh, set aside the conviction and sentence inflicted on Charli Raja on the

ground that there was a reasonable doubt in the prosecution evidence as regards the complicity of Charli Raja in the crime. Lok Pal Singh

appealed to the Supreme Court. The evidence showed that Lok Pal Singh had taken a leading part in entering the house and aided and assisted

other persons in murdering the six persons in the house, and the gang had gone from room to room in order to make a detailed search for their

victims. Before the Supreme Court, it was contended that in view of the fact that Lok Pal Singh was only 18 or 20 years of age at the time of the

incident, he should not be given the maximum penalty of death sentence. The Supreme Court found it unable to accept the contention for the

participation of Lok Pal Singh along with others had been clearly proved, and it was proved that he had taken a leading part in the murders that

were committed. Their Lordships said that ""it was a most cruel, heinous and dastardly murder and there was no extenuating circumstance for

reducing the sentence of death of imprisonment for life.

In the instant case before us also, Jasubha went from place to place in search of his victims and killed as many as seven persons by his own gun.

He was the leader of the gang, the other members of which killed some three persons. Jasubha, at the time of the incident was aged about 31 years

of age, his birth date being December 18, 1953, as is seen from his service record Exh. 300. He, therefore, does not deserve any mercy being

shown to him.

161. In Sevaka Perumal, etc. Vs. State of Tamil Nadu, , before the Supreme Court, the argument, was to commute the death sentence into

imprisonment for life, on the ground that the accused were young men, and the breadwinners of the family consisting of young wives, minor children

and aged parents. The observations of their Lordships of the Supreme Court in paragraphs 8 and 9 of that judgment about penological principles

are very pertinent and may be extracted as follows :

8. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential

function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law

must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of

lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law

which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of order should meet the challenges

confronting the society. Friedman in his ""Law in Changing Society"" stated that ""State of criminal law continues to be -- as it should be -- a decisive

reflection of social consciousness of society"". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the

deterrence based on factual matrix. By deft modulation of sentencing process be stern where it should be, and tempered with mercy where it

warrants to be. The facts and given circumstances in each ease, the nature of the crime, the manner in which it was planned and committed, the

motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the

area of consideration. For instance a murder committed due to deep seated personal rivalry may not call for penalty of death. But an organised

crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh and Others Vs. State of Madhya

Pradesh, , this Court while refusing to reduce the death sentence observed thus :

It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To

give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in

Courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.

9. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the

efficacy of law and society could not long endure under serious threats. If the Courts did not protect the injured, the injured would then resort to

private vengeance. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in

which it was executed or committed, etc.

After making the aforesaid pertinent observations about the duty of the Court to award proper sentence having regard to the offence, and the

manner in which it was executed or committed, their Lordships adverted to the arguments made on behalf of the convicts for reduction of the death

sentence to imprisonment for life. Referring to the compassionate ground put up by the convicts, based on the facts that the convicts are the bread

winners of the family of each consisting of young wife, minor children and aged parents and, therefore, the death sentence may be converted into

imprisonment for life, the Supreme Court found no force therein. The Supreme Court observed that ""these compassionate grounds would always

be present in almost all cases, and are not relevant for interference with sentence.

162. The learned advocates for Jasubha on the other hand, relied upon the decision in the case of Ajmer Singh and Others Vs. The State of

Punjab, , and contended that in the present case if the other accused are dealt with leniently on question of sentence, there should be no reason

why Jasubha should be discriminated and be given death sentence. We have gone through that judgment in the case of Ajmer Singh, and we think

that the facts there having nothing in parallel with the facts in the present case before us. There, the participation of all the three accused Ajmer

Singh, Chanan Singh and Ujagar Singh in the crime was similar and equal, and yet Chanan Singh and Ujagar Singh were sentenced to

imprisonment for life while Ajmer Singh was sentenced to death. Here in the case before us, such is not the fact situation. As is clear, Jasubha was

the moving spirit behind the crime, and others acted under his influence. He was directly responsible for killing seven persons, while so far as the

other accused are concerned, they are not proved to be directly responsible for any of the deaths. The decision in the case of Ajmer Singh,

therefore, has nothing to assist convict Jasubha.

163. On behalf of Jasubha, reliance was also placed on Neti Sreeramulu Vs. State of Andhra Pradesh, . There, the commission of murder was

possibly out of sexual jealousy or indignation on account of unfaithfulness, and there was a long delay in the execution of the death sentence. On

those facts, the sentence of death was reduced to life imprisonment.

We will take up the contention about delay a little later. So far as the case of indignation on account of unfaithfulness of the deceased, as the

evidence in that case showed, there is nothing of that sort in the instant case before us.

164. In view of the judgments referred to by us hereinabove, we are convinced that none of the compassionate grounds advanced by Jasubha in

his written statement before us, can take out his case from the category of the rarest of rare cases. As held by the Supreme Court such

compassionate grounds would be available in almost all cases, but they are not relevant for interference with the death sentence. Such grounds

would not take out the case from the category of the rarest of rare cases, if otherwise, the case falls within that category and warrants death

penalty. That, if death penalty is imposed, the family of Jasubha would be ruined, would be an argument which, if accepted, would lead us to a

conclusion that in no case, death penalty could be imposed upon a person with a family.

165. It was argued on behalf of Jasubha that he has served the country by serving in Army, and therefore, leniency should be shown to him. That

argument also cannot be accepted. On the contrary Jasubha having served in Army should have been more disciplined. Instead he has shown utter

lack of discipline, and disregard for law. Though not exactly apposite, it would be advantageous to refer to the decision in the case of Triveniben

Keshavlal Parmar v. State of Gujarat (1989) 30 Guj LR 923 : 1990 Cri LJ 273. There of course, the death penalty imposed upon Shashikant, the

son of petitioner Triveniben had been confirmed earlier, right up to the Supreme Court. However, after the rejection of the earlier mercy petition,

for mercy being shown to the condemned prisoner, a petition was moved before this High Court for stay of execution of death sentence on the

ground that another mercy petition was filed. In support of that petition, an argument was advanced that the condemned prisoner had, after he was

sentenced to death donated one of his kidneys, and that should be a factor which should be taken into consideration. This Court refused to accept

that argument and said that ""the fact that the accused donated one kidney should not be considered a ground for staying the execution of death

sentence"". Thus, it is clear that such a ground that the prisoner had donated one kidney and had served the community thereby has not been

considered to be a factor relevant for the purpose of staying the execution of death sentence. In the present case, Jasubha having served in army,

as said above, should have been more disciplined, and the mere fact that he served in the army, in our opinion, would not furnish a extenuating

ground for not awarding death penalty to him, if it is otherwise imperative. It may be noted here that Machhi Singh who was one of the appellants

in Machhi Singh and Others Vs. State of Punjab, , was an officer of the Punjab Home Guards, and yet death penalty was imposed on him. The

fact that he was an officer of the Punjab Home Guards, did not come in the way of imposing upon him death penalty, as otherwise, it was

absolutely warranted on the facts and circumstances of the case.

Similarly, in Tapinder Singh Vs. State of Punjab and Another, , appellant Tapinder Singh was a businessman and a Municipal Commissioner. That

he was a businessman and a Municipal Commissioner did not come in the way of imposing on him death penalty as it was otherwise absolutely

warranted in the facts and circumstances of the case.

166. As a result of the foregoing discussion, we hold that the fact that Jasubha served in army, is not a mitigating circumstance. If at all it would, to

an extent, be an aggravating circumstance. As said above, having served in the army, he should have behaved with greater sense of discipline and

should have shown higher respect for law. He has behaved just the other way round.

167. It was argued on behalf of Jasubha that after the sentence passed on him in the present case, he was released once on parole and once on

furlough leave and during that period, he has not shown any criminal tendency, and that should be taken to be a ground for not imposing death

penalty on him. This ground, on factual aspect; was controverted by Mr. Divetia, the learned Addl. Public Prosecutor, who submitted that even in

jail, Jasubha had misbehaved with other persons, and therefore, he was required to be transferred from Rajkot Jail to Baroda Jail. When Jasubha

was produced before us, he admitted having been transferred from Rajkot Jail to Baroda Jail, and he also admitted that it was by way of jail

disciplinary action against him that he was transferred. However, he contended that jail disciplinary action was wrongly and maliciously initiated

against him. We do not think we can go into the correctness or otherwise of these allegations and cross-allegations. The fact remains that Jasubha

was required to be transferred from Rajkot Jail to Baroda Jail, as a result of some jail disciplinary action. Even otherwise, the mere fact that

Jasubha might not have-misbehaved while he was released on parole and furlough leave, would not be a ground for saying that he has, since the

present incident shown improvement in his behaviour. It is required to be remembered that his present appeal is pending, and the enhancement

appeal of which notice had been served to him is also pending. Jasubha might have, under the circumstances, seen wisdom in properly behaving

himself when he was released on parole and furlough leave. However that fact alone will not prove a guide for saying that now he has come on the

path of rectitude.

168. That Jasubha was a member of the prisoners'' committee in jail and that he has invested a sum of Rs. 1,000/- in Narmada Vikas Bond, are

circumstances which can hardly come to his help.

169. The learned advocates for Jasubha submitted that the trial Court having shown its preference for the lesser of the two sentences permissible

under law, this Court should not lightly interfere with that discretion and enhance the sentence to one of death. In that context reliance was placed

on the decision in the case of Dalip Singh and Others Vs. State of Punjab, , where in connection with the discretion of the trial Court to choose

between two sentences available for an offence u/s 302, I.P. Code, it was held (para 39) :

But the discretion is his and if he gives reasons on which a judicial mind could properly found, an appellate Court should not interfere. The power

to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for

an appellate Court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the

appellate Court but to the trial Judge and the only ground on which an appellate Court can interfere is that the discretion has been improperly

exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross

that no normal judicial mind would have awarded the lesser penalty.

True, the case of Dalip Singh was governed by the old Code under which for an offence of murder, death penalty was the rule, and the lesser

sentence of transportation was the exception to be resorted to, for reasons to be recorded by the trial Judge. None-the-less, the principles

governing the appellate Court"s power to enhance the sentence as enunciated in the said judgment holds good even under the present Code of

Criminal Procedure, under which, for an offence of murder, imprisonment for life is the rule and death penalty is to be imposed for special reasons

to be recorded, which should make out the case on hand, belonging to the rarest of rare category. As we have seen above, there cannot be any

exhausive list of facts and circumstances, constituting special reasons which would make the case to be of the rarest of rare category. Each case

would depend upon its own facts. But the principle remains that, once the trial Court has exercised its discretion, and has preferred imprisonment

for life as the sentence to be inflicted upon the convict, the appellant could not be justified in reversing its finding about sentence, merely on the

ground, that left to itself, it would have awarded the highest penalty. In an enhancement appeal, even under the new Code, it is required to be

shown that the discretion in choosing the sentence exercised by the trial Judge is exercised wholly improperly, as for example, where the facts are

so gross that no normal judicial mind would have awarded the lesser penalty.

170. In Kodavandi Moidean alias Baputty Vs. The State of Kerala, :

It is no doubt true that the question of a sentence is a matter of discretion and when that discretion has been properly exercised along accepted

judicial lines, an appellate Court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed

on the face of the judgment. If a substantial punishment has been given for the offence of which a person is found guilty, after taking due regard to

all the relevant circumstances, normally there should be no interference by an appellate Court. On the other hand, interference will be justified when

the sentence is manifestly inadequate or unduly lenient in the particular circumstances of a case. The interference will also be justified when the

failure to impose a proper sentence may result in miscarriage of justice.

171. The above referred two judgments -- one inline case of Dalip Singh (1953 Cri LJ 1465) and the other in the case of Kodavandi Moideen

(1973 Cri LJ 671), clearly indicate that interference will be justified, when the sentence is manifestly inadequate or unduly lenient in the particular

circumstances of a case, and would also be justified when the failure to impose a proper sentence may result in miscarriage of justice. Along with

these principles the principles enunciated in the case of Sevaka Perumal, etc. Vs. State of Tamil Nadu, extracted hereinabove), have also to be

kept in mind.

172. The learned trial Judge has, in paragraph 91 of his judgment articulated the reasons for not imposing the extreme penalty of death to Jasubha.

In that paragraph, this is what the learned trial Judge, in substance, has said :

The accused are not anti-social, hardened or professional killers, nor have they acted for any monetary gain. It is not proved that they acted for

achieving any reprehensible aim. The accused have not caused any harm to females and they have caused harm only to selected persons. They

have not injured other Patels who were on the road in village Mangadh at the time of the incident. But they have only selected those persons as

their victims with whom they had enmity and they have searched out those enemies and liquidated them.

None of these arguments advanced by the learned Judge can ever be accepted in mitigation of the offence, nor can any of them be accepted for

not inflicting death penalty upon Jasubha. That Jasubha is not an anti-social or hardened or professional killer is not a statement of whole truth. As

we have indicated above, he has pursued a career of crime even when he came on leave from Army service. Merely because the crime has not

been committed for monetary gain, would again be no ground in favour of Jasubha for, it is not that, only if a crime is committed for monetary gain,

it would attract death penalty. The reason that the accused have not acted for achieving any reprehensible aim is also a misstatement of fact.

Jasubha has acted with the sole object of liquidating as many Patels of Mangadh as possible. If that aim is not considered to be reprehensible, we

fail to understand as to what other aim could be branded as reprehensible. That Jasubha has not injured any female is again not a correct statement

of fact. There is evidence to show that Diwaliben was hit when she was attempting to get up. However, the fact remains that Jasubha opened fire

at the passengers in the trailer, and there were about 12 or 13 females in the trailer. If Jasubha did not want to hit any female, he would certainly

have desisted from opening fire on the passengers in the trailer. The fact that he opened fire on the passengers in the trailer when there were 12 or

13 females therein, would go to show that he had no regard for women as well. That he has not hurt any other Patels on the road in village

Mangadh and that he only selected his victims, in our opinion, is also aground which is besides the point. As a matter of fact, as we have seen

earlier, he allowed Premji Purshottam to go for, in all probabilities, there must have been some understanding between him and Premji Purshottam,

after the incident that happened on July 21, 1984. That he chose his enemies and searched them out and liquidated them, is a factor which would

rather go against him than in his favour. We have seen above, in the case of Lok Pal Singh (1985 Cri LJ 1134) (supra) that Lok Pal Singh went

from room to room in detailed search of his victims. In the case before us, Jasubha went in search of his victims from place to place, and killed a

number of persons.

173. The learned trial Judge has further reasoned that the accused are of Gharasia community, and under certain circumstances, they have been

living in certain mental stress, on account of the fact that three members of their families had been killed. Therefore, till the time their sense of

vendetta did not come to be quenched, they would certainly be under tension. This argument also is wholly unacceptable. In the case of Tapinder

Singh (1976 Cri LJ 1415) (SC) (supra), the appellant had a similar sense of vendetta against the deceased and yet that was not considered to be a

ground, on which death sentence which was otherwise warranted should be reduced.

In the case of Lok Pal Singh (supra) also the case was that appellant Lok Pal Singh was inspired by unholy spirit of retaliation, and entered the

house of the deceased and killed a number of persons. Even then, those facts were not considered to be such as would warrant non-infliction of

death sentence.

174. We have hereinabove pointed out that quite a number of the victims of the present incident had almost nothing to do with the murders of three

Darbars which were committed on June 20, 1982. Purshottam Jaga was in no way connected with those murders. Gordhan Lakha and Popat

Lakha were also themselves in no manner connected with those murders. Of course, some of their relatives were the accused in that earlier case of

1982. Similarly, except Purshottam Mulji, the other passengers in the tractor and the trailer were not the accused in that 1982 case, though of

course, some of the relatives of those passengers were the accused. But then, Jasubha pounced not upon the majority of the persons who were

accused in the 1982 case, but upon their relatives. That would be most reprehensible.

175. One of the arguments advanced by the learned Judge in paragraph 91 of his judgment for not inflicting death penalty upon Jasubha is that

even if death penalty is imposed upon the accused, that would not mitigate the damage done to the persons who have been left behind by the ten

deceased. The argument is wholly unacceptable. If that argument is accepted, in no case, death penalty can be awarded. Once a person dies, he

could never be brought back to life. The other argument advanced by the learned Judge is that the accused by committing the present crime have

invited the ruination of their family members and that would be a ground for not inflicting death penalty. That argument is also wholly irrelevant. We

have seen earlier in some of the judgments that such compassionate grounds would be available in most cases. However they would be irrelevant.

176. The learned Judge has relied upon the decision in the case of Babubhai Satyamrai Rai v. State of Gujarat, 1986 (27) 2 Guj LR 771. We have

carefully gone through that judgment. However, we do not find anything therein which can apply to the facts of the present case. That case of

Babubhai stood on its own facts.

On the other hand, Mr. Divetia, learned A.P.P. relied upon the decision in the case of State v. Shashikant Keshavlal Parmar, 1982 (2) 23 Guj LR

234. In that case, the accused who had some labour dispute with his employer had engaged one Hasubhai as his lawyer in that case. The

management was prepared to reinstate the accused, but the accused felt that his claim for full back wages was not awarded, and his lawyer

Hasubhai was negligent. He therefore, nurtured a grievance against Hasubhai, and on the date of the incident, he entered the house of Hasubhai

and killed three persons, that is, the father, the brother''s wife and the niece of Hasubhai. The learned Addl. Sessions Judge convicted the accused

for murders and inflicted capital punishment on him. This High Court confirmed that capital punishment by the judgment under report cited above.

This High Court has, in that judgment considered quite a large number of cases bearing on the point. It is not necessary for us to reproduce in

extenso from that judgment. However, we would say that in that judgment, the case of the accused was considered to be rarest of rare type, and

death penalty was held completely justified.

177. We have carefully gone through the reasons given by the learned Judge for not inflicting death penalty, and we are constrained to say that no

reasonable judicial mind would have approached the present matter in the way the learned Judge has approached it for holding that death penalty

should not be inflicted.

178. We have hereinabove pointed out various circumstances as regards Jasubha which would positively warrant a finding that if death penalty is

not inflicted upon him, that would be travesty of justice.

179. True, with the changing trend in penology, the deterrent and retributive theories of punishment are fast making room for reformative theories.

But the deterrent and retributive theories of punishment have not totally become irrelevant even today. As held in the case of Bachan Singh Vs.

State of Punjab, , while deciding the question of sentence, focus has to be both on the crime and the criminal, and when we talk of focus on the

crime, what is implicit in it is that the victim of the crime or persons who have been left behind by the victim of the crime are not totally required to

be forgotten. So far as focus on the criminal is concerned, as discussed hereinabove, Jasubha is a man who has shown criminal propensities both

before the incident, and by keeping himself away from the law after the incident. On the other hand, as the evidence shows, quite a large number of

families have been rendered helpless on account of their bread-winners having died in the present incident. Take for instance, the case of

Gangaben, whose husband Gordhan Lakha, died in the present incident. Her deceased-husband had only five bigha of land, and she was required

to work on scarcity relief work, in order to supplement her income. On the death of Gordhan Lakha, Gangaben -- a woman of about 35 years on

the date of her deposition in June, 1987 -- is required to take care not only of herself, but of her two sons and a daughter, the eldest of these

children being son, aged about 15 or 16 years. Then take the case of Liliben, whose husband Babu Bechhar, has been killed. On the day of her

deposition, she was 32 years of age. She has two daughters and a son, the son being the eldest and aged about 14 years. These widows have

been rendered helpless. Their children have also been rendered helpless. They cannot be totally forgotten while saying that if Jasubha is hanged his

family would be ruined. Of course, if Jasubha is sentenced to death, that is not going to bring back either Gordhan Lakha or Babu Bechhar. But

then, the judicial approach requires that where death penalty is absolutely warranted the Court should not shirk its duty under the argument that the

family members of the condemned prisoner would be ruined.

180. Mr. A.D. Shah, the learned advocate for Jasubha very strenuously contended that Jasubha has been arrested as early as July 15, 1985, i.e.

some 6 1/2 years ago, and since then he has been in jail. According to Mr. Shah, the order of conviction and sentence has been recorded in this

case on December 14, 1987, i.e. before about 4 years and 2 months from now and since then Jasubha is undergoing irgorous imprisonment. In the

submission of Mr. Shah, therefore, Jasubha has served out the sentence of about 6 1/2 years, or at any rate of about 4 years and 2 months, and

now if Jasuba is asked to go to the gallows, that would be wholly unjust, and that would be inflicting double penalty on Jasubha.

In support of his submissions, Mr. A. D. Shah firstly relied upon the decision in the case of The State of Punjab Vs. Jagir Singh, Baljit Singh and

Karam Singh, . That case is quite distinguishable on facts. In that case the Sessions Court had convicted Jagir Singh, Baljit Singh and Karam Singh

for an offence of murder, and sentenced them to death. The High Court acquitted those convicts. The State went to the Supreme Court. The

Supreme Court allowed the State appeal and convicted those three persons. However, in view of the fact that more than two years had elapsed

after the acquittal of the accused by the High Court, it was considered to be appropriate not to inflict the extreme penalty of law on those accused.

The facts in the case of State (Delhi Administration) Vs. Laxman Kumar and Others, were almost similar to the case just now referred to.

181. We fail to see how these cases can render any assistance to the accused in the present case. There, though the Sessions Court had convicted

the accused, and sentenced them to death, the High Court had acquitted them. That acquittal continued for more than two years, and it was

thereafter that setting aside the acquittal, the Supreme Court restored the conviction, and it was because of that interregnum of about two years

that the Supreme Court though it fit not to impose the death penalty. In the present case, we are not faced with any such situation.

182. Mr. A.D. Shah, the learned advocate for Jasubha, then relied upon the decision in the case of Sadhu Singh alias Surya Pratap Singh Vs. State

of U.P., . The appellant was under the spectre of sentence of death for over 3 years and 7 months, and the evidence gave an indication that he was

probably instigated directly or indirectly by his father. On those facts and circumstances, the Supreme Court substituted the sentence to life

imprisonment for the death sentence imposed upon the accused in that case.

In the case before us, till today no death penalty, has been imposed upon Jasubha. He cannot, therefore, be said to be under the spectre of

sentence of death.

183. Mr. Shah nextly relied upon the decision in the case of Mangal Singh v. State of Rajasthan, 1985 Cri. L. J. 602. There Mangal Singh had

hatched a well-knit plan to finish his family and executed the same in such a manner so as to make it a case of accidental burning. The wife, the

sons and the daughters of Mangal Singh except one were murdered by him. One of his daughters Kum. Kamla survived the operation burning of

the entire family when they were in a car. The offence was committed on July 15, 1973. The Sessions Court rendered its judgment on January 10,

1980 by which Mangal Singh was convicted for offences punishable under Sections 302 and 307 I.P. Code and was sentenced to imprisonment

for life. Mangal Singh challenged his conviction and sentence by filing an appeal before the Rajasthan High Court. The State filed an appeal against

Mangal Singh for enhancing his sentence to death. The High Court"s judgment was rendered on April 27, 1984. By the time, the High Court

appeal came to be decided, Mangal Singh had served out more than 10 years of his sentence. The High Court while rejecting Mangal Singh"s

appeal also did not accept the State appeal for enhancement, inter alia on the ground of this inter-regnum of more than ten years. However,

paragraph 34 of that report makes it clear that what weighed with the High Court the most, was that the accused must have by then realised the

horror of his act, and secondly, his daughter Kum. Kamla had lost her mother, brothers and sisters and she could then look towards her father, the

accused. Thus, the Rajasthan High Court had, inter alia concentrated on the victim of the crime as well. Kamla, the daughter of Mangal Singh was

the victim of the crime, committed by her father Mangal Singh, the accused. In the crime committed by Mangal Singh, Kamla"s mother, sisters and

brothers died. Fortunately Kamla survived the horrendous act of her father in which her mother, brothers and sisters unfortunately came to be

burnt to death. The last lines of paragraph 35 show that the High Court, therefore, reluctantly refused to accept the State appeal for enhancement

of sentence. The reluctance was not so much because ten years had elapsed, but was because of the concern for Kamla, the daughter of the

accused.

184. In the present case, since the rendering of the judgment of the trial Court, about 4 years and 2 months have elapsed. But then, it is clear that

Jasubha was in custody not only for the present case, but he was in custody also in respect of the case that arose in relation to the incident dated

July 21, 1984. In that case, being sessions Case No. 115 of 1985, he was convicted by the judgment of the learned Addl. sessions Judge, dated

February 17, 1986, and since that date, he was serving out the sentence of ten years rigorous imprisonment. His appeal being Criminal Appeal

No. 295 of 1986 came to be allowed by this court on September 30, 1988. Therefore, at least till that date, he was in custody, not only for the

present case, but even for the earlier case, being sessions Case No. 115 of 1985. If we consider the matter from that angle, he is in custody as

regards the present case only, from September 30, 1988. Even so, more than three years have elapsed. The question is whether on account of that

fact alone, Jasubha should not be visited with the extreme penalty of law, if otherwise it is wholly warranted? In our opinion, the answer should be

in the negative.

185. In Iman Ali v. State of Assam, AIR 1968, SC 1464 : 1969 Cri LJ 23, dacoity with murder was committed on the night between 11th & 12th

May, 1962. The trial court convicted the accused and sentenced them to imprisonment for life. The accused preferred Criminal Appeal No. 115 of

1964 to the Assam & Nagaland High Court. The High Court while admitting the appeal of Iman Ali, the appellant, suo motu issued a notice for

enhancement of sentence. Similar notice was also issued to the other accused. It appears that the State had not preferred any enhancement appeal.

The High Court by its judgment dated August 30, 1967, enhanced the sentence from imprisonment for life to death sentence. When the accused

approached the Supreme Court, their appeal was dismissed on March 2, 1968. The facts of the case would show that in respect of the dacoity

with murder that was committed on 11/12-5-1962, in the sessions Court the accused were sentenced to imprisonment for life, by the judgment,

which must have been rendered before the Appeal No. 115 of 1964 came to be filed. The High Court by its judgment dated August 30, 1967,

enhanced the sentence. Thus, the death penalty was imposed upon the accused after more than five years and three months computed from the

date of the offence. Though we do not find from the report, the exact date of the judgment of the sessions Court, it is clear that that judgment must

have been rendered sometime in 1964 or even earlier for, the accused preferred criminal appeal, which was number as Criminal Appeal No. 115

of 1964. Considering the matter from that angle, it was about three years, or perhaps more, after the imposition of life term by the Sessions Court

that the High Court, enhanced the sentenced of imprisonment for life, to one of death, and that too, when the State had not preferred any

enhancement appeal. That judgment of the High Court came to be confirmed by the Supreme Court.

186. Our attention was also invited by Mr. Divetia, the learned Addl. P. P., to the decision in the case of Ghisa v. State of Rajasthan, 1976 Cri LJ

39, where the following observations appear (para 12) :

It is true that the lapse of long period between the date of commencement of trial and hearing of appeal by the High Court is a factor which in the

context of a particular case may, in conjunction with other circumstances, justify the reduction of sentence. But this is not an absolute rule justifying

interference with the discretion of the trial Court in the matter of sentence in every case. The criminals who mercilessly use sharp-edged weapons

against unarmed persons should not be allowed to carry an impression that they can deprive others of their limb if they are prepared to undergo a

comparatively short term of imprisonment.

This judgment, of course, is not directly on the point, but it certainly indicates that the mere delay in the High Court inhearing an appeal would be

no ground for showing leniency to the accused who have been proved guilty.

187. In State of Maharashtra v. Hirachand Modaji Jain, 1976 Cri LJ, 1850 (Bom), the accused was convicted and was sentenced to R. I. for six

months, by the Chief Metropolitan Magistrate. The State went to the High Court for enhancement. While the enhancement appeal was pending,

the accused completed his jail term as awarded to him by the Magistrate. The High Court found on facts that the sentence was grossly inadequate.

However, on behalf of the accused, it was contended that as the accused had already served out the imprisonment imposed by the Magistrate, the

sentence should not be enhanced. The contention has been negatived by the Bombay High Court.

188. In this connection, Mr. Divetia, the learned Addl. Public Prosecutor also invited our attention to Lajar Masih Vs. State of U.P., . In that case,

the incident happened on October 3, 1971. The sessions Court convicted the accused and sentenced him to death by the judgment dated March

20, 1972. The High Court confirmed that order by its judgment dated September 20, 1972. The appeal before the Supreme Court came to be

decided on February 3, 1976, i.e. at the end of 4 years and 4 months, computed from the date of the incident, and about 4 years after the

judgment of the sessions Court, and after, about 3 years and 5 months computed from the date of the High Court judgment. In that connection, the

observations of the Supreme: Court in paragraph 15 of the report are pertinent. This is what the Supreme Court has said :

This takes us to the second point. Doubtless, the appellant is under a sentence of death since his conviction on March 20, 1972 by the trial court.

But it is to be noted that after the dismissal of his appeal by the Allahabad High Court on September 20, 1972, he did not for a period of more

than 18 months move this court. It was only after condonation of this delay, that special leave to appeal under Article 136, was granted. In view of

the extremely heavy load of work with the High Court and this Court, the delaty in hearing this appeal cannot be said to be extra-ordinary. Be that

as it may, the value of such delay as a mitigating factor depends upon the features of a particular case. It cannot be divorced from the diabolical

circumstances of the crime itself which, in the instant case fully justify the award of capital sentence for the murder of the deceased. We therefore,

uphold the award of capital sentence to the appellant and dismiss the appeal.

Thus, this judgment clearly shows that in view of extremely heavy work-load in the High Courts and in the Supreme Court, delay in hearing and

disposal of the matters has become inevitable and though no hard and fast rule could be laid down about the extent of delay, which would work as

a mitigating factor, each case has to depend upon its facts.

189. In the present case before us, we have indicated hereinabove that the crime of Jasubha was dastardly and horrendous. After committing the

crime, he absconded for about 9/2 months.

190. In this High Court, there is a heavy work-load. There is a pendency of matters in the vicinity of 90,000. Some amount of delay in hearing

appeals, is therefore, bound to take place. Furthermore, in this case, the record is very bulky. The paper book was required to be printed. The

paper book which is a closely printed one on full size paper runs into 1260 pages. On inquiry from the office, we have learnt that the preparation of

the paper book itself took about an year. Taking all these facts into consideration, the contention made by Mr. A.D. Shah, the learned advocate

for Jasubha that there has been inordinate delay in hearing the present appeals, and oh that ground the enhancement appeal against Jasubha should

not be allowed, cannot be sustained.

191. The contentions that Jasubha must have acted under extreme mental disturbance, and that he must have reasonably believed that he is morally

justified in committing the offence, and that he was under duress at the time he committed the offence, have no merit whatsoever. Looking to the

dastardly crime committed by him, it has got to be said that even in face of the murders of three Darbars of his community, his act of having killed

so many persons, in the circumstances discussed hereinabove, cannot provide any extenuating circumstance to him.

192. Having considered the matter from all possible angles, we are convinced that the case, so far as Jasubha is concerned, warrants death penalty

in, the matter of murders, and no other view on the question of sentence to be imposed upon him, is reasonably possible to be taken.

We therefore, decide that Jasubha Bharatsinh Gohil should be sentenced to death.

193. We have hereinabove, in paragraphs 130 and 131 of this judgment indicated as to how the accused should stand convicted. The accused are

accordingly convicted.

194. (A) Criminal Appeal No. 8 of 1988 filed by Jodha Khoda Rabari, accused No. 4 is allowed. The order of conviction and sentence recorded

against him is hereby set aside. He is acquitted of the charges levelled against him. He is on bail. His bail bonds are ordered to be cancelled.

(B) Subject to the modifications in convictions as indicated in paragraphs 130 and 131 above, Criminal Appeal No. 58 of 1988 is rejected for,

even with those modifications in so far as accused Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12 are concerned, no change is warranted in the order of

sentences passed against those accused. The order of sentences passed against those accused (other than Jodha Khoda Rabari -- accused No. 4,

and Jasubha Bharatsinh Gohil -- accused No. 11), is confirmed.

(C) Criminal Appeals No. 88 of 1988 and 89 of 1988 are partly allowed. Jasubha Bharatsinh Gohil -- accused No. 11 in the Sessions Case, is

sentenced to death for the offences of murder on various counts indicated in paragraph 130 above. He be hanged by the neck till he is dead.

(D) For the other offences for which Jasubha Bharatsinh Gohil -- accused No. 11, has been convicted, the sentences imposed upon him by the

trial court are maintained.

(E) Jasubha Bharatsinh Gohil is present before us. He is informed and explained the position that he has a right to appeal against this judgment and

order, and that he can file an appeal in the Hon"ble Supreme Court of India, within 30 (thirty) days from now, as that is the period of limitation

prescribed for filing an appeal.

195. The Registry of this court is directed immediately to give to Jasubha Bharatsinh Gohil, accused No. 11, free of cost, a certified copy of this

judgment.

196. Before parting with the matter we would like to make a special mention about the assistance rendered by the learned advocates M/s. K.J.

Shethna and A.D. Shah, who argued the matter for the accused, as also by Mr. S.R. Divetia, the learned Addl. Public Prosecutor. Hearing in this

matter lasted for 14 working days. Mr. Divetia, the learned Addl. Public Prosecutor as also the learned advocates for the accused had put in a lot

of industry and labour in preparing and arguing the matter. But for their able assistance, our task would have been much harder than it has been.

We understand that going by the usual standard fees admissible under the Law Officers'' Rules, Mr. Divetia, the learned Addl. Public Prosecutor

would be getting less than Rs. 200/- all told for this group of matters. In our opinion, it would be a pittance. Looking to the industry and labour put

in by Mr. Divetia, we think no less than Rs. 3,000/- should be considered only the just adequate remuneration payable to him. We are alive to the

fact that there may be some other matters wherein Mr. Divetia as the Addl. Public Prosecutor might be getting fees on the scale prescribed under

the Law Officers'' Rules, even when the matter may be small. Even so, we are sure, this is a rarest of rare cases, not only from the stand-point of

capital punishment, but also from the standpoint of the magnitude of the matter and the points involved therein requiring hard labour and industry. It

may be mentioned that the closely printed paper book in the matter, runs into 1262 pages, and the original record which was required to be

scanned is also very bulky. Therefore, we believe that the usual standard fees admissible to Mr. Divetia under the Law Officers'' Rules would be

grossly inadequate. We therefore, recommend that the Government may pay Mr. Divetia, the learned Addl. Public Prosecutor, special

remuneration quantified at Rs. 3,000/-. We hope that the Government will appreciatively accept our recommendation so that the morale of the

Law Officers may be maintained.