***IN THE HIGH COURT OF DELHI AT NEW DELHI**

**+ CRL.REV.P.No._____/2017 (to be numbered)**

% COURT ON ITS OWN MOTION ..... Petitioner

Through : *Nemo*

versus

1. DHANRAJ
   s/o MEHAR CHAND
   r/o B-210, RAJ NAGAR,
   DELHI
2. MAHENDER SINGH
   s/o PALEY RAM
   r/o RZ-7A/18,
   PURAN NAGAR,
   PALAM COLONY, DELHI
3. BALWAN SINGH KHOKHAR
   s/o PURAN SINGH
   r/o WZ-245, RAJ NAGAR,
   PALAM COLONY, DELHI
4. MAHENDER SINGH YADAV
   s/o TEJ RAM
   r/o VILLAGE BAGDOLA,
   P.S. NAJAFGARH, DELHI

   (*Address of private respondents as per the composite final report dated 25th March, 1985*)

5. STATE (GOVT OF NCT DELHI)

6. SMT. SAMPURAN KAUR (*Complainant*)
   w/o S. NIRMAL SINGH
   (*address to be ascertained by the State)*

..... Respondents

Through : *Nemo*

***(Regarding : SC No. 32/86)***

**CORAM:**
**HON'BLE MS. JUSTICE GITA MITTAL**
**HON'BLE MS. JUSTICE ANU MALHOTRA**

**ORDER**

**% 29.03.2017**

1. While hearing Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/2013, 861/2013, 1099/2013 and 710/2014 (*challenging the judgment dated 30th April, 2013 in Sessions Case No.26/10 arising out of RC 24/2005-SIU-I/SIC-1/CBI/ND*) ld. counsels for the private parties have relied upon judgments in Sessions Case No. 31/86 dated 29th April, 1986; Sessions Case No.32/86 dated 17th May, 1986; Sessions Case No.11/86 dated 28th May, 1986; Sessions Case No.10/86 dated 15th July, 1986 and Sessions Case No.33/86 dated 4th October, 1986 shocking our judicial conscience and compelling us to invoke our jurisdiction under Section 401 of the Cr.P.C. Without opining on the merits of any of the submissions made therein or the veracity of the evidence led in SC No.26/10 or on the legal merits of the prosecutions, trials and judgments in SC Nos.31/86, 32/86, 11/86, 10/86 and 33/86, we set out some essential facts, statutory provisions and legal principles which have compelled us to make the present order.

***Factual narration***

2. Post the assassination of Smt. Indira Gandhi, Late Prime Minister of India, in the riots with erupted in Delhi, FIR

No.416/84 was registered at P.S. Delhi Cantt. on 4th November, 1984 on the basis of a statement given to the police by Smt. Baljit Kaur, daughter of Late Shri Avtar Singh.

3. Several other complaints pertaining to deaths and other offences in the Raj Nagar area of Delhi Cantt. were received during investigation of FIR No.416/84 and clubbed in the same FIR. These included complaints on 15th November, 1984 by Jagir Kaur (*subject matter of SC No.31/86*); on 18th November, 1984 by Sampuran Kaur (*subject matter of SC No.32/86*); on 15th November, 1984 by Swaran Kaur (*subject matter of SC No.11/86*); on 19th November, 1984 by Daljit Kaur (*subject matter of SC No.10/86*). The complaint made on 4th November, 1984 by Baljit Kaur (*registered as FIR No.416/84*) was the subject matter of SC No.33/86). These complaints related to murders of Sikh men and violence to their property in the riots which erupted in the Raj Nagar area (under the jurisdiction of Police Post Palam Colony, Police Station Delhi Cantt.) post the assassination on the 31st October, 1984 of the then Prime Minister Smt. Indira Gandhi. We note that these were five out of several such complaints received at the Police Post Palam.

4. Concerned with *inter alia* the progress of the investigation and the cause into the large scale violence in 1984, the Government of India appointed several commissions including, *inter alia* Marwah Commission, 1984; Justice Ranganath Misra Commission of Enquiry, 1985; Dhillon

Committee, 1985; Ahuja Committee, 1985; Kapur Mittal Committee, 1987; Jain Banerjee Committee, 1987; Potti Rosha Committee, 1990; Jain Aggarwal Committee, 1990 and the Narula Committee, 1993 to examine different aspects of the matter.

5. Vide Notification No.441(E) dated 8th May, 2000 of the Ministry of Home Affairs, the Government of India had appointed a Commission of Inquiry under the Chairmanship of Mr. Justice G.T. Nanavati with the following terms of the reference :

> *"2. The terms of reference assigned to the Commission were as follows :*
>
> *(a) to inquire into the causes and course of the criminal violence and riots targeting members of the Sikh community which took place in the NCT of Delhi and other parts of the country on 31st October, 1984 and thereafter.*
>
> *(b) the sequence of the events leading to and all the facts relating to such violence and riots;*
>
> *(c) whether these heinous crimes could have been averted and whether there were any lapses or dereliction of duty in this regard on the part of any of the responsible authorities/individuals;*
>
> *(d) to enquire in the adequacy of the administrative measures taken to prevent and do deal with the said violence and riots;*
>
> *(e) to recommend measures which may be adopted to meet the ends of the injustice;*
>
> *(f) to consider such matters as may be found relevant in the course of the inquiry.*"

6. On 9th February, 2005, the Nanavati Commission presented its report to the Union Home Minister.

7. In a discussion in the Lok Sabha on the 10th of August 2005 and the Rajya Sabha on the 11th of August 2005 regarding the report of the Justice Nanavati Commission of Inquiry into 1984 Anti-Sikh riots in Delhi, the then Prime Minister and Home Minister had given an assurance that wherever the Commission has named any specific individuals as needing further examination or re-opening of case, the government will take all possible steps to do so within the ambit of law.

The assurance was thus restricted only to cases where certain individuals had been named in the report of the Justice Nanavati Commission.

8. After examination of the matter, a communication dated 24th October, 2005, (exhibited as Ex.PW8/A before the trial court trying SC 26/10), was issued by the then Special Secretary (H), Ministry of Home Affairs, Government of India *inter alia* directing as follows :

> "*2. The matter has accordingly been examined and it is observed that the Report of Justice Nanavati Commission, inter alia, contains recommendations regarding investigation/reinvestigation of the cases against (a) Shri Dharam Das Shastri, (b) Shri Jagdish Tytler, and (c) Shri Sajjan Kumar. I am enclosing a copy of the Report of Justice Nanavati*

*Commission alongwith the relevant extracts of the Report against these three persons.*

*3. It has been decided by the Government that the work of conducting further investigation/re-investigation against (a) Shri Dharam Das Shastri, (b) Shri Jagdish Tytler, and (c) Shri Sajjan Kumar as per the recommendations of the Justice Nanavati Commission should be entrusted to the CBI.*"

9. The Government of India had also decided that the work of conducting the investigation/re-investigation as per the recommendations of the Justice Nanavati Commission be entrusted to the CBI. The relevant records, as available with the Ministry, were forwarded to the CBI with the direction that additional records and information required in connection with the investigation, be obtained from the Delhi Police.

10. The CBI registered the FIR No.RC24/2005-SIU-I/SIC-1/CBI/ND and investigated the same. Chargesheet No.1/10 dated 13th January, 2001 was filed against eight accused persons, namely, Sajjan Kumar, Balwan Khokhar, Mahender Yadav Capt. Bhagmal (Retd.), Girdhari Lal, Krishan Khokhar, Maha Singh and Santosh Rani @ Janta Hawaldarni. It appears that some other accused persons, namely, Ishwar Chand Gaur @ Chand Sharabi, Dharamveer Singh Solanki, Balidan Singh and Raj Kumar @ Raja Ram had died before the trial. The case was registered as SC No.26/10.

11. By the order dated 24th May, 2010, charges were framed under different provisions of the IPC against six of the surviving accused persons, as Maha Singh and Santosh Rani @

Janta Hawaldarni had also died prior to framing of the charge. So far as the allegations are concerned, the charges related to commission of offences committed on the 1st and 2nd of November, 1984, more specifically detailed as hereunder :

| ***S.No*** | ***Date/Time*** | ***Details of Incident*** |
|---|---|---|
| *I.* | *01.11.1984 Morning 7 am onwards* | *Attack on Gurudwara, Raj Nagar. Damage to Gurudwara. Murder of Nirmal Singh.* |
| *II.* | *01.11.1984 1.30 – 2pm* | *Attack on house of Jagdish Kaur. Murder of husband Kehar Singh, son Gurpreet Singh and other offences.* |
| *III.* | *01.11.1984 10-11pm* | *Visit of A1 Sajjan Kumar to affected area in Raj Nagar. Survey/reprimand and instructions by him to the members of the mob.* |
| *IV.* | *02.11.1984 6.30-7 am* | *Capture and murder of Narenderpal, Raghuvender and Kuldeep Singh. Attack on house of Jasbir Kaur and murder of her husband, mother-in-law and father-in-law.* |
| *V.* | *02.11.1984 after 9 am* | *Sajjan Kumar addressed and instigated/instructed a gathering near police post Palam Chowk.* |

12. By the judgment dated 30th April, 2013 passed by the Additional District and Sessions Judge, the trial court acquitted Sh. Sajjan Kumar of the charges while convicting the other five accused persons for commission of different offences.

The order on sentence against the convicted persons was passed on the 9th of May 2013.

13. As a result, the following appeals came to be filed in this court challenging the convictions :

*(i) Crl.A.No.715/2013 : Mahender Yadav v. CBI*
*(ii) Crl.A.No.753/2013 : Krishan Khokar v. CBI*
*(iii) Crl.A.No.851/2013 : Capt. Bhagmal Retd. v. CBI.*
*(iv) Crl.A.No.861/2013 : Balwan Khokhar v. CBI*
*(v) Crl.A.No.710/2014 : Girdhari Lal v. State Thr. CBI.*
*(vi) Crl.A.No.831/2013 : Jagdish Kaur & Anr. v. Balwan Khokhar & Ors.*

14. The CBI had also filed Crl.L.P.No.385/2013 seeking leave to assail the acquittal of one of the accused person. Leave was granted on 27th August, 2013 and the matter came to be registered as Crl.A.No.1099/2013.

15. During the course of hearing of these appeals, Mr. R.N. Sharma, ld. counsel for the appellant (in Crl.A.Nos.851/2013) and Mr. Anil Kumar Sharma, ld. counsel for the respondent no.1 (in Crl.A.No.1099/2013) drew our attention to five trial court judgments placing heavy reliance thereon, detailed as below :

| ***Sr.No*** | ***Case No.*** | ***Parties name*** | ***Result of the trial*** | ***Details of complaint*** |
|---|---|---|---|---|
| *(i)* | *SC No.31/86* | *State v. Vidyanand, Balwan Khokhar, Mahender Singh Yadav* | *Acquittal by judgment dated 29.04.1986* | *Dated 15.11.1984 by Jagir Kaur (widow)* |
| *(ii)* | *SC No.32/86* | *State v. Dhanraj, Mahender Singh, Balwan Khokhar, Mahender Singh Yadav* | *Acquittal by judgment dated 17.05.1986* | *Dated 18.11.1984 by Sampuran Kaur (widow)* |
| *(iii)* | *SC No.11/86* | *State v. Dhanpat, Ved Parkash, Shiv Charan, Ramji Lal Sharma* | *Acquittal by judgment dated 28.05.1986* | *Dated 15.11.1984 by Swaran Kaur (widow)* |
| *(iv)* | *SC No.10/86* | *State v. Balwan Khokhar* | *Acquittal by judgment dated* | *Dated 19.11.1984 by Daljit Kaur* |

| | | | | |
|---|---|---|---|---|
| | | | *15.07.1986* | |
| *(v)* | *SC No.33/86* | *State v. Mahender Singh, Ram Kumar* | *Acquittal by judgment dated 04.10.1986* | *Dated 4.11.1984 by Baljit Kaur (daughter) (registered as FIR 416/84)* |

16. So far as the above cases are concerned, Mr. R.S. Cheema, ld. Senior Counsel for CBI has pointed out that Sh. Ashok Kumar Saxena was the investigating officer in FIR No.416/84. He filed a composite challan i.e. police report u/s 173 Cr.P.C. dated 25th March, 1985 along with five separate list of witnesses in what were captioned as Challan I, II, III, IV and V. Therefore, on the composite challan, five different cases were registered as SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86.

17. This final report provides the nature of allegations against the accused as well as the investigations conducted thereon and is necessary to be carefully read. We extract the same highlighting the investigation undertaken thereon :

> मरतबा SI अशोक कुमार गुज़ारिश है की संक्षिप्त हालात मुकदमा हजा इस प्रकार है की दिनांक 84- 11- 04 को कुमारी बलजीत कौर के बयान पर मुकदमा हजा u/s 149 / 148 / 147 / 436 / 427 /3 07IPC दर्ज रजिस्टर हुआ था दौरान तफ्तीश दिनांक 84-11-04 को ) illegible) बलजीत कौर ने बहाज़री चौकी आ कर अपना बयान तहरीर कराया कि ' मैं अपने

परिवार के साथ पता बाला पर रहती हूँ और तारीख 84-11-01 को करीब 3.30 बजे दिन करीब 500 / 400 आदमीयों कि ग्रुप हमारे मकान पर आया और खिड़की दरवाज़े तोड़ कर आग लगा दी और मेरे पिताजी को व मेरी माताजी को ईंटें मारी जो मेरे पिताजी बेहोश हो कर गिर गए जो हमने कहा कि वह मर गए तो वे लोग चले गए इसके बाद मेरे पिताजी को होश आ गया और उनको हमने बाथरूम में छिपा दिया I जो अगले रोज़ 84-11- 02को घर पर पांच छः दफा आये और देख कर चले गए सातवी दफा फिर आये और मेरे पिताजी को देख लिया I उन्हें मौना बना दिया गया था जिसको देख कर कुछ लोगों ने कहा कि हिन्दू हो गया है छोड़ दो, लेकिन एक आदमी महेन्द्रा शराबी जो कि हमारे पड़ोस में रहता है उसने कहा कि वह है तोह सरदार ही और हाथ में लिया फरसा सबसे पहले मेरे पिताजी के पेट में मारा उसके बाद और लोगों ने भी मारा और मेरे पिताजी का दिमाग बहार आ गया और सांस चल रहा था तो उन लोगों ने मेरे पिताजी के ऊपर पेट्रोल डाल कर आग लगा दी जिससे मेरे पिताजी के ऊपर चारपाई बिस्तर वगेहरा डाल दिए और पानी कि हथी उतार ले गए ताकि आग बुझा ना सके I जिससे बिलकुल जलकर भस्म हो गए मेरे पिताजी AIRFORCE में central account office में बतोर UDC धौला कुआँ सुब्रोतो पार्क में काम करते थे जो मैं और मेरे भाई भाग कर सुब्रोतो पार्क के AIR FORCE में पहुँच गए और आज AIR FORCE के अफसरान के साथ हाजिर चौकी आई हूँ I जो )illegible) से SI राम निवास चौकी पालम कालोनी ने मामला सरेदस्त सूर्त पूर्व जुर्म 147/ 302 / 436 / 427 / 149IPC का होना पाकर मुकदमा हजा दर्ज रजिस्टर कराया और तफतीश

अमल में लाई मुलाहजा किया बक्शा और मौना बनाया और WA - ) 10illegible) के आँगन में से जली हुई हड्डियां राख को हस्व) illegible) पुलिस को लाया I आइन्दा की तफतीश बजरिये दीगर SI अजीत) illegible) द्वारा अमल में लाई गई

दिनांक 84- 12- 22 को श्रीमती सुरजीत कौर W /O अवतार सिंह का बयान भी हासिल किया जिन्होंने अपनी लडकी बलजीत कौर के बयान की ही बात को बताते हुए महेंद्र शराबी के अलावा बलवाइयों में जगविरा व एक नाई जिसकी दुकान बैंक वाली गली में है और बाद में नाम राजकुमार बतलाया को भी शामिल बताया I राम कुमार ने अवतार सिंह को सिर के भाला मारा I सुरजीत कौर ने अपना बयान में यह भी बताया कि बलवाई घर का सारा सामान लूट कर ले गए । मुकदमा में कब्जा में किए गए Exhibits को C.F.S.L. बराये opinion (illegible) और मौका के फोटो कराये गए । तफतीश से मुसामीयान महेन्द्र सिंह @ शराबी, राम कुमार @ नाई के खिलाफ सबूत काबिले गिरफ्तार गुजरने पर हर दोनों को मुकदमा में गिरफ्तार किया गया जो बर जमानत अदालत रिहा है । काफी कोशिश के बावजूद भी जगबीरा के full particulars नहीं मिल सके जिसकी वजह से उसकी गिरफ़्तारी नहीं हो सकी .C.F.S.L से result मुकदमा में मौजूद हो चूका है । अब तक की तफतीश हालात व बयानात गवाहान से हर दोनों मुलजमान उपरोक्त के खिलाफ मुकदमा में सबूत )illegible) चालान गुजर चुके हैं लिहाजा हर दोनों मुलजमान के खिलाफ चालान न o I अलग मुरतब किया गया ।

दौराने तफतीश दिनांक 11-11-84 के Smt. Sampuran Kaur मुदई ने एक तहरीर दी जिसको मुकदमा हजा में दिनांक 18 -11-84 को u/s 161 CrPc examine किया गया जिसकी दरख्वास्त व बयान के मुताबिक दिनांक 1-11-84 को वह उसके पति सरदार निर्मल सिंह अपने बच्चों के साथ घर पर ही थे । श्रीमती इन्द्रा गाँधी की हत्या के बाद सरदारों को मारने के लिए हजूम घूम रहा था की 9. 30 AM पर उन लोगों ने गुरुद्वारा राज नगर को आग लगा दी और दूसरी गली में चले गए करीब एक घंटे के बाद वही करीब 500 बलवाई उनके घर पर आये और पथराव करने लगे और मकान को आग लगाने लगे ।उस वक्त बलवाइयों की अगवाई महेन्द्र सिंह यादव बगडोला वाला व बलवान खोकर कर रहे थे । जो उसके पति निर्मल सिंह बाहर आये और बोले कि हम लोगों को क्यों मार रहे हो जो बलवाई उस वक्त वहाँ से चल दिए । थोड़ी देर बाद ही बलवान खोकर आया और उसके पति को यह कहकर कि Compromise करा देते हैं उसके पति निर्मल सिंह को अपनी मोटर साइकिल पर बैठा कर सामने ही धनराज की दुकान पर ले गया जहाँ वह बलवाई खड़े हुए थे । बलवान खोखर ने उसके पति निर्मल सिंह को बलवाइयों के हवाले कर दिया जो वह और उसकी लड़की उनकी तरफ दौड़े तभी बलवाइयों में से धनराज ने निर्मल सिंह को रस्सी से बाँध दिया और महेन्द्र शराबी व दीगर बलवाइयों ने सरदार निर्मल सिंह के ऊपर मिटटी का तेल डालकर आग लगा दी और फिर उसके मकान को भी लूट कर आग लगा दी । बलवाई 20 तोले सोने के जेवर , पन्द्रह हजार रुपया नकद व बाकी House Hold articles को लूट ले

गए और बकाया सामान को आग लगा दी जिसमे उसका कुल करीब पांच लाख रुपया का माल लूटा व जलाया गया । दौराने तफतीश मुलाहजा मौका करके नक्शा मौका तैयार किया गया । मौका के फोटो कराये गए । मुकदमा में मुल्जिमान धनराज, महेन्द्र सिंह )illegible), बलवान खोखर व महेन्द्र सिंह यादव मुलजमान उपरोक्त को सबूत काबिले गिरफ्तारी गुजरने पर मुकदमा हिजा में हस्ब जाब्ता गिरफ्तार किया गया जो हर बारी मुलजमान बर जमानत अदालत रिहा है । अब तक की तफतीश, हालात व ब्यानात गवाहान से हर चारों मुलजमान उपरोक्त के खिलाफ सबूत काबिले चालान गुजर चुकी है । लिहाजा हर चारों मुलजमान के खिलाफ चालान न o II अलग से मुरतब किया गया ।

दौराने तफतीश )illegible) दिनांक 15-11-84 को श्रीमती जागीर कौर Complainant उपरोक्त की एक दरख्वास्त मौजूद हुई जिसकी तफतीश भी मुकदमा हजा के साथ ही अमल में लाते हुए दिनांक 22-11-83 को श्रीमती जागीर कौर को मुकदमा हजा में u/s 161 CrPc examine किया गया जो दरख्वास्त व बयान के अनुसार दिनांक 1-11-84 को करीब 1000/5000 आदमी करीब 5.30 PM पर एक Mob ने जिनमे से वह बलवान खोखर , विघानन्द गुप्ता व महेन्द्र सिंह R/o गाँव बगडोला को अच्छी तरह पहचानती थी ने उनके घर पर हमला बोला और उसके पति सरदार जोगा सिंह के घर से बाहर निकल कर ईंट व पाइप से जो कि बलवाई हाथ में लिए हुए थे से मारा और फिर मिट्टी का तेल डाल कर जला दिया । और घर का सामान करीब 25000/- रूपये की कीमत का लूट कर ले गए । दौराने

तफतीश मुलाहजा मौका किया , नक्शा मौका तैयार किया गया । फोटो कराये गए और )illegible) विद्यानंद गुप्ता , बलवान खोखर व महेन्द्र सिंह मुलजमान उपरोक्त को मुकदमा हजा में गिरफ्तार किया गया जो बर जमानत अदालत रिहा है ।अब तक की तफतीश हालात व बयानात से हर तीनो मुलजमान उपरोक्त के खिलाफ सबूत काबिले चालान गुजर चुके हैं । लिहाजा हर तीनो मुलजमान उपरोक्त का मुकदमा हजा में चालान नं o ।।। अलग से मुरतब किया गया ।

दौराने तफतीश दिनांक 15-11-84 को मुसामान स्वरन कौर Complainant की एक तहरीर मौसूक हुई जिसकी तफतीश भी मुकदमा हजा के साथ ही अमल में लाई गई जो दौरान तफतीश दिनांक को मुसामान स्वरन कौर का बयान u/s 161 CrPc तहरीर किया गया जो दरख्वास्त व बयान के मुताबिक दिनांक 1-11-84 को शाम करीब दिन के 10 बजे जब वह अपने पति सरदार हरभजन सिंह के साथ अपने मकान RZ -439F राज नगर मौजूद थी तो दंगाइयों का एक हजूम जिसमे करीब 2000/2500 आदमी थे हाथों में लाठी सरिये वगैरह लिए कालोनी में सरदारों को लूटते , मारते जलाते आये और उनका मकान से भी जेवरात पांच तोला, नकदी दो हज़ार रुपया, घड़ी बर्तन टी आदि लूट लिए । और मकान को जला दिया और .वी .

उसका पति साथ ही केमकान में छुपे हुए थे जो फिर सरदार जी को भी ढूंढ कर पकड़ लिया और लाठी , दण्डी, सरिया से मार मार कर ख़त्म कर दिया और उन पर मिट्टी का तेल डाल कर लाशों को जला दिया । दंगाइयों ने शिवचरण, घनपत कुम्हार व उसका छोटा भाई गोपाल ,

रामजीलाल शर्मा, बाल किशन राजस्थानी हवलदार और सुरेन्द्र गाँव बगडोला को अच्छी तरह से पहले से जानती है शामिल थे उसके )illegible) के सिर में और दंगाईयों को मारने व लूटने के लिए उकसाया था । जो दौराने तफतीश मुलाहजा मौका करके नक्शा मौका तैयार किया गया और मुल्जिमान शिवचरण, घनपत, वेद प्रकाश व रामजीलाल शर्मा को मुकदमा हिजा में गिरफ्तार किया गया । गोपाल व दूसरे एक लंबे लडके के बारे में पूछ ताछ व दरयाफ्त से कोई सुराग नही चला । मुस्मि बालकिशन जो मुकदमा में मतलूब है मुलाकी नहीं हो सका है । बाल किशन (illegible) Army में active service में मुलाजिम है जो दिनांक 1-11-84 से 10-11-84 तक लगातार अपनी Regiment में हाजिर रहा है । मुस्मि सुरेन्द्र को गिरफ्तार करने की काफी कोशिश की गई जो अब तक अपनी गिरफ़्तारी से बच कर छुपा हुआ है । लिहाजा गिरफ्तार नही किया जा सका है । अब तक की तफ्तीश हालात व बयान से मुसमियान शिव चरण , घनपत , वेद प्रकाश , रामजीलाल व सुरेन्द्र के खिलाफ सबूत काबिले चालान गुजर चुका है । लिहाजा सुरेन्द्र को खाना नं o 2 व बकाया मुलजमान गिरफ्तार शुदा को चालान हजा में उपरोक्त मुलजमान का चालान नं o 4 अलग से तैयार किया गया । जिसमे मुस्मि सुरेन्द्र सिंह के खिलाफ u/s 82/ 83 CrPc की request भी की गई ।

दौराने तफतीश दिनांक 19-11-84 को श्रीमती दलजीत कौर w/o अवतार सिंह R/o RZ 241 / D राज नगर की एक Complaint मौसूल हुई जिसकी तफतीश भी मुकदमा हजा के साथ ही अमल में लाते हुए दिनांक 29-11-84

को )illegible)को u/s 161 CrPc examine किया गया जिसकी दरख्वास्त व बयान के मुताबिक वह अपने पति सरदार अवतार सिंह व लड़के सुखविंदर सिंह के साथ RZ 241 D राज नगर में रहती थी दिनांक 1-11-84 को दंगो के दौरान करीब 500/ 600 लोगों के एक mob ने आकर जिनके पास लाठियां व सरिये थे उनके मकान पर हमला बोला और उनके पति अवतार सिंह को घर के बाहर खींचकर लाठियों व सरियों से जान से मार डाला और फिर घर के अंदर खड़े स्कूटर में से पेट्रोल लेकर लाश को जला दिया ।

बलवाइयों में से बलवान खोखर को वह अच्छी तरह पहचानती है । जिसने उसके पति को मरवाया व जलवाया उसका लड़का सुखविंदर सिंह अपनी जान बचाकर भाग गया जो बाद में और पता चला की उसको भी दंगाइयों ने जान से मार डाला । बलवाइयों ने उनके घर में से 20 तोले सोने के जेवर, स्कूटर, T.V. , Friz , को लूट कर बाकी घर को आग लगा दी जिसमे उनका सारा समान जल गया ।

<u>दौराने तफतीश मुलाहजा मौका किया, नक्शा मौका तैयार किया गया फोटो कराये गए । काफी कोशिश के बावजूद भी यह मालूम नहीं हो सका कि सुखविंदर उपरोक्त को कहाँ मारा गया । मुकदमा में मुस्मि बलवान खोखर को गिरफ्तार किया गया । जो बर जमानत अदालत रिहा है । अब तक की तफतीश हालात व बयान से मुलाजिम बलवान खोखर के खिलार्फ सबूत काबिले चालान गुजर चुके हैं । लिहाजा मुलजम के खिलाफ चालान नं o 5 अलग से मुर्तब किया गया है</u>

*(Emphasis by us)*

18. The above five judgments placed before us note that the investigating officer Shri Ashok Kumar Saxena was examined as a witness in SC No.10/86 as PW-4; in SC No.11/86 as PW-3; in SC No.32/86 as PW-2 and in SC No.31/86 as PW-3. In SC No.26/10, he stands examined as a defence witness and has testified as DW-4.

We propose to consider the judgments individually.

19. SC No.32/86 decided by the judgment dated 17th May, 1986 was premised on a written complaint dated 18th November, 1984 made by Sampuran Kaur (widow of S. Nirmal Singh and mother of one Nirpreet Kaur). Details of this complaint are noted in para 5 of the said judgment thus :

> "*5. ... **Sampuran Kaur** gave a **written application** and her statement u/s. 161 Cr.P.C. was recorded on **18-11-84** and **according to her application** and **the statement, on 1-11-84, she was present along with her husband S.Nirmal Singh and children at her house and after murder of Smt. Indira Gandhi, the mob was roaming to kill Sikhs,** that **at 9.30 a.m., they had set on fire Gurdwara, Raj Nagar** and **had gone to some other Gali and after one hour, those rioters, about, 500 in number, had come to her house** and had started pelting stones and had started **setting on fire her house** and at that time, the **rioters were being led by Mahinder Singh Yadav, Bagdola-wale and Balwan Khokhar**; that **when husband Nirmal Singh came out and told as to why they were killing them and at that time, the unruly mob had gone from there and after some time, Balwan Khokhar had come and taken her husband saying that he will get settled compromise** between them and*

***he had taken her husband Nirmal Singh after getting him seated on the motorcycle*** *and had taken him at the* ***shop of Dhan Raj*** *where unruly mob was there and* ***Balwan Khokhar had trusted her husband Nirmal Singh to the rioters and then she and her daughter had run towards him (her husband) and then Dhan Raj, one of the rioters, had tied Nirmal Singh with a rope and then Mahinder Singh Sharabi*** *and other rioters* ***had sprinkled kerosene oil on Nirmal Singh and had set him on fire and then they had robbed her house and set her house on fire*** *and the rioters had* ***looted 20 tolas of gold ornaments and Rs.15,000/- in cash*** *and other household articles and they* ***had also set on fire the remaining articles*** *and she suffered in all the less of about Rs.51 lacs. ...''*

*(Emphasis supplied)*

20. So far as the trial is concerned, in paras 8 and 9 of the judgment dated 17th May, 1986 in SC No.32/86 referring to the examination of the witnesses, the trial court has noted as follows :

"*8. In this case,* ***seven witnesses have been cited****. Out of them,* ***four have been examined****.* ***Smt. Sampuran Kaur, Nirprit Kaur and Constable Paramjit Singh have not been examined.*** *As regards Paramjit Singh is concerned, she is a formal witness. He was a photographer. The* ***photos Ex.PX, PY & PZ*** *were* ***admitted by the accused persons****. Photos do not show anything to connect the accused persons with the alleged offences.* ***Evidence of PW Paramjit Singh was formal*** *and he had taken* ***only photographs****.*

*9. In this case,* ***Sampuran Kaur and Nirprit Kaur****, according to the prosecution,* ***were the eye-witnesses of the incident****. They were the* ***only eye-***

***witnesses of the incident***. *They were the* ***only eye-witnesses of the*** *incident who had been* ***cited as prosecution witnesses.*** *But, unfortunately,* ***both these alleged eye-witnesses have not been produced by the prosecution.*** ***Summons*** *of these witnesses were issued* ***for 14-4-86*** *and they were* ***not properly served*** *and they did not appear. In this connection, in the order-sheet dated 14-4-86, I have mentioned regarding the* ***slackness of the process-serving agency*** *and in view of the request of the* ***I.O., I had*** *ordered for given dasti summons to the I.O. The case was* ***fixed for prosecution evidence on 28-4-86***. *On* ***that date also, Sampuran Kaur and Nirprit Kaur did not appear*** *and the* ***service upon them was not properly effected.*** *Regarding the slackness of the process-serving agency, I have mentioned in the order-sheet which is self-explanatory.* ***Even the report of the process server were not forwarded by the SHO*** *which was necessary according to the practice. On* ***28-4-86,*** *in view of the request of the APP and the I.O.,* ***the case was adjourned*** *and it was mentioned that the* ***last opportunity was given and 16-5-86 was fixed for Sampuran Kaur and Nirprit Kaur*** *again for* ***16-5-86*** *and they were* ***received back unserved again*** *and* ***according to the report they were untraceable.*** ***No other address of these witnesses was supplied by the prosecution***. *In these circumstances, the* ***most important witnesses Sampuran Kaur and Nirprit Kaur have not been produced*** *by the prosecution and* ***according to the process server's reports, they were untraceable****."*

*(Emphasis supplied)*

As per the judgment, the prosecution thus produced only four police witnesses during the trial.

21. Finally, in paras 16 to 18 of the judgment dated 17th May, 1986, the trial court has held as follows :

"*16. **Sampuran Kaur**, who had given these applications and who was the **complainant**, has **not** been **produced**. She had given these **applications with great delay** and there was **possibility of manipulations**. As regards **Nirprit Kaur** is concerned, her **statement was recorded with great delay on 1-3-85**. In this way, her statement u/s. 161 Cr.P.C. was **recorded for the first time after about four months from the date of incident.** Hence, **why she had not approached the police four months after the incident, has not been satisfactorily explained by the prosecution**. The arguments of the defence counsel that **Nirprit Kaur was introduced** as an eye-witness in this case **after consultation and manipulation and with undue delay, has got force in the circumstances of this case.***

*17. **Nothing incriminating** was **recovered** from the possession of the accused persons. **Accused** persons were **arrested after a long gap** from the date of the incident. They had **no motive** to commit the alleged offences. The accused persons had **not given** any **disclosure** statements and they had **not given** any **confessional** statements.*

*18. I have considered the entire evidence on record and the circumstances of this case. **Prosecution has miserably failed to prove its case. Prosecution story appears to be improbable and unreliable**. No offence is proved against the accused persons, in this case."*

*(Emphasis by us)*

22. Para 9 of the judgment extracted above narrates the steps taken by the trial court in SC No.32/86 regarding summoning and ensuring appearance of the two cited eye-witnesses. The case was therefore, fixed for 14th April, 1986, 28th April, 1986 and 16th May, 1986 when it was reported by the "*process server*" that they were "*untraceable*" and were treated as

untraceable without any further effort at all to trace the eye-witnesses in serious offences including rioting and murder.

***Power of trial judge to secure appearance of witnesses***

23. So are there any options available to a trial judge under the ***Code of Criminal Procedure, 1973*** to secure the appearance of witnesses? On a cursory examination, this statute contains the following statutory provisions :

> ***"62. Summons how served.***— *(1) Every summons* ***shall be served by a police officer****, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.*
>
> *xxx xxx xxx*
>
> ***64. Service when persons summoned cannot be found.***— *Where the* ***person summoned cannot, by the exercise of due diligence, be found****, the summons may be served by* ***leaving one of the duplicates for him with some adult male member*** *of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.*
>
> ***65. Procedure when service cannot be effected as before provided.***— *If service cannot by the exercise of due diligence be effected as provided in Section 62, Section 63 or Section 64, the* ***serving officer shall affix*** *one of the duplicates of the summons to some* ***conspicuous part of the house or homestead*** *in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either* ***declare that the summons*** *has been* ***duly served or order fresh service*** *in such manner as it considers proper.*

*xxx xxx xxx*

***87. Issue of warrant in lieu of, or in addition to, summons.***— *A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a* ***warrant for his arrest***—

> *(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or*
>
> *(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.*

*xxx xxx xxx*

***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.***

*(Emphasis supplied)*

24. We may also usefully advert to a provision of the ***Indian Evidence Act, 1872*** as well in this regard which read thus :

> *"****165. Judge's power to put questions or order production.****—The Judge may,* ***in order to discover or to obtain proper proof of relevant facts****, ask any question he pleases, in any form, at any time, of any*

*witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and* ***neither the parties nor their agents shall be entitled to make any objection*** *to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:*

*Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:*

*Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."*

*(Emphasis supplied)*

25. We have noted above that the Code of Criminal Procedure as well as Indian Evidence Act, 1872 amply empowers the trial court to take action for ensuring the appearance of the witnesses. Therefore, the judgment of the trial court dated 17th May, 1986 in SC No.32/86 suggests that it was passed without any effort by the court to ensure that vital witnesses were served and their evidence recorded.

26. It is noteworthy that the case stands registered as SC No.32/86 and the trial was completed in the middle of May,

1986 on 17th May, 1986 i.e. within a period of hardly five months.

***Duty of the Court***

27. The further question which arises is as to whether the trial judge can remain content with steps taken by the police and the prosecution to secure presence of witnesses without anything more? On the aspect of the duty of the trial judge in ensuring the presence of the witnesses at the time of trial, we may usefully advert to the pronouncement of the Supreme Court reported at ***(2002) 1 SCC 655, Shailendra Kumar v. State of Bihar*** wherein it was held thus :

> ***"9.*** *In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded with by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the* ***accused wants to frustrate the prosecution by unjustified means*** *and it appears that by one way or the other the* ***Additional Sessions Judge as well as the APP have not taken any interest in discharge of their duties****. It was the* ***duty of the Sessions Judge to issue summons*** *to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants, as the case may be. It should be well understood that the prosecution*

*cannot be frustrated by such methods and victims of the crime cannot be left in a lurch."*

(Emphasis by us)

28. The Supreme Court has further elaborated on the role of the court in ensuring that all valuable evidence is brought on record in the judgment reported at ***(2006) 3 SCC 374, Zahira Habibullah Sheikh (5) v. State of Gujarat*** wherein it has been held as follows :

> ***"25.*** *As has been noticed earlier in the earlier case (Zahira [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] ) the* ***role to be played by the courts, witnesses, investigating officers, Public Prosecutors*** *has to be focussed, more particularly when eyebrows are raised about their roles.*
>
> ***26.*** *In this context, reference may be made to Section* ***311 of the Criminal Procedure Code*** *which reads as follows:*
>
> > *"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."*
>
> *The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as*

*a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.*

***27.** The **object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side**. The **determinative factor** is whether it is **essential to the just decision of the case**. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers*

*the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.*

***28.*** *As indicated above, the section is wholly discretionary.* ***The second part*** *of it* ***imposes*** *upon the Magistrate* ***an obligation****: it is,* ***that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case.****"*

*(Emphasis supplied)*

Therefore, what would arise for consideration in the present case is whether the above statutory provisions and legal principles were complied with by the prosecution and by the trial court?

***Whether any evidence of the offence could have been available to the trial court conducting the trial in SC No.32/86?***

29. Another material question thrown up from the above extract of the trial court judgment is as to whether it was ensured that the best and all evidence were secured and made available to the trial court? It has been pointed out by Mr. R.N. Sharma, ld. counsel for the appellant (in Crl.A.No.851/2013) and Mr. Anil Kumar Sharma, ld. counsel for the respondent

no.1 (in Crl.A.No.1099/2013) referring to the trial in SC No.26/10, that to establish the commission of the offences, the attack on the Gurudwara, Raj Nagar and the murder of Nirmal Singh on the 1st of November 1984, the prosecution has examined Joginder Singh as PW-7 and also produced Nirpreet Kaur (daughter of Nirmal Singh) as PW-10 and Manjeet Singh as PW-12 in this trial.

30. Mr. R.N. Sharma, ld. counsel for the appellant (in Crl.A.No.851/2013) and Mr. Anil Kumar, ld. counsel for the respondent no.1 (in Crl.A.No.1099/2013) have submitted that amongst others, the prosecution examined Nirpreet Kaur (daughter of Late Nirmal Singh and Sampuran Kaur) who was examined as PW-10 in SC No.26/10. Mr. Sharma and Mr. Anil Kumar, ld. counsels have elaborately read before us her testimony. To illustrate, we extract hereunder some portions of her testimony recorded on 6th January, 2011 placed before us which read thus :

> "*PW-10 Ms. Nirpreet Kaur w/o Late Sh. Dilbar Singh, aged 42 years r/o H. No. WZ-127A Street No.10A, Old Shahpura, Tilak Nagar, N.Delhi-18, occupation: ready-made garment business.*
>
> *xxx* *xxx* *xxx*
>
> *I am **residing at the above** mentioned address for last about **10-12 years**. In the **year 1984** I was **residing at RZ/WZ-241, Raj Nagar, Palam Colony, N. Delhi alongwith my father** Late **Sh. Nirmal Singh, mother Sampuran Kaur, my two brothers namely Nirpal Singh and Nirmolak Singh.** My father was a transporter by profession and he was*

*also running a taxi stand in Anand Niketan. I and my family members are followers of Sikh religion. My father was keshdhari and an amritdhari Sikh.*

*On **31.10.1984** I came to know that Prime Minister Smt. Indira Gandhi has been assassinated by her security guard. Except for some stray incident, everything was normal. On that day my father had come early to the house. In the evening at about 6.30pm, Balwan Khokar who used to introduce himself as nephew of Sajjan Kumar alongwith his brother Krishan Khokhar came to our house and asked my father to keep his brother Krishan Khokhar as driver. My father told him that at present there is no vacancy and in case there will be any vacancy, he will inform him within 3-4 days. Balwan Khokar and Krishan Khokar are present in the court today. My father asked Balwan Khokar that Sikhs are being attacked thereupon Balwan Khokar told him that Sajjan Kumar is his maternal uncle and he had assured him that there shall be no attack in our colony.*

*On the **intervening night of 31.10.1984 and 01.11.1984** at about **2.30-3am, 'Granthi' of our Gurudwara** came to our house and informed my father that police personnels have come in the Gurudwara because **my father was President of the Gurudwara**. My father and my mother accompanied him to Gurudwara. **Our house was very near to Gurudwara**. When my father and mother went to Gurudwara they had a talk with the police personnel and they inform him that situation outside is not congenial and they have been deployed to safeguard the Gurudwara. **I also went to Gurudwara at about 5/5.30am** for bhajan & kirtan. When I had reached Gurudwara at that time police personnel were present in the gurudwara but during the midst of prayers **police official disappeared, without intimating anyone.** In the meantime, **we heard noise***

***and of slogans at about 7.30/8am.*** *We rushed outside and saw that* ***a huge mob*** *is coming which was being* ***led by Balwan Khokar, Mahender Yadav and owner of Mamta Bakery.*** *They were* ***armed with sariyas, rods, subbal, jellies etc.*** *The people in the mob were* ***raising slogans*** *"Indira Gandhi amar rahe", "en Sardaron ko maro, enhonne hamari maa ko mara hai". I became* ***scared and became apprehensive*** *that mob may not dishonour (beadbi) "Guru Granth Saheb". I* ***rushed back to Gurudwara*** *in order to pick up Guru Granth Saheb.* ***My younger brother Nirmolak Singh who was aged about 9 year*** *at the time followed me. The* ***mob attacked us.*** *I could save myself, he was caught by the mob, but due to his tender age, he could also managed to come out from the clutches of the mob.* ***Mahender Yadav and owner of Mamta Bakery told the mob*** *by pointing out towards us "ese maron, ye saap ka bachcha hai". I picked up Guru Granth Saheb and returned back to my house. I saw that the* ***mob had come to my house and they had damaged the wall*** *of my house and the gate.* ***My father came out of the house*** *and told the mob that they are not responsible for killing of Indira Gandhi and they are also citizens of India. On hearing this some members of the mob went away and* ***some persons from the mob set on fire a truck*** *belonging to Harbans Singh. In our street mainly Sikhs persons were residing. On hearing the voice of my father Harbans Singh and other Sikhs came out of their houses and they all put off the fire. All decided that they will save themselves.* ***For 2½ to 3 three hours we were defending ourselves****. In the meantime* ***police personnels/police officials came. Balwan Khokar, Mahender Yadav and Kishan Khokar came****, where all the Sikhs had gathered.* ***Mahender Yadav bowed down towards the feet of my father and told him that he is just like his younger brother and will try to solve the matter and offered to compromise***

*and that they will pay the compensation for the loss/damages. My father and other Sikhs who had gathered over there refused to compromise.* ***Police personnels asked my father and other Sikhs persons to compromise the matter. Police personnels took the kripan from the Sikhs and went away. My father went with Balwan Khohar and Mahender Yadav on a scooter****. Mohan Singh one of the Sikh, who had gathered over there uttered that now my father would not come back. On hearing this,* ***I rushed in the same direction where my father had gone. I saw that the scooter stopped near the shop of Dhanraj where mob was present and Balwan Khokar told the mob that the Sikh who was left has been brought by him. Mob caught hold of my father, Ishwar Sharabi Sprinkled kerosene oil over my father. The mob was not having any match box at that time. One police personnel told the mob*** *"doob maro tum se ek Sardar bhi nahi jalta".* ***From his name plate, I could gather that his name was Inspector Kaushik. Inspector Kaushik gave match box which was taken by Kishan Khokar and Kishan Khokar set on fire my father. Mob had gone a little ahead my father jumped on a nearby nala. When the mob saw that my father is alive they returned back. Dhanraj gave ropes from his shop. Captain Bhagmal tied my father with ropes on the telephone pole. Wife of Dua gave kerosene oil and my father was again set on fire. The mob then left. My father again jumped into the nala. Pujari of a nearby Temple called the mob*** *again by telling them that he (Sardar) was still alive.* ***The mob again came. Balwan Khokar hit my father with rod. Mahender Yadav sprinkled some white powder on my father as a result of which he was burnt.*** *Somebody from the mob shouted that after 15 minutes his whole family should be killed. On hearing this* ***I rushed towards my house.*** *I found my mother lying unconscious,* ***my house was burning****.*

*Police personnels were standing near the gate of our house, but* ***nobody helped us****. Wife of Sh. Santok Singh Sandhu who used to live in our neighbourhood and her husband was serving in Air Force somehow managed to get Air Force vehicle and in that vehicle her family and our family went to Air Force Station, Palam. On the way I saw half burnt bodies of Sardars."*

*(Emphasis by us)*

31. It is pertinent to note that as per para 5 of the judgment dated 17th May, 1986 in SC No. 32/86, the killing of S. Nirmal Singh was the subject matter of the complaint dated 18th November, 1984 made by his widow Smt. Sampuran Kaur. It was the subject matter of SC No.32/86, the trial whereof culminated in the judgment of acquittal dated 15th May, 1986 primarily for the reason that eye-witnesses were not examined.

32. So far as her daughter Nirpreet Kaur being joined in the investigation into the commission of the offences in 1984, recording of her statement and appearance in court is concerned when examined as a witness in SC No.26/10, Nirpreet Kaur has given the following testimony on oath :

*"I do not know if my mother is a witness in this case or not. Name of my mother is Sampuran Kaur. Statement of my mother was not recorded by the CBI. I know this fact and therefore I am deposing to this effect. It is incorrect to suggest that my mother gave a statement to CBI on 17.09.2008 or that she has been cited as PW-19 in the present case. My statement was recorded by CBI in January 2009. Again said CBI recorded my statement in December 2008 and my statement was recorded by Magistrate in January 2009. ...*

*xxx* *xxx* *xxx*

*Probably the report of Nanavati Commission came in the year 2005 but I am not confirmed about the same.* ***During the period 2000 to 2005 I continued visiting PS Delhi Cantt and Riot Cell for the killing of my father****. It is incorrect to suggest that I did not visit PS Delhi Cantt or riot cell or that if I had visited these places I would have been informed by the duty officer of PS Delhi cantt that the case has since been decided on** *17.05.1986 or that even the riot cell would have also informed me about the fate of the case after seeing the record which was with them.* ***It is incorrect to suggest that from the very beginning I was aware of the fact that case pertaining to killing of my father has been decided. It is incorrect to suggest that if I was not aware about the fate of case of killing of my father*** *I would have made representation when NDA Government came into power.* ***Vol. For me change of Government was of no consequence. I had no faith in any of the Government****."*

*(Emphasis by us)*

33. In SC 26/10, Nirpreet Kaur (PW-10) has also testified about her whereabouts and the circumstances which prevented her from taking any legal action about the murder of her father. Some portion of her testimony reads as follows :

*"****After leaving the house at Raj Nagar****, Palam Colony,* ***I stayed at Air Force Gurudwara and Moti Bagh Gurudwara****. When we were* ***in Moti Bagh Gurudwara, my mother started receiving threats that I speak too much and I will be killed. My mother became very scared and took me and my brothers to village Ghorewal, Tehsil Khanowan, Distt. Gurdaspur, Punjab, in end November,1984. In the***

***beginning of December, 1984, red card was issued to us. I have brought the same in the court. In first week of January, 1985 we came back to Delhi and started living in a rented accommodation initially at Anand Niketan; thereafter at Virender Nagar and then Chokhandi. We kept on changing the houses because some suspicious element used to roam near houses and therefore being scared we used to change accommodation****. In **1986** we were alloted accommodation like other riot victims at Tilak Vihar and **my mother is now residing in the alloted accommodation as riot victim. In May 1985, I again went to my village Ghorewal as I again started receiving threats. After staying there for some time, I went to Jhalandhar at the house of my** maternal uncle and **took admission in Lyallpur, Khalsa College, Jhalandhar. I was having the feeling of anguish that injustice is being done to Sikhs** and nobody is coming to their help **therefore I joined Sikh Student Federation. In 1984 I was 16 years of age**. At that time I was student. **After I joined Sikhs Student Federation, I was involved in two false cases of TADA. I remained in Jail for many years. In one case** I was **acquitted** while in **another case I was discharged. In Punjab also I was implicated in a case pertaining to TADA. In that case also I was discharged**.*

*xxx xxx xxx*

***It is correct that I did not make any written representation before any authority regarding killing of my father upto December 2008****. Vol. When CBI official contacted me I gave statement. I do not know when my statement was recorded by the CBI but I joined investigation in the end of August 2008 and thereafter had several meetings with them.* ***I had faith in the courts from where I was acquitted and discharged****. xxx*
*xxx xxx.* ***I had taken the plea in the TADA cases that***

***I have been falsely implicated because I was an eye-witness to the killing of my father in 1984 riots****. I have been verbally telling the court that since I have been speaking against MPs and MLAs therefore I have been falsely implicated in false cases. There was no question of taking any such plea in writing before the concerned judges as* ***my statement was not recorded therein (it is stated by counsel for the CBI that no statement u/s 313 CrPC was recorded by the concerned judges due to no incriminating facts appearing against the accused and she was accordingly acquitted/discharged in all cases.).*** *I do not know if I was produced in person before the TADA Committee for review within three months of my arrest.* ***Vol. After the arrest I was tortured and I was only produced before the court where the proceedings were going on and was bailed out after three years.*** *…"*

*(Emphasis by us)*

34. So far as knowledge about the judgment dated 7th May, 1986 is concerned, in SC 26/10 Nirpreet Kaur (PW-10) has given the following testimony :

*" ... It is correct that I was* ***informed by Mr. Pangarkar that case pertaining to killing of my father was tried*** *and that has* ***resulted into acquittal but I did not believe his*** *version* ***because we were never called to appear as witness in that case nor he showed the copy of judgement to me****.*

*Q. After you came to know from Mr. Pangarkar that the case pertaining to killing of your father had been tried and same has resulted into acquittal then what steps you have taken?*

***Ans. I gave statement before Mr. Pangarkar and thereafter before Magistrate U/sec. 164 CrPC expecting that now the case pertaining to killing of my father will be tried.***

***During the course of argument on charge when it was submitted by counsel for accused that this case does not pertain to killing of my father and thereafter I went through the judgement then I came to know that this case does not pertains to killing of my father****. After I came to know about this fact I contacted the IO* ***Mr. Anil Yadav*** *and told him that if this case does not pertain to killing of my father then why I was made a witness in this case. Thereupon he* ***told me that in the case pertaining to killing of my father our summons have been sent to wrong address*** *and therefore that case has resulted in acquittal however since I knew the incident which had taken place in the locality therefore I have been cited as witness. Till date I am not satisfied and want that I should get justice for the killing of my father.*

*Q. After coming to know that this case does not pertains to killing of your father and after going through the judgement it was confirmed to you. Have you made any representation either to the CBI or to any other authority while explaining that my statement was recorded for killing of my father which they have not pursued and I am cited as witness in a different case?*

***Ans. I am still finding ways and means to get the case pertaining to killing of my father tried.***

*Q. I put a question to you specifically submit before the court what steps you have taken after knowing to this fact in writing?*

*Ans.* ***I do not want to disclose the step*** *which I am taking now.*

*xxx xxx xxx*

*Q. You have stated before the court that you have read the judgement in case titled as State vs. Dhanraj and ors. FIR no.416/84 u/s*

*148/302/201/436/149/427/395/396 IPC in Session Case no.32/86 decided by the hon'ble Court of Sh. S.P. Singh Choudhary, ld. ASJ vide his order dated 17.05.1986. Is it correct that the concerned hon'ble court has observed in the judgement and has made observation while considering your statement dated 01.03.1985 recorded by S.I. A.K. Saxena, South Distt. Line, u/s 161 CrPC before Delhi Police in that case?*

***Ans. Neither me and my mother made any such statement u/sec. 161 CrPC except an application dated 11.11.104 was given by my mother for compensation."***

*(Emphasis by us)*

35. In the trial in SC No.26/10, the investigating officer Shri Ashok Kumar Saxena stands examined by the defence as DW-4 on 3rd August, 2011 and 4th August, 2011. On the nature of the investigation conducted by him into FIR No.416/84 and the complaints (including the complaint dated 18th November, 1984 given by Sampuran Kaur) clubbed with it, Shri Ashok Kumar Saxena *inter alia* stated thus :

*"... **S.I. Arjun Singh had also partly investigated FIR No. 416/84**. He was a member of the investigating team. He had also investigated this case with me. **I do not remember how many charge sheets were submitted in case FIR No. 416/84. I have seen S.I. Arjun Singh signing and writing as he** worked with me. I did know Urdu. **S.I. Arjun Singh knew Urdu**. I identify the handwriting and signatures of Arjun Singh appearing on the statement of Jagdish Kaur dated 20.01.85. The same is EX DW 4/B (objected to as to mode of proof). Arjun Singh signed on the statement at point A. S.I. Arjun Singh used to write Urdu and the statement shown to me is in Urdu and formed part of case diary therefore, it bears the signature of S.I. Arjun*

*Singh therefore, I say that the statement was recorded by S.I. Arjun Singh. In the gist of relevant case diary' statement of Guru Charm Singh is mentioned' the same is EX DW 4/C, and signature of S.I. Arjun Singh is at point A. (objected to as to mode of proof).''*

*(Emphasis disclosed)*

36. Shri Ashok Kumar Saxena was also extensively cross-examined by Mr. R.S. Cheema, ld. Senior Counsel for CBI when he stated as follows :

***"It is correct that myself and S.I. Arjun Singh never remained posted together and I never worked with him prior to the formation of special investigation team of case FIR No. 416/84.*** *There was* ***no personal/official exchange of letters between me and S.I. Arjun Singh. vol.*** *During the course of investigation of this FIR No. 416/84 when the file used to come to me I used to go through the investigation carried out by S.I. Arjun Singh and during that period I used to see his writing.* ***I used to get the Urdu portion read over to me by someone when he was not there. I do not remember if Jagdish Kaur joined the investigation of the case in my presence or not. I do not remember under what circumstances and what place and in what manner the statement EX DW4/B was recorded.*** *I do not recollect if I met personally Jagdish Kaur or having seen her.* ***I can write my name in Urdu but otherwise I cannot read and write Urdu. I have not read Urdu as subject in my school. It is correct that if on two separate papers in Urdu without mention of case diary etc. is shown to me I will not be able to say with certainty if the same are written by S.I. Arjun Singh or not****.''*

*(Emphasis supplied)*

37. So far as the status of the residence of the complainant and recording of the statement of Nirpreet Kaur is concerned, we extract hereunder some portions of Shri Ashok Kumar

Saxena's (DW-10) cross-examination on this aspect which read thus :

> *"I had visited the house mentioned in statement EX DW 4/B. This statement was recorded in Moti Bagh Gurudwara. It is not mentioned in the statement that it was recorded in* ***Moti Bagh*** *Gurudwara and I am* ***stating so on the basis of my memory****. I can tell after seeing the case diary.* ***Some goods were lying burnt in the house but house was not reduced to ashes.*** *When I had gone for site inspection at that time* ***nobody was living in this house****. Witness is shown case diary dated 01.03.1985 of case FIR No. 416/84, P.S Delhi Cantt. It is correct* ***that prior to 01.03.1985 I did not meet Nirpreet Kaur nor I knew her.*** *During investigation I went to Gurudwara Moti Bagh where on inquiry about the resident of WZ 241, Raj Nagar Palam Colony Nirpreet Kaur d/o Nirmal Singh came forward and I recorded her statement. Many other ladies were present at that time. I am* ***stating this fact from my memory.*** *The ladies were from other victims families of Delhi Cantt.* ***I am not recollecting the name of any other lady.*** *It is incorrect to suggest that I never went to Moti Bag Gurudwara or that I never recorded the statement of Nirpreet Kaur EX DW 4/A or that it is a forged statement.* ***I can not say if Nirpreet Kaur was not residing at Moti Bagh Gurudwara however, she was there when she met me and I recorded her statement****. I am not aware if any camps were organized for the victims or not but riot victim's families were there in the Gurudwara.* ***I cannot say if there was a camp in Moti Bagh Gurudwara for the riot victims families or the same was closed in March 1985. I can not say if after 01.3.85, I went to Moti Bagh Gurudwara*** *or not.* ***I do not remember when I lastly visited Moti Bagh Gurudwara****.*
>
> ***I did not record any statement of Sampooran Kaur w/o Nirmal Singh****. I* ***do not remember if I ever***

***met her.*** *After seeing the case diary dated 09.05.85 the witness admits that he recorded the supplementary statement of Sampooran Kaur on 09.05.85. (at the request of counsel for the accused the statement is exhibited as DW 4/D). It is correct that* ***same address is mentioned in the statement of Sampooran Kaur as that of Nirpreet Kaur****. It is incorrect to suggest that the statement dated 09.05.85 of Sampooran Kaur is forged one or that she was not available at Moti Bagh Gurudwara on 09.05.85 or that* ***there was no camp at that time****. It is incorrect to suggest that statement EX DW 4/B and EX DW 4/C are not recorded by S.I. Arjun Singh or that in order to favour the accused persons I am going out of the way to identify signatures of S.I. Arjun Singh. ...''*

*(Emphasis by us)*

38. With regard to the address of Sampuran Kaur and Nirpreet Kaur (wife and daughter of Late Shri Nirmal Singh respectively), Shri Ashok Kumar Saxena (DW-10) has made the following statement :

*'' ... It is correct that* ***Sampooran Kaur*** *w/o Nirmal Singh and* ***Nirpreet Kaur*** *d/o Nirmal Singh* ***did not appear in the court however I can not say if they were served or not.*** *It is incorrect to suggest that I know it fully well that both these witnesses were not served with the summons or that I am intentionally pleading ignorance.* ***Whatever addresses were given by them at the time of their statements, were given in the charge sheet****.*

*Question: I put it to you that* ***you have mentioned the address of Nirpreet Kaur and Sampooran Kaur*** *as resident of* ***WZ 241 Raj Nagar, Palam Colony*** *in the challan ?*

*Ans. So far as I recollect beside WZ 241 Raj Nagar Palam colony they had also given some new number of the same house which was also mentioned in the statement U/s 161 Cr.P.C.* ***I do not remember if on 15.05.85, they were not residing at this address****. I remember in March 1985 when I recorded their statements they were in Gurudwara Moti Bagh. Thereafter I do not where they lived."*

*(Emphasis by us)*

39. So far as the manner in which the investigation has been conducted, the witness Ashok Kumar Saxena (DW-10) has stated as follows :

"*I do not know Guru Charan Singh whose statement has been exhibited as DW 4/C. I can not say if SI Ram Niwas investigated case FIR No.416/84 from 4.11.84 to 17.11.84 but he and other I.Os had investigated this FIR. After formation of Special investigation Team S.I. Avtar Singh, S.I. Arjun Singh and myself investigated this FIR. I do not remember if I investigated this FIR on 04.12.1984 for a single date. However, it is correct that I had investigated this FIR in a single date. Vol. thereafter also. It is correct that the file remained with me till final compliance from 26.02.85. It is correct that I had taken help of someone for getting the Urdu version read over to me but I do not remember if the name of that person was SI. Bhim Singh. I do not want to see the case diary in this regard."*

40. So far as the judgments passed in 1986 of acquittals, the filing of the final report/challans and cases registered by P.S. Delhi Cantt. are concerned, the witness Shri Ashok Kumar Saxena (DW-4) has stated as follows :

*"**I do not exactly remember how many killings were the subject matter of FIR No. 416/84.** However **I remember** that there **were 3/4 killings and the same was the number** of the complainant. **I do not remember if there were 22 complaints involving killing of 30 persons**. It is correct that objections raised by prosecution branch was tried to be removed in that case. It is correct that **4/5 challans of FIR No. 416/84 were dealt with by me. I do not remember if a composite report U/s 173 Cr.P.C was prepared by S.H.O. Sita Ram Mamgai or that he annexed five list of witnesses. I do not want to see the case diary in this regard**. **It may possible that out of five challans I was cited as witness in four challans**. Charge sheet was submitted by the SHO. **I appeared as a witness but I can not tell in how many cases I appeared as a witness. It may be possible that I might have appeared as witness in the case pertaining to the killing of Nirmal Singh**.*

*xxx xxx xxx*

*Question. **In three of the five challans pertaining to the murder of Avtar Singh, Nirmal Singh, and Joga Singh, the eye witnesses were not served and the court found that they were not residing at the given addresses and the cases resulted in acquittal**.*

***Ans. I can not say anything.***

***It is correct that in all these cases the deceased were Sikh males. It is correct that Gurudwara Raj Nagar also came to notice during investigation and we visited there.** We had gone to Gurudwara for making inquiry. **I do not remember about the damage of Gurudwara.** In the statement of the witnesses it had come that houses were looted. I do not remember if any looted property was recovered. Details of looted property did of come to my notice therefore house of any accused could not be searched in that perspective. **During investigation it was revealed that some of the victims were burnt, some of them were half burnt and their postmortem was***

***conducted. I do not remember if in these five challans any postmortem was conducted or not. It is incorrect to suggest that a large number of murders were clubbed together illegally in FIR No. 416/84 to suppress the scale of crime. It is further incorrect to suggest that investigation conducted by us was a farce and the addresses of eye witnesses were not correctly given to give undue benefits to the accused persons****. It is further incorrect to suggest that I have deposed falsely under the influence and pressure of the accused. It is further incorrect to suggest that CBI had joined me in investigation on more than one occasion and my detailed statement was recorded on 19.06.2006."*

*(Emphasis supplied)*

41. We have merely noted the above portions of the testimony of two of the witnesses in SC No.26/10. This should not be construed as our having opined on the truth and veracity of this evidence. The above statements raise the question as to whether the prosecution made any effort to ensure that the best and available evidence was produced during trial in SC No.32/86 and whether the trial judge took any steps in this regard? We consider these questions hereafter.

***Whether this court has any jurisdiction to intervene in the judgments bearing SC No.31/86 dated 29th April, 1986; SC No.32/86 dated 17th May, 1986; SC No.11/86 dated 28th May, 1986; SC No.10/86 dated 15th July, 1986 and SC No.33/86 dated 4th October, 1986***

42. The judgments in SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86 have come to our knowledge while hearing appeals being Crl.Appeal Nos.715, 753, 831, 851, 861, 1099/2013 &

710/2014, in exercise of our jurisdiction under Section 386 of the Cr.P.C. *Prima facie* the judgments reflect a very perfunctory and hasty disposal of the cases which has deeply troubled our judicial conscience. Would it be permissible for this court to shut its eyes in the matter or does the available statutory regime and law make available any possible option for intervention at this stage? We are conscious that no order adverse to the interest of an accused person (who stands acquitted) or a victim can be passed without hearing him/her or behind his/her back. However, to exercise judicial power, a *prima facie* view has to be recorded to ensure whether such intervention could be justified and appropriate. For this reason, prior to issuance of notice, we have undertaken a prima facie examination of the statutory provisions as well as judicial precedents which, we set out hereunder.

*Statutory scheme*

43. Mr. R.S. Cheema, ld. Senior Counsel appearing for the CBI in Crl.A.No.715/2013 and the clubbed appeals, has drawn our attention to the scheme of the Code of Criminal Procedure. We find that Chapter XXX of the Cr.P.C. headed "*Reference and Revision*" contains Sections 395 to 405 which manifests the power of superintendence conferred on the High Courts over trials.

44. A perusal of Section 397 of the Cr.P.C. would show that, statutorily, concurrent power of revision is conferred on the

Court of Session as well as the High Court to call for and examine the record of any proceeding before any inferior Criminal Court situated within its or his local jurisdiction.

45. The legislature has also enacted an important piece of legislation by way of Section 401 of the Cr.P.C. conferring a plenary power on the High Court, the contours whereof we propose to consider hereafter. In this regard, first and foremost, we extract hereunder the provisions of Section 401 of the Cr.P.C. which suggests conferment, *inter alia*, of additional powers on the court of appeal while exercising jurisdiction under Sections 386, 389, 390 and 391 of the Cr.P.C. This statutory provision reads thus :

> *"**401. High Court's Powers of revisions.***
>
> *(1) **In the case of any proceeding** the record of which has been called for by itself or **which otherwise comes to its knowledge**, the **High Court** may, **in its discretion**, **exercise any of the powers conferred on a Court of Appeal** by sections 386, 389, 390 and 391 **or on a Court of Session** by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.*
>
> *(2) **No order under this section shall be made to the prejudice of the accused** or other person **unless he has had an opportunity of being heard** either personally or by pleader in his own defence.*
>
> *(3) **Nothing in this section** shall be deemed to **authorise a High Court to convert a finding of acquittal into one of conviction.***

*(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.*

*(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."*

*(Emphasis supplied)*

46. It is important to note that the discretion to exercise the power under Section 401 of the Cr.P.C. is conferred on the High Court which is exercising powers conferred on the "*Court of Appeal*" by virtue of Sections 386, 389, 390 and 391 of the Cr.P.C. We may therefore, also usefully extract the provisions of Section 386 of the Cr.P.C. which provides for powers of the Appellate Court and reads thus :

*"**386. Power of the Appellate Court.-** After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-*

*(a) **in an appeal from an order** or **acquittal**, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as*

*the case may be, or find him guilty and pass sentence on him according to law;*

*(b)* ***in an appeal from a conviction****-*

*(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or*

*(ii) alter the finding, maintaining the sentence, or*

*(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;*

*(c) in an appeal for enhancement of sentence-*

*(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or*

*(ii) alter the finding maintaining the sentence, or*

*(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;*

*(d) in an appeal from any other order, alter or reverse such order;*

*(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."*

*(Emphasis supplied)*

*Exercise of discretion under Section 401 of the Cr.P.C. – which is the court competent to do so?*

47. This court hearing Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/2013, 861/2013 and 710/2014 is exercising powers as a Court of Appeal under Section 386 of the Cr.P.C. The judgments of the sessions trials in SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86 have been brought to our notice during the hearings in these appeals. We find that on a bare reading of sub-section (1) of Section 401 of the Cr.P.C., discretion stands vested on this court to exercise any of the powers conferred on a Court of Appeal in respect thereof by Sections 386, 389, 390 and 391 or on a court of session by virtue of Section 307 of the Cr.P.C.

48. It is also noteworthy that the offences for which the persons were tried in the above Sessions cases included commission of the offences under Section 302 of the IPC which is punishable with life imprisonment or death penalty. In accordance with Rule 1(xx) in Part B of Chapter 3 titled "*Jurisdiction*" in Volume V of the Delhi High Court Rules, 1967 such appeals would have to mandatorily be heard by a bench comprising of more than one judge.

49. Crl.A.No.1099/2013 has been filed by the CBI challenging the judgment of acquittal of the accused in SC No.26/10. So far as an appeal against acquittal is concerned, it would also have to be heard by a bench comprising of more

than one judge, in accordance with the Delhi High Court Rules.

50. Therefore, in the present case, this Division Bench hearing the Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/2013, 861/2013, 1099/2013 and 710/2014 appears to stand empowered to exercise the power under Section 401 of the Cr.P.C. so far as the judgments in SC No.31/86 dated 29th April, 1986; SC No.32/86 dated 17th May, 1986; SC No.11/86 dated 28th May, 1986; SC No.10/86 dated 15th July, 1986 and SC No.33/86 dated 4th October, 1986 are concerned.

51. There is yet another reason supporting this. So far as the outcome of SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86 are concerned, the trials have culminated in judgments of acquittals of the accused persons. By virtue of the operation of the statutory provisions as well as Delhi High Court Rules also, if the appeals would have been filed by the State assailing these judgments, such appeals would also have to be laid before the Division Bench.

52. We are also supported the view we have taken on the question of the jurisdiction to invoke Section 401 of the Cr.P.C. from the scheme of sub-section 1 of the said Section which states thus :

> ***"401. High Court' s Powers of revisions.***
>
> *(1) ... the* ***Judges composing the Court of revision are equally divided in opinion****, the case shall be*

*disposed of in the manner provided by section 392. …"*

*(Emphasis by us)*

The legislature has therefore, contemplated exercise of this revisional power under Section 401 of the Cr.P.C. by a bench "*equally divided*" i.e. consisting of more than one judge. Clearly, revisional power under Section 401 is exercisable by a Bench of the High Court consisting of two judges.

53. It is noteworthy that sub-section 4 of Section 401 of the Cr.P.C. prohibits a revision at the instance of a party who could have filed an appeal also suggesting that the power under Section 401 be exercised *suo motu* by the court.

54. By virtue of sub-section 5 of Section 401 of the Cr.P.C., in case an application for revision is made to the High Court by any person under an erroneous belief that no appeal lay thereto, and it is found necessary in the interest of justice so to do, the High Court may treat the application for revision as a petition for appeal and deal with the same.

55. *Prima facie*, it therefore, appears that the present Division Bench hearing Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/2013, 861/2013, 1099/2013 and 710/2014 is competent to exercise revisional jurisdiction under Section 401 of the Cr.P.C. in respect of the judgments being SC No.31/86 dated 29th April, 1986; SC No.32/86 dated 17th May, 1986; SC No.11/86 dated 28th May, 1986; SC No.10/86 dated 15th July, 1986 and SC No.33/86 dated 4th October, 1986, the same

having been brought to our knowledge. This matter thus has to be heard by the Division Bench.

56. While recording this prima facie view, we make it clear that it shall be open to the persons effected hereby to raise jurisdictional objections. A final view shall be taken after hearing all concerned.

***Procedure for taking suo motu cognizance***

57. So what would be the procedure for exercise of the High Court's power? So far as the manner in which the High Court would exercise the power under Section 401 of the Cr.P.C. is concerned, the manner is provided in the statute itself. Sub-section 2 thereof clearly lays down that no order would be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by his pleader in his own defence. Therefore, the first and foremost step which has to be taken by the court would be to issue notice to all the necessary parties, especially, the person accused of the offence.

58. So far as the present case is concerned, prior to making an order permitting revision of an order, it is necessary to issue notice to the persons who have stood trial and afford them a reasonable opportunity of hearing either personally or by a pleader in accordance with sub-section (2) of Section 401 of the Cr.P.C.

59. Sub-section (3) of the statute clearly stipulates that the High Court has no power to convert a finding of acquittal into one of conviction.

***<u>When is the court to exercise jurisdiction under Section 401 of the Cr.P.C.?</u>***

60. So what are the contours of exercise of jurisdiction under Section 401 of the Cr.P.C.? Light is thrown on this issue in the pronouncement reported at ***(2013) 14 SCC 207, Venkatesan v. Rani & Anr.*** wherein the Supreme Court has observed thus :

> *"**7.** To answer the questions that have arisen in the present case, as noticed at the very outset,* ***the extent and ambit of the revisional jurisdiction of the High Court, particularly in the context of exercise thereof in respect of a judgment of acquittal, may be briefly noticed. The law in this regard is well settled by a catena of decisions of this Court. Illustratively, as also chronologically, the decisions rendered in Pakalapati Narayana Gajapathi Raju v. Bonapalli Peda Appadu [(1975) 4 SCC 477 : 1975 SCC (Cri) 543], Akalu Ahir v. Ramdeo Ram [(1973) 2 SCC 583 : 1973 SCC (Cri) 903], Mahendra Pratap Singh v. Sarju Singh [AIR 1968 SC 707 : 1968 Cri LJ 865] , K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788 : (1963) 1 Cri LJ 8] and Logendranath Jha v. Polai Lal Biswas [AIR 1951 SC 316 : (1951) 52 Cri LJ 1248] may be referred to.***
>
> ***8.** Specifically and for the purpose of a detailed illumination on the subject,* ***the contents of paras 8 and 10 of the judgment in Akalu Ahir v. Ramdeo Ram [(1973) 2 SCC 583 : 1973 SCC (Cri) 903] may be usefully extracted below****: (SCC pp. 587-88)*

*"8. ... This Court, however, by way of illustration, indicated the following* ***categories of cases*** *which would* ***justify the High Court*** *in* ***interfering with a finding of acquittal in revision****:*

*(i) Where the trial court has no jurisdiction to try the case, but has still acquitted the accused;*

*(ii) where the trial court has wrongly shut out evidence which the prosecution wished to produce;*

*(iii) where the appellate court has wrongly held the evidence which was admitted by the trial court to be inadmissible;*

***(iv) where the material evidence has been overlooked only (either) by the trial court or by the appellate court; and***

*(v) where the acquittal is based on the compounding of the offence which is invalid under the law.*

*These* ***categories*** *were, however, merely* ***illustrative*** *and it was clarified that other cases of similar nature can also be properly held to be of exceptional nature where the High Court can justifiably interfere with the order of acquittal.*

***

*10. No doubt, the appraisal of evidence by the trial Judge in the case in hand is not perfect or free from flaw and a court of appeal may well have felt justified in disagreeing with its conclusion, but from this it does* ***not follow that on revision by a private complainant, the High Court is entitled to reappraise the evidence for itself as if it is acting as a court of appeal and then order a retrial. It is unfortunate that a serious offence*** *inspired by rivalry and jealousy in the matter of election to the office of village Mukhia, should go unpunished. But that can scarcely be a valid ground for*

*ignoring or for not strictly following the law as enunciated by this Court."*

***9.*** *The observations in para 9 in* ***Vimal Singh v. Khuman Singh [(1998) 7 SCC 223 : 1998 SCC (Cri) 1574]*** *would also be apt for recapitulation and, therefore, are being extracted below: (SCC pp. 226-27)*

*"9. Coming to the* ***ambit of power*** *of the High Court* ***under Section 401*** *of the Code, the High Court in* ***its revisional power does not ordinarily interfere with judgments of acquittal passed by the trial court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the trial court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial court has no jurisdiction to try the case or where the trial court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked.*** *These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 401 mandates that the High Court shall not convert a finding of acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction.* ***No doubt, the High Court in exercise of its revisional power can set aside an order of acquittal if it comes within the ambit of exceptional cases enumerated above, but it cannot convert an order of acquittal into an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial."***

***10. The above consideration would go to show that the revisional jurisdiction of the High Courts while examining an order of acquittal is extremely narrow and ought to be exercised only in cases where the trial court had committed a manifest error of law or procedure or had overlooked and ignored relevant and material evidence thereby causing miscarriage of justice.*** *The reappreciation of evidence is an exercise that the High Court must refrain from while examining an order of acquittal in the exercise of its revisional jurisdiction under the Code.* ***Needless to say, if within the limited parameters, interference of the High Court is justified the only course of action that can be adopted is to order a retrial after setting aside the acquittal.*** *As the language of Section 401 of the Code makes it amply clear there is* ***no power*** *vested in the High Court* ***to convert a finding of acquittal into one of conviction.****"*

*(Emphasis by us)*

It needs no further elaboration that the above principles would guide the court's scrutiny of a case while considering whether discretion under Section 401 of the Cr.P.C. ought to be exercised or not.

***Meaning and purpose of a 'Fair Trial'***

61. In as much as jurisdiction under Section 401 Cr.P.C. must be invoked if there has not been a fair trial and miscarriage of justice has resulted, it becomes necessary to examine the legal principles laid down by the Supreme Court on the meaning of a "*fair trial*" and functioning of a prosecutor and the duties of the court to ensure the fair trial. Reference may been made to the pronouncement of the Supreme Court

reported at ***(2004) 4 SCC 158, Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.,*** commonly known as "*Best Bakery Case*" in this regard. The case relates to the incidents of violence which occurred between 8:30 pm on the 1st of March 2002 and 11:00 am of the 2nd of March 2002. During this period, an unruly mob of large people burnt out a business concern known as the Best Bakery at Vadodara. In this incident, 14 persons were killed. The attacks were alleged to be part of retaliatory action to avenge the killing of 56 persons who had been burnt to death in the Sabarmati Express. Zahira was the main eye-witness who lost two family members including women and children in this incident. Several other persons were also eye-witnesses to the violence. The perpetrators were arrayed as accused persons in the chargesheet which was filed in June, 2002.

62. During the trial, the persons examined as eye-witnesses, resiled from their previous statements recorded during investigation. Additionally, faulted and biased investigation as well as a "*perfunctory trial*" were said to have marred the sanctity of the process undertaken to bring the culprits guilty of the heinous offences to book. On the 27th of June 2003, the trial court acquitted the accused persons of commission of offences with which they were charged.

63. Zahira made a complaint before the National Human Rights Commission wherein she had stated that she had been threatened by powerful politicians not to depose against the

accused persons. The State filed an appeal on 7th of August 2003 against the judgment of the trial court which the Supreme Court observed, was not up to the mark and not in conformity with the required care. The NHRC moved the Supreme Court and its special leave petition was directed to be treated as writ petition under Article 32 of the Constitution of India. Additionally, Zahira along with an organization – Citizens for Justice and Peace filed a Crl.Rev.No.583/2003 before the High Court of Gujarat questioning the legality of the trial court judgment.

64. The State of Gujarat additionally filed applications under Sections 391 and 311 of the Cr.P.C. seeking permission to adduce additional evidence as well as for examination of certain persons. Another application was filed to bring on record a document and to treat the same as corroborative piece of evidence. By an order dated 27th June, 2003, the Gujarat High Court upheld the judgment of the trial court and also rejected the prayers made in the two applications. This order was the subject matter of the challenge before the Supreme Court.

65. One of the main grounds urged by the State and Zahira in support of the prayer for fresh trial before the High Court was that *when a large number of witnesses have turned hostile, it should have raised a reasonable suspicion in the mind of the court that the witnesses were being threatened or coerced; that the public prosecutor did not take step to protect the star*

*witness* who was to be examined on 17th May, 2003 *specially when four out of all the injured witnesses had resiled* on 9th May, 2003 *from their previous statements made during investigation*; that Zahira, the main witness had specifically stated on affidavit about the threat given to her and the reason for her not coming out with the truth during her examination before the court on 17th May, 2003. It was further contended that the *public prosecutor had not acted in a manner befitting the position held by him and that he did not request the trial court for holding the trial in camera when a large number of witnesses were resiling from their statements made during investigation*.

66. It was also contended that *failure to exercise powers under Section 311 of the Cr.P.C. to recall and re-examine the witnesses* as their evidence was essential to arrive at the truth and just decision in the case *as well as power under Section 165 of the Indian Evidence Act, had led to miscarriage of justice*.

67. The judgment of the Supreme Court notes the manner in which one eye-witness, whose statement was recorded by the policeman on 4th March, 2002 disclosing the names of the accused persons, was sought to be examined before the trial court. Summons were issued to this eye-witness on 27th April, 2003 for examination on 9th May, 2003 which could not be served on the ground that he had left for his native place in Uttar Pradesh. Therefore, summons were issued on 9th June,

2003 for recording his evidence on 10th June, 2003 giving only one day's time to him to appear. When these could not be served, summons were issued on 13th June, 2003 for him to remain present before the court on 16th June, 2003. This could also not be served for the same reasons. Ultimately, the public prosecutor prayed for dropping him as a witness which was granted by the trial court.

68. Another important witness, namely, Sahejad Khan Hasankhan was not examined by the prosecutor on the ground that he was of unsound mind. Though the witness was present, the public prosecutor dropped him on the ground that he was not mentally fit to depose. The Supreme Court had observed that when such an application was made by the prosecution for dropping him on the ground of mental deficiency, it was the duty of the ld. trial court to at least make some minimum efforts to find out as to whether he was actually of unsound mind or not by getting him examined by a Civil Surgeon or a doctor from psychiatric department. It was observed that this witness was injured and was unconscious between 2nd to 6th March, 2002. However, when he regained consciousness, his statement was recorded on 6th March, 2002 in which he gave names of four accused persons i.e. A-5, A-6, A-8 and A-11. It is noteworthy that this witness filed an affidavit in the Supreme Court in a pending matter narrating the whole incident.

69. In the case of yet another witness, namely, Shailun Hasankhan Pathan summons were issued on 9th June, 2003

requiring his presence on 10th June, 2003, one day later, which could not be served upon him. He disclosed the names of three accused persons i.e. A-6, A-8 and A-11. This witness was also treated of deficient mind without any material and without taking any effort to ascertain the truth or otherwise of such serious claims. Other injured eye-witnesses were similarly not examined before the trial court. These different witnesses filed affidavits before the Supreme Court highlighting as to how and why they have been unfairly kept out of trial.

70. Before the Supreme Court, Zahira had contended that there was "*no fair trial and the entire effort during trial and at all relevant times before also was to see that the accused persons got acquitted*".

71. In para 11 of ***Zahira Habibulla H. Sheikh***, the Supreme Court notes that this shows that "*both the public prosecutor as well as the court were not only oblivious but also failed to discharge their duties*". On a consideration of these petitions, in para 18 of ***Zahira Habibulla H. Sheikh***, the Supreme Court observed thus :

> ***"18. ... When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim****."*
>
> *(Emphasis by us)*

72. In paras 30 to 33 of ***Zahira Habibulla H. Sheikh,*** it was held thus :

> *"**30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts**. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.*
>
> ***31. In 1846, in a judgment which Lord Chancellor Selborne would** later describe as "one of the **ablest judgments** of one of the ablest judges who ever sat in this court", Vice-Chancellor Knight Bruce said [Pearse v. Pearse(1846), 1 De G&Sm. 12 : 16 L.J. Ch. 153 : 63 ER 950 : 18 Digest (Repl.) 91, 748] :*
>
> > *"**The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice**; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, **cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them**. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination… **Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much**."*

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

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

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

***33.** The **principle of fair trial** now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the*

*nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."*

*(Emphasis by us)*

73. On a consideration of the above facts and circumstances, in ***(2004) 4 SCC 158, Zahira Habibullah,*** the Supreme Court directed a *de novo* trial of the whole case and appointment of a special prosecutor with the consultation of the victims in the following terms :

***"73.*** *... This appears to be a case where the* ***truth has become a casualty*** *in the trial. We are satisfied that it is a* ***fit and proper case****, in the background of the* ***nature of additional evidence*** *sought to be adduced and the* ***perfunctory manner of trial*** *conducted on the basis of* ***tainted investigation a retrial is a must*** *and* ***essentially called for in order to save and preserve the justice-delivery system*** *unsullied and unscathed by vested interests. We should not be understood to have held that whenever additional evidence is accepted, retrial is a necessary corollary.* ***The case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence****. It is normally for the appellate court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on the facts of this case, the direction for retrial becomes inevitable.*

*xxx* *xxx* *xxx*

> ***75.*** *Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system with no congenial and conducive atmosphere still prevailing, we direct that* ***the retrial*** *shall be done by a court under the jurisdiction of the Bombay High Court. The Chief Justice of the said High Court is requested to fix up a court of competent jurisdiction."*
>
> *(Emphasis supplied)*

74. The principles laid down in *Zahira Habibulla H. Sheikh* were reiterated by the Supreme Court in ***(2005) 1 SCC 115, Satyajit Banerjee & Ors. v. State of W.B. & Ors.*** it has been held that exercise of revisional jurisdiction for retrial at the instance of the complainant and direction for retrial should not be made in all or every case where acquittal of the accused is for want of adequate evidence. In the ***Best Bakery Case***, the first trial was found to be a farce and was described as "*mock trial*". Therefore, the direction for retrial was, in fact, for a real trial. In this regard, the observation of the Supreme Court in paras 25 to 27 deserve to be considered in *extenso* and read thus :

> ***"25.*** *Since strong reliance has been placed on Best Bakery case [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] (Gujarat riots case) it* ***is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary***

***circumstances that the court not only directed a de novo trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat****.*

***26.*** *The law laid down in* ***Best Bakery case*** *[(2004) 4 SCC 158 : 2004 SCC (Cri) 999] in the aforesaid extraordinary circumstances,* ***cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence****. In Best Bakery case [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] the* ***first trial was found to be a farce*** *and is described* ***as*** *"****mock trial****". Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in Best Bakery case[(2004) 4 SCC 158 : 2004 SCC (Cri) 999] .*

***27. So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial****."***

*(Emphasis by us)*

75. It has therefore, been stated that while exercising revisional power by the High Court, evidence already on record as well as additional evidence recorded on the retrial has to be read. However, in extraordinary and extreme cases as illustrated by the *Best Bakery Case****, (2004) 4 SCC 158****,* if the

first trial is found to a farce and a "*mock trial*", directions for a complete retrial, which would be the real trial, can be made.

76. The following observation of the Supreme Court in the three Judge Bench pronouncement reported at ***(2012) 4 SCC 516, Ratti Ram & Ors. v. State of Madhya Pradesh*** are also illuminating :

> ***"39.*** *... Fundamentally, a* ***fair and impartial trial*** *has a sacrosanct purpose. It has a* ***demonstrable object*** *that the* ***accused should not be prejudiced****. A* ***fair trial*** *is required to be* ***conducted*** *in* ***such a manner*** *which would* ***totally ostracise injustice, prejudice, dishonesty and favouritism***.
>
> *xxx* *xxx* *xxx*
>
> ***62.*** *... Decidedly, there has to be a fair trial and* ***no miscarriage of justice*** *and under no circumstances,* ***prejudice should be caused to the accused*** *but, a pregnant one,* ***every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair****. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."*
>
> *(Emphasis by us)*

77. The Supreme Court has extensively discussed the law on the subject including the above precedents in the judgment reported at ***(2015) 8 SCC 787, Bablu Kumar & Ors. v. State of Bihar & Anr.*** In this case, the informant had lodged an FIR on 29th November, 2004 at police station Tikari at 8:00 pm that the accused persons came armed with various weapons and

took away her husband Brahamdeo Yadav, the deceased, and threatened the family members not to come out from their house. The deceased was taken towards the house of Krishna Yadav and he was found dead the next morning having several injuries. So far as motive for committing the crime was concerned, it was alleged that litigation between the two sides was the cause of the offence. The investigating officer submitted a chargesheet for commission of offences under Sections 147, 148, 149, 341, 342 and 302 of the IPC. The chargesheet was registered as Sessions Trial No.350/2006. Charges were framed on the 10th of August 2007 against the accused persons. Summons were issued to the witnesses on 17th August, 2007. As even the informant did not appear on 5th December, 2007, non-bailable warrants were issued against her. The ld. trial judge recorded on various dates that the witnesses were not present. Finally, an order dated 17th May, 2008 was passed directing the matter to be posted on 23rd May, 2008 for orders under Section 232 of the Cr.P.C. On this date, the court recorded the judgment of acquittal.

78. Against this judgment, the informant preferred a revision petition being Crl.Rev.No.919/2008. Noting that there was no service report or report of execution of warrant of arrest against the informant; no service report on record showing service of summons on other witnesses or execution of the bailable or non-bailable warrants against the witnesses, it was observed that the police had not taken steps to produce the evidence and

that the ld. trial judge had also not taken effective steps for production of the witnesses and tried to conclude the trial without being alive to the duties of the trial court.

79. The ld. Single Judge of the High Court opined that there has been no fair trial and consequently remanded the matter for re-trial by the High Court. This judgment was assailed before the Supreme Court of India and culminated in the judgment reported as above.

80. We find that in ***Bablu Kumar,*** the Supreme Court has placed reliance on further precedents with regard to the concept of fair trial and summed up the principles thus :

> ***"19.*** *In this regard, it is apt to reproduce a passage from Natasha Singh v. CBI[(2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828] wherein it has been laid down: (SCC p. 749, para 16)*
>
> > *"16.* ***Fair trial*** *is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner.* ***Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned,*** *and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised."*
>
> ***20.*** *In* ***J. Jayalalithaa v. State of Karnataka*** *[(2014) 2 SCC 401 : (2014) 1 SCC (Cri) 824] the Court dealing with the concept of a fair trial has opined that: (SCC pp. 414-15, para 29)*
>
> > *"29.* ***Denial of a fair trial*** *is as much* ***injustice to the accused*** *as is to* ***the victim and the society****. It necessarily requires a trial before an impartial Judge,*

*a fair prosecutor and an atmosphere of judicial calm. Since the* ***object of the trial 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. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution****."*

***21.*** *The* ***same principle*** *has also been* ***stated*** *in NHRC v. State of Gujarat [(2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44] , State of Karnataka v. K. Yarappa Reddy[(1999) 8 SCC 715 : 2000 SCC (Cri) 61] , Ram Bali v. State of U.P. [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045] , Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977] and Dayal Singh v. State of Uttaranchal [(2012) 8 SCC 263 : (2012) 4 SCC (Civ) 424 : (2012) 3 SCC (Cri) 838 : (2012) 2 SCC (L&S) 583]."*

*(Emphasis by us)*

81. These statutory principles have to guide our consideration.

***<u>Duty of the court</u>***

82. At the same time, the Supreme Court has repeatedly commented on the duty of the court. We extract two illuminating judicial precedents hereafter.

83. In ***(2015) 8 SCC 787, Bablu Kumar & Ors. v. State of Bihar & Anr.,*** the Supreme Court has stated as follows :

***"22*** *Keeping in view the* ***<u>concept of fair trial</u>****,* ***the obligation of the prosecution, the interest of the***

***community*** *and the* ***duty of the court****, it can irrefragably be stated that the* ***court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding****. They* ***cannot expropriate*** *or hijack the* ***community interest by conducting themselves*** *in such a* ***manner*** *as* ***a consequence*** *of* ***which the trial becomes a farcical one****. The* ***law does not countenance*** *a "****mock trial****". It is a* ***serious concern of society****.* ***Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses.*** *The* ***Public Prosecutor who conducts the trial has a statutory duty to perform. He cannot afford to take things in a light manner****.* ***The court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial****.*

***23.*** *In the case at hand,* ***it is luculent that the High Court upon perusal of the record has come to hold that the notices were not served on the witnesses****. The agonised widow of the deceased was compelled to invoke*

*the revisional jurisdiction of the High Court against the judgment of acquittal as* ***the trial was closed after examining a formal witness.*** *The order passed by the High Court by no stretch of imagination can be regarded as faulty. That being the position, we have no speck of doubt in our mind that the* ***whole trial is nothing but comparable to an experimentation conducted by a child in a laboratory. It is neither permissible nor allowable****. Therefore, we unhesitatingly affirm the order passed by the High Court as we treat the view expressed by it as unexceptionable, for by its order it has* ***annulled an order which was replete with glaring defects that had led to the miscarriage of justice****."*

*(Emphasis by us)*

84. In paras 38 and 39 of the judgment reported at ***(2004) 4 SCC 158, Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.,*** also the Supreme Court held thus :

> ***"38. 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****.*

> ***39.*** *Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence.* ***Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.***
>
> ***40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.****"*
>
> *(Emphasis by us)*

85. On the aspect of duty of the court, the relevant paras of the judgment of the Supreme Court reported at ***(2004) 4 SCC 158, Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.*** are reproduced thus :

> ***"42.*** *Legislative measures to emphasise prohibition against* ***tampering with witness, victim or informant*** *have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with.* ***There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the***

***individual accused. In this courts have a vital role to play.***

***43. 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 wide 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.***

***44. The power of the court under Section 165*** *of the Evidence Act is in a way* ***complementary to its power under Section 311*** *of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the* ***mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court.*** *Though the discretion given to the court is very wide, the very width requires a corresponding caution.*

*In Mohanlal v. Union of India [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "**any court**", "**at any stage**", or "**any enquiry or trial or other proceedings**", "**any person**" and "**any such person**" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, **the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code.** The second part of the section does not allow any discretion but **obligates and binds the court to take necessary steps** if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. **Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case.** 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.*

***45.** 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 request 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.*

***46.*** *Ultimately, as noted above,* ***ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code*** *does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a* ***power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage*** *to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.*

*xxx xxx xxx*

***54.*** *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 stages 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.***

***55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.***

***56.*** *As pithily stated in* ***Jennison v. Baker [(1972) 1 All ER 997 : (1972) 2 QB 52 : (1972) 2 WLR 429 (CA)]*** *: (All ER p. 1006d)*

> *"**The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope**."*

*Courts have to ensure that accused persons are punished and that the might or authority of the State*

*are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large.* ***If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918] .)***

*xxx xxx xxx*

***61. In the case of a defective investigation the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977] )***

***62. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104 (para 8)] it was held that if the lapse or omission is committed by the investigating agency designedly or because of negligence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 of the Code and***

> ***Section 165 of the Evidence Act*** ***at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty***.
> ***63.*** *As was observed in* ***Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085****] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice in the hands of courts. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641].''*
>
> *(Emphasis by us)*

86. So far as analysis of the manner in which the trial court in ***Zahira Habibullah (2004) 4 SCC 158*** had proceeded in issuing summons one day before the date of hearing and thereby making it must for witnesses to depose and also overlooking the pressure created leading to witnesses turning hostile before the trial court are concerned, the following observations of the Supreme Court are extremely important which read thus :

> ***"68.*** *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 a 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****.*

***69.*** *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.*

***70.*** *In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act, it has to be seen as to whether the High Court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecuting agencies and the trial court, as well. There are several infirmities which are telltale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a retrial of the case.* ***There was no reason for the High Court to come to further conclusion of its own about false implication without concrete basis and that too merely on conjectures****. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and out-turn of events can equally be not ruled out.* ***When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted at this stage that the High Court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion****."*

*(Emphasis by us)*

87. The Supreme Court also criticised the High Court in ***Zahira Habibullah*** for its finding that some of the witnesses were not present and, therefore, question of their statement being recorded by the police did not arise and that the

statements under Section 161 of the Code were recorded in Gujarati language though the witnesses did not know Gujarati. The Supreme Court has also faulted the finding of the High Court that the witnesses were not present for the reason that their statements under Section 161 did not exist. In this regard, the following observations of the Supreme Court shed valuable light on the similar issue under consideration :

> ***"71. …****The reasoning is erroneous for more reasons than one. There was no material before the High Court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not a literate to read and write. Additionally, it is not a requirement in law that the statement under Section 161 of the Code has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 of the Code. Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the police officer concerned. Sub-section (3) is relevant, and it requires the police officer to reduce to writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.* ***Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the section is a***

***truthful disclosure by the person who is examined. In the above circumstances the conclusion of the High Court holding that the persons were not present is untenable. The reasons indicated by the High Court to justify non-examination of the eyewitnesses is also not sustainable. In respect of one it has been said that whereabouts of the witness may not be known. There is nothing on record to show that the efforts were made by the prosecution to produce the witness for tendering evidence and yet the net result was "untraceable". In other words, the evidence which should have been brought before the Court was not done with any meticulous care or seriousness. It is true that the prosecution is not bound to examine each and every person who has been named as witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in the court. There was no such material brought to the notice of the courts below to justify non-examination. The materials on record are totally silent on this aspect****. …"*

*(Emphasis by us)*

88. So far as the role of the prosecutor is concerned, in para 71 of ***Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. (2004) 4 SCC 158***, the Supreme Court has made the following observations :

*"71. … **Role of the Public Prosecutor** was also not in line with what is expected of him. Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. Time and again, this Court stressed upon the need of the investigating officer being present during trial unless*

*compelling reasons exist for a departure. In the instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even the Public Prosecutor does not appear to have taken note of this desirability. In* ***Shailendra Kumar v. State of Bihar [(2002) 1 SCC 655*** *: 2002 SCC (Cri) 230 : (2001) 8 Supreme 13] it was observed as under: (SCC pp. 657-58, para 9)*

> *"9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the court and by the* ***APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not taken any interest in discharge of their duties****. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case.* ***The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in a lurch****."*
>
> *(Emphasis by us)*

89. So far as the affidavit regarding threat from powerful persons meriting re-examination of the witnesses in ***Zahira Habibullah*** is concerned, the uniqueness of the circumstances

and the trial have been discussed in para 73 of the judgment in the following terms :

> ***"73. So far as non-examination of some injured relatives*** *is concerned, the High Court has held that in the absence of any medical report, it appears that they were not present and, therefore, held that the prosecutor might have decided not to examine Yasminbanu because there was no injury. This is nothing* ***but a wishful conclusion based on presumption.*** *It is true that merely because the affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances as in this case clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to the background of events as happened, the appropriate course for the courts would be to admit additional evidence for final adjudication so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly and legally tested in the context of probative value of the two versions. There cannot be a straitjacket formula or rule of universal application when alone it can be done and when, not. As the provisions under Section 391 of the Code are by way of an exception, the court has to carefully consider the need for and desirability to accept additional evidence. We do not think it necessary to highlight all the infirmities in the judgment of the High Court or the approach of the trial court lest nothing credible or worth mentioning would remain in the process.* ***This appears to be a case where the truth has become a casualty in the trial. We are satisfied that it is a fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation a retrial is a*** *must*

*and essentially called for in order to save and preserve the justice-delivery system unsullied and unscathed by vested interests.* ***We should not be understood to have held that whenever additional evidence is accepted, retrial is a necessary corollary***. *The* ***case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence***. *It is normally for the appellate court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on the facts of this case, the direction for retrial becomes inevitable."*

*(Emphasis by us)*

90. In para 9 of the judgment of the Supreme Court reported at ***(1984) 4 SCC 533, Sunil Kumar Pal v. Phota Sheikh***, it was held thus :

> *"9. ... It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law."*

91. In ***(2006) 3 SCC 374 Zahira Habibullah Sheikh (5) & Anr. v. State of Gujarat & Ors.***, the Supreme Court has succinctly stated the principles on which the conduct of trial must be evaluated thus :

> *"**38. Failure to accord fair hearing either to the accused or the prosecution** violates **even minimum standards of due process of law**. It is inherent in the concept of due process of law, that condemnation should be rendered only after the **trial in which the hearing is a real one**, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be **vitiated and violated by an over hasty stage-managed, tailored and partisan** trial.*
>
> ***39.** The fair trial for a criminal offence consists not only in technical **observance of the frame, and forms of law**, but also in **recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice**."*
>
> *(Emphasis supplied)*

92. So far failure to produce vital witnesses by prosecution adversely impacting the outcome of trials is concerned, in ***(2006) 3 SCC 374 Zahira Habibullah Sheikh (5) & Anr. v. State of Gujarat & Ors.***, the Supreme Court has observed thus:

> ***"40.** "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations*

*at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in Dhanaj Singh v. State of Punjab [(2004) 3 SCC 654 : 2004 SCC (Cri) 851 : JT (2004) 3 SC 380] . It was observed as follows: (SCC p. 657, paras 5-7)*

> *"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977] )*

> *6. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.*
>
> *7. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641]."*

93. A *prima facie* consideration of the composite challan dated 25th March, 1985 indicates lip service to the duty to investigate while the judgments in SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86 reflect no steps or compliance with Sections 62, 64, 65, 87 and 311 of the Cr.P.C. as well as Section 165 of the Indian Evidence Act, 1872 and haste to scuttle prosecutions and close trials.

94. The complaints which were the basis of the trials in SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86, refer to the incidents on 1st and 2nd November, 1984, all in the Raj Nagar

referable to the police post Palam Colony under Police Station Delhi Cantt. They were investigated by the same police officials. A consolidated final report dated 25th March, 1985 under Section 173 of the Code of Criminal Procedure was filed in court. It is undisputed that after committals and framing of charges, the trials in these cases culminated within a short period of three to four months and the final outcome was acquittal of the accused persons from the charges.

95. Even if each complaint could be examined as a standalone crime, it is undisputed that each of them relates to the very serious offence of commission of murder. Some of the accused persons are implicated for commission of more than one such offence. Would these crimes fall in the category where truth has become a casualty at the hands of investigator, prosecutor and in the trial?

***Passage of time – whether could impact exercise of revisional powers of the High Court under Section 397 of the Cr.P.C.***

96. In ***(1981) 2 SCC 758, Municipal Corporation of Delhi v. Girdharilal Sapuru & Ors.,*** the magistrate acquitted the respondent accused in a food adulteration case relying upon a Supreme Court decision. The MCD preferred a revision petition to the High Court of Delhi. By the time, the High Court heard the matter, the decision which had been relied upon by the High Courts stood overruled by the Supreme

Court. However, the High Court was of the view that the revision petition which had been filed by the MCD was barred by the limitation on account of delay in refiling after removing the objections of the Registry. The Supreme Court held that the High Court was in error in dismissing the revision petition filed by the MCD. The Supreme Court observed that even under Section 397 of the Cr.P.C., the High Court was enabled to exercise the power of revision *suo motu*.

97. So far as the restriction of exercise of power on a technical ground of delay or limitation is concerned, we extract hereunder the observations of the Supreme Court in para 5 of ***(1981) 2 SCC 758, Municipal Corporation of Delhi v. Girdharilal Sapuru & Ors.,*** which shed valuable light on the consideration of the scope and contours of exercise of revisional jurisdiction thus :

> ***"5.*** *... Without going into the nicety of this too technical contention, we may notice that* ***Section 397 of the Code of Criminal Procedure enables the High Court to exercise power of revision suo motu and when the attention of the High Court was drawn to a clear illegality the High Court could not have rejected the petition as time barred thereby perpetuating the illegality and miscarriage of justice.*** *The question whether a discharge order is interlocutory or otherwise need not detain us because it is settled by a decision of this Court that the* ***discharge order terminates the proceeding and, therefore it is revisable under Section 397(1), CrPC and Section 397(1) in terms confers power of suo motu revision on the High Court, and if the High Court exercises suo motu revision power the same***

***cannot be denied on the ground that there is some limitation prescribed for the exercise of the power because none such is prescribed. If in such a situation the suo motu power is not exercised what a glaring illegality goes unnoticed can be demonstrably established by this case itself.*** *We, however, do not propose to say a single word on the merits of the cause because there should not be even a whimper of prejudice to the accused who in view of this judgment would have to face the trial before the learned Magistrate."*

*(Emphasis by us)*

98. A very interesting question arose for consideration before the High Court in the judgment reported at ***AIR 1962 SC 1530, State of Kerala v. Narayani Amma Kamala Devi & Ors.*** The accused stood convicted on a charge of theft by the magistrate and his appeal to the Sessions Court was unsuccessful. Unfortunately, the accused Gobindankutty Nair died within a few hours of the pronouncement of the judgment. His widow and two minor sons presented an application under Section 439 (presently Section 401 of the Code of Criminal Procedure, 1973) in the High Court of Judicature of Kerala against the Sessions Court judgment praying that the order recording the sale proceeds of the car of the accused which had been seized during investigation be set aside. The High Court rejected the application for revision as not maintainable, the accused having died, however, granting a certificate under Article 134(1)(c) of the Constitution certifying that the case was fit for appeal. The Supreme Court considered the

distinction between the provisions of the Cr.P.C., as applicable to a criminal appeal, and the revisional jurisdiction under the Cr.P.C. It was observed that so far as an appeal is concerned, upon the death of the convicted person, by virtue of Section 431 of the Cr.P.C. (presently Section 394 of the Code of Criminal Procedure, 1973), the appeal abates on the death of the appellant. However, there was no such provision guiding consideration of the revision which was an important distinction between the exercise of appeal and revisonal jurisdiction.

99. It was noted in para 6 of ***Narayani Amma Kamala Devi*** that the appeal must be preferred by a convicted person which was a condition for exercise of the power. This condition was conspicuous by its absence so far as the exercise of revisional power is concerned as Section 439 of the Cr.P.C. mandates that in case of any proceedings, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, the "*revisional jurisdiction can be exercised by the High Court by being moved either by the convicted person himself or by any other person or suo motu, on the basis of its own knowledge derived from any source whatsoever without being moved by any person at all. All that is necessary to bring the High Court's powers of revision into operation is: such information as makes the High Court think that an order made by a subordinate court is fit for the exercise of its powers of revision*".

100. In para 7, it was clearly laid down that in a proper case, the High Court can exercise its power of revision of an order made against an accused person even after his death.

It is therefore, well settled that revisional jurisdiction of this court is exceptional and wide and would be exercised to secure ends of justice.

***Prima facie observations***

101. Even at the cost of repetition, we hasten to add that we are not commenting on the correctness of the evidence of Nirpreet Kaur as PW-10 or that of Shri Ashok Kumar Saxena (DW-10) in SC No.26/10 or the legal acceptability of her explanation. We may note here that a strong objection is taken by Mr. R.N. Sharma and Mr. Anil Kumar Sharma, ld counsels for the appellants in Crl.A.Nos.851/2013 and Crl.A.No.1099/2013 to the testimony of Nirpreet Kaur (DW-10) on the fact that she has surfaced and made the allegations for the first time in the case only in the year 2011 when her evidence had been recorded during trial in SC No.26/10 by the trial court and that she deserved to be disbelieved for this reason. We shall rule on this after hearing counsels in Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/2013, 861/2013, 1099/2013 and 710/2014. These are amongst the several aspects on merits which we shall consider in the appropriate proceedings.

102. We have extracted the testimony of Nirpreet Kaur (PW-10) and of Shri Ashok Kumar Saxena (DW-4) only to point out that the prosecution in SC No.32/86 was bound to bring out the truth. However, the responsibility to do so did not rest only on or end with the prosecution. It was the statutory duty of the court as well conducting the trial and actively engaged with the proceedings to ensure that the truth is brought out and the justice is done.

103. The instant case manifests that after giving three dates, which were separated by barely a few weeks, there was a total period hardly of one and a half months, for service of the two eye-witnesses including the complainant to the occurrence. It was brought out on record that the complainant's own house stood burnt; that she was not available at that address; that the summons sent by the court had not been served on her as per para 9 of the judgment dated 17th May, 1986, no effort was made by the trial court for causing an inquiry to be made with regard to her address and serving her even with summons let alone taking the coercive action by way of bailable or non-bailable warrants to enforce the presence of a witness.

104. Persons have come forward as eye-witnesses and have given their testimony in SC No.26/10. Upon consideration of the principles laid down by the Supreme Court in ***(2004) 4 SCC 158, Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.*** and ***(2015) 8 SCC 787, Bablu Kumar & Ors. v. State of Bihar & Anr.,*** *prima facie* it appears that the present

case is fit to invoke the revisional power by this court under Section 401 of the Cr.P.C. to thereby set aside the impugned judgment and direct a retrial of the case.

***Investigation – whether any undertaken?***

105. A perusal of the above composite chargesheet/final report under Section 173 of the Cr.P.C. dated 25th March, 1985 would show that the bare essential requirements of an investigation into any of the complaints do not appear to have been carried out before its filing. It is not disclosed as to on whose instance the site plan was prepared and what were the photographs taken of? No effort has been made to trace out either the dead bodies or the stolen materials. No statement of the eye-witnesses, including relatives or any other neighbours or other public persons who may have been present has been recorded. To say the least, the bare notions of investigation do not seem to have been carried out before the challan has been filed.

106. What to say of investigation, the complaints which disclosed commission of the heinous and serious offence like murder, have not even been registered.

107. The prosecutors also appear to have completely abdicated their duties and have not assisted the trial courts nor ensured that the truth was brought out, guilty convicted and serious crimes punished. The prosecutions were launched

without any effort at ensuring that investigations were honestly complete and that culpability could be fixed.

108. During the course of hearing Crl.A.Nos.715/2013, 753/2013, 831/2013, 851/201, 861/2013, 1099/2013 and 710/2014, we have repeatedly queried counsels as to who was killed, or even how many died in the violence which erupted after the 31st of October, 1984? We have got no firm answer at all. The complaints in SC No. 10/86 (*lodged by Daljit Kaur*); 11/86 (*lodged by Swaran Kaur –widow*); 31/86 (*lodged by Jagir Kaur – widow*); 32/86 (*lodged by Sampuran Kaur – widow*) and 33/86 (*lodged by Baljit Kaur – daughter*) show that only adult male members of families of one community were killed. The complaints disclose horrifying crimes against humanity. The complaints also point out that male members of one community were singled out for elimination. This suggests that these were no ordinary crimes, or '*simple'* murders (if ever a murder could be termed as '*simple'*). Treated as individual cases, while the culprits got away scot free, everybody else, the police, the prosecutors, even the courts, appear to have failed the victims, and, most importantly society. Perhaps, had these terrible offences in 1984 been punished and the offenders brought to book, the history of crime in this country, may have been different. We are of the view that if we fail to take action even now, we would be miserably failing in our constitutional duty as well as in discharging judicial function.

109. We have crafted this order with care and circumspection merely noting bare facts, proceedings and orders brought to our knowledge, as well as statutory provisions and judicial precedents, conscious of the first principle that no person can be "*condemned*" unheard. However, this order under Section 401 of the Cr.P.C. must show that we have applied our mind and *prima facie* found that material and circumstances as well as the law mandates invocation of our revisional jurisdiction under Section 401 of the Cr.P.C. before issuance of notice. We have abided by this discipline required by law. We, therefore, make it clear that all our observations hereinabove are a *prima facie* consideration. Nothing herein contained is a final view in the matter which would be taken after hearing the respondents.

110. Given the manner in which the Delhi Police appears to have conducted itself and the failure of the prosecution in performing its basic functions, we are of the view that independent assistance is needed by this court for consideration of the case.

***Whether the victim and complainant should be heard***

111. In the present case, the composite final report dated 25th March, 1985 admits that it commenced intervention only on complaints made by relatives of deceased who were also victims of the violence. They had complained of having faced threats and their property being stolen or destroyed. We have extracted hereinabove the composite final report under Section

173 of the Cr.P.C. regarding the five complaints setting out the nature of investigation undertaken on their complaints and the final judgments after the trials which suggest insufficient effort, if any made, to ensure the appearance of the complainants before the court.

112. In this background, would it not be appropriate to array the complainants as party respondents and give them an opportunity of being heard on the notice which we are proposing to issue? We are of the view that interests of justice merit that the complainant would have a right to be heard and ought to be afforded an opportunity of hearing in this revision. We have consequently arrayed the complainant in SC No.32/86 as party respondent No.6 hereinabove. Upon appearance, it shall be ascertained as to whether the complainant – respondent no.6 deserve to be assigned counsel by the Delhi High Court Legal Services Committee to ensure effective representation.

In case, the other private respondents have an objection to the representation of the complainant in the present matter, we shall hear them on such objections as well.

113. We make it clear that nothing herein contained is an expression of opinion on the merits of the case. However, the order under Section 401 must show that we have applied our mind and that there is material and circumstances exist for invoking our revisional jurisdiction under Section 401 of the

Cr.P.C. before taking a view in this matter. We shall abide by this discipline by law.

***Directions***

114. We accordingly direct as follows :

(i) Let this order be registered as a petition under Section 401 of the Cr.P.C.

(ii) Issue notice without process fee to private respondent nos.1 to 4 as well as the State – respondent No.5 to show cause as to why the judgment dated 17th May, 1986 in SC No.32/86 premised on the composite chargesheet dated 25th March, 1985 based *inter alia* on the complaint dated 18th November, 1984 of Smt. Sampuran Kaur (clubbed with FIR No.416/84, P.S. Delhi Cantt.), be not set aside and a retrial/fresh trial be directed by this court in exercise of its revisional powers under Section 401 of the Cr.P.C.

(iii) Issue notice without process fee to private respondent nos. 1 to 4 as well as the State – respondent no.5 to show cause as to why this court not direct fresh/further investigation into the complaint of Smt. Sampuran Kaur by an independent agency as the Central Bureau of Investigation.

(iv) The address of the complainant – respondent no. 6 shall be ascertained by the State and the same shall be filed in the Registry within two weeks from today.

(v) Subject to the compliance with the above directions, court notice without process fee shall be issued for the service of complainant – respondent no. 6.

(vi) Compliance with the above directions shall be got ensured by the Commissioner, Delhi Police.

(vii) A copy of the composite final report dated 25th March, 1985 filed by the Delhi Police in SC Nos.10/86, 11/86, 31/86, 32/86 and 33/86 (placed by CBI on the record of Crl.A.No.1099/2013) and a copy of the judgment dated 17th May, 1986 in SC No.32/86 shall be placed in the file along with the present order.

(viii) For the reasons set out above, we appoint Mr. P.K. Dey, Advocate as *Amicus Curiae* in this matter.

(ix) The Registry shall ensure that a complete paper book is made available to the *Amicus Curiae*.

(x) It shall be the responsibility of the Delhi High Court Legal Services Committee to pay the fees of the *Amicus Curiae* which are quantified at ₹50,000/-.

(xi) All notices shall be returnable on 20th April, 2017.

**GITA MITTAL, J**

**ANU MALHOTRA, J**

**MARCH 29, 2017**
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