

**THE BEST BAKERY CASE: IS OUR CRIMINAL JUSTICE
DELIVERY SYSTEM BEST?**

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1. THE BEST BAKERY ' ON FIRE'

On February 27, 2002, Gujarat witnessed a ghastly inhuman act when fifty nine persons, mostly 'tor sevaks'¹ returning from Ayodhya, traveling in the *Sabarmati Express* were burnt to death by a mob¹ of about 1000 persons, mostly Muslims, at Godhra, which triggered a series of communal riots, planned or instant, in nearly twenty districts of Gujarat between February and May 2002 and claimed about two thousand lives, mostly of Muslims.²

One of the 'instant' & 'retaliatory' [and gruesome] communal riots in the series that followed the equally infamous the Sabarmati Express carnage was the Best Bakery massacre in Vadodara,³ wherein a violent mob of about 15,000 persons armed with petrol bombs, plausibly 'reacting' to the burning train, *Sabarmati Express*, incidence on March 1, 2002, ransacked, torched and set on fire the Best Bakery and brutally roasted alive seven persons and killed other five persons. And nine of them were from the bakery owner Habibullah's family and three were Hindus, who lost their lives as the mob believed them to be Muslims. Two other

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¹ However, an inquiry instituted revealed that the fire emanated from one of the bogies of the train itself. One hundred and thirty one persons are booked under the POTA. Trial is still pending.

² *Times of India*, New Delhi, July 13,2003, (8).

³ Other notorious and ghastly communal riots were: the Frenzied violence, wherein a mob allegedly owing allegiance to the *Viswa Hindu Parishad* (VHP) and *Bajarang Dal* (BD) plunged the homes of Muslims and raped their women; the Kidyad massacre in Panchmahals, wherein over sixty persons travelling in a tempo were set ablaze, the Dipda darwaji killings in Mehsana, wherein eleven persons were burnt and their remaining were dumped in sewage, and the Gulberg riots.

persons, who are still missing, are also believed to be dead in the massacre.

Twenty one persons were charged and prosecuted for committing acts contrary to sections 147 (riot); 148 (riot with deadly weapons); 149 (unlawful assembly); 188 (disobedience to order promulgated by public servant); 504 (intentional breach of peace); 342 (wrongful confinement); 427 (mischief by causing damage to property); 436 (mischief by fire & explosives); 395 (dacoity); 307 (attempt to commit murder), & 302 (murder), of the Indian Penal Code, 1860 (IPC).

2. THE BEST BAKERY 'RULING': A 'FAST' (HALF) BAKED CAKE?

On June 27, 2003, Judge Hemantsinh U. Mahida, Additional Sessions Judge of a fast track court, Vadodara, acquitted all the 21 accused persons on the ground that the testimony of all the witnesses appeared before him was 'not adequate enough' to 'convict' the suspected culprits.⁴ 'That a violent mob caused the death of 14 people in the incident is beyond question', the court observed, but 'there is not even an iota of evidence produced on record of the case which can be legally accepted' to 'connect the accused with the charges leveled against them', the court ruled.⁵ Judge Mahida, pulling up the police for 'shoddy investigation' and for 'fabricating' evidence to 'frame' the 'innocents' and commenting on the 'handling' of the Best Bakery massacre, observed:

After years of experience it can be said that whenever communal riots takes place, the police investigation in the riot related offences turns out to

⁴ See *State of Gujarat v. Rajubhai Dhamirbhai Baria & Ors.*, Sessions Case no. 248/02 (Translation-Mimeo). The author gratefully acknowledges his colleague Ms. Richa Mathur for making him available a copy of the trial court's judgement and of the NHRC's Special Leave Petition (SLP). ⁵ *State of Gujarat v. Rajubhai Dhamirbhai Baria & Ors.*, *ibid.*, para. 52.

be lame as compared to other investigations. The real culprits escape from the scene of offence on arrival of the police. The innocent passer-by and others watching the sight curiously remain under impression that they would not be harmed since they are innocent. However, from amongst such people and from the surrounding population the police selectively picks certain persons of their choice. — Just as bogus accused are roped in the offence, bogus witnesses are also roped and involved and similarly bogus *panchas* are created. Since the accused are bogus, the depositions made by the true and real witnesses also turn out to be meaningless against the bogus accused. — From the case papers of the police investigation, there appears to be clear circumstances to believe that the police officers have abruptly and arbitrarily recorded the so-called statements of the witnesses subsequently and have falsely incorporated the names of the accused persons.⁶

The trial court concluded:

In short, there is no cogent, reliable and legal evidence produced on record so as to establish guilt against the accused who are produced before this court. Looking to the circumstances of the case, it clearly transpires from judicial scrutiny of the evidence produced on record of the case that totally false evidence has created against wrong accused.⁷

A reading of the trial court's judgement reveals that the fast track court relied heavily upon testimony of the main complainant Zahira Shaikh, a 18 year-old daughter of the Bakery owner HabibuUah Shaikh, who lost her nine relatives in the Best Bakery

⁶ *Ibid.*, paras. 42, 49 & 50.

⁷ *Ibid.*, para. 45.

massacre; her mother, Shaherunissa Shaikh, & younger brother, Nafitullah Shaikh, and one Lai Mohammad Khudabaksh, to held all the accused 'innocent'.

Zahira, resiling from her earlier statement made before the police, categorically denied that she had either 'seen' anybody or 'heard' anything in front of the Best Bakery on the evening of March 1, 2002 [when the Best Bakery was set on fire] as that evening was 'dark and smoky'. Deposing before the court she said:

I do not know what the 15,000-strong mob was doing in front of the Bakery on the evening of March 1. As the mob gathered on the day of the incident, I ran upstairs with my family. I was very scared so I hid. I do not know what the mob was doing below.

Denying that she had ever gone to the police to make her complaint, Zahira asserted in the Mahida court:

No, I had not gone to make a complaint. Police had taken my statement and signature at SSG Hospital where I was getting treated after the incident. My statements of March 9 and April 1, 2002 to the police are false.

Further, when Judge Mahida pointed out to her that she had claimed in her police complaint that the mob was carrying swords, kerosene cans and other sharp-edged weapons, she said that the statement was 'false'.⁸ Later Zahira's mother Shaherunissa, & younger brother, Nafitullah, also turned 'hostile' to the prosecution by retracting from their earlier statements. Nafitullah, in a tone similar to that of her sister Zahira, deposing before the court said:

⁸ *Indian Express*, New Delhi, May 19, 2003 (4). Plausibly, relying on, and encouraged by, the Zahira's denials, all other witnesses (including Zahira's mother and brother), allegedly at the behest of some local leaders of the BJP and the police, refused to identify the accused during the court proceedings.

I do not know as to how our house was burnt. We were hiding on the terrace when the fire broke out. There was lot of smoke due to fire and lights were also off. There were ten to fifteen thousand people in the crowd and I fell unconscious due to smoke. I regained consciousness thereafter in the hospital. I have not seen any body either setting fire or doing anything else.⁹

The court, while acquitting the 'innocent' accused, also placed its high reliance upon the testimony of another key-witness, Lai Mohammed, who, when the Best Bakery was burning, was [is still] living in the neighbourhood of the Best Bakery and whose premises were also put on fire by the same mob. In his statement before the police recorded on March 9, 2002, he implicated the accused persons. But three months thereafter, on June 16, 2002, for undisclosed reasons, he gave a 'supplementary statement' to the police not only retracting from his earlier recorded statement but also stating that 'some of the accused persons' [implicated in the Best Bakery case] in fact 'sheltered him and his family' when his house was 'attacked' and the Best Bakery was reeling under 'fire'. Deposing before the court he said:

On 01.03.02 — I was at my residence with the 18 members of my family. At the time of incident I was very much scared and worried about our life. — - I know all the accused present in the court. All accused are residing in our area. At the night of the incident all these accused constantly protected us and they have only saved our life. — I say that is only because of these accused today our lives are saved. — The arson on the night of incident was a horrible nightmare. We were not safe in our houses and therefore we had gone out. Had we gone ahead, anybody would have killed. These accused called us

⁹ *Supra* n. 4, para. 39.

and saved us. — We are in all 65 persons including several women and children who have been saved by these people. If those persons in Best Bakery had also come out, it is true that these people would have certainly saved them.¹⁰

Recalling the hitherto well established rules of administration of criminal justice that a Judge has to: function merely as an 'umpire'; adjudge the 'guilt' of an accused on the basis of evidence brought before him, and ensure that hundreds of criminals may escape but one single innocent must not be punished, Judge Mahida, in a sort of helpless tone, said that [his] court, in the instant case, had:

— [N]o powers and jurisdiction to find and establish that if the accused is not guilty, then who is the real offender or that to award compensation from the government to the sufferer. The court of justice is not the court of justice in its real sense but it is a court of evidence'.¹

Further, in the same spirit he, probably appreciating the difficulty [in the absence of cogent evidence] of the Public Prosecutor to prove his case, Judge Mahida remarked:

In the circumstances [as aforesaid] the public prosecutor is burdened with the most difficult uphill task of driving a dead horse so as to reach the winning point. Howsoever hard he may hit the horse with his shoes or hunter, the dead horse can never proceed further.¹²

¹⁰ See, /tod., para. 41.

¹ *Ibid.*, para. 48.

¹² #>/</, para.51.

3. THE BEST BAKERY CASE 'UNDER FIRE'

The 'political and judicial handling' of the Best Bakery massacre, the first of the post- *Sabarmati Express* communal riots to come up for judicial determination of the 'fault' and thereby setting 'judicial tone & precedent' for the other cases in the series of the post-Godhra communal violence awaiting trial across Gujarat, however, has now been projected as a classic and illustrious blot on the governance according to 'rule of law' in Gujarat and an impending challenge to the criminal justice delivery system vogue in India. It is pertinent to recall here that the National Human Rights Commission (NHRC), recalling the politico-socio-communal 'climate' between March and May 2002 in Gujarat, and doubting impartiality & integrity of the Bharatiya Janata Party (BJP)-led state government of Gujarat in conducting effective investigation and ensuring 'fair trial', urged the Gujarat Government to transfer the Best Bakery carnage [and other communal riots that took place in Gujarat] to the Central Bureau of Investigation (CBI). However, the Narendra Modi Government, deposing its faith in the state investigatory and prosecutory agencies and pleading that such a move would unnecessarily cast aspersions on the integrity and competence of the state machinery, refused to concede the NHRC's plea. He, with pride, also claimed that the justice delivery 'system' in the state is the best one.

Recalling the State Government's claim that a 'full proof investigation' was carried out against all the accused persons and the prosecution was having in its armory all the 'strong' evidence against all of the 'suspected' culprits to 'convict' them, it is pertinent to note some of the significant facts having bearing on the 'fair' trial. They are: *first*, the prosecutor appointed by the Government in the Best Bakery case, Raghuvir Pandya, had contested the Vadodara municipality elections with BJP's support, *secondly*, of the 120 witnesses listed by the prosecution, about a third (47), including 12 eye-witnesses, never made to appear before the court; *thirdly*, of the (73) witnesses who

¹³ *Times of India*, New Delhi, July 11, 2003, (7).

appeared, about a half of them (37) turned 'hostile' in the court; *fourthly*, the prosecution's one of the prime & key witnesses Ms. Shaherunissa Shaikh did not dare to disclose the 'truth' because she was afraid of her life; *fifthly*, Zahira [who in earlier statement made to the police 'identified' 10 accused persons who had burnt alive some of her relatives in front of her eyes], another key eyewitness, who was 'escorted' to the trial court by the local sitting BJP legislator, Madhu Shrivastava,¹⁴ on the day of her testimony, and who allegedly intimidated her, told the court that she had neither 'seen' nor 'heard' anything about the incident;¹⁵ *sixthly*, another witness, one Lai Mohammed, who in his earlier statement made to the police [on March 9, 2002] initially identified all the accused persons, gave a supplementary statement [on June 16, 2002] to the police saying that when his premises were attacked on March 1, 2002, the day on which the Best Bakery was put on fire, he and his family members were indeed sheltered by some of the accused persons; *seventhly*, another key witness did not depose before the court, who according to his brother's deposition, had lost his mental balance, and *eighthly*, the fast track court 'examined' the Investigating Officer (IO) and 'heard' all the 21 accused and 'recorded' their statements under sec. 313, CrPC and 'heard' 'arguments' in part in a single day [June 21, 2003].¹⁶

A number of human rights' activists and defenders, from India and abroad,¹⁷ who have greeted the Best Bakery case with utter distress

¹⁴ However, Madhu Shrivastava's version was that he accompanied Zahira on that day only because she received threats from anti-social elements. See Indian Express, New Delhi, May 19, 2003 (4) & June 28, 2003 (2). It was also reported that Chandrakant Shrivastava, a Congress councillor and cousin of Madhu Shrivastava, was responsible for intimidating Zahira and her mother. And Sonia Gandhi has ordered an inquiry into a media report alleging the role of Chandrakant Shrivastava in the Best Bakery case and assured a proper action against him, if his role in the silencing the witnesses of the Best Bakery is proved. See Indian Express, New Delhi, August 8, 2003, (1 & 2).

¹⁵ *Times of India*, New Delhi, June 30, 2003, (12).

¹⁶ *Times of India*, New Delhi, August 28, 2003, (1).

¹⁷ For example, the Amnesty International is very critical of the 'handling' of the Best Bakery case and mobilising its members to call on the Government of India to ensure safety and protection of witness in the Gujarat communal violence and

and suspicion, have not only exhibited their 'deep concern' for human rights of the victims of the Best Bakery massacre and for 'fair and just trial' but also expressed their strong 'reservations' about, and 'reflections' on, the investigatory, prosecutory, and judicial 'handling' of the Best Bakery case. The case, according to some of the critiques, delivers 'injustice' rather than 'justice' and carries 'miscarriage of justice'.¹⁸ Other cases of communal riots awaiting trial in Gujarat, they apprehend, will carry further the 'tone', 'tenor', and 'legacy' of the Best Bakery case. It will also have demoralising effect on witnesses in the other cases of communal riots awaiting trial and the judicial verdict will go in the Best Bakery way, if witnesses are not protected, the critiques

Critiques of the Best Bakery judgement, among other things, also wondered as to why and for what reasons Judge Mahida remained 'a mere mute spectator' when witness after witness turned 'hostile' in his court and 'failed' to invoke his statutory powers [such as the power to hold the proceedings in camera, power to recall and re-examine witnesses and power to order further investigation] to make the trial a 'fair' one; to unearth the 'truth', and thereby to deliver 'justice'.²⁰

The Best Bakery case came under severe 'fire' when two of the prosecution's key-witnesses, Zahira Shaikh and, her mother,

to institute an inquiry by an independent agency in the circumstances leading to withdrawal of the testimony of key-witnesses in the Best Bakery case. See <http://web.amnesty.org/library>, visited on 28* August 2003.

The Citizens for Justice and Peace, for example, pleading that the June 27 verdict of Judge Mahida carried 'a serious miscarriage of justice' & blaming the Public Prosecutor as well as the trial court for 'failing to carry out their duties to ensure congenial atmosphere in the trial', petitioned the apex court for retrial of the case.

¹⁹ This apprehension gets support from the fact that during the hearings of the Nanavati-Shah Commission probing the riots several witnesses had said that either there were no riots in their area or they were not there when it occurred. See, for example, *Times of India*, Bombay, August 28, 2003 (4).

²⁰ For example see, Mani Mitta, It's about rule of law, Mr. Modi, *Indian Express*, New Delhi, August 7, 2003 (8).

Shaherunissa Shaikh, disclosed in media that they had to 'lie' the court out of 'fear' and 'danger' to their lives and of their relatives.²¹ 'I was threatened by BJP leader Madhu Shrivastava. He told me that if I say the truth in the court my mother and other family members would be killed. So, I lied in the court because of fear and these accused were set off free', Zahira told the press in Mumbai. Crying for 'justice', she, further, disclosed that 'Shrivastava used to call me regularly over the phone and threatened me. He also told me that everyone in the court are [*sic*] his men and nobody will believe me. And therefore under pressure I lied.'²²

Subsequently, Zahira, with her plea for re-investigation & re-trial of the Best Bakery outside Gujarat, approached the NHRC, the Citizens for Justice and Peace [a Mumbai-based NGO], and the Supreme Court of India.

On July 11, 2003, she approached the NHRC [which earlier on April 1, 2002 urged the Gujarat Government to transfer the Best Bakery massacre, along with other communal riots, to the CBI and to create special courts to try those cases & to appoint special prosecutors for conducting the proceedings],²³ to seek its intervention for re-opening the case outside Gujarat.

²¹ See *Times of India*, Bombay, July 7, 2003 (1).

²² See, *Frontline*, vol. 20 (Issue 15), July 19-Aug 01, 2003. However, it is pertinent to recall here three significant instances having nexus with Zahira's statement to appreciate Zahira's claim in the right perspective. First, Madhu Shrivastava admittedly accompanied Zahira on the day of her appearance in the trial court because she received threats from some anti-social elements. Second, when Zahira, after her deposition in the trial court, was asked by the media persons as to why she had turned 'hostile', Madhu Shrivastava reportedly said that she would 'not speak' to media as it was a matter of life of 21 persons [accused] and he asked the press 'to leave her alone'. Third, on the day of acquittal of the accused, families of the accused showered their praises on Madhu Shrivastava and expressed their deep gratitude to him for what he had done for them. See *Indian Express*, New Delhi, May 19, 2003 (4) & June 28, 2003 (2):

²³ In the absence of the Gujarat Government's request, the Central Government expressed its inability to transfer the investigation of the cases to the CBI.

Alleging that 'crucial evidence was shut out through 'threats & intimidation' and that 'the eye-witnesses could not identify the perpetrators of the ghastly crime only because of threats, intimidation and hostile environment within the court as well as in Gujarat generally', and contending that the trial court's judgement premised on such an evidence is liable to be set aside, she also moved the Supreme Court for seeking its 'directions' for reinvestigating the Best Bakery case by CBI [or any other independent agency] and its retrial 'at any place outside Gujarat' under constant monitoring of the apex court. She in her petition asserted that the Best Bakery case is a case where 'miscarriage of justice' has occurred at every level of the justice delivery system. 'The investigation was defective, the witnesses were not protected, the Public Prosecutor glossed over his job of effective representation of the victims, the trial judge mechanically acquitted all the accused and the entire trial was conducted in a hostile atmosphere', she contended in her petition to the apex court.²⁴

The NHRC, through Special Leave Petition (SLP), arguing that the trial court has not paid adequate attention to the fact that many key witnesses had turned 'hostile' & that ...atmosphere in Gujarat was not conducive for a 'fair trial', and disclosing some pertinent 'errors of omission and commission' committed by the police & the trial court in 'handling' the Best Bakery case that led to the acquittal of all the accused charged with the heinous crime of charring to death 14 persons got scot-free and the crime remained unpunished, by invoking art. 136 of the Constitution of India,²⁵

However, on May 6, 2002 the Rajya Sabha, through a resolution unanimously adopted, urged the Central Government to intervene effectively under art. 355 of the Constitution to protect lives and property of the citizens in the State. Such a resolution would have justified the Central Government to intervene in the communal riot cases occurred in Gujarat.

²⁴ *The Hindu*, New Delhi, September 2, 2003 (11). The apex court has decided to club this petition with the NHRC's SLP for hearing.

²⁵ Art. 136 (1), which is material for us, reads: '(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to

also appealed the Supreme Court for re-investigation and re-trial of the Best Bakery case outside Gujarat. Submitting that the Gujarat High Court, even if approached or being seized of the case, is not empowered to order either 'reinvestigation' or 'retrial' of the Best Bakery outside Gujarat and that only the apex court, by virtue of arts. 136 and 142 of the Constitution, being vested with such a power, in its discretion, can grant special leave to appeal from the Best Bakery judgement and to 'order', with a view to 'doing complete justice' in a cause or matter pending before it, re-investigation and retrial of the Best Bakery.

According to the NHRC, the prosecution by examining Lai Mohammed, who, in his supplementary statement, resiling from his original statement, stated that some of the accused persons in fact have 'sheltered' and 'saved' him and his family members when his premises were attacked by the mob, and thereby giving 'signals' to it that he was not going to 'support the prosecution', has taken the steps to weaken', rather than to strengthen, its case. Such a 'dramatic *volte-face*' by Lai Mohammad, the NHRC felt, was adequate enough to give 'signals' and 'caution' the investigating agency that its witnesses were reeling under some 'external pressure' and to take appropriate steps to protect its witnesses from such an external pressure to make its case strong.

NHRC, outlining in its SLP how the trial was reduced to a mere 'farce' by, among other things, doing away with a detailed cross-examination of the investigating officer who took the witness stand on June 21, 2003. On the same day, judge Mahida completed the examination and recording of the statements of all the 21 accused persons under sec. 313 of the CrPC and proceeded to hear arguments in part. The Fast Track Court, true to its name, delivered its judgement in the Best Bakery case on June 27, 2003, which began on February 20, 2003.

appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India. —

The NHRC, in this backdrop, 'prayed' the apex court 'to set aside the impugned judgement of the trial court in the Best Bakery case' and 'to issue directions for further investigations of the case by an independent agency and re-trial of the case in a competent court located outside the State of Gujarat'.²⁶ It has, *inter alia*, contended in its SLP that:

1. The concept of fair trial is a constitutional 'imperative' and is explicitly recognised as such in the specific provisions of the Constitution including articles 14, 19, 21, 22 and 39A of the Constitution as well as in various provisions of the Code of Criminal Procedure, 1973, (CrPC).
2. The right to fair trial is also explicitly recognised as a human right in terms of art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by India and which now forms a part of the statutory legal regime explicitly recognised under sec. 2(1 Xd) of the Protection of Human Rights Act, 1993, (POHRA).
3. Violation of a right to fair trial is not only a violation of fundamental right under the Constitution of India but also violative of the internationally recognised human rights as spelt out in the ICCPR to which India is a party.
4. Criminal justice system in India endeavours to provide fair treatment not only to the accused but also to the victims of crime as well as witnesses involved therein. A denial to fair trial or access to justice to accused, victims of crime, or witness vitiates a criminal trial. Depositions of witnesses and victims of crime under fear of their own safety, therefore, not only vitiates the whole trial but also amounts to a mockery of criminal justice system.
5. Whenever a criminal goes unpunished, it is the society at large that suffers because the victims become demoralised and

Through a separate application filed under sec. 406 of CrPC, the NHRC also urged the Supreme Court to transfer four other serious cases of communal riots for their trial outside Gujarat. These cases include one relating to the Godhra train burning of February 28 that triggered the riots. See, *National Human Rights Commission v. State of Gujarat*, [Transfer Petition (Criminal) No. 194-202 of 2003].

criminals encouraged. It therefore, becomes duty of the apex court to use all its powers to unearth the truth and render justice so that the crime is punished.²⁷

Exhibiting its 'deep concern' about 'the damage to the credibility of the criminal justice delivery system and the negation of human rights of victims caused by the Best Bakery judgement', the NHRC also urged the Supreme Court, 'in the interest of justice' and 'to enhance the efficacy of the criminal justice delivery system', to invoke its powers under art. 142 of the Constitution²⁸ 'to lay down guidelines and directions in relation to protection of witnesses and victims of crime in criminal trials which can be adhered to both by the prosecuting and law enforcement agencies as well as the subordinate judiciary'.

However, the BJP, a political party ruling in Gujarat and leading the National Democratic Alliance (NDA) Government at the Center, did not like the NHRC's 'intervention' in the Best Bakery case. V. K. Malhotra, the BJP spokesman, labelling the NHRC as 'anti-Hindu', reportedly, remarked:

What the NHRC has done is not proper and we hope that Central Government takes the necessary action. Filing the SLP in the Supreme Court is unprecedented and is a danger to the federal structure of the country.²⁹

²⁷ See Special Leave Petition (Criminal) of 2003 *In the matter of National Human Rights Commission v. State of Gujarat & Ors.*, filed on July 31, 2003, para 4.

²⁸ Art. 142, *in materia*, says: '(1) The Supreme Court in the exercise of its jurisdiction may pass such decree order or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.'²⁹ *Hindustan Times*, New Delhi, August 8, 2003, (1).

Narendra Modi, the Chief Minister of Gujarat, a few days prior to the scheduled hearing by the Supreme Court of the NHRC's SLP and preferring appeal in the Gujarat High Court against the Mahida judgement, resorted to an unprecedented device by approaching the President of India urging him to make survey of all the hitherto riots. In a letter addressed to the President of India, indirectly attacking the NHRC, he urged the President to make public details of all the riots since independence to 'expose the vested interests that have targeted not only Gujarat but have tried to weaken the democratic fabric and reputed institutions of this country'. 'When group clashes and communal riots [plausibly referring to the 1984 Sikh massacre in Delhi purportedly engineered by the Congress Party] occur in many parts of the country, why is such a focus on Gujarat?', the Chief Minister Narendra Modi queries with the President.³⁰

However, on August 7, 2003, a day prior to the scheduled hearing of the NHRC's petition in the Supreme Court, when it became very clear to the Government of Gujarat that it was bound to invite some severe strictures from the apex court for its 'handling' the Best Bakery case, the Modi Government suddenly felt 'aggrieved' by the Judge Mahida's ruling and filed its appeal [under sec. 378, CrPC] in the Gujarat High Court against the Best Bakery judgement.³¹ Obviously, this step was taken by the Gujarat Government just to pre-empt the NHRC's SLP and to save itself from the inevitable strictures.

Further, the appeal listed twenty grounds, many of which are 'general' and 'routine' grounds for assailing a trial court's judgement in an appellate court, for setting aside the order of acquittal of the Mahida court in the Best Bakery case. The hitherto judicial precedents reveal that normally, an appellate court does not 'reverse' an order of acquittal, unless the appellant cites extraordinary grounds to do so. But the Gujarat Government's in

See *Indian Express*, New Delhi, August 7, 2003, (8) & August 8, 2003, (1). *State of Gujarat v. Rajubhai Dhamirbhai Bariya & Others*, Criminal Appeal No. 956 of 2003.

the Best Bakery did not cite any such extraordinary ground. Interestingly, it refrained from seeking 'retrial' of the Best Bakery case on the basis of further '(re) investigation'. The government, as sounded in its appeal, desires the Gujarat High Court to direct the trial court to examine afresh the 'evidence' before it, even though the same quality of evidence has led to the collapse of the prosecution's case against the accused.

The State government felt 'aggrieved', *inter alia*, by the fact that the trial court failed to consider Zahira Shaikh's statement to the police as a First Information Report (FIR) wherein she claimed that she had not only witnessed the gruesome act but also disclosed names of the persons who set the Best Bakery on fire and killed her relatives and others in front of her eyes. The trial court, it pleads, 'acted illegally' and 'with material irregularities' when it did not rely upon statement of Zahira, who disclosed the names of the accused involved in the incident. The court also 'erred in law' by treating statement of one Raees Khan, one of the witnesses who was not examined by the prosecution, as an FIR. The trial court, asserts the State Government, also 'materially erred' in law by ignoring the 'settled legal position' that merely because witnesses turn hostile, their evidence does not become unrealistic and unbelievable and thereby liable to be rejected by a trial court. The Government claims that the Investigating Officer (10) has duly 'proved' during his examination that the statements of witnesses recorded during the course of investigation, even though some of them turned hostile. 'When the witnesses turn hostile, their statements to police can be relied upon by the trial court to corroborate any piece of circumstantial evidence, which is of substantive nature', the Government pleads in its appeal. Further, the appeal claims that the trial court has failed in its duty by delivering the judgement without appreciating the entire evidence and by giving its findings only on few of the issues raised by the prosecution.³²

See *Indian Express*, New Delhi, August 8, 2003, (1 & 2); *The Hindu*, August 28, 2003 (11), and *Frontline*, vol. 20, Issue 17, August 16-29, 2003.

4. THE BEST BAKERY CASE: INTERVENTION BY THE SUPREME COURT OF INDIA

On August 8, 2003, a three-Judge Bench, comprising V. N. Khare, Chief Justice of India (CJI), S. B. Sinha & Arun Kumar, J J., of the Supreme Court of India, in spite of the pre-emptive act of the Gujarat Government, directed the Gujarat Government to submit, within two weeks, the statement of the witnesses given to the police and before the trial court; the memo of the grounds of appeal filed by the State Government in the Gujarat High Court, and names of the lawyers appearing on behalf of it in the High Court. It also 'directed' the Gujarat Government 'to provide protection to the witnesses and their families' and asked it to inform the (apex) court of 'the steps, if any, taken by the Government for extending protection to the lives of victims, their families and their relations', and the 'action' taken by it 'against those who are said to have extended threat or coercion to the witnesses'. However, the Supreme Court, in spite of deposing its faith in the judicial system and the Gujarat High Court, refused to allow the appeal as a 'mere eyewash' and desired to 'monitor' the trial.³³

The Gujarat government, responding to the notice of the apex court, reiterated its stand on the NHRC's intervention in the Best Bakery. Assailing the NHRC for 'rushing' to the Supreme Court for seeking retrial of the Best Bakery case, it pleaded that the NHRC's SLP is 'thoroughly misconceived' & 'prejudiced' and therefore is untenable in law. Contending that the NHRC is 'appeared to be carried away by the campaign orchestrated by a section of media casting aspersions on the functionaries of administration of justice', the government urged the apex court not to entertain the petition as it will set a bad precedent having wide

³³ *The Hindu*, New Delhi, August 9, 2003, (1). Recently, the apex court has decided to hear the special leave petitions filed by the Citizens for Justice and Peace and of Zahira Shaikh seeking re-investigation by the CBI and re-trial of the Best Bakery outside Gujarat with the NHRC's SLP. See, *The Hindu*, New Delhi, September 2, 2003, (11).

repercussions on the criminal cases pending throughout the country. Further, the NHRC's petition, according to it, 'does not survive' as its appeal against the trial court's verdict is pending in the Gujarat High Court and there are no precedents of bypassing High Courts in criminal trials ending in acquittals. Similarly, the NHRC's prayer for laying down guidelines for the protection of witnesses and victims of crime in the criminal trial, which in ultimate analysis not only amounts to a prayer for enacting a new law but also seeking a remedy not provided under law, it opines, makes the petition untenable. Referring to the direction of the apex court to the state government for protecting witnesses, the government said that the threat to life of the two key-witnesses, Zahira and her mother, came to its notice through media and none of the witnesses of the Best Bakery case had either before or during pendency of the trial complained to the police or the State Government about the threat or coercion extended to them. Further, most of the witnesses in other communal riots cases refused to accept the protection for the time being.³⁴

Subsequently, the apex court, on September 12, 2003, taking a serious note of the tone, tenor and quality of the Government's appeal to the High Court, termed the appeal as 'mere eyewash' and warned the State Government that the court is not going to be a 'silent spectator'. 'Is this an appeal? You do not take any plea and it is for the courts to do everything. Even a counsel with one year's experience will not draft such an appeal. It is just an eyewash and nothing else', CJI V. N. Khare, speaking for self and his co-judges on the Bench, remarked. Commenting upon quality of the appeal and recalling the hitherto conduct of the state machineries, the CJI expressed his apprehension that the appeal gives him an impression that the State will repeat its conduct once again before the High Court. And it summoned the State's Chief Secretary and

Affidavit filed by J. R. Rajput, Deputy Secretary to the Gujarat Government in August.

the State Director General of Police (DGP) to get to know more about the appeal.³⁵

On September 19, 2003 the apex court indeed grilled the Chief Secretary and the Director General of Police of Gujarat to extract a sort of admission from them that the witnesses in the Best Bakery case were 'won over' and 'coerced' to turn them 'hostile' to the prosecution.³⁶ The DGP, quoting the Vadodara Police Commissioner, categorically told the CJI that the witnesses were 'coerced and won over' by the accused. However, he asserted that there were 'no bogus accused' in the case as alleged by the trial court. And the Chief Secretary of the state disclosed before the apex court that the Advocate-General of Gujarat had been personally asked to 'amend' the appeal to seek 'further inquiry', 'collection of additional evidence', and 'direction for re-trial' and to argue it before the High Court. The Chief Secretary, in his affidavit, also stated that the state government, in consultation with the Advocate-General, is in the process of appointing Special Public Prosecutors to conduct the prosecution and to 'monitor' it by an officer of the rank of Inspector-General of Police. Nevertheless, the apex court made it clear that it will also appoint its *amicus curiae* to assist the prosecution and monitor the progress of the trial in the High Court. The apex court, however, remarked that it is 'not bypassing the High Court' but it wants that 'the matter be seriously prosecuted'.

Expressing displeasure of the Bench on the conduct of the Government and the prosecution in handling the Best Bakery case, the CJI thundered that his Lordship and colleagues on the Bench have 'no trust' in the prosecution agency of Gujarat and said that there appears to be 'some collusion between the government and the prosecution' as the later did not bother to cross-examine the

" See *Times of India*, September 13, 2003 (1), and *Indian Express*, New Delhi, September 13, 2003 (1 & 2).

³⁶ See *Indian Express*, New Delhi, September 20, 2003 (1 & 2) and *The Hindu*, New Delhi, September 20, 2003 (1).

hostile witnesses to know as to why they turned hostile to the prosecution.³⁷

Reacting to the State's counsel Additional Solicitor General Mukul Rohatgi's reliance on the 1984 anti-Sikhs riots in Delhi after assassination of the then Prime Minister of India, Mrs. Indira Gandhi, to impress upon the apex court that 'the malady in our system is such that the guilty persons in riot cases are mostly unpunished' and thereby to elevate the subversion of law in Gujarat to the status of a general systematic failure in all riots cases in India, the CJI re-countered, 'are you saying the rioters in Gujarat should also be acquitted because of this malady?'³⁸ Reminding the Modi Government of its '*rajdharm*'³⁹ the CJI in no unclear terms warned:

I have no faith left in the prosecution and the Gujarat government. I am not saying article 356 (President's Rule) be imposed. You have to protect people and punish the guilty. What else is *rajdharm* You quit if you cannot prosecute the guilty. — Democracy does not mean you will not

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prosecute anyone.

However, the CJI, refuting an implicit attempt of the state counsel to blame Judge Mahida for collapse of the Best Bakery case, reiterated that 'we have absolute faith in our courts. If the

³⁷ *Times of India*, New Delhi, September 13,2003 (1).

³⁸ Rohatgi's reference to the Delhi riots is an echo of the letter Narendra Modi addressed to the President of India seeking general record of riot cases in the country in the post-independent era and sharing his agony for underserved attention to the Gujarat riots.

³⁹ Atal Bihari Vajpayee, the Prime Minister of India, in April 2002 referring to the Godhra and the post-Godhra riots *vis-a-vis* the states responsibility used the term *Rajdharm* to indicate that a true Ruler never discriminates his subjects and he is required to provide justice to every citizen without any bias.

⁴⁰ *Times of India*, New Delhi, September 13,2003 (1).

Government does not bring facts and evidence before the court, what can it do than acquitting the accused.⁴¹

5. IS OUR CRIMINAL JUSTICE DELIVERY SYSTEM BEST?-A
LOOK 'THROUGH' AND 'BEYOND' THE 'BEST BAKERY' CASE

*5. J Is our Criminal Justice Delivery System Best?-A
Look 'through' the 'Best Bakery' Case*

It may be recalled here that Judge Mahida 'blames' the police for 'shoddy investigation', which, in turn, blames all the 'hostile' key-witnesses and the prosecutor for not effectively 'exposing' them [hostile witnesses]. And the 'key-witnesses', who turned 'hostile' to the prosecution, blame, the named 'politically powerful and influential' persons, who have allegedly 'intimidated' them to 'lie' the court. A cumulative effect of all these factors was that all the 21 accused 'proved' innocent and the real culprits [who were not brought before the court have gone] are remained 'unpunished' and are roaming freely in the society.

A close look at the Best Bakery case, in the backdrop of the attending circumstances, prior to, during and after the Judge Mahida Ruling, as outlined in the preceding pages, thus, illustriously demonstrates that our criminal justice delivery system is not in sound health. Almost all the critiques of the Best Bakery case feel that it was not a 'fair trial' and it therefore led to 'miscarriage of justice'. A set of prominent reasoning given by the critiques are: (i) investigation was carried out and presented in the trial court was tainted with a lot of deliberate flaws and twists; (ii) a number of witnesses, including key-witnesses, were not only 'threatened' or 'induced' by either accused or their well-wishers to dire consequences if they dare to speak 'truth' in the court; (iii) about one-third of the listed witnesses, including key-witnesses, for undisclosed reasons were not examined; (iv) a number of witnesses, including eye-witnesses were 'kept-away' from the trial court and a majority of witnesses those appeared before the court,

⁴¹ *Indian Express*, New Delhi, September 13,2003 (1 & 2).

resiling, under 'threat', 'coercion' or 'intimidation', from their statements earlier, turned 'hostile' to the prosecution; (v) the police, prosecution and the trial court, even after getting ample signals of their 'resiling' and 'hostile' tendencies, did not either take any effective steps to instill 'confidence' in them nor created the atmosphere conducive for their free and fearless deposition before the trial court; (vi) the prosecution as well as the trial court did not effectively 'grill' the 10 as well as witnesses to extract 'truth' from them; (vii) the trial court, on technical grounds, by not treating the statement of Zahira, who in her earlier statement recorded immediately on the next day of the Best Bakery massacre, implicated majority of the accused for burning in front of her eyes her relatives, as FIR of the case, and by its 'misplaced' emphasis and heavy reliance on the subsequent supplementary statement of Lai Mohammed, and on his deposition terming the accused 'saviour' of his own life and that of his family members on the unfortunate day when the Best Bakery was put on fire killing fourteen persons, had erred in law by holding all the accused not guilty, (viii) the whole criminal law system failed to render justice to the victims of crime as well by not punishing the real culprits; (ix) Judge Mahida, by his 'mechanical adherence' to the principle that hundreds of criminals may escape, but one single innocent must not be punished' and insistence for the 'proof beyond reasonable doubt' to hold the accused guilty, has adopted an easy course for acquitting the accused; (x) the trial court was not equally sensitive and cautious to ensure that no criminal should also escape from criminal liability, and (xi) the trial court, though it had come to the conclusion that 'totally false evidence had been created against the wrong accused', did not proceed against the investigating agency and thereby it encouraged the fabrication of false evidence, which did strike at the very root of the criminal justice delivery system.

Our criminal justice delivery system, if seen 'through' the Best Bakery case, thus, gives us an impression that our criminal law system: (i) allows witnesses, with impunity, to turn 'hostile', by choice or under 'compulsion, threat, or inducement'; (ii) makes a trial judge to feel 'helpless' and a 'mute spectator' when a witness

after witness turns 'hostile' to the prosecution in his court and when 'atmosphere' in his court becomes hostile to, and intimidating for, key-witnesses to depose before him freely and fearlessly and thereby it makes him to feel that his court is not a court of justice but merely a court of evidence and, therefore, compels him to be a mere compulsive apathetic & insensitive observer of the plight of victims of crime, and (iii) allows a 'collusion' between investigatory and prosecutory agencies of the state to ensure 'acquittal' rather than 'conviction' of accused and thereby make a trial 'farce' and the whole system a 'mockery' and also permits 'political heavy weights' or 'power brokers' to hijack the whole criminal justice delivery system and thereby to make it an utter failure and a 'criminal injustice' delivery system. All these questions, in the backdrop of the Best Bakery case and in the light of criminal law system regime vogue in India, deserve a serious consideration and attention.

5.1.1 Is a witness, with impunity, free to turn 'hostile' to the prosecution?

The Best Bakery case collapsed because of key-witnesses turning 'hostile'⁴² to the prosecution. But Zahira Shaikh and her mother, who on oath in the Mhaida court resiled from their statements made earlier to the police, on occasions more than once, have said that they have lied to the court as they were 'coerced and induced' to do so. In fact, Zahira even approached the NHRC and the Supreme Court, vocally reiterating that she lied the court, to plead for reinvestigation and retrial of the Best Bakery case. And the apex court has decided to hear petition along with the NHRC's SLP. These facts ostensibly create an impression that a witness, on oath, can retract with impunity from earlier statements and get away with even though that witness had misled the court and instrumental in making the trial a 'farce' inevitably leading to

⁴²'Hostile witness' is not defined in the IEA. But as understood in India, a 'hostile witness' is a witness who tries to defeat the prosecution by suppressing the truth or is gained over by the opposite party. See *Yusufv. U.P.*, 1973 CrLJ 1220.

'miscarriage of justice'. And no state functionary - the police, prosecution, trial court, even the apex court, one might feel, can do anything about it. Is it due to lapses on part of the legal system or due to lack of will on part of the state functionaries? This query obviously needs, at least, a look at the relevant legal regime in India.

Sections 161 and 162 of the CrPC deal with examination of witnesses by the police during investigation. The former empowers an IO to examine any person who is supposedly acquainted with the facts and circumstances of the case under investigation and puts such a person under legal obligation to answer truly all the questions put to him by the IO. The IO may or may not reduce statements of a witness in writing. But if he reduces them in writing, the later section provides that these statements are not necessarily required to be signed by the maker. Sec. 162 further states that the statements made by any person to a police officer during investigation can be used by the accused and with the permission of the court only for the purpose of contradicting the witness in accordance with sec. 145 of the Indian Evidence Act, 1872 (IEA). In other words, such statements cannot be used as previous statements for the purpose of corroborating the witness. Sec. 161 requires a police officer to examine witnesses and puts such persons under legal mandate to answer all the questions but sec. 162 prohibits the police to use these statements in legal proceedings. Such a legal stand flows from, and is premised on, distrust and suspicious credibility of the police. But such a provision not mandating a witness to sign his statements made to an IO, enables, rather encourages, a witness to, with impunity, to turn hostile to the prosecution at the trial due either to threats, fear or coercion. Ostensibly, such retractions of witnesses during a criminal trial lead to 'miscarriage of justice'.

The term 'miscarriage of justice', which is nowhere defined either in substantive or procedural law in India, generally refers to the failure of criminal process to function in such a manner as to achieve outcomes which are considered 'just' from different perspectives. See Frank Belloni & Jacqueline, *Criminal Injustice* (Macmillan, London, 2000).

However, sec. 154 of the IEA, plausibly to cure this legal infirmity, empowers the prosecution, with permission of the trial court, to cross-examine its own witness if he turns 'hostile' to it. And when a prosecution witness states something what is destructive of the prosecution case, the prosecutor is entitled to pray for such permission and the trial court is bound to grant such a petition. The utility of cross-examination of a prosecution witness by the prosecutor under sec. 154, IEA, is supposed to be that it is a means whereby the trial court can more readily get the truth out of the witness, as the party's own witness makes statements adverse to the party calling him.⁴⁵ It would, therefore, be wrong for the prosecutor not to exercise its right to seek permission to put leading questions to its witness when he gives answers fatal to its [prosecution's] story by treating him as a 'hostile' witness. Nevertheless, a trial judge, by virtue of sec. 311, IEA, can summon and examine a 'hostile witness', if his evidence is necessary for a 'just' decision.⁴⁷

Further, sec. 193 of the IPC and sec. 344 of the CrPC, with a view to deterring a witness from resiling his statements made earlier, make the act of giving false evidence in a judicial proceeding punishable by a Judicial Magistrate of the First Class by an imprisonment for a term up to seven years with fine. However, the mere fact that a deponent had made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under sec. 193 of the IPC, but it must be proved that the deponent has intentionally given a false statement at any stage of the judicial proceedings. And such a prosecution for perjury should be taken only if it is expedient in the interest of justice.⁸ It also criminalises the act of giving false evidence in proceedings other than judicial ones and

⁴⁴ *G. S. Bakshi v. State (Delhi Administration)*, AIR 1979 SC 569.

⁴⁵ *Samir Das v. State of Tripura*, 1999 CrLJ 953 (Gau.).

⁴⁶ *Food Inspector v. A. K. Ahammad Haji*, 1984 CrLJ (NOC) 82.

⁴⁷ *M. H. Pandey v. Deputy Superintendent of Police, Madras*, 2001(1) Crimes 486 (Mad.).

⁴⁸ *K. T. M. S. Mohd. V. Union of India*, 1992 CrLJ 2781 (SC).

provides for an imprisonment for a term up to three years with fine. However, sec. 344 of the CrPC empowers a Court of Session or Judicial Magistrate of the First Class, who is of the opinion that a witness appeared before him has given false evidence and 'interest of justice' warrant his summary trial, to impose a sentence of imprisonment for a term up to three months, with or without fine, for giving false evidence.

We do have another two sections in the IPC, namely, sec. 182 and 211. With a view to preventing a person from giving false information to a public servant and thereby intending to mislead him, sec. 182, IPC, provides for an imprisonment for a term up to six months or fine up to one thousand rupees for giving false information to a public servant. It criminalises the giving of false information which misleads a public servant into doing what he ought not to do, whether that can be shown to be intended for the purpose of injuring any particular person or not.⁴⁹ Its object is that a public servant should not be falsely given information. This section undoubtedly takes in its ambit any false information given to the police as the expression 'public servant' used in sec. 182 sufficiently covers a Police Officer. It also takes in its ambit the information even if it is given to a Police Officer in the course of investigation under sec. 161, CrPC in reply to questions put by him. The section is not confined to information which is volunteered and which falls under sec. 154 of the CrPC.⁵⁰ And sec. 211 of IPC penalizes a person for making false charges and/or instituting a false criminal case against another. A reading of provisions of sec. 182, along with that of sec. 211, makes it clear that information given to the public servant short of amounting to institution of criminal proceedings against a defined person and short of amounting to the falsely charging of defined person with an offence as defined in the IPC can be brought under it.

The criminal law system, thus, does not allow a witness, even under the so-called 'threat' or 'coercion' or 'inducement', to turn,

DaulatRam v. State of Punjab, AIR 1962 SC 1206.
Emperor v. Gopal Das, 37 CrLJ 870 (Sind).

with impunity, hostile to the prosecution and thereby to make the prosecution's case weak. However, the hitherto judicial responses to the cases of perjury reveals that hostile witnesses are seldom made criminally responsible for giving on oath false evidence. Law enforcement agencies of State, for reasons known best to them, have hardly resorted to their statutory powers to book the hostile witnesses for perjury as well as persons giving false information to the police and thereby to deter them as well as potential 'hostile' witnesses and 'false' informers. The Best Bakery case, wherein Zahira and her mother have publicly been reiterating that they, under 'threat and intimidation', have given 'false evidence' in the trial court, is the latest testimony of such a judicial apathy to perjury cases. Further, the criminal law system does not, on its own, accord any 'protection' to witnesses to make them bold and courageous to speak truth before trial courts and to instill their confidence in the administration of criminal justice.

5.1.2 Was Judge Mahida indeed 'helpless' to deliver justice?

A reading of the Best Bakery ruling given by Judge Mahida discloses that he, in the absence of statutory powers, was indeed placed in a 'helpless' situation as he, in the absence of 'cogent evidence', could not only held the 'innocent' and 'bogus' accused of burning 14 persons alive 'guilty' but also could not order the investigatory as well as prosecutory agencies to find out the 'real' culprits. He, for the same reasons, though unwillingly, could not direct the government to 'compensate' the unfortunate victims of the Best Bakery massacre.

However, a perusal of the CrPC; the IEA, and IPC, contrary to the assertion of Judge Mahida that a trial judge is merely an umpire who has to adjudge the criminal trial based on the evidence adduced before him, reveals that a judge is not only armed with the power to ascertain 'truth' of, and render 'justice' in, a case brought before him but he is also duty-bound to do so.

Section 311 of the CrPC empowers a trial judge, in his discretion, to recall and re-examine any person already examined, particularly

when it appears to him that such evidence is essential to arrive him at the just decision in the case before him. It confers a wide discretion on the court to act as the exigencies of justice require. A trial court is expected to exercise its inherent power conferred by this section in the interest of justice⁵¹ and to serve the cause of justice.⁵² If ends of justice require, it may even summon and examine witnesses 'deliberately kept back' by the prosecution.⁵³ A trial court is duty-bound under sec. 311, CrPC, to examine all the material witnesses for rendering a just decision.⁵⁴

Under sec. 309 (2) of the CrPC, a trial court can, for reasons to be recorded in writing, postpone the trial in order to ensure that a safe atmosphere is created to enable witnesses to depose without any fear. By invoking his powers under this section Judge Mahida would have certainly enabled him to relieve the key-witnesses, Zahira and her mother, from the 'external intimidative pressure' compelling them to speak lie and also to make the court room atmosphere less hostile. Undoubtedly, in the Best Bakery case, by virtue of sec. 9 (6) of CrPC, it was incumbent on the prosecution to apply to the trial court to have the trial conducted in camera when it found that one witness after the other were resiling from their earlier statements. But the trial court in no way was powerless to suggest that the trial should be held in camera.

Discretionary powers conferred on a trial judge by sec. 311 of the CrPC are further complemented by sec. 165 of the IEA,⁵⁵ which authorises him, with a view to discovering or obtaining proper proof of relevant facts, to ask 'any questions he pleases, in any form, at any time, about any fact' and no party is entitled to make any objections to such questions. It confers vast and unrestricted powers on the trial court to put any question he pleases in any form at any time, to any witness in order to discover relevant facts.

⁵¹ *Rajendra Prasad v. Narcotic Cell, Delhi*, AIR 1999 SC 2292.

⁵² *Nagina Sharma v. State of Bihar*, 1991 CrLJ 195 (Pat.).

⁵³ *Darya Singh v. State of Punjab*, AIR 1965 SC 328.

⁵⁴ *State of Gujarat v. Senma Savabhai Bhikabhai*, 1995 CrLJ 3061 (Guj.)

⁵⁵ *Jamatraj Kewalji Govani v. State of Maharashtra*, AIR 1968 SC 178.

Almost five decades ago a Division Bench of the Calcutta High Court, outlining the legislative intent of sec. 165 of the IEA and reading thereunder the duty of a trial court to unearth the truth, observed:

It is obvious that the judge contemplated by the section is not a mere umpire at a wit combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. — If therefore the judge finds that the examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but also his duty to intervene with his own questions, —. There is no limit to the questions what the judge may put and if — he has not yet got to the bottom of the matter — there is no reason why he should not go on with the examination, whatever the number of the questions required to achieve the purpose of eliciting the truth.⁵⁶

In 1981, Justice O. Chinnappa Reddy, the then judge of the Supreme Court, was more eloquent when he observed:

The adversary system of trial being what is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal

Sunil Chandra v. the State, (1954) CriLJ 805 (Cal.), pp. 817-18.

Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.⁵

Further, sec. 173 (8), CrPC, empowers a trial court to 'direct the police, even after laying final report, to carry out further investigation. The court is not obliged to hear the accused while issuing such a direction.⁵⁸ And by virtue of sec. 319 of the CrPC, a trial court, when it appears to it that there are other persons who in fact appear to be guilty of the offence(s) but are not arrested, can, on its own, proceed to put the criminal law machinery in action. The power exercisable under sec. 319 is an extraordinary power conferred on the Court to do real justice.

A close reading of the Judge Mahida's judgement, unfortunately, reveals that he, in the present submission with due respect, preferred not to either invoke his above mentioned statutory powers to intensively grill the 'hostile' witnesses to extract from them the truth or to order further inquiry in the Best Bakery massacre to unearth the truth.

With due respect it is again submitted that Judge Mahida by refusing to wield his statutory powers [and not because of the absence of any statutory powers] and by putting his 'misplaced' reliance on testimony of some of the key-witnesses, like Lai Mohammad, has put himself in 'helpless' situation to make his court a mere 'court of evidence' and not a 'court of justice'.

Ram Chander v. State of Haryana, AIR 1981 SC 1036, at para. 2. Also see *State of Rajasthan v. Ani*, AIR 1997 SC 1023; *Raghunandan v. State of U.P.*, AIR 1974 SC 467, and *Nepal Chandra Roy v. Netai Chandra Das*, (1971) 3 SCC 303.

Shri Bhagwan Samartha Sree Pada Vallabha Vishwandadha Maharaj v. State of A.P., AIR 1999 SC 2332.

However, Judge Mahida was right when he felt 'helpless' for compensating victims of the Best Bakery massacre. Criminal law system in vogue does not unfortunately enable a trial court to compensate victims of crime if accused are not held guilty for the charged offence(s). We do not have a statute providing for compensation to victims of crime. Nevertheless, sec. 357 of the CrPC and sec. 5 of the Probation of Offenders Act, 1958 (POA), provide for, though discretionary, the payment of compensation to
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 crime victims.

Section 357(1) of the CrPC⁶⁰ empowers a trial court (as well as an appellate court), in its discretion, at the time of passing judgement, to award compensation to victims of crime 'out of the fine' imposed on offenders). Such an order of compensation can be passed in favour of: (i) a complainant for meeting expenses properly incurred in the prosecution, (ii) a person who has suffered loss or injury by the offence and who can recover compensation in

For further details see K. I. Vibhute, *Compensating Victims of Crime in India: An Appraisal*, 32 *JIL*6& (1990).

Clause (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

- (a) In defraying the expenses properly incurred in the prosecution;
- (b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- (c) When any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
- (d) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any *bonafide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

a Civil Court, (iii) a person who is entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abetment thereof, and (iv) a bona fide purchaser of property that has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property, and which is ordered to be restored to its rightful owner. However, sub-section (3) of sec. 357 enables a Court to order payment of compensation even in cases where substantive sentence of imprisonment was awarded. Section 357, thus, indents to empower a Court to, some extent, reassure a victim of crime that (s)he is not forgotten in the criminal justice system. Section 5 of the POA⁶¹ also empowers a trial court, in its discretion, to direct an offender, whom it desires to release him after admonition or on probation of good conduct, to pay 'reasonable compensation' to his victim for 'loss or injury' caused to him by commission of the offence. However, courts in India have seldom resorted to these enabling provisions.

*5.1. 3 A 'collusion' between 'investigatory' and
'prosecutory' state functionaries*

The police in Gujarat are accused of deliberate failure in combating the communal riots spread in twenty districts of Gujarat during March-May 2002. If press reports and the NHRC's assertions are reliable, the police deliberately reached late at the riot spots. Subsequently, they also turned their blind eye to the intimidation of the victims and witnesses by either accused directly or through their 'well-wishers', to 'weaken' or 'spoil' the prosecution's riot cases. And the police also deliberately delayed the investigation and arrest of the suspected persons to enable them either to intimidate or win-over the witnesses. Referring implicitly

Section 5 (1) reads: *Power of court to require released offenders to pay compensation and costs-* (1) The court directing the release of an offender under section 3 or 4 may, if it thinks fit, make at the same time a further order directing him to pay - (a) such compensation as the court thinks *reasonable* for *loss* or injury caused to any person by the commission of the offence; and (b) such *costs* of the proceedings as the court thinks reasonable.

to the Best Bakery trial, the apex court lamented the fact that 'criminals often have access to the police and influential persons' and that 'the trial in most of the sensational cases does not start till the witnesses are won-over'.⁶² Subsequently, none other than the DGP of Gujarat, as mentioned earlier, categorically told the apex court that the witnesses of the Best Bakery were indeed 'coerced and won over' by the accused.

There are strong indications to believe that the police had deliberately indulged into 'lapses' to ensure that the statement of Zahira, who in her statement recorded on the very next day of the Best Bakery massacre named ten of the accused persons who had burnt alive some of her relatives and family members in her presence, not be treated as FIR. They rather made, on technical grounds, the Mahida court to believe that the statement of Raees Khan, who was not examined by Judge Mahida, was a proper FIR. During the Best Bakery trial the police had not only 'kept away' from the court witnesses, including some eye-witnesses, probably 'inconvenient' to the prosecution but 'preferred' to produce the 'won-over' or 'coerced' or 'intimidated' witnesses, including Zahira and her mother, brother and sister, who either 'agreed' or 'made to agree' to be 'hostile' to the prosecution. Here, it is necessary to recall depositions of, at least two illustrative star-witnesses, Lai Mohammed and Zahira, to substantiate this observation. Lai Mohammed, who, as stated above, for undisclosed reasons, gave his supplementary statement to the police resiling from his earlier statement made to the police 'identifying' almost all the accused, was produced before the court to willfully damage the prosecution's case as the police and prosecution were well aware of his 'earlier statement' as well as his 'subsequent stand'. Lai Mohammed, contrary to his earlier statement, referred to some of the accused as 'saviors' of his life and of his family members on the evening when the same accused allegedly put the Best Bakery on fire. The police and the prosecution, ultimately, made Judge Mahida not only to believe Lai Mohammed but also to rely heavily upon his testimony. A reading of the Best Bakery verdict reveals

Indian Express, New Delhi, August 9, 2003 (2).

that Judge Mahida has attached immense 'evidentiary value' to the Lai Mohammed's deposition in holding all the accused 'innocent' and 'not guilty'. Zahira, on the other hand, as disclosed by herself, was 'made' to 'lie' the court. She was intimidated 'out side' as well as 'in side' the court room (by the hostile atmosphere in the court room) to resile from earlier statements made to the police and neither the police nor the prosecutor endeavored to instill in her the required 'courage' and 'confidence' to speak the 'truth'. Even Judge Mahida, though statutorily empowered, failed to create an atmosphere conducive for such a free and fearless deposition of witness in his court. The PP has also not raised the issue of the security of his witnesses. Even, he did not bother to either draw attention of Judge Mahida to the press reports revealing intimidation of witnesses or the thitherto published NHRC reports revealing the fact that witnesses were reeling under 'threat' and 'recommending' their protection. It also seems from the Mahida Judgement that the PP was also not very keen to grill Zahira to know 'contradictions' between her 'original' and 'resiled' statements and the reasons, if any, therefore. He did not even confront with Zahira to know the circumstances and reasons, if any, for making her earlier signed statement and subsequently resiling from it.

The PP, in spite of the fact that not only Zahira but a number of other witnesses one after another turned 'hostile', never either asked for an adjournment to investigate this 'unusual' phenomenon to make his case strong nor relied upon his statutory power, though discretionary, to seek the court's permission to 'declare' the witnesses resiling from their earlier statements, including Zahira, as 'hostile' and thereby to cross-examine them to unravel the 'truth'. In fact it is duty of a PP to cross-examine, of course, with the court's permission, his own witness if he discovers that the witness is trying to be 'hostile' to the prosecution.⁶³

Maharani Kniord Kumari Devi v. Ghasi Kuar, ILR 1962 Cut. 767. Cited from, Ratanlal & Dhirajlal, *the Law of Evidence* (Wadhwa, Nagpur, 20th edn.) 1301.

It, thus, seems that, the PP, in collusion with the investigatory agency of the state, pursued the Best Bakery case half-heartedly effort pregnant with insincerity and assiduousness design. Such a lapse on part of the PP, against the backdrop of his (past) ideological and political nexus with the BJP, not only seriously doubts the professional credibility and integrity of the PP but also hints at his 'collusion' with the investigatory agency. Was the PP, in collusion with the police, not at the first place interested in making the prosecution a 'dead horse' by not diligently resorting to his statutory powers and then undertaking the 'uphill task', borrowing from Judge Mahida's argument, 'of driving the dead horse', even by hitting it hard with his shoes or hunter, 'to reach the winning point'?

*5.2 A look 'beyond' the 'Best Bakery case: 'fair trial'
and 'miscarriage of justice'- Emerging Facets*

Critiques of the Best Bakery feel that our criminal justice delivery system has miserably failed to ensure a 'fair trial' and thereby led to the 'miscarriage of justice'. The connotations of the 'fair trial' and 'miscarriage of justice' thitherto the Best Bakery were predominantly linked with the gross violations of the procedural safeguards and rights of accused in criminal law processes starting from his arrest to the final disposal of his trial.

Denial to him of his rights and safeguards have been perceived as the indicators for conceiving a trial 'unfair' and the 'justice' rendered as 'miscarriage of justice'. However, 'handling' of the Best Bakery case in the existing criminal justice delivery system has made us to, in the interest of 'justice', ponder seriously upon, addition of a few thitherto-unknown pertinent dimensions and counters to these concepts. A proper and effective investigation of a case in search of truth by Investigating Officer (*IO*) as *well* as. due protection to prosecution-witnesses and victims of crime; a prosecution sensitive to, and a real representation of, victims of crime throughout the trial; a duty of a Court *to* make every possible effort to make the in-court atmosphere conducive for free and fearless depositions in his court; a judicial tendency not to strictly

adhere to the traditional burden of proof beyond reasonable doubt but to search for the truth, and crime victim right to be compensated, are some of the new facets and contours of the emerging connotations of 'fair trial' and 'miscarriage of justice'.

However, it is interesting to note some of the reforms suggested by the Committee on Reforms of Criminal Justice System, appointed by the Government of India and headed by Dr. Justice V. S. Malimath, in its Report⁶⁴ submitted to the Central Home Ministry in March 2003, coincidentally have a great bearing upon, and contextual relevance with, the 'handling' of the Best Bakery case and 'issues and controversies' arose therefrom. It delves into the hitherto factors alien to the so-called 'unfair' fair trial and the 'miscarriage of justice'. A reading of the Committee Report and the signals receiving from the Central Government and the Supreme Court of India in response to the Report make us to feel that the so-called notions of 'fair trial' and 'miscarriage of justice' are inviting some new contours.

The Malimath Committee has suggested comprehensive reforms, though some of them are controversial, in the entire criminal law system, including some of the 'fundamental principles' that have been 'guiding principles' of, and 'foundations' for, the hitherto criminal justice delivery system in India. However, here below we will refer to only those reforms having bearing on the issues raised and controversies that arose from the Best Bakery case and will, at appropriate place, also offer our comments on their feasibility and desirability.

5.2.1. Investigatory and prosecutory machinery: professional commitment and co-ordination

Obviously, the machinery of criminal justice system is put into gear when an offence is allegedly committed and investigated by the police. When an offence is committed and is brought to notice

Government of India, *Report: Committee on Reforms of Criminal Justice System* vols. I & II (Ministry of Home Affairs, 2003).

of the police, it is their responsibility to investigate into the matter to find out who has supposedly committed the alleged offence, ascertain the facts and circumstances relevant to the crime and collect all the relevant oral as well as circumstantial evidence, that is necessary to prove the case in a court of law. The success or failure of the case obviously depends upon the quality of evidence collected by the 10. A prompt and quality investigation of a case by the police is, therefore, the foundation of the effective criminal justice delivery system. The manner in which police investigations are conducted is of crucial importance to the functioning of criminal justice system. 'Not only serious miscarriage of justice will result if the collection of evidence is vitiated by error or malpractice, but successful prosecution of the guilty' feels the Malimath Committee, 'depends on a thorough and careful search for truth and collection of evidence which is both admissible and probative.' And 'in undertaking this search, it is', according to the Committee, 'the duty of the police to investigate fairly and thoroughly and collect all evidence, whether for or against the suspect.'⁶ Quality investigation not only warrants an unbiased and impartial investigation by the police but also the collection of 'untainted' information. However, it is a matter of common knowledge that the existing Police Organisation in India is structurally as well as functionally dependent on, and close to, the executive and their political masters. Such a proximity, as it happened in the Best Bakery, doubts the professional credibility and integrity of the police when it comes to the investigation and collection of quality evidence and its evidentiary value in a court of law. The Malimath Committee, pleading for insularity and integrity of the investigatory agency in criminal justice system, rightly observed:

For fair and impartial investigation, it is imperative that the investigating machinery is immune from political and other extra influences and acts in accordance with the law of the land and the

Government of India, *Report: Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, 2003), vol. I, para. 7.2.

Constitution. It has, however, been observed that the people in authority think nothing of wielding influence to scuttle and, and even thwart, criminal investigations or to bend them to suit their political or personal conveniences. — Integrity of the IO has a vital bearing on the integrity of the investigation conducted by him. The misconduct of the IOs has been often overlooked due to misplaced and misconceived service loyalties.⁶⁶

Referring to, with approval, the recommendation of the Law Commission of India⁶⁷ and of the K. Pradmanabham Committee on Police Reforms that Crime Police (an investigating agency) be separated from the Law and Order Police (ordinary police) by putting the former under the control of judiciary, and accepting it in principle, the Malimath Committee has recommended that all the serious crimes triable by Sessions Courts be tried by the Crime Police and other crimes created by the special and local Acts be handled by the Law and Order Police.⁶⁸

Such a separate wing of investigation with clear mandate that it is accountable only to *rule of law* is, in the backdrop of the instances like the Best Bakery, the need of the day. It will, to some extent, prevent the collusion between the investigatory and prosecutory agencies of a State.

It is, however, obvious that a good investigation and full-proof evidence does not necessarily lead to conviction of the accused unless a PP is equally professionally as well as ideologically impartial, independent and committed to his profession as he, as an Officer of the Court, is required to assist the court in the search of truth, which is the ultimate objective of criminal justice delivery system. It is needless to say that good and painstaking

⁶⁶ *Ibid*, para 7.12.

⁶⁷ Law Commission of India, *One Hundred and Fifty-fourth Report on the Code of Criminal Procedure*, 1973 (Government of India, 1996).

⁶⁸ *Supra* note 65, paras 7.9.4-7.9.8.

investigation will be futile if PP is indifferent, inefficient and partial. However, the institution of Public Prosecutor in India, for a variety of reasons, has been weak and politicized. Recruitment of a PP, in most of the cases, is made on the basis his 'political pulls', 'ideological', or 'personal' connections and not on his professional merits and competence.⁶⁹ In such a situation, as evident in the Best Bakery case, a professionally unethical co-ordination and collusion between the investigatory and prosecutory agencies of a State cannot be ruled out.

The Malimath Committee, with a view to overcoming such a 'collusion' and facilitating effective co-ordination between the investigating and prosecuting officers, has, *inter alia*, also suggested that a Police Officer of the rank of Director General of Police (DGP) be, in consultation with the State Advocate-General, appointed as the Director of Prosecution. And the Director of Prosecution, *inter alia*, be authorized to call reports in all cases that end in acquittal from the Prosecutor who conducted the case and the Superintendent of Police of the District concerned to ensure accountability as well as to monitor the cases of acquittals.

In this context it is interesting to note here that almost all the Public Prosecutors appointed by the Gujarat Government in the post-Godhra communal riot cases have BJP, Vishwa Hindu Parishad (VHP) or Rashtriya Sawyansevak Sangh (RSS) connection. For example, Dilip Trivedi, who was appointed as Public Prosecutor in the Sardarpura riot case, wherein 33 persons were burnt alive on February 28, 2002, and the Dipda Darwaja riot case, wherein 11 persons were hacked to death, is a General Secretary of VHP. Piyush Gandhi, a member of the VHP Lawyers' Panel and President of a District Unit of VHP, representing the Government in the Panchmahals riot case. P. S. Dhora, who is handling riot cases in Anand and Kheda districts of Gujarat, is a known RSS sympathizer, and Chetan Shah, a member the VHP advocate panel, is handling the Naroda and the Gulberg riot cases wherein 89 and 39 persons were killed respectively, and Sanjay Bhatt, who is recently asked to handle the Vadodara riot cases, is the nephew of VHP city unit president Ajay Joshi and a VHP advocate, who defended the 21 accused in die Best Bakery case. See Indian Express, New Delhi, September 20,2003 (1 &2).⁷⁰ *Supra* note 65, paras 8.12 & 8.13.

5.2.2. *'Hostile' witnesses and 'perjury': a plea for effective measures*

In most of the criminal trials the prosecution mainly relies on the oral evidence of witnesses for proving its case against the accused. Unfortunately, as our experience reveals, there is no dearth of witnesses who come to the courts and give false evidence with impunity. Many a times witnesses, for undisclosed reasons, renege from their earlier statements before the court. While others, lie to the court because either of 'threats' or intimidative pressures received from, or inducements offered by, the accused themselves or through other interested persons. In either case an ultimate consequence is nothing but an acquittal of the accused as the prosecution, which always carries the burden of proving its case 'beyond reasonable doubt', fails to 'prove' its case. Accused, according to the basic canons of criminal jurisprudence, gets the 'benefit of doubt' to avoid his criminal liability.

As indicated above, unlike in other countries, we, unfortunately, do not have a law requiring either the police or the prosecution to give protection to the witnesses subject to 'threats' even though it makes the criminal justice delivery system a mockery and an utter failure. Nevertheless, we do have a few penal provisions to deter the persons who give false evidence to the police and the courts. But these penal provisions are seldom resorted to by the courts.

A statutory protection, on the USA lines, to the witnesses who are likely to lie to the court due to 'threats' to them or to their families and 'certainty of punishment' for those who, due to either 'inducement' or 'for any other reasons', turn hostile to the prosecution will certainly combat the menace of giving false evidence. Simultaneously making the existing law of perjury more definite and severe by plugging the in-built loopholes and overcoming the pragmatic inhibitions will also make our criminal justice delivery system more effective.

The Malimath Committee, with this spirit, has recommended a number of legislative, judicial, punitive, and administrative measures. Prominent among them are:

1. A law, on the lines of the laws in USA and other countries, be enacted fongiving protection to the witnesses and their family members.
2. Sections 161 and 162 of the CrPC be suitably amended to make it obligatory on part of the police to record statements of any person in the narrative or question and answer form and to make obligatory on the part of the maker of the statement to sign it and to receive a copy of it respectively so that such statement can be used both for contradicting and corroborating the maker of the statement.
3. Section 344 of the CrPC (summary trial for giving false evidence) be suitably amended to require the court to try the case summarily once it forms the opinion that the witness has knowingly or willfully given false evidence or fabricated false evidence with the intention that such evidence should be used in such proceeding. And with this purpose, the Committee feels, the expression occurring in sec. 344(1) to the effect 'if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating as the case may be, false evidence' be deleted.
4. Evidence of experts falling under sections 291 (depositions of medical witness); 292 (evidence of officers), and 293 (reports of certain government scientific experts), as far as possible, be received under Affidavit.
5. As the oath of affirmation administration to the witnesses has become an empty formality and does not act as a deterrent against making false statements by witnesses, it is recommended by the Committee that a provision should be incorporated requiring the judge administering the oath or affirmation to caution the witness that he is duty bound under sec. 8 of the Oaths Act to speak the truth and that if he makes a false statement in violation of the oath or affirmation that has

⁷¹76/rf., Part - VI, para. 11.

been administered to him, the court has the power to punish him for the offence of perjury and also to inform him of the punishment prescribed for the said offence.

6. The judges should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity.
7. The punishment of three months or fine up to Rs. 500/- or both (provided for giving false evidence in sec. 344, CrPC) be enhanced to imprisonment for two years or fine up to Rs. 10,000 /-or both.
8. The High Court should impress upon the subordinate courts of their duty to resort to these provisions to curb the menace of perjury, through training and calling for periodic reports.

5.2.3. A 'fair' criminal trial - a quest for 'truth' and 'justice'

Believing that quest for the truth is the foundation of the criminal justice system and every functionary of the criminal justice system and everyone associated with it in the administration of justice is duty bound to actively pursue the quest for truth and to focus on justice to victims, the Malimath Committee suggested that Preamble to the CrPC and other relevant provisions of the Code be suitably amended to inject the spirit of quest of criminal justice in all the criminal justice instrumentalities of a State.

5.2.3.1 The adversarial or the inquisitorial system? : a search for truth - A choice

The Malimath Committee, in its quest to find the truth, after giving 'its anxious consideration' to the question as to whether the adversarial system is satisfactory or not, examined the inquisitorial system, in which investigation is supervised by the judicial magistrate and results in a high rate of conviction, feels that some of the good features of the inquisitorial system need to be adopted in the adversarial system, though it assures fairness to the accused, to: (i) make the adversarial system more effective and fair; (ii) impose the duty on the Courts to search for truth; (iii) assign a proactive role to the judges; (iv) give directions to the investigating

officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth, and (v) focus on justice to victims."

Charged with this spirit the Committee, *inter alia*, recommended that a provision to the effect that 'quest for truth shall be the fundamental duty of every court' be placed immediately above sec. 311 of the CrPC, and existing sec. 311 of the Code be amended to read it as under:

Any Court shall at any stage of any inquiry, trial or other proceeding under the 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 as it appears necessary for discovering truth in the case.

And the new sec. 311 be followed by the following provision empowering a Court to direct an IO to carry out further investigation to assist it to 'search for truth. The recommended provision reads:

Any court shall, at any stage of inquiry or trial under this Code, have such power to issue directions to the investigating officer to make further investigation or to direct the Supervisory Officer to take appropriate action for proper or adequate investigation so as to assist the Court in search for truth.

In addition to the recommended power, a Court, like a High Court, according to the Committee, be further, by suitably amended sec. 482 of the CrPC, armed with the inherent powers 'to make such orders as may be necessary to discover truth or to give effect to

⁷² *Ibid.*, Part - VI, para. 5. & 6.

any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice.'

*5.2.3.2 'Presumption of innocence' and
'burden of proof beyond reasonable doubt':
a 'burden' for the 'quest for truth'?*

Recalling the fact that the 'proof beyond reasonable doubt' required in criminal cases in India is premised not on the IEA but on judicial pronouncements of the Indian courts following the English precedents, and comparatively evaluating it against the so-called 'standard of proof on preponderance of probabilities', the Committee, again in its quest for truth as the foundation of criminal justice delivery system, feels that the standard of 'proof beyond reasonable doubt', presently followed in criminal cases, be done away with and it be replaced by the standard of proof which is higher than the 'preponderance of probabilities' and lower than 'proof beyond reasonable doubt' i.e. the 'standard of clear and convincing'. It accordingly recommends that the following clause be added in sec. 3 (interpretation clause) of the IEA. The recommended clause reads:

In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced that it is true.

According to the Committee, it seems, the burden on the prosecution to prove its case beyond reasonable doubt emanated from the presumption of innocence is 'burden' for the quest for truth, the prime objective of a criminal trial.

5.2.3.3 Justice to victims of crime: an integral aspect of criminal justice

The Committee feels that one of the prime objects of the criminal justice system is to ensure justice to crime victims also. But however, our criminal justice delivery system does either confer a

substantial right on, or allows a crime victim to participate in the criminal proceedings. Therefore, the Malimath Committee, like the Law Commission of India, feels that the criminal law system must also focus on justice to victims. It has made several recommendations, including the right of the victim to participate in cases involving serious crimes and the right to be compensated by the state and/or offender.

The victims' right to participate in criminal trials, according to the Committee, *inter alia*, should include: (i) to, with leave of the Court, produce oral as well as documentary evidence; (ii) to know the status of investigation and to move the court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth; (iii) to be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution; (iv) to advance arguments after the prosecutor has submitted arguments, and (v) to prefer an appeal, to the court to which an appeal ordinarily lies against the order of conviction of such a court, against any adverse order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate sentence, or granting inadequate compensation.

The right of a crime victim to be compensated, the Committee feels, need to be recognised by a statute. And such a right be recognised in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. The 1995 Bill prepared by the Indian Society of Victimology, according to the Committee, may be used as a blueprint of the proposed statute.⁷³ The proposed

⁷³ The Fourteenth Law Commission, in its 154th Report on the Code of Criminal Procedure of 1973, recalling 'the weaknesses of the existing provisions for compensation to crime victims in the criminal law' and disapproving the idea of compensating victims of crimes linked with, and limited to, 'fines, penalties and forfeitures realised', asserted that the State Governments should render its assistance to victims of crimes out of its funds in all cases regardless of the fact whether an accused is acquitted or the perpetrator is not traced (but the victim is identified). The Law Commission, with this zeal, in its proposed sec. 357-A, suggested a comprehensive victim compensation scheme to be administered, on

compensation law should, by creating a Victim Compensation Fund, preferably by pulling together fine recovered; funds generated by the justice system and public contribution; assets confiscated and forfeited in organized crime and financial frauds, to be administered by authorities created under the Legal Services Authority Act of 1987 and providing for the scale of compensation in different offences for the guidance of the Court & specifying the offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn, be made comprehensive.⁷⁴

6. CONCLUDING REMARKS

The *raison d'etre* of a criminal law system, comprised of substantive criminal law and procedural laws, is to protect life, limb and property of an individual as well as to ensure law and order in the community for peaceful and harmonious co-existence. Dominated by this philosophy a criminal law system obviously creates a required mechanism for 'investigation' of commission of a crime, prosecution of a 'suspect' and for 'determination' of guilt of the wrongdoer, who has caused some 'harm' to the community as well as to his victim, whose rights are invaded by him. Thus, here comes the establishment of interrelated institutions - investigatory; prosecutory and adjudicatory- and the processes associated therewith. The administration of criminal law system involves a three-party-chain, namely the state, an offender and a crime victim. A criminal justice delivery system, is, therefore, required to insure that the 'interests' of one component of this chain are not jeopardized by that of the other. In other words, a criminal law system must provide a sufficient safeguard to the accused so that his rights and freedom are not unnecessarily curtailed by the mighty State and an innocent is punished. At the

recommendations of a trial Court, by the Legal Services Authorities constituted at the District and State levels under the Legal Services Authorities Act, 1987. See, Law Commission of India, *One Hundred and Fifty-fourth Report on the Code of Criminal Procedure*, 1973, *supra* note 67, chapt-XV.⁷⁴ *Supra* note 65, para. 6.

same time the system has to ensure that real culprits are not left unpunished. In the process, a crime victim, another partner of the so-called 'penal-couple', should also not be neglected by the system. A criminal justice delivery system - police prosecutors, and criminal courts - thus, is expected to be 'fair' and 'just' to all the partners - society, offender and crime victim - associated with the criminal law regime. A slight tilt in favour of either of these 'associates' of 'criminal law process' makes the whole system 'unfair', 'unjust' as it invariably leads to 'miscarriage of justice' and thereby it makes the criminal trial a 'farce' and the criminal law system a 'mockery'.

However, a look 'at', and 'through', the 'burnt' Best Bakery case reveals that our criminal justice delivery system, by clever 'manipulations' and deliberate 'collusion' between the investigatory and prosecutory state-functionaries, with or without inadvertent or advertant or callous connivance of trial court, can be turned into an 'unfair' and 'unjust' system of 'justice delivery'. The Best Bakery 'handling' at all the stages of the administration of criminal justice - investigation, prosecution and trial-unquestionably demonstrates that: (i) a credible administration of criminal justice system requires an upright investigation, politically as well as ideologically independent public prosecutors and judges of impeccable integrity who inspire confidence of witnesses for 'free', 'fearless' and 'true' depositions as well as of victims of crime in particular and of the community in general in the 'just' and 'fair' administration of criminal justice; (ii) sensitive investigations, especially in cases of mob violence with political overtones, are often guided by considerations other than upholding the 'rule of law'⁵ and 'justice'; (iii) investigators, who are obliged by the law to carry effective investigation and gather legally sustainable evidence, exhibiting their political masters, carry a sort of 'tailor-made investigation' to ensure acquittal of the 'suspects'; (iv) witnesses, in connivance with the police and the public prosecutor, are 'allowed' or 'compelled' to turn 'hostile' to the prosecution; (v) sometimes public prosecutors, who are ideological akin to their political masters, turn their blind eye to the hostile witnesses and thereby further ensure acquittal of the 'suspects',

and (v) judge can be made a helpless and mute spectator watching witness after witness turn hostile to the prosecution.

A look 'beyond' the 'fire' of the Best Bakery, however, makes us to take a pause to ponder upon as to whether the so-called 'unfair' trial leading to 'miscarriage of justice' is because of some pertinent 'weaknesses in our legal system' or because of 'weaknesses' and 'prejudices' of those who make our criminal justice system work. Our considered response probably lies somewhere in between the two set of 'weaknesses'. In other words, a criminal trial becomes 'unfair' trial leading to 'miscarriage of justice' partly because of 'weaknesses' in the criminal law system and partly because of 'weaknesses' and 'prejudices' of those who operate the system.

As demonstrated in the preceding pages, our criminal law system adequately takes care of 'hostile' witnesses and effectively arms the investigatory, prosecutory and adjudicatory functionaries of State to find 'truth' as well as to 'penalize' those give false or fabricated evidence consequentially leading to 'miscarriage of justice'. However, these state functionaries, for undisclosed reasons, plausibly due to their 'weaknesses', have hardly resorted to their powers in quest for 'truth'. Nevertheless, our existing criminal law system exhibits some 'weaknesses' leading to 'miscarriage of justice'. Prominent among them are: (i) partial and unscientific investigation; (ii) no protection to witnesses carrying the risk of being intimidated, or coerced or induced to give 'false evidence' by resiling from their earlier statements made to the 10, and (iii), no concern for, and intense insensitivity to, victims of crime. However, emerging contours of 'fair trial' and of 'criminal justice' warrant a reasonably independent and impartial investigation, effective protection to witnesses and victims of crime and a well-designed institutionalized compensatory scheme and mechanism for compensating victims of crime.

The suggestions of the Malimath Committee about the independent and insulator investigatory mechanism by separating the Investigatory Police Wing from the Law and Order Police Wing; statutory protection, on the USA lines, to witnesses & victims of

crime; strengthening the law of perjury to desist and deter witnesses from turning 'hostile' to the prosecution, and the compensatory scheme for compensating victims of crime, are most welcome. However, its suggestions pertaining to the manner of recording of statements by the police; the standard of proof required [i.e. the 'standard of clear and convincing'] for convicting 'suspects', and the court's authority to direct further investigations till 'truth' is discovered, require, in the interest of justice, a serious reconsideration and review before they are implemented.

Keeping in view the illiteracy among the people and the ill-famous notoriety of the police in India for 'using' and 'abusing' their powers for 'doing' and 'undoing' anything, the suggestion of the Malimath Committee that sec. 161 of the CrPC be amended to make it obligatory to record statement of witness and to require the witness to sign it to admit that the statement is correct and its use for subsequent corroboration and contradiction, in the present submission, seems to be not viable for, at least, three reasons. *First*, the statements when narrated by a witness and reduced to writing by IO may not always be accurate and may not be in the manner narrated by the witness. *Secondly*, an over-zealous IO, by abusing his authority and power, may record such a statement against will of the witness. *Thirdly*, even if statements made to IO are made admissible as evidence and usable to corroborate and contradict the subsequent statement, the proposed suggestion may not be useful particularly when a witness turns hostile because of 'threat' to him or to his family.⁷⁵ To make the suggestion more pragmatic and viable, it may be supplemented or supplanted by making mandatory for IO to send all the material witnesses during the course of investigation to the nearest Magistrate for recording their statements on oath.⁷⁶

⁷⁵ Such a recommendation, in the present submission, will be more pragmatic and effective if it is supplemented by criminalizing an act of intimidating or inducing a witness through inserting an appropriate section in the IPC.

⁷⁶ The Law Commission of India in its 41st Report, such a recommendation. It seems that that the Central Cabinet is more impressed by this recommendation when it recently, in wake of the Best Bakery case, approved an amendment to the CrPC requiring a compulsory record of statement before a Magistrate. And if

The suggested 'standard of clear and convincing' proof for 'convicting' accused, if accepted, will not only alter the foundation of our criminal justice system and undermine the basic principles of criminal jurisprudence but will also lead to a set of hitherto unknown hardships for all, an accused, witnesses, and prosecutors.

Similarly, the Malimath Committee's suggestion for authorizing courts to direct further investigations till 'truth' is discovered, in the interest of justice, will introduce tremendous 'subjectivity' of a trial judge in determining complicity of an individual and hardships for the IOs, trial courts as well as witnesses. Probably, it will lead to further delays in disposal of cases. It is significant to recall here that we do have such a provision, in the form of sections 173 (8) & 319 of the CrPC, in our criminal law system.

Nevertheless, the Best Bakery unequivocally illustrates that our contemporary administration of criminal and penal justice is not sound and it deserves an urgent attention. The system, which ensures protection of rights of the accused - constitutional and statutory - and which is dominated by the idea of reformation and rehabilitation of offenders, is not only unjust and inequitable from the point of view of victims of crimes and their competitive claims of reparation but is also negation of *rule of law* and the concept of 'justice'. It is needless to emphasise here that it is prime need of the hour to give serious consideration to effective and equitable reparation of victims of crime with a view to doing justice to them and to making the contemporary administration of criminal justice 'just' and 'equitable'. Otherwise, we would be proving ourselves worst than our uncivilized ancestors and be guilty of unjustified perpetuation of anti-thesis of victimology and negation of *rule of law*. It is difficult to resist reminding Barnes and Teeters, who observed:

a witness goes back on the recorded statement, the charge of perjury can be leveled against him. See, *The Hindu*, New Delhi, August 12, 2003 (9).

Our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned. Even where fines are imposed today, the state retains the proceeds and the victim gets no compensation.⁷⁷

How long and on what justifications, legal or moral, can we afford to neglect victims of crime and their reparation and undermine their right to be compensated? Should we, in the interests of victims of crime and their equitable right to be re-compensated for 'loss' or 'injury' caused by commission of an offence, and 'just' administration of criminal justice, not look back to the ancient and medieval times in which victims of crime were not that neglected and look at the current legislative trends and developments in other jurisdictions exhibiting equal concern to crime victims and the Law Commissions' proposals for reforms, to update the law governing payment of compensation to victims of crime in India and to make it more effective, equitable and comprehensive? Should we, in the 21st Century, not remind ourselves that victims of crime deserve to be treated with human dignity and respect in our criminal justice delivery system to make the system more 'fair' and 'just'?