

Riots as Murder

Re-examining the Best Bakery Case

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I. What are riots

What is a riot ? Is it an explosion of events which simply happened for which no one is responsible ? Or, does it congeal a series of incidents and events which when broken up into their individual sequences reveal horrible acts by individuals and groups who have mercilessly chosen to inflict acts of cruelty on innocent fellow human beings and everything around them through pre-meditated acts for which it would be irresponsible to say that they are not responsible. A riot is a carnage. A ghastly carnival of violence by people who knew what they were doing whilst pursuing their own social and political agendas. Riots are not effusive explosions that simply happen for which no one is to blame - even if it may be more convenient for our rulers and more exciting for the media to report on them as a dramatic splurge of events that simply happened. Riots are not crimes of passion. Broken down frame by frame they aggregate as a series of gruesome murders, arson, rapes, beatings and killings. Picasso's Guernica reminds us to fracture our perceptions of what appears to be an impressionist blur to see a riot as a series of chilling crimes acts committed by callous people for cruel ends to viciously inflict torture and pain on the innocent. In this alternative conception, a riot is not a television programme of something that happened out there or a headline that merges into the next. It is a series of events for which people are culpable. It is easier for those who rule us to treat riots as unfortunate events which are best forgotten so as to hide what was real and blunt its poignancy by merging everything in the 'noble' task of reconstruction that lies ahead. In this, our images of riots as murder get lost and disappear. In succumbing to this invasion of reality, we fail a thousand times over – by carrying over misleading images of a riot to the next riot and the next. By this time our entire concept of a riot is changed. Instead of perceiving riots in their gruesome truth of a series of murderous acts, they conveniently come to be perceived as socially unfortunate incidents for which no one to blame.

Such a conception of riots is dishonest and irresponsible. Eventually our understanding of a riot gets sanitized there is no blood on our canvass or on

anyone's hand, no killing, no arson, no rape, no incident as such. Tell this to those who saw their loved ones slaughtered before their eyes or who went through the trauma of the arson, rape and killing or beating – which they recall not as a weakening memory but as a vivid recollection remembered minute by minute, frame by frame and second by second. And, that too, as a memory which recurs – in the form of a face, a hatchet, or blood, rape and violence. In the Best Bakery case, it is not what our politicians would like to forget, but what Zaheera saw and sees many times over that is important; and, perforce, what we see through her eyes. No court can convince her that what she saw was a riot and not a murder. She knows what she saw. The Best Bakery case is her story which needs to be told again and again even as she grows older; and time outraces events to invoke indifference to something that is made to recede into the past. Whether the court believes Zaheera or not is another matter. But even if it is convenient not to do so, surely we cannot allow ourselves to accept that a series of murders is just another riot.

II. Godhra and after: The BJP's Electoral Priorities

The year 2002 tested the secular justice of Indian democracy. We do not know enough about how and why a train carrying pilgrims was attacked in Godhra in Gujarat on 29 February 2002. But, we do know about the aftermath that followed. There was a communal massacre of Muslims on a scale that was barbaric. Pillage, murder and rape went unchecked. The State machinery embarrassed itself in not checking the spread of this violence – joining in the process directly and by default. Entire communities were uprooted with no where to go – in fear of their lives. Hunted down, the Muslim communities fled to fragile camps living in fear of being attacked again. More interested in politics than in the discharge of their humanitarian duty, the leadership of the State and its administration failed the situation – not because they were helpless but because, in most instances, they chose to be so. The fragile camps turned out to be human disasters. In these camps, there was no sense of permanence, no intimation of safety, not enough food and insufficient shelter. The minorities were trapped. If they left these camps, they would face carnage. If they stayed in the camps, security was not vouchsafed under unliveable conditions. The story of the Gujarat carnage will haunt us - as poignantly as the destruction of the Babri Masjid in 1992 and the ghastly events that followed. India needs to be reminded of the horror of the events of Gujarat and the failure of that State to protect its Muslims citizens whilst the fundamentalist BJP-led government in power effectively watched on. If Gujarat was a lesson to Indian democracy, we need to unravel that message so that it is correctly read for now and the future.

There are several indictments of the Chief Minister Modi's State Government in Gujarat. As soon as the carnage began, the officials watched as if they were told to do so – joining the oppression and exacerbating it by acts of commission and omission. While the report of the Nanavati Commission appointed to inquire into what happened is awaited, there is no dearth of data on the extent of the atrocities committed and the deliberate failure of the State not to recognize and perform the obligations that devolve on the State in these circumstances. In what appears to be a conspiracy, the state government lacked remorse and the Union government remained supportively inactive. If this was the case, emergency President's Rule should have been imposed on the State. This was not even contemplated. The reason for this is that the BJP's eyes were on the re-elections to the Gujarat Elections which were due in 2003. Mr. Modi, supported by the BJP leaders in Delhi desperately wanted to win this election at all costs. To the BJP and its 'sangh parivar' supporters, the answer lay in cashing in the cruelty of the communal violence, whip up Hindu sentiment, convert this sentiment into support and translate the support into electoral victory. Mr. Modi could have waited till the insanity of events subsided and Gujarat was restored to secular peace. But, he did not want to do that. So, on 19 July 2002, he dissolved the Gujarat legislation to call an earlier election by October. The Governor should have refused the dissolution in these circumstances. But, the Governor, S.S. Bhandari being close to the BJP did not demur. Dissolution of the House meant that Mr. Modi would continue to be Chief Minister of a burning State without any accountability to the State's legislature. Normally, I would not support to impose President's Rule on any state, but here was a majority party ruler who refused to rule any further and did not want to account to the legislature from which he was chosen in the interregnum. Significantly on 6 May 2002 the Rajya Sabha passed a Resolution expressing its anguish and asking the Union to intervene to ensure the protection and relief and rehabilitation to the victims of violence.

“That this House expresses its deep sense of anguish at the persistence of violence in Gujarat for over six weeks, leading to loss of lives of a large number of persons, destruction of property worth crores of rupees and urges the Central Government to intervene effectively under article 355 of the Constitution to protect the lives and properties of the citizens and to provide effective relief and rehabilitation to the victims of violence.”

Under such conditions, the Governor should have recommended President's Rule so that Gujarat administration was, at least accountable to the Union Parliament. But the BJP led Union government, which had earlier tried to impose President's Rule in Bihar and investigate the government of West Bengal, remained strategically non-chalant . Modi wanted a snap election. In August 2002, the Election Commission took the view that although it would try to hold an election as soon as it could within six months, it could not do so by October as demanded by the Union and the BJP. Instead of accepting this, the Union government referred a concocted issue of the Election Commission's powers to the Supreme Court which the Supreme Court answered – answering some questions and leaving some in the air. Elections were called. Just as Khakhi' elections cash in on military victory, these were 'genocide elections' to whip up a communal victory. In 2003, Mr. Modi won a disgraceful but landslide victory. Pushed towards its limits, democracy had lost its reason.

Around a year later, when the BJP coalition was effectively bundled out of power at the Union, former Prime Minister Vajpayee declared that Gujarat was a mistake! This was something of a confession. It was an admission of constitutional failure. Mr. Vajpayee knew that Gujarat had been inflamed in an indefensibly outrageous manner. After all, if Modi as Chief Minister of the State and Mr. Vajpayee as the Prime Minister of India had done their duty, there was no mistake. But, if Gujarat was a mistake committed by Mr. Modi and the BJP which cost them victory in the Union elections, then what was this mistake? We can only read the 'mistake' controversy of June-July 2004 as reinforcing the accusation that the BJP at both the Union and State levels knew what was going, succumbed to the policy of encouraging violence and sought to cash in on it for electoral benefits in ways they later regretted. Gujarat was won; but secular India was lost. What is in issue is not the failure of the mal-calculations of the BJP and their guessing games with the electorate. What is in issue is the fact that India's secular governance not only failed in Gujarat but was put to ransom for an unprincipled electoral victory.

We are concerned here with not just the failure of constitutional governance, but the collapse of the rule of law in dealing with issues of justice in Gujarat during the carnage and after the riots simmered down.

III. Modified Irresponsibility

Tragedy compounded tragedy with the failure of a remedial welfare being outmatched by a further failure of the rule of law. The BJP was keen to portray the Gujarat riot as an unfortunate explosion in which despite the administration's efforts there was mayhem, and death. The portrayal of the 'riot as a mob explosion' cloaks what really happens. The projection of events as "riots as explosion" has the absolving effect of saying that nobody was really culpable, that it was all very unfortunate and that the rule of law yielded to people's worst passions. This prepares the way for saying that no real legal remedies are necessary. What is required is a restoration of status quo ante. No real investigation is called for. No prosecutions are necessary. No further legal action needs to be taken.

This view of a 'riot as a mob explosion' resulting in a legal breakdown has consumed Indian indifference on communal riots. By using this paradigmatic defence, everyone is let off. A Commission is appointed. The Commission both ambiguously 'blames' people on the abstract and, no less ambiguously fails to do so. The police are indicted. Prosecutions are recommended. Future disasters management is proposed. With a seal of approval, and amidst some dissension, the 'riots' report is unceremoniously sent off to the archives. Injustice is recognized, but a 'nobody-can-really-be-blamed' formula disguises the failure of the rule of law. This is precisely what the Modi government had in mind for Gujarat. A Gujarat judge was appointed to head an inquiry. There was some objection to this. Eventually, Justice Nanavati, a retired judge from the Supreme Court took over the work of the Commission which remains unfinished over two years after the event - by which, "time" has absorbed the tragedy to push it on the flight path of indifference. As long as the 'Commission' formula was available, the Gujarat government felt safe. The Commission would not interfere with the government's plans. The Commission was substituted for the rule of law.

As alternative approach to the concept of a 'riot as explosion' lies in accepting the ghastly portrayal of a 'riot as murder'. In this alternative image, the social and political camera does not just sweep over the devastation but examines what happened frame by frame. What each frame reveals is not a mass explosion, but 'murder', intentional killing and pre-meditated massacre. Each frame calls for the State to look at each murder – not in the diluted abstraction of a 'riot as explosion' but a cruel murder which requires investigation, prosecution and, punishment. In each frame an individual murder or collective massacre is conducted which cannot simply be given the go-by and absolved as a conflagration. It is this refusal to examine each frame with the integrity and

rigour of justice that has led to the sad tragedy of the rule of law. The tragedy of the slaughter of the Sikhs after the assassination of Mrs. Gandhi in 1984 creates continuing anger and anguish precisely because the image of “riots as gruesome murder” has been subordinated and swept under the carpet to yield to the government’s convenient portrayal as “riots as an explosion”. Such a deliberate obfuscation redeems no one; and questions the basis of governance itself. For those who have seen the murder happen before their very eyes, it is insulting to tell them that what occurred was an unfortunate social conflagration. This anguish carries over. The citizen who has witnessed the gruesome killing of a family member, friends, neighbour or even a stranger is forced to give up what he has seen and abandon any expectation that the rule of law will confront the murder. This happens in riot after riot. But, it happened poignantly in the Sikh riots in which murderers were either not prosecuted, let-off or acquitted. Individual murders fall within the domain of law, but mass murderers escaped its net. A similar strategy was pursued in Gujarat.

If the Modi government had been left to its own devices, they would have followed the usual pattern of ‘riot as explosion’ to by-pass addressing the issues of ‘riots as murder’. Unfortunately for Modi, at that time, the National Human Rights Commission (NHRC) while conscious of the need for massive welfare relief measures immediately focused attention on the rule of law questions as to how the riots murders needed to be investigated and prosecuted. The NHRC visited Gujarat on 19-22 March 2004, forwarded an interim report to the Union and State governments on 1 April and made its final report on 31 May 2002. The final Report constitutes a severe indictment of the State Government’s handling of the Godhra affair in light of the advance information available. After the riots broke out, there were 27,780 arrests for crimes and by way of preventive detention. Of the crime related arrests, 3269 out of the 11167 were of the minority community; and, of the preventive arrests 2811 arrests were of the minority community. The Commission’s Special Representative noted that 90% of those arrested for serious and heinous crimes got bail as soon as they were arrested – even though the State Government denied this. But, were these arrests of the right people in the crisis zones where the arson, rape, pillage and murder was taking place ? On this the NHRC found that the Government was evasive. There was ample evidence to suggest that First Information Reports (FIRs) were distorted. A large number of FIRs – especially those dealing with atrocities towards women – were not registered. The Commission felt that “... *(t)he facts indicate that the response was often abysmal, or even non-existent, pointing to gross negligence in certain instances or, worse still, as widely believed, to a complicity that was tacit if not explicit*”. On this basis and the vast amount of

information available, the Final Report of the NHRC reiterated its submission that the investigation of the various crimes (including Best Bakery) should be done by the CBI (Central Bureau of Investigation) and not the state agencies. Given the Rajya Sabha's Resolution of 6 May 2002, the Union was asked to instrument an appropriate justice instead of repeating the stance of the State government that the State administration was the victim of fake and vicious propaganda.

The importance of the stance of the NHRC was that it turned to the crucial issues of the murders, rapes, arson, pillage and violence as crimes which needed investigation. In the NHRC's interim Report the State confronted the NHRC with precisely the kind of dilution of issues by showing the 'riots' were just another part Gujarat's "long history of communal riots" – pointing to the earlier Commissions of Inquiry by Justice Reddy in 1969 and Dave in 1985. But, the NHRC was more specific in thinking that an inquiry was necessary into Godhra, the Chamanpura – Gulbarga society incident, the Naroda Patiya incident, the Sadarpura incident in Mehsana district; and, of course the Best Bakery case in Vadodra . Thus, the State Government was put on notice that the Best Bakery case required rigorous and independent investigation. It felt reinforced in its drawing attention to material and evidence collected by its own special representatives and by various NGOs. There was a massive amount of information. On 11 March 2002 SAHMAT conducted a spot inspection to speak of what happened in Gujarat as "ethnic cleansing". After the NHRC's visit of 22-6 March, Amnesty viewed the situation in its Report of 28 March 2002 to stress the need for State responsibility. The Women's Group Report of 16 April 2002 by Syeda Hameed and others related to what the survivors saw and spoke of, what happened and of the attitude and response of the administration. The Human Rights Watch Report of April 2002 implicated the police in what happened. Meanwhile, the NHRC had made its interim assessment to recommend that the CBI took over the investigation. The Women's Forum Report of the NHRC was followed by further examination by the Peoples Union of Civil Liberties (PUCL) in its report of 31 May 2002 and a further Independent Assessment by Syeda Hameed and Muchkund Dubey. Harsh Mander's detailed report showed the abysmal relief and rehabilitation conditions. By the time Modi dissolved the State Assembly to leave himself in a position of power without accountability, there was enough documented evidence to show that the police had not done its job, arrests had been random to show something was being done, FIRs of violence and rape had not been registered, the FIRs registered seemed to have been interfered with to make them inadequate and serious investigation was not taking place.

Meanwhile, a number of petitions were filed in the Supreme Court seeking to remedy the ghastly situation. The Mallika Sarabhi Petition (WP 221 of 2002) asked for a special investigating team; and later sought an implementation of the NHRC's recommendations. Apart from the many petitions asking for relief and rehabilitation measures, the Devendrabhai Pathak petition (WP (Crim.) 37-52 of 2002) sought an investigation by the CBI. The Mahasweta Devi petition (WP 530 of 2002) sought many reliefs including asking for an independent commissioner to monitor the investigations and entrust the existing cases to the CBI. But, for a considerable period of time, all these cases lay fallow in the Supreme Court. Perhaps, the Court which was dealing with the Presidential Reference on the holding of elections in Gujarat and did not want to be seen to get into these problems. After July 2002, even the NHRC seemed to back off. In the run up to the elections and immediately thereafter, the Supreme Court remained relatively distant from the issue – perhaps, once again because it did not wish to be taking a stance to affect the elections in any way. While the Court has to be statesmanlike in both its actions and forbearances, there are times when unpleasant interventions are needed not to diffuse the situation but to ensure that justice is done. During this period, camps closed down leaving defenceless Muslims with no where to go to. Shelter and rations were scarce. The compensation to be paid was unfair. At first, more compensation was paid to the Godhra (Hindu) victims than the Muslim. Later, it was equalized. The conditions of proof for obtaining compensation required proofs of identity which victims of arson could scarcely provide. Insufficient rehabilitative support and loans were made available. Perhaps, if the Court had intervened, a different direction might have been given to what was being done and needed to be done.

But, most significantly, the investigation of the cases was not handed over to the CBI or supervised by some monitoring committee. All this was left entirely to the Gujarat police. Those suspecting of transgression were placed in charge of investigative justice. There is no doubt that the Supreme Court monitored the Best Bakery case after the trial court acquitted the accused. But our present concern is whether the Court could, and should, have interfered to monitor the investigation or handed it over to the CBI. Normally, the Supreme Court does not interfere with an investigation unless the occasion demands it. Where the Court has felt that the CBI should be called in to investigate, it has ordered that this should be done in many cases. Indeed, in the Hawala case (1998), the Supreme Court underscored its right to issue what it called the “continuing mandamus” to monitor the proceedings on a report back basis. This

is not a usual remedy to be invoked everyday. But, it was certainly a remedy that the Supreme Court should have considered in the Gujarat cases. Instead, matters of investigation and prosecution were left to the Gujarat government. It should not have required too much prescient wisdom to predict with tolerable certainty that the investigations and prosecutions could go hopelessly wrong.

IV. Judge Mahinda's Fast Track Justice

The investigation into the Best Bakery case was carried out by the Gujarat police. Under normal circumstances, the autonomy of the investigation is generally not interfered with. No doubt under the system of accountability devised by India's Criminal Procedure Code 1973, the senior police officers can exercise the powers over investigating police and the State Government has a power of superintendence over its police under the Indian Police Act 1861. However, in 1980, the Supreme Court upheld the power of the State Government to direct further investigation in a case. This decision was made by a 'left wing' Supreme Court judge to support an activist intervention by the government and has to be read in the special circumstances which warranted State intervention (see Bihar v. Saldanha (1980) 1 SCC 554 as interpreted in West Bengal v. Sampat Lal (1985) 1 SCC 317). For Gujarat, the year 2002-3 was plagued with both turmoil and political uncertainty on an unprecedented scale. Increasingly, India's administration and police have become more sensitive to politics than they dared to demonstrate in earlier years. Perhaps, the police and administration were waiting for the elections to yield a definite result. The return of Modi's government sent out a devastating signal that the Gujarat electorate supported Modi's fundamentalist and communal governance. If this was a virus, it was bound to infect what was going in the criminal investigation of the Best Bakery and other cases. Equally, any possibility that the State Government would cast an oversight over these cases in the interest of secular justice was hopelessly unlikely. The police were free to soft pedal their investigation. The State stood by to watch injustice unravel itself.

The murders in the Best Bakery case took place from around 8.30 pm on the 1st of March 2002 to 11 am on the 2nd of March 2002. In what the Supreme Court was to decide was a 'ghastly' and 'gruesome' incident, 14 innocent persons were murdered. A private report is not wrong in describing these murders as a communal cleansing. Most of the investigation took place in March. The charge sheet was filed in June 2002. The trial began on 7 May 2003 in a 'fast track' court and proceeded at breakneck speed with many witnesses being excused, and many being perfunctorily cross-examined to yield a quick

judgment with many irrelevancies on 27 June 2003. There were 73 witnesses. 7 were eye witnesses. 29 panch witnesses. In all 37 witnesses turned hostile. On 9 May 2003, 4 eye witnesses turned hostile and on 17 May 2003, 3 more witnesses including Zahira turned hostile. The Court seemed to proceed in a way more mindful of its fast track procedure and less so of the imperatives of justice. Its judgment came on 27 June 2003. At times, it reads like an essay by a college student turned politician. Judges are free to place their judgments in the broader context of social and political life; but they cannot get carried away by their wise insights in ways that go well over the top by a half baked discourse that is neither appropriate nor insightful.

That the investigation and prosecution of the Best Bakery case was suspiciously inept seems borne out by the record. Before the trial sessions court, Judge Mahida grounded his judgment in the fact that the investigation officers had not acted in a manner that was ‘reasonable’ or ‘safe’; and that there had been an unpardonable delay in sending the First Information Report (FIR) to the Magistrate. The trial judge broadly took the view that the “police investigation of riots always proved poor in comparison to the police investigation of other offences”. According to him, the police intimidate people and create dummy witnesses to indict dummy accused. So, if the police were not to be trusted, what were the responsibilities of the Court ? Should it just stand by ? Or, did it have a more comprehensive role to play ? In the Appeal before the High Court Justice Sethna (for himself and Justice Vora) also took the view that the investigation was “absolutely dishonest and faulty”. The appeal Court went further and made an adverse comment on the Public Prosecutors to say that the he “may not have conducted in a more skilful way, but cannot be said when for a moment that the Public Prosecutor (had) not properly conducted the case”. Even so, the Trial Court and the High Court were forbearing in both their indictments and on the critical question of the responsibilities of a Court faced with faulty investigation and inept prosecution. Later, when the Supreme Court examined the case, it felt – as we shall see that even a “cursory stance of the record showed that the justice system was taken for a ride” and likened the administration and rulers of Gujarat as “modern day Neros” who looked elsewhere whilst the innocent were being burnt and slaughtered.

Even if somewhat dramatic in its narration, the Supreme Court poignantly expresses the challenge that such cases pose for the criminal justice system. What should a court do when faced with bad investigation and doubtful prosecution ? Is it simply an umpire or does it have a more dedicated role ? At the trial court stage, Judge Mahida had no doubt in his mind that his role was

that of an umpire who, nevertheless had strong views of his own. An umpire with strong views brings a pre-disposition even to the task of umpiring. On his umpire role Judge Mahida said:

“But the Court has to carry out its work as an umpire in the procedure of rendering justice given to us by English Rulers. It is to be decided on the basis of evidence as to whether the persons being produced by police as accused are true offenders. The Judge has to take care to remain sensitive. “If hundreds of accused have to be released in order to see that one innocent is spared punishment, so be it.” It is not in purview of this Court to find out who is the true offender if the accused are not offenders or to provide compensation to the victim through the Govt. The Court of Justice in real sense is not the Court of Justice but the Court of Evidence.”

This seems like an astonishing stance to take. At first blush, this approach seems to create a haven for the civil liberties for the accused – including, perforce, murders, arsonists rapist, looters and thugs. Its logic appears to be that if the State has not proved its case beyond all reasonable doubt, the accused is presumed to be innocent. This sounds like a good statement in favour of civil liberties. But, it cannot be taken to an illogical conclusion without demur. If it is, it is an invitation to corrupt an already corrupted police force and allows disinterested prosecutors feeding on their disinterest as they try to grapple with their already over-loaded docket of cases. In India’s context, there is no dearth of people able and willing to corrupt the investigation and prosecution system to present the courts with a clever fait accompli. No less, powerful accused are more than adept at buying out and terrorizing witnesses into silence or switching sides to support their tormentors. In India, the rich get away with it. A social profile of those found guilty of murder shows that the bulk of them are poor and disadvantaged. Invariably those who are condemned to capital punishment are also poor – unable to defend themselves or bribe the investigation or prosecution. Judge Mahida’s depiction of his own role as that of an umpire throws the baby out with the bathwater. If the judge continues to play ‘umpire’ to a game when he is expected to do justice, something is seriously wrong.

The trial court of Justice Mahida is astonishing – both for what it does and fails to do. There were three issues before the trial judge: was a crime committed? Were the accused guilty? What order was to be passed? The judges succinct conclusion stated:

“This is proved beyond doubt that in the incident the violent mob had resorted to destruction, loot and arson and 14 persons lost their lives. But there is not even an iota of evidence being produced in the record of this case, linking the accused persons or any of the accused to the crime.”

There is no doubt that a ghastly crime was committed. Someone was to blame. The case against the accused was not proven. But, nothing more could be done. Nothing more needed to be done. The file on this tragedy was closed; and, indeed, foreclosed.

Justice Mahida’s approach to the evidence was consistent with his self pronounced declaration that a “court of justice is not a court to justice but the court of evidence”. But, even as a “court of evidence”, the judge probed into matters lightly without being overtly disturbed that something was seriously wrong. The argument of the Public Prosecutor appears to have been that 7 witnesses had identified the “accused as culprits” in their statements to the police. These witnesses were Shaheerabanu Habibullah Shaikh, Virsingh Chandrasingh Zala, Nakitullah Habibullah Shaikh, Bharatbhai Ishwarbhai Tadavi, Zahirabibi Habibullah Shaikh, Shaheerunishan Habibullah Shaikh, and Raju @ Habibullah Shaikh. That these 7 witnesses had stated all this was verified by the Investigating Officer. So, here was some proof which needed examination. But Justice Mahida simply stated that 5 of the eye witnesses categorically stated in their evidence in court that they could not identify the accused. So, there was a disparity. How was this to be explained. In court, Zahira had also impliedly taken back her statement to the police. Her statement was devalued further. This statement should have been taken as the FIR which identified 3 accused. But, the judge refused to add credibility to this statement which had been sent to the police station late, and presented to the Magistrate even later still by the police. Justice Mahida concluded that the clear and categorical statement by Zahira to the police should simply be treated as one ‘got up’ by then police. However, the Police Commissioner, Piyush Patel, deposed that when he spoke to Zahira she identified three of the accused. But, apart from the fact that Zahira seems to have retracted what she said, according to Justice Mahida, Police Commissioner Patel was to be disbelieved because he thought the weeping, bedraggled Zahira was 35-40 years instead of just 19 years! This is hardly a ground enough to discredit the Police Commissioner’s evidence or not probing the facts further. Apart from the eye witness, Judge Mahida was also confronted with a revolt by the pancha witnesses resiling from their statements identifying the weapons used in the slaughter including “swords, gupti, big knives, iron pipes and sticks”. So, the judge was faced with a

situation where eye witnesses and the pancha witnesses both had turned hostile, the question was what should a judge faced with this entire volte face do ?

The judge had three alternatives. The first to take an active interest, ask questions himself and order further witness and other evidence. But, the judge did not choose to do that because he had (in his own words) convinced himself that his court was a court of evidence and not a court of justice. The second alternative was to simply state that on the basis of all the evidence a case beyond all reasonable doubt had not been proved. But, the Judge Mahida wanting to go one step further by stating that the entire evidence was false and concocted. Thus, while Commissioner Piyush Patel's evidence was found to be insufficient, the next paragraph also suggests it was all false. The third alternative chosen by the judge was also to try and absolve the accused from any moral blame and portray them in a heroic light. This he does on the basis of the evidence of Lalmohamad Khudabax which was simply reproduced "as very much necessary ... in the interest of justice". This witness stated that their lives were saved because of refuge given to them in the house of Munno – otherwise known as Harshad Solanki - who was the accused number 9. But, should not this testimony also have been subjected to greater rigour instead of being left in the air as a moral absolution for all the accused ?

The reason why Judge Mahida seemed to approach this case in the way in which he did is discernible from the latter half of his judgment. He seemed to subscribe very much to the view of 'riots as an eruption' rather than 'riots as murder'. According to him, riots are difficult to investigate resulting in the police distorting evidence. For him riots were the inevitable consequence of politics and arose "(m)ostly ... (from) (1) communal tension (2) failure in industrial policy and (3) uneasiness due to "reservation" are the causes in riots". Having found himself a platform, Judge Mahida assumed the role of historian, sociologist and conscience keeper of nation. In a survey that extends to the Mahabharata, the Second World War, India's unworthy leaders, English justice, India's opting for development and ignoring agriculture, the Anglicization of the Indian people who give pet names to their children such as Ann, Billy, Dicky and Harry, the Muslim invaders from the North over the centuries and much more, Judge Mahida regales the reader with his wisdom and his insights. He seemed to overlook that what he wrote was not a speech for a Foundation lecture but a judgment in a criminal trial. But, these broad strokes of eloquence are more than just confounding because of the circumstances in which they were written or the style in which they were delivered. Hidden between these lines are disguised barbs which may suggest a political edge. There seems to be an attack

on Nehru, Gandhi and others for agreeing to the Partition of India in 1947. They are blamed for faltering just as Bhishma and Dronacharya did in the Mahabharat – even though no contemporary names are mentioned in the judge’s script. It seems that the indictment that after independence our leaders wanted to assumed power, keep permanent problems burning and become ‘world leaders’ is clearly an attack on Nehru. This is reinforced by his attack on British imperialism and India making the ‘second blunder’ of following an industrial policy taken from Russia to result in the neglect of agriculture and expansion of town populations. To this was added his attack on India’s affirmative action (reservation) policies which engender vote banks and against which he expected “(r)ationalists and supporters of human rights ... (to) raise their voice”. While all this is supported with a plea for communal peace and a declaration that the victims in the Best Bakery slaughter were non-communal Muslims and good people, yet one cannot but read Justice Mahida’s speech as political propaganda which had no place in any judgment – still less one in a politically charged murder trial.

When we leave the script of Judge Mahida’s judgment, it can only be with a sense of his dis-belief. Portraying himself as umpiring evidence rather than doing justice, the judge’s treatment of the evidence is as unhappy as his treatment of Indian history. The judgment fails many times over precisely because it failed to deliver justice. With the judge portraying himself as an umpire, justice itself became a game. The game did not matter, because it concerned a riot. And, if it was a riot then no one was really to blame. And, if someone was to blame surely it was the ‘Congress style’ leaders of post independence India who opted for Soviet planning, industrialization and continuing affirmative action policies for the disadvantaged to steal an edge on the higher classes. All this seems bizarre – even more so because that it was part of a judgment in a mass murder case.

V. The Supreme Court Interceeds

The Best Bakery acquittal faced a storm of protest. Not everyone who protested realized the strange – even weird – manner in which Judge Mahida had chosen to air his views. Most people were disconcerted that 14 persons had been killed; and everyone was acquitted. Why did this happen ? Was it a failure of justice ? Was it a failure to prove the case in the absence of evidence ? If evidence was not forthcoming, why was this so ? Was it due to the investigation ? Or the Prosecution ? The figure of 37 out of 73 witnesses turning hostile was alarming by any standards. If so, did the witnesses resile from their earlier

version of the truth because they were scared or intimidated ? Amidst these questions, emerged the figure of Zahira who was amongst the first to give information to the police; but, her statement was not treated as an FIR because it reached the police station later. Even according to Judge Mahida, Zahida was a star witness. Why had the star witness recalled her statement to the police ? Was she lying when she spoke to the police ? Or was she hiding something from the court ? Acting on a hunch that Zahira had not really told her story, she was sought out by the Indian Express which broke her story in July 2003 – soon after Judge Mahida had acquitted all the accused. Zahira was just a little girl. In her teens. Around 15 perhaps ? She both broke down and broke out. She was scared, she was threatened. As against this, the Appellate High Court cast – as we shall see – a very uncharitable picture of this turn of events in its judgment of 26 December 2003 when it portrayed the new Zahira as someone who was put up by the media:

“.....(W)e have reasonable apprehension in our mind that there is a deep seated conspiracy misusing this witness Zahira, victim of the unfortunate incident by some people, with an ulterior motive, and unfortunately poor people, like Zahira and others have easily fallen into their prey.”

What exactly did the Court mean by ‘poor people’ ? Simply that they were vulnerable? Or that they were paid ? The Appeal Court was equally uncharitable about Sahejadh Khan Hasankhan who also claimed to be inspired by Zahira’s example to tell what he believed to be the truth. It is not easy to acquire the courage to tell the truth – still less so when you have told the reverse story to the court and would invite a charge for perjury. There is no doubt that activists did seek out these unfortunate witnesses who were labouring with their conscience. But, did they, in fact, go further to doctor these witnesses. The Appeal court was in no doubt that those who helped and supported these witnesses in their search for self expression acted wrongly and illegally:

“... (I)t appears that an attempt is made by the journalists human rights activists and advocate, Teesta Setalvad and Mihir Desai, respectively, of the Citizens for Justice and Peace to have parallel investigating agency, whereas the statutory authority to investigate any case is police, CBI or any other agency established under statute. We do not know how far it is proper! We certainly state that it is not permissible in law”.

The anxiety of the judge cannot be wholly written off but may have been misplaced in the context of this case. There is a thin dividing line between

helping a witness find their courage and influencing them. But, in this case – as we shall see – the Appeal Court seemed to have an angst against activists generally including the activists who took the Narmada Dam case to the Supreme Court. It is this angst that put in question the remarks made by the Appeal judges; and, perforce, made the Supreme Court expunge the remarks against Teesta Setalvad and Mihir Desai and take exception to what was said on the NHRC. This does not foreclose answers to a future question about the extent of activist interaction with witnesses. India is full of people seeking to put pressure on witnesses who need to be protected from such pressure. But, in the context of the Best Bakery case, such intervention was necessary and bonafide to rectify what the Trial judge should have done and did not do; and to bring on record what Zahira and other really wanted to say but were prevented from doing because of intimations of pressures and threats. Whatever the response of the Appeal court months later, there was something in Zahira’s act of courage that inspired public confidence to demand a re-trial of the case.

But, if there was to be a re-trial would the State file the appeal ? Flushed with the Modi victory at the polls, the State of Gujarat was not about to erode its communal and fundamentalist electoral base for re-testing the waters of justice. For the State, Justice Mahida had examined the evidence. The accused were acquitted. Some of the accused were heroes and had protected Muslims. For the Modi government, the accused were as falsely accused as the Modi government itself! Meanwhile, Zahira went to the NHRC to record her statement that she had been pressurized, threatened and prevailed upon. One simple question faced the State: Should Justice Mahida’s judgment not be appealed at all ? State governments appeal the most doubtful of judgments, why were they so forbearing now? Concerned that the State may forbear, the NHRC appealed to the Supreme Court against Judge Mahida’s judgment. This petition was treated as a fundamental rights petition concerning civil liberties and the observance of the due process of law. An appeal was also filed by the Citizens for Peace and Justice (SLP 3770 of 2003). Despite this exposure, the State was most reluctant to file an appropriate appeal. On 7 August 2003, some kind of appeal was filed by the State Government in the Gujarat High Court. The Supreme Court was aghast that such a half hearted and perfunctory effort was made. Indeed, the Supreme Court in its final judgment in 2004 summarized its earlier response by observing that “an appeal not up to the mark and neither in conformity with the required care, appears to have been filed by the State against the acquittal before the Gujarat High Court”. Had the Supreme Court not maintained its oversight, the State would have evaded filing a responsible appeal ? It was pressure from the NHRC along with others moving the Supreme Court, that created the basis

for reviewing what was happening. A multitude of objections were raised in the Supreme Court about whether the NHRC could have filed its appeal which was made a fundamental rights petitions ? Or whether an appeal lay directly to the Supreme Court from a trial court judgment when an appeal lay to the High Court? Or whether any third party – whether the NHRC or the Citizens Committee or Zahira or Sahira - could have appealed in a criminal case where the State or the accused alone have an exclusive right to appeal ? Some of these are teasing questions, but not as formidable as either the State or the accused made them out to be.

The Supreme Court's strategy was simple and engaging. Firstly, the Supreme Court made it clear that it was not going to usurp the process of directly deciding the appeal itself when the Criminal Procedure Code provided for an appeal. The Supreme Court felt that it was entitled to consider whether there was a failure of due process on the part of the State not applying its mind to the filing of an appropriate appeal in the light of the new evidence under circumstances that suggested a miscarriage of justice. Thus, the Supreme Court was not usurping the functioning of an appellate court but ensuring that the State of Gujarat did not short change due process by taking a defiant stance that justice was done when it was manifest that what was done was not enough. That is why the Supreme Court treated the NHRC appeal from the trial court not as an appeal but as a fundamental rights petition concerned with issues of life, liberty and due process.

The second broad argument before the Supreme Court was that the NHRC, the Citizens for Justice, Zahira, Sahejadhkhan and others who filed affidavits before the Supreme Court were fact meddlesome interlopers who should not be permitted to interfere in criminal cases. In the Bofors case (1992), the Supreme Court had made it clear public interest petitions should not be filed in live criminal cases. No less, in Simranjit Mann's case doubt was cast on whether persons other than the State and accused (as the case may be) had the locus or the right to file criminal appeals and revisions. Normally, witnesses, victims and people with a public interest persona cannot invoke the appellate and such process. But, there cannot be hard and fast rules about this. Indeed, it seemed ironic that Mr. Tulsi, counsel for the accused in the Best Bakery case, argued that relatives of victims and others had no right to invoke or participate in criminal proceedings. At the same time, when Mr. Tulsi appeared in the High Court of Delhi on behalf of the victims of the Uphaar Cinema fire tragedy he argued the converse proposition that relatives of the victims had a significant role to play to aid and assist the process of justice. Perhaps, lawyers are an end

to themselves and argue to suit the need of the case before them. The locus of the NHRC in taking up the Best Bakery case cannot really be put in dispute. The NHRC was created by the Protection of Human Rights Act 1993 as the custodian of human rights in India. It has the specific power to approach Courts. The Supreme Court itself had involved the NHRC in the Punjab Canal murder case and other cases (Paramjit Kaur v. State of Punjab (1999) 2 SCC 131, Upendre Baxi v. State of U.P. (1998) 9 SCC 388 and N.C. Dhoundiyal v. Union of India (2004) 2 SCC 579). In the wake of the Gujarat riots, the NHRC had visited Gujarat in March 2002, made an interim report on 1 April and a final report on 31 May 2002 – especially drawing attention to the need for a CBI investigation. Zahira had approached the NHRC who was of the considered view that her statement and the NHRC’s apprehensions about the failure of process had to be brought to the attention of the Supreme Court. In fact, it was the duty of the NHRC which is the statutory custodian of human rights in India to have brought these matters to the attention of the Court. But, despite the fact that the NHRC’s bonafide and right to intervene was cleared by the Supreme Court, the Appeal Court questioned the NHRC’s bonafides; to suffer strong condemnatory comments from the Supreme Court when the appeal from the High Court appeal reached the Supreme Court.

We now turn to the other appellants and applicants who approached the Supreme Court including public interest litigants and others like Zahira who placed their affidavits before the Supreme Court. The general rule is to permit a ‘person aggrieved’ to seek remedial justice from a trial court decision. Victims and relatives of victims cannot be ousted from taking the case to a higher court. Equally, it could not be said that the Citizens for Justice and which filed an appeal to the Supreme Court (SLP (Crl.) 3770 of 2003) lacked the bonafides to approach the Supreme Court and assist in placing the affidavits of Zahira and others before the Court. Eventually in the shadow of the Supreme Court’s proceedings, appeals, revisions and applications were filed before the High Court in respect of Justice Mahida’s judgment. Zahira’s sister, Sahira Banu, had already filed a criminal revision (CR 583 of 2003) in the High Court challenging the acquittal in the case. The State filed a criminal appeal in the High Court (No. 956 of 2003) along with a miscellaneous application (No. 9677 of 2003) asking that the affidavits of various key witnesses (Zahira, Saira Banu, Sahejadkhan, and Mohmad Ashraf Shaikh) be brought on record. Then, the State filed a further application (Crim. Misc. Appl. 9825 of 2003) to place certain documents which would constitute corroborative evidence before the Appeal Court. At last, after many subterfuges, an appeal was filed and important evidence of key witnesses and corroborative evidence was before the High Court. It was for the

High Court sitting in appeal to take the case further and consider whether there had been a miscarriage of justice.

The question was whether the Appeal Court would hear the appeal fairly and justly; and, order a re-trial if it felt that justice had not been done after taking into account all the facts and circumstances including the arguments of the counsel for the accused who had been acquitted by Justice Mahida.

VI. No Redemption by the High Court

The Best Bakery appeal before the Gujarat High Court had a slow start and an abrupt end. Even though the Supreme Court order directing the High Court to hear the appeal was passed on 17 October 2003 was passed, it took some time for the High Court to get its act together under circumstances which are best explained from the High Court's judgment in the appeal:

“From the bare reading of the order dated 17.10.2003 passed by the Hon'ble Supreme Court, it is more than clear that, the Hon'ble Supreme Court has not issued any direction to this court to decide the Appeal at the earliest. It has only expressed hope that the hearing of the appeal may commence on 1st December, 2003 and the matter be decided expeditiously. It may be stated that while admitting this Appeal, Division Bench of this Court (Coram: D.K. Trivedi & M.S. Shah, JJ.) had fixed the hearing of the Appeal on 1st December, 2003. On that day, it was placed before another Division Bench of this Court (Coram: K.R. Vyas & K.M. Mehta, JJ.), and that being the first day of hearing and time was prayed for by the Advocates of the accused for preparing themselves in the matter, therefore, as stated by the learned Advocate at the Bar, the hearing of the matter was kept on 17.12.2003. However, on 17th December, 2003, when it was placed before another Bench (Coram: K.R. Vyas & A.L. Dave, JJ.), Hon'ble Mr. Justice A.L. Dave had exception to the hearing of this Appeal and, therefore, the matter was placed by the Office of this Court before the Hon'ble Chief Justice on the Administrative side for placing it before the appropriate Bench. Thereupon, the Hon'ble Chief Justice ordered to place these matters before another Division Bench (Coram: J.M. Panchal and M.C. Patel, JJ.). Accordingly, the matter was placed by the Office on 18.12.2003 before Hon'ble Mr. Justice J.M. Panchal, senior members of the Bench,

for obtaining convenience date and time of His Lordships for hearing of these matters. However, J.M. Panchal, J. ordered that the matter may receiving consideration by a Bench of which he is not one of the members. In view of the endorsement made by J.M. Panchal, J., the matter was immediately placed it once against before the Hon'ble Chief Justice of this Court on that very day i.e. on 18.12.2003. Thereupon, the Hon'ble the Chief Justice passed an order on that very day i.e. on 18.12.2003 to post these matters before this Division Bench on 19.12.2003. Accordingly, it was placed before us.”

We do not quite know why the appeal went from bench to bench and why the various judges recused themselves from hearing it. These are matters which could have been handled administratively a little better. The hearing lasted for six days. Satisfied that the Supreme Court expressed no view on merits, the Court re-examined various issues including the role of the NHRC and whether the Chairman of the NHRC had committed contempt of court in commenting on trial court judgment. Having allowed counsel to raise the issue, the Court then proceeded to say the Appeal Court was not the proper forum where such a question could be raised. This was a way of making a comment by stating that the Court was not was making the comment. Later the Supreme Court was intrigued by, and deprecated, the High Court for making comments about the NHRC which was not before it. What made the High Court's comments on the NHRC even more incomprehensible and unjustified was the fact that the counsel for the accused. Mr. Sushil Kumar, told the Supreme Court that he had made no arguments about the NHRC even though the High Court judges claimed he had. If this is so, clearly there was something rankling in the minds of the High Court judges about the NHRC and others which they felt needed to be expressed. But, if the appeal court proceedings started controversially, they ended abruptly. Having heard proceedings from 19 December through 26th December 2003, the Court pronounced its view on the latter date to the effect that there was no substance in the appeals. No reasons were given. The reasons were to follow. The public message upholding the acquittal was declared. But the public reasons came later. The High Court's explanation that the vacation was from 27 December 2003 – 11 January 2004 is hardly a reason for making a public declaration of the result. Clearly as soon as arguments ended (that, too, after several days of hearing), the judges had already made up their mind that the appeal was to be dismissed. Did the judges have time to examine the material ? Had they conferred with each other? Had they made up their minds before the arguments were concluded ? Later the Supreme Court took the view that there was no conceivable reason for the hurry. And, hurry there was.

Several decisions of the Supreme Court state that final orders should not be passed without reasons being given. What is even more baffling is that the written arguments of the State Government were filed on 29 December 2003 and those of the accused on 1 January 2004. The purpose of filing written submissions is to influence both the outcome as well as the reasoning of a judgment. The two are inseparable. But, here written submissions were given after the outcome was announced. These procedures followed by the High Court, when read with the many other comments made by the High Court on various institutions and persons, undermine rather than win the confidence of the public.

In a sense two inter-connected questions confronted the High Court in appeal. The first question was whether Judge Mahida had failed to exercise his powers as a trial judge resulting in a miscarriage of justice ? The second question related to whether the new evidence in the form of affidavit by several witnesses required a re-trial of the case in the light of all the facts and circumstances. No doubt, the case was unusual. Normally, it is the accused who complains of a miscarriage of justice and demands a re-trial. The justice system is not anti-accused. If an accused is acquitted, there have to be good reasons for the acquittal to be set aside. It follows that despite everything and the vast publicity surrounding the Best Bakery case which hit the headlines day after day, the Court could not overlook the interest of the accused. As an appeal court, it needed to find a balance.

The first question relates to the role of a trial judge. We have already seen that Judge Mahida had answered this question by using the metaphor of an “umpire” and assessing his own role in the Best Bakery case declared: “The Court of Justice in real sense is not the Court of Justice but the Court of Evidence”. Whatever his other reasons for acquitting the accused, Judge Mahida seems to have got caught within the influence of his own metaphor. The issue is: Did the law require something more from Judge Mahida ? Or was his perception of an ‘umpire judge’ wrong ? The predicament before Judge Mahida was that 37 out of 73 witnesses had resiled from their statements to the police ? The presiding trial judge is not helpless. There are various provisions of the Criminal Procedure Code (Cr.P.C.) and Evidence Act. To begin with, trials should be conducted expeditiously but not at breakneck speed so as to undermine justice. Under section 309 of the Cr.P.C., the trial judge can always adjourn a trial if the occasion requires it for reasons to be recorded. Apart from inspecting any place connected with the crime under Section 310 of the Cr.P.C., every trial judge has the vital power under Section 311 to summon a material witness or examine or

summon any person as a witness. This power could not have been more broadly couched:

“311. Power to summon material witness, or examine person present—*Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.*”

Under Section 313, the judge also has the power to examine the accused. Although the accused would not be placed under oath or punished for not answering questions, what he says can be taken into account. Under section 319 where a Court feels that someone else should be tried with the accused, he may be proceeded against with all the evidence being re-heard to give the new accused a fair hearing. All these are massive powers to seek out and do justice. These powers are reinforced by Section 165 of the Evidence Act which empower him to ask questions and seek out evidence “to discover and obtain proper proof of relevant facts”. Think of what all this mean so. The judge can put questions to witnesses, recall witnesses, summon new witnesses, adjourn the proceedings and add further accused if the case requires it. These empowerments are enough to explode the myth of the ‘judge as umpire’. Of course, the judge must decide on evidence. To that extent every court of justice is a court of evidence. But, it is also a court of justice. The two are not alternatives. The reason why the trial judge has all these powers is that he has a power coupled with a duty to find the truth.

The High Court in appeal noted all these empowerments (including hefty precedents from volumes of cases). But Justice Sethna’s judgment while accepting the width of the power seemed to dismiss these precedents with the almost bald counter assertion that they were inapplicable to the facts of this case. Why did not the judge put questions to the witnesses – including those who retracted their testimony en masse ? Judge Sethna observed:

“But in the instant case, all the eye witnesses had clearly stated before the court that they had never made any statements before the Police and thereby resiled from their earlier so called statements recorded by the Police. When the evidence of the witnesses who have been already turned hostile, does not appear to be essential to the learned Judge for arriving

at just decision of the case, then there was no question of the learned Judge exercising his power under Section 311 of the Code. Hence this submission is also rejected.”

But this begs the question without answering it. Just as the dog in Sherlock Holmes’s story aroused suspicion because he did nothing in the night, so also the fact that the witnesses did nothing to reconcile their earlier statement to the police with their statement in court should at least have persuaded the judge to ask a few questions – especially after the comprehensive pattern of retraction became apparent at the end of the trial. Equally, when dealing with the powers of a trial judge under the Evidence Act, Justice Sethna in the Appeal court said:

“But none of the judgments of the Hon’ble Supreme Court has any application to the facts of the present case, therefore, we have refrained ourselves from dealing with the same in detail. Suffice it to say that there was nothing on record before the learned Trial Judge to exercise his powers under Section 165 of the Act. Therefore, it cannot be said that the learned Judge failed to exercise his power under Section 165 of the Act. Hence this submission of the learned Advocate General is also rejected.”

But, surely, that was the issue before the Appeal Court to see whether there was something on the record which Judge Mahida should have responded to. The bald assertion that there was nothing on the record to justify some proactive interest by Judge Mahida compounds Judge Mahida’s inactivity with insufficient reasoning. Unfortunately, too many archetypes are created whereby the ‘common law’ judge drawn from the British system is portrayed as an umpire judge and the ‘civil law’ judge from French and other continental systems is seen as ‘active’ or ‘inquisitorial’ judge. These ideal types have been too widely drawn apart to create confusion. Recently, the Malimath Committee over-prescribed the inquisitorial system for India. All this adds to the image of the helplessnesses of the so-called ‘umpire judge’ which Judge Mahida portrayed himself to be. But, it can hardly be in dispute that the situation that Judge Mahida was confronted with as an extraordinary situation which required him to use his powers to re-assess what had happened. His failure to do so was an abdication of his duty to invoke these powers. This was not a subjective matter of doing what he felt like. The objective facts summoned him to invoke these powers – however carefully they needed to be exercised. Justice Sethna for the Appeal Court seemed to think that all this was simply a matter for the trial judge. Nor was it correct to say that there was nothing on the record supporting the need for a more investigative role for Judge Mahida. This becomes all the

more important because the Appeal Court strongly observed that the police had been biased in their investigation and the public prosecutor had not been upto the mark. Both the courts seemed to proceed on a subjective appreciation of the role when objective circumstances to the contrary stared them in the face.

But, if Justice Sethna's appeal court decision found no 'omission' by the trial judge, the High Court seemed to assess the evidence in a manner that defies conviction. (i) To begin with is the evidence of Pathan which was taken as the FIR in preference to Zahira's earlier statement which was reported to the police station later. In his first statement on 2 March 2002, when Pathan was wounded but conscious, he simply narrated the incident of the burning bakery without identifying names. When he was better on 4 March 2002 he identified 5 of the accused. This was hardly a volte face on the part of a witness who had seen tumultuous events. But, Justice Sethna went to the other extreme that this was a clear example of dishonesty and faulty evidence planted by the police ! (ii) Controversy surrounded as to why Sahejadjkhan Hasankhan who had identified 4 accused was suddenly declared of unsound mind at the trial as he murmured that his intelligence had gone (mairi akal mari gai hai). After the trial Sahejadjkhan Hasankhan filed an affidavit before the Supreme Court that he was of sound mind but felt paralysed and terrified. Is this surprising ? Taking a witness of this importance off the witness stand was an important decision agreed to by the trial Court. However, the Appeal Court said that Judge Mahida was right to recuse him from the trial and did not have to send the witness for psychiatric support because he had enough close relatives around to cure him! Deep down Justice Sethna obviously believed, without directly saying so, that this witness was tutored by activists Teesta Setalvad and Mihir Desai. These latter remarks were later expunged by the Supreme Court. (iii) Then, came the case of the eyewitness Shailun Hasankhan who had disclosed the name of 3 of the accused to the police. This witness was dropped by the prosecution. He was not examined by the trial court. The response of the Appeal Court was to note that he had gone to his village after receiving injuries and to ask: "where is the question of having lost his memory(!) now examining Shailun ?" Surely such a witness was crucial to the case ? (iv) Then came the testimony of Tufail who had disclosed the name of 4 accused on the 4 March 2002 - for whom no summons was issued because he was no where to be found and whose evidence was not narrated by Inspector Baria. So, the quest of searching for Tufail was abandoned – with the High Court stating that "non-examination of the injured Tufail has (not) resulted into failure of justice" even though he was a key witness who identified the accused. (v) Yasimbanu had also identified 3 accused persons but was not examined by the trial court. Once again, the Appeal Court

was satisfied that just because Inspector Baria had not mentioned her statement there was no need to examine Yasimbanu – casting doubt on her statement which was recorded on 4 March 2002. But should not her evidence have been placed before the trial court ? (vi) Lalmohmad Khudaba Singh was a witness who (like Pathan) had said little in his first statement to the police; but, later claimed that the accused had in fact provided refuge to the victims of the bloodbath. If the Court had applied the same test as for Pathan, the trial court would not have relied on Lalmohmad to even morally absolve the accused. To the Advocate General arguing the State appeal, the prosecutor and the court should have probed Lalmohmad’s story further. But the Appeal Court expressed ‘shock’ and ‘surprise’ at the Advocate General’s argument (and later accused the Advocate General running away from the truth) – once again relying on the evidence of Inspector Baria who, too, was not recalled for examination on this issue. Nor indeed was Kanchanbhai and Jyotsnaben Bhan who seemed to confirm Lalmohmad’s version in his improved testimony. Lalmohmad was to be believed. The others were not. (vii) Zahira was a key witnesses whose statement should have been the FIR and who went public after the acquittal by the trial court. She had filed her affidavit before the Supreme Court to state that she was wary, scared and terrified. In her statement to the police she had identified several accused. Justice Sethna drew attention to the Indian Express having been responsible for Zahira going public and refused to accept that what Zahira said was true. The broad reason for this that “all these witnesses, including three injured witnesses, were victims of the incident and lost their near and dear ones, but (had not) initially tried to falsely involve the accused”. But whether they had tried to do so ‘falsely’ was precisely the issue before the Court. After all, they had later identified the accused to the police after the initial trauma and repeated the indictment after the trial. Why was it so impossible to accept that they may have been under pressure not to tell the real truth at the trial ? Such an explanation was more consistent with the facts and could not have been dismissed out of hand. (viii) No less, the appeal court did not think too much of the argument that 7 witnesses for the prosecution were, in fact, relatives of the accused ! (ix) Having relied greatly on the evidence (or, non-evidence) of one police officer (Inspector Baria), the High Court doubted the integrity of DCP Piyush Patel because Inspector Baria had not referred to the presence of Piyush Patel at the hospital. But, this could have been verified by the Court. Somehow, the accused had to discredit Piyush Patel who had given evidence that Zahira had disclosed names of the accused to him. Even though Patel affirmed his presence and testimony on the basis of a fax message, Justice Sethna seemed to accept the argument that “if the police can manipulate the FIR, then it is very easy for them to manipulate Fax message also”. This required

evidence. No doubt, Patel had, for plausible reasons, not recorded the FIR of Zahira at the place of the incident and recorded his own testimony later. But this was not enough to discredit what he said or what others said to him or to dub him as an officer who had “miserably failed to discharge his duties”. This was an indictment to which the Supreme Court later took exception. From all this, it would appear that this was a case where the Trial Court had failed to examine the entire evidence. For the Appeal Court to say that “....(b)y no stretch of imagination it can be said that the trial was either not full or fair or not satisfactory (or) heavily loaded in favour of the accused” seems to be unsatisfactory. But the Court seemed convinced the entire purpose of the appeal was to convict the accused. It is difficult to accept how the Appeal Court could ignore, that a key witness had been accepted as insane without further ado, several witnesses who identified accused were dropped by the prosecution, one police witness was believed whilst doubt was cast on the other one, crucial witnesses had not been summoned because they had left the local area and ‘star’ witnesses were permitted to change their testimony without the trial court battering an eyelid or asking a question.

Somehow the Gujarat courts seemed to want to paint their judgments on the wider canvass of sociological explanation. Just as Judge Mahida had a few extravagant things to say about India, Indian history, the Indian people and various aspects of governmental policy, Justice Sethna also chose to add his insights. We have already noted his views on media and activist interference. In particular, it is interesting to record his stray comments on why people like the Narmada Bachao Andolan had caused great loss to the State of Gujarat.

“Certain elements failed everywhere, at all levels, and to obstruct the development and progress of the State, are trying to muse the process of law, so far they have not fully succeeded. Sometime back in the name of environment, matter was file before the Apex Court in Narmada matter, which was dismissed by the Apex Court, however, because of the ex parte ad interim order, they were successful in causing huge loss, running into thousands of crores of rupees to the State because of the delay in the construction of the dam. Ultimately, such huge loss had to be suffered by the people of the State for no fault of theirs. Gujarat is very much part and parcel of our Nation and any loss to the State means loss to the Nation.”

But, how was this linked to the case ? It seemed that there was a conspiracy that “some more persons, for their petty benefits, (were) trying to add the fuel to the

fire, which is already extinguished and keep the situation tense”. Apart from a conspiracy theory surfacing as a wild and wholly unsubstantiated conjecture, we can also discern the judge broadly taking the view that riots come and go. There is no one to blame. The sooner we forget about them, the better. Reinforced by these ideas and intuitions, it is not surprising that the Gujarat High Court refused to order a re-trial whilst recognizing their power to do so.

With this, the case went up in appeal to the Supreme Court.

VII. The Supreme Court orders a re-trial

Both Zahira and the State of Gujarat filed appeals to the Supreme Court. But the intensity of concern of these appellants before the Supreme Court was vastly different. The State of Gujarat had floundered at every step. An inept investigation was compounded by a clumsy prosecution. Modi’s return to power fortified the State’s inclination to step back from the case after Judge Mahida’s acquittal of the accused. But, for the pressure from the NHRC and eventually the Supreme Court, the State would either have filed no appeal; or, perforce, the half hearted appeal originally drafted by the State which the Supreme Court thought was woefully inadequate. Eventually, a more comprehensive appeal was filed which, as we have seen, failed to pass muster with the High Court in appeal. In the High Court, the State had led the assault on the Judge Mahida judgment. It failed. Zahira found herself caught in the sand storm of events. It was only after Judge Mahida’s acquittal that she realized the enormity of her error in not placing what she believed to be the true facts but which she felt afraid to place before the Mahida court. Fortified by the self confidence that grew with the growing support for her, she had become more involved in the issues of justice. Unlike the High Court, in the Supreme Court it was her lawyer, the irredoubtable Kapil Sibal, who led the proceedings for Zahira in a case the cause title of which bears her name under the legend: Zahira Habibullah Sheikh v. State of Gujarat. Although the State of Gujarat had also filed an appeal, the cause title in Zahira’s case (which led all the rest) was fittingly appropriate. This part of the Best Bakery case was truly her case against the State of Gujarat. It was the State of Gujarat that had failed her and the cause of justice.

A prima facie issue that goes to the core of the failure of justice in the Best Bakery case was, in a sense, raised by Judge Mahida’s startling observation in the original trial judgment that the judge was merely an umpire because the trial court was not a court of justice but a court of evidence. These were heady

observations which taken by themselves, would undermine the ordinary person's faith in justice. A trial case is not a cricket match or the quarter finals of a Wimbledon tennis tournament. The reason why a trial judge presides over a trial is not to oversee the game of justice and let the better side, which scores the most or better points, win. The judge is not a mechanical observer of the trial. He is a judge. He has to exercise his judgment. Winning and losing is not scoring points according to the rules of the game. It is a question of convincing the judge as to who is right in a manner consistent with justice. The judge does not have to determine the evidence, he has to assess and evaluate it. Although the Supreme Court did not specifically refer to Judge Mahida's metaphor, it clearly had Justice Mahida's exposition in mind when it went back to first principles to enunciate what a trial judge was supposed to do:

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

And, as if to state the obvious, when it clearly needed to be stated, Justice Passayat (for Justice Raju and himself) had to propound observations on the criminal trial.

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

Inevitably, the Supreme Court relied on various observations from the common law, to reinforce its view that “discovery, vindication and establishment of truth are the main purposes of the courts of justice”. It may not be assuring to accept the Supreme Court citing the American judge Holmes’s dictum that the “merit of the common law (is) that it decides the case first and the principle afterwards”. Indeed, a possible criticism of Gujarat justice in the Best Bakery case is that the case was decided in ways that abjured principles. But, if common law visions of criminal justice belong to its own untidy past, Justice Passayat added certain modern elements as he spoke of the “principle of a fair trial” as a “constant development process continually adapted to new and changing circumstances and exigencies of the situation”. But, lest this be misunderstood or taken out of context, Justice Passayat’s judgment yields five important imperatives that trial (as, indeed, appellate) criminal justice should bear in mind. The first imperative was to find the truth – or, as the Supreme Court emphasized in a free speech case the question is whether truth is to be put in the first or the second place. The second imperative was to remember the public interest requires that people should not lose faith in the criminal justice system. The third imperative was to find the supportive link between the ‘rule of law’ and ‘due process’ and human rights protection. It was not enough to simply follow the black letter law but to ensure justice – both for the accused and the cause of justice. Hence the emphasis that

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

The fourth imperative was the “the courts have to take a participatory role in criminal proceedings.” They are not mere “tape recorders but to arrive at the truth and subserve the ends of justice.” Finally, the participatory role of the judge (and the State) requires not just adherence to the principle that the accused has to be protected and given a fair trial, but that witnesses and others also need protection as part of the overall concept of fairness and due process. Needless to say:

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

These principles – loosely articulated by Justice Passayat - help us to understand why Judge Mahida went hopelessly wrong in his assessment that he was simply an umpire. Such a self restraint was, with respect, itself subversive of justice.

Did Judge Mahida in the trial court comply with these basic tenets of justice ? Are these tenets grounded in law ? Was Judge Mahida powerless to play judge instead of umpire ? The powers of the trial judge are both pro-active as well as reactive. The Cr.P.C. gives wide powers to the trial judge of local inspection (Section 310), to summon material witnesses and examine persons present

(Section 311 – see also Section 165 of the Evidence Act), to proceed against others (Section 319) and to order in camera proceedings (Section 327). The appeal court has the power to order re-trial (Section 386) – or even call for further evidence itself (Section 391). All these provisions were cited before the Trial and Appellate Court. The Trial Court simply went by the suspect evidence without probing further even though the situation demanded it. The Appellate High Court agreed that the powers of the Court were wide, but that the trial judge was right to interfere and the Appeal Court did not think the case for a re-trial was borne out! The Supreme Court reviewed the empowerment of the trial court judge under the Cr.P.C. and the Evidence Act to indicate:

“The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wise powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.”

Lest people misunderstand, the Court added:

“The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

Of course, such a wide power has to be exercised with caution and not in every case or routinely:

“It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently that the court concerned should readily accede to such requested by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.”

Many of these powers of the Trial Court and appeal court are theoretically unlimited - calling for cautious and circumspect use. But, such powers are necessary to redress something going wrong – whether by the prosecution or otherwise.

As against Judge Mahida’s metaphor of the umpire judge, the Supreme Court re-interpreted the portrayal of the judge as blindfolded by saying that it was only a veil.

“Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in states the faith inbuilt in the judicial system ultimately destroying the very justice delivery system of

the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.”

Repeating that judges were not tape recorders, Justice Passayat quoted from an English case to say that “... the law should not seem to sit by limply while those who defy it go free and, those who seek its protection lose hope”. This must not be taken to empower convicting judges with further certitude but to find a balance so that the civil liberties of the accused are reconciled to the claims of justice.

Applying these principles, should Judge Mahida have played a more active role? Should the Appeal Court have ordered a re-trial ? There was no factual dispute about the trial. The bare facts that stated the trial judge in the face were (i) the Public prosecutor did not examine injured witnesses. (ii) Rahish Khan’s evidence was placed before the Court even though neither the prosecution nor the accused relied upon it. (iii) An eye witness who identified five accused was permitted to be recused from the trial because summons could not be served on him in Uttar Pradesh. (iv) Another important witness was recused from giving evidence even though he had identified some accused on the grounds that he was insane without the Court probing this further. (v) This maneuver of not serving witnesses and declaring them to be mentally deficient was also followed for another witness who identified three accused. (vi) No summons was issued to one witness who had disclosed the name of four accused. (vii) Another witness who would have identified four accused was also not examined. (viii) One witness was “hurriedly” examined. (ix) Some witnesses, like Zahira, had given statements to the police identifying the accused but withdrawn their statements in court (x) An “unusual procedure” was followed by the prosecution of placing the evidence of six relatives of the accused who naturally, gave the accused a clean chit. (xi) Injured relatives of the victims were not examined in the absence of a medical report that they were not injured. (xii) Important evidence by a police officer was rejected because it was not reduced to writing earlier than it was. (xiii) The police officer who helped to acquit the accused was praised by the High Court but the one whose evidence would have pointed to a conviction was singled out and chastised. There were many other lapses which were apparent from the record of the proceedings of the trial court and the appellate court. (xiv) The trial and appellate courts were convinced that the investigation and prosecution had not done their jobs properly.

What do we make of all this evidence ? The Supreme Court was crystal clear that there had been a total failure of justice :

“If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State’s approach in assailing the trial court’s judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be mock trials or shadow-boxing or fixed trials. Judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern day “Neros” were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these “wanton boys”. When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.”

This is enough to come to the conclusion that Judge Mahida whilst following his self induced intuition of an umpire had fail to pursue the ends of justice.

What should the High Court have done in appeal ? The Appellate Court had the benefit of additional evidence in the form of the affidavits filed before the Supreme Court – including that of Zahira. The question was whether the Appellate Court, in the facts and circumstances of this case, should have considered these affidavits ? It must be remembered that the Appellate Court can examine further evidence under the Criminal Procedure Code. However, the High Court in appeal dealt with this issue perfunctorily in just one paragraph to come to the conclusion that while considering whether a re-trial could be orderd, the Court could examine only the trial court order before Judge Mahida and nothing else. If this were so, then why did the appeal court have the power to look for additional evidence ? It seems that the High Court had misconstrued its own power. As the Supreme Court put it:

“This perception of the powers of the appellate court and misgivings as to the manner of disposal of an appeal per se vitiates the decision rendered by the High Court.”

Having got its own power wrong, the High Court, therefore, never considered the new evidence against the old – preemptively rejecting the new evidence as inadmissible and, therefore, valueless.

“Merely because the High Court permits additional evidence to be adduced, it does not necessarily lead to the conclusion that the judgment of the trial Court was wrong. That decision has to be arrived at after assessing the evidence that was before the Trial Court and the additional evidence permitted to be adduced. The High Court has observed that question of accepting application for additional evidence will be dealt with separately, and in fact dealt with it in a cryptic manner practically in one paragraph and did not think it necessary to accept the additional evidence. But at the same time made threadbare analysis of the affidavits as if it had accepted it as additional evidence and was testing its acceptability. Even the conclusions arrived at with reference to those affidavits do not appear to be correct and seem to suffer from apparent judicial obstinacy and avowed determination to reject it. For example, to brand a person as not truthful because a different statement was given before the trial Court unmindful of the earliest statement given during investigation and the reasons urged for turning hostile before Court

negates the legislative intent and purpose of incorporating Section 391 in the Code. The question of admission of evidence initially or as additional evidence under Section 391 is distinct from the efficacy, reliability and its acceptability for consideration of claims in the appeal on merits. It is only after admission, the Court should consider in each case whether on account of earlier contradiction before Court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth. To reject it merely because of contradiction and that too in a sensitised case like the one before court with a horror and terror oriented history of its own would amount to conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-orientated mission. In a given case when the Court is satisfied that for reasons on record the witness had not stated truthfully before the trial Court and was willing to speak the truth before it, the power under Section 391 of the Code is to be exercised. It is to be noted at this stage that it is not the prosecution which alone can file an application under Section 391 of the Code. It can also be done, in an appropriate case by the accused to prove his innocence. Therefore, any approach without pragmatic consideration defeats the very purpose for which Section 391 of the Code has been enacted. Certain observations of the High court like, that if the accused persons were really guilty they would not have waited for long to commit offences or that they would have killed the victims in the night taking advantage of the darkness and/or that the accused persons had saved some person belonging to the other community were not only immaterial for the purpose of adjudication of application for additional evidence but such surmises could have been carefully avoided at least in order to observe and maintain the judicial calm and detachment required of the learned Judges in the High Court. The conclusions of the High Court that 65 to 70 persons belonging to the attacked community were saved by the accused or others appears to be based on the evidence of the relatives of the accused who were surprisingly examined by prosecution. We shall deal with the propriety of examining such persons, infra. These aspects could have been, if at all permissible to be done, considered after accepting the prayer for additional evidence. It is not known as to what extent these irrelevant materials have influenced the ultimate judgment of the High Court, in coming with such a strong and special plea in favour of a prosecuting agency which has miserably failed to demonstrate any credibility by its

course of action. The entire approach of the High Court suffers from serious infirmities, its conclusions lopsided and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgment under challenge, in unreasonably keeping out relevant evidence from being brought on record.”

It was no fault of the victims if the investigation and prosecution was inept. It is precisely in defective investigation cases that the Court needs to be more alert. Clearly both the trial and appellate court had contributed to a miscarriage of justice.

This led to the next question of what the Supreme Court should do. A re-trial of the case was necessary. But where ? Could a fair trial have taken place in Gujarat ? In an earlier Supreme Court case in some other matter, the Supreme Court dwelled on the effect of pressure tactics or pressures affecting a case requiring that it be tried elsewhere.

“Nevertheless, we cannot view with unconcern the potentiality of a flare up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned, against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial.”

In the Best Bakery case, the Supreme Court clearly felt that the case could not be heard in Gujarat and transferred it to the neighbouring State of Maharashtra.

The conditions of transfer were (a) a reinvestigation would take place which would be monitored by the Director General of Police of Gujarat. (b) A new Public Prosecutor would be appointed – it not being clear whether by Gujarat or Maharashtra. (c) Gujarat would provide protection to the witnesses – to which Maharashtra could give further protection, (d) All expenses incurred by Maharashtra would be reimbursed by Gujarat. (e) The accused would be on bail if they had been released - it being left to the trial court to consider their custody during trial.

Unfortunately, the matter did not rest there. No sooner was the ink dry on Justice Passayat's judgment, the State of Gujarat filed an application for further directions. This was really seeking a review of the case. In the Supreme Court, an application for review is heard by circulation amongst judges and not by way of hearing. The application by Gujarat, therefore, tried to circumvent the process of review. The Court heard this new plea of Gujarat; but not with the result that the Gujarat government expected. By this time, the State of Gujarat must have realized that it was not just the Best Bakery case that was on trial but the justice system of Gujarat itself. The pleas made by Gujarat were technical and misleading relating to whether the relief for re-trial was requested, and whether it was contrary to law and justified in this case? In fact, the power to order a re-trial and transfer the case was within the Courts gift. Quite recently, the Supreme Court had transferred the 'corruption' case of the Chief Minister of Tamil Nadu to the neighbouring State of Karnataka. Nor could it be said that in the Best Bakery case, the State of Gujarat was not heard on this question. The Supreme Court refused to budge from its previous order. The Best Bakery case moved on to its re-trial in Maharashtra giving rise to the usual preliminary disputes as to which State should appoint the Public Prosecutor and on others matters. After two years, the Best Bakery case was beginning all over again – from scratch.

As we leave the Supreme Court's judgments in appeal, we must do so with caution. There are parts of the judgments that are overwritten. But, even where the language shows the intensity of its concern with a dramatic flare of words, the Court has been quite cautious in its enunciation of the role of the trial judge. The Supreme Court's judgment in the Best Bakery case is not an invitation to every trial judge to actively interfere in every trial to ensure a conviction. But, judges are not just umpires in the game of justice. They cannot turn away from a case when a trial continues to take a wrong turn again and again. Had it not been for the Supreme Court, the Best Bakery case would have remained a testimony to injustice. It was due to the Supreme Court that a proper

appeal was filed in the High Court. But, when the High Court itself failed to examine the mis-trial properly, the Supreme Court had to step in to ensure a proper re-trial which was fair to the accused, the relatives of the victims and the public interest in the cause of justice. But, the very fact that the Supreme Court monitored the filing of the appeal in dramatic week to week proceedings and heard the matter many times over shows both the failures and success of Indian justice – failure because things went hopelessly wrongly; success because they were put right. But this cannot happen in every case all the time. The last in the system needs to be cared in the judicial and political system of the states. The corrective of the Supreme Court cannot become substitute for Indian justice at all levels of Indian justice. If that happens, India's justice system itself would have to be pronounced as veering towards total failure.

VIII. Unfinished Business

The Best Bakery case and all its discontents pose a comprehensive challenge to Indian governance. It was not just another case in which the trial judge was wrong, the State refused to appeal and the Supreme Court stepped in to rectify errors of justice. The handling of this it interrogates virtually every aspect of Indian governance. The violence was as merciless as it was unabated. The State stood by watching it happen – perhaps, joining in and adding to the fury. We do not know why the massacre of Hindus took place ? But we do know that the carnage that followed was rightly described as akin to an ‘ethnic cleansing’? This was not a case where the Chief Minister went out of his way to declare his solidarity for the Muslims. He had an election to win – overtly expressing sympathy for Muslims would have upset his political agenda. The Union government – led by the BJP - also had a vested interest in a communal election. Anti-Muslim terror and hate was seen as positive part of the undeclared election agenda. Despite the NHRC's plea, neither the State nor the Union government wanted an independent investigation by India's national investigation agency, the CBI. The State's investigations into the crimes and murders was motivated towards the criminally accused – with doubtful officers taking care to subvert the work of the good ones. There are always some good ones about. The relief and rehabilitation act was itself an act of cruelty – harsh and inadequate, failing to provide either food, shelter or security. Modi called an election in July – three months after the riots hoping to cash in on the communality of the carnage. Neither the Governor nor the Union Government thought it fit to stop him until the State was in better state of calm. Only the Election Commission stood in Modi's and the BJP's way. But, the Election

Commission was taken to Court through a meaningless Advisory Reference devised by the Supreme Court by the BJP led government at the Union. Modi triumphed. Indian governance was dealt a fatal blow. Once Modi's was secure in his victory, the entire administration fell like ripe fruit in his hands. The cause of justice suffered. The Best Bakery case shows that even the law courts failed to deliver until the Supreme Court stepped in.

To begin with, there seems to be a considerable ambiguity about what a 'riot' is. Legal definitions tend to be evasive. Way back in 1840, the Criminal Law Commissioners of England found it unnecessary and inconvenient' to differentiate between an unlawful assembly, rout and riot which, in any event, were seen as aggravated versions of the same thing. Under the common law the meaning of riot was sanitized and wrapped up into legal concepts of intent, conspiracy and causing alarm. By the time the Indian Penal Code came to be enacted, riots were seen as offences against public tranquility. Section 146 of the Indian Penal Code 1860 (IPC) states:

“Rioting.—Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.”

Thus, by the time all the legal niceties were worked out, even the Supreme Court of India in a decision from the State of UP took the view that a verbal quarrel which expanded into an armed conflict was not an armed quarrel. This lent credence to the view that wherever something happened spontaneously, it was not a riot. So, -- as in a Madhya Pradesh case -- where there was a free fight, there was no riot. Under the aegis of the Supreme Court, trying to prove a case for rioting became increasingly difficult. Only those were guilty of riot whose presence was established through the FIR and shown to be engaged in covert acts of violence. These judgments are unexceptional in that they seek to protect innocent bystanders from prosecution by a motivated police which might have their own scores to settle. The offence of riot has ceased to have any great significance. It carries a punishment of two years under Section 147 of the Indian Penal Code and if armed with a weapon likely to cause death for 3 years. The law also punishes these those who wantonly give provocation for a riot (Section 153), provide the land for unlawful assemblies (Section 154), benefit from the riot (Section 155) or harbour those who participate in such unlawful acts (Section 156-7). These offences carry low thresholds of punishments; and are basically ineffectual. The police find it easier to convict for the offence of

‘unlawful assemblies’ and its connected family of offences of hiring persons for (Section 150), joining or continuing in any unlawful assembly (Section 151) or assaulting an officer suppressing a riot, assembly or affray (Section 152). These are selective weapons in the hands of the police. The strategy of the law in dealing with riots is to create low threshold offences so as to treat riots as merely aggravated versions of a breach of peace.

But the political strategy of governance is different from the legal strategy of the law. The political strategy of governance was to treat as unfortunate, social explosions which occurred and which had to be quelled under conditions that brought civil society to peace. In this sense, the task of governance was seen to restore peace without controversy. Implicit in this approach of avoiding controversy was not to use the criminal law against controversial big shots or in a controversial way. The law was ‘janus faced’ on this issue. As long as the statute book contained a law of riot, it had to be enforced. But, as we have seen, each offence was individuated in a way that mere participation in a riot would not yield a conviction. The law was, thus, powerful and disempowered. More generally, a myth developed that no one can really be punished for what happens as riots. Indeed, such an argument was made in a most plaintively simple way in the Cambridge riots case (Rv. Caird (1970) 54 Cr. A. Rep.499) by the rioters (which as it happened included myself amongst the demonstrators). This is how it was put:

“The next point to be mentioned is what might be called the “Why pick on me?” argument. It has been suggested that there is something wrong in giving an appropriate sentence to one convicted of an offence because there are considerable numbers of others who were at the same time committing the same offences some of whom indeed. If identified and arrested and established as having taken a more serious part, could have received heavier sentences. This is a plea which is almost invariably put forward where the offence is one of those classed as disturbance of the public peace – such as riots, unlawful assemblies and affrays. It indicates a failure to appreciate that on these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace. It is, moreover, impracticable for a small number of police when sought to be overwhelmed by a crowd to make a large number of arrests. It is indeed all the more difficult when, as in the present case, any attempt at arrest is followed by violent efforts of surrounding rioters to rescue the person being arrested. It is worse still

when steps have been taken, as in the present case, to immerse the mob in darkness.

If this plea were acceded to, it would reinforce that feeling which may undoubtedly exist that if an offender is but one of a number he is unlikely to be picked on, and even if he is so picked upon, can escape proper punishment because others were not arrested at the same time. Those who choose to take part in such unlawful occasions must do so at their peril.

The present case was one of a long-lasting concerted attempt of grave proportions by aggressive force of numbers to overpower the police, to embark on wrecking, and to terrify citizens engaged in following peaceable and lawful pursuits. Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers.”

This is a harsh over-statement of the law. Fortunately, Indian courts are more exacting on issues of civil liberties. But, I am more concerned here with attitudinal postures. Political governance seeks to generalize the problem of riots out of existence in the name of peace; and legal governance, no less exactingly, seeks to individuate the problem out of existence by Indian courts insisting of rigorous proof of individual complicity. It is this kind of deliberately created ambiguity whereby Mr. Advani and others seek to escape both moral and legal blame arising out of their presence at the demolition of the Babri Masjid.

All this has resulted in a general pervasive attitude on the part of governance that riots are simply unfortunate; and, that the sooner we forget them the better. Thus, the general approach towards a riot is not to deal with either the problems that give rise to it or the atrocities that are committed during it. Consistent in this “riots-are-best-forgotten” approach, many techniques of governance are evolved. The first is to assuage peoples feelings by appointing a Commission of Inquiry. A Supreme Court or High Court judge is appointed who, over several years, goes through the evidence. Any one who is blamed is entitled to be heard under what is now referred to as the Kiran Bedi defence of claiming the right to be heard, cross examine and be heard last. Eventually, the twin objectives of the inquiry of (a) generally examining the cause of the riot and (b) discovering individual complicity get mixed up. When the Report is

finally placed after it has conquered all the procedural hurdles placed in the way of its production, it becomes a bit of a dead letter. If recommendations are made for prosecuting particular individuals – as in the case of the Justice Srikrishna Report – it is greeted with political consternation. Sometimes – as in the case of the Wadhwa Report – the judge shows unenviable restraint in refusing to make political indictments in ways that have been rightly described as unsatisfactory.

It is this general attitude that has led governance to look at the past of a riot with the hindsight of the future. This has resulted in unconvincing commission reports, the lack of action taken on any report, clumsy investigations, inept prosecutions and rare convictions. The harshness and cruelty of this indifference came out prominently in the reactions to the anti-Sikh riots and massacres in Delhi and elsewhere. The reports were unsatisfying – a kind of cover up which totally contrasted with a detailed non-government studies which seemed more credible, more direct and more convincing. But there is a marked contrast in the attitude of Muslims towards riots and those of the Sikhs. In post – independent India, Muslims have been pressurized into being forced to forget the atrocities committed against them. They are reminded of the creation of Pakistan, made to feel like second class citizens and, sub silentio, forced to justify their presence in India. Imbedded in their minds is the idea that riots are best forgotten. Victims of riots are paid paltry ex gratia sums. But, the psyche of the Sikhs towards both the invasion of the Golden Temple as well as the Sikh riots of 1984 was entirely different. They refused to forget or forgive. Those ‘riots’ are deeply embedded in Sikh history as massacres which are not to be forgotten. There is no compromise on this. The party that was responsible for these riots became a political enemy. Acts of contrition were not enough. The Sikhs wanted justice; and, refused to dislodge their quest for justice until and unless they got it. Their struggle continues. Even though the Muslims constitute a larger electorate than the Sikhs, the Muslims were politically confronted with the still greater voting power of the Hindus on emotive issues like the Babri Masjid. Although the Muslim vote has now become an arena for political appropriation, the story of communal riots do not reflect well for Indian governance.

I must not be misunderstood. I am not saying that all communal clashes must be fought through to their bitter end in the name of justice. But, the policy of ‘riots are-best-forgotten’ which forms part of our governance is not a policy of good governance, but simply one of political expediency. It is calculated to get the problem out of the way until it recurs again; and, then, get rid of it again. There is no egalitarian dignity in this. In fact, it is a surrender to a dominant

communal politics to leave behind the startling message that Indian governance will not pursue communal injustice in the name of communal harmony of peace. This is not because the peace of the nation would be put in peril, but because it is more convenient (even expedient) to swallow the injustice, eclipse its existence and gain political dividends for doing so. This evasive approach is not to be confused with the policy for 'truth and reconciliation' which Nelson Mandela used with some embarrassing success in South Africa. The 'truth' commissions became a forum for people to admit their guilt as acts of contrition. In India, the transgressors admit no such guilt. Nor do they make symbolic act of contrition as part of reconciliation. Much rather they quietly cash in on the role attributed to them to pursue and obtain political victory. A distinguished scholar on the Aligarh riots is surely right when he offers the view that riots are about dominant communities trying to obtain dominance over others: (R)iot is a key defining factor in the history of struggle for dominance of one community over another". The struggle for 'Hindu nationalism' has contrived many weapons in its armoury – including myths about Hindutva, the Hindu nation, Indian history and the revival of the 'Aryan' legacy over centuries of Muslim 'misrule'. In this 'struggle' (if it can be called that) there is no fairness, no respect for truth and no restraint. Paintings are destroyed, films are injunctioned, libraries invaded and people threatened, injured or murdered. The riot is an important part of this strategy as government's have become more and more indolent in their attitude to riots. The objective of achieving peace through self calculated indolence has long past gone. Since riots are political statements, the post riot status quo enables a victory for those who created and sustained the riot for political ends. Riots are mystified as simply things that happen. With Hindu fundamentalism expanding its social and political strategies, the less that is done after a riot the more beneficial it is in advancing the political cause of such fundamentalism.

This is why riots cannot and should not be erased from memory. Riots are not just a reminder of much that is rotten in our society. They represent political statements by those who take political advantage of them. The State formally pretends to a neutrality that asks people to accept riots as an unfortunate aberration that should be forgotten. But, those who seek to derive social and political benefit from a riot portray their 'rioters' as heroes rather than murderers who acted for and advanced the Hindu cause. The very act of 'soft pedaling' the issue of riots by the State gives rise to the communalists 'hard pedaling' their insidious purposes. That is why Brass's study of the Aligarh riots goes to the root of the issue when observing that the issue of dealing with riots cannot be left in the air:

“What is truly important for India’s present and future in all these respects (i.e. territorial integrity, societal peace, democratic functioning, and even its status in a world of nation-states), is escape from the self-perpetuating traps of blame displacement and the complementary traps of maximizing and minimizing the significance of horrific violence. In short, it is necessary to fix responsibility and penetrate the clouds of deception, rhetoric, mystification, obscurity, and indeterminacy to uncover what can be uncovered, knowing full well that the whole truth can never be known, but that the evident actions and inaction of known persons, groups, organizations, political leaders, media, academics seeking causes, and patriots seeking comfort can be uncovered, exposed, and brought to book.”

Governance requires that neither the State nor civil society can lose its way by not fixing responsibility on those who committed gruesome acts of violence and murder. To give up this pursuit is to give up governance itself. The Best Bakery case is a heart rending; but, also, an exhilarating example of the need to pursue the ends of justice so that the victims of communal violence are not forgotten. The Best Bakery case is not just another case. It is a singular example of a counter struggle to re-examine the way Indian governance views the very concept of a riot and how it is to be dealt with.

A lot can be said about the secularism that holds India together. Too much has been written and said about this. Too little has been properly understood. India is the most diverse country in the world. Its Muslim population alone is the second largest in the world – larger than most countries in Europe, Africa or the ‘states’ of America. Indian secularism does not seek to swallow up the richness of Indian diversity any more than it can allow modern day Hindu zealots to swallow an India of their imagination within their untrustworthy grasp. If Indian governance is to survive in its pursuit of the greatest experiment in secular living that the world has ever known, it has to do more than wait for all this to happen. It has to keep India’s Hindu fundamentalists at bay. Such communalists would risk India to gain their ends and kill others in the name of riots for their indefensible purposes. The Best Bakery case goes to the root of Indian governance. There cannot be peace without justice.