IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1067 of 2006

With
R/CRIMINAL APPEAL NO. 1142 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

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Approved for Reporting	Yes	No
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SACHINBHAI HASMUKHBHAI PATEL & ANR.
Versus
STATE OF GUJARAT

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Appearance:
MR VIJAY PATEL for HL PATEL ADVOCATES(2034) for the Appellants in CRA 1067/06
MR CHIRAG UPADHYAY for the Appellant in CRA 1142/06
MS MONALI BHATT, ADDITIONAL PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE GITA GOPI**

Date : 28/07/2025

COMMON ORAL JUDGMENT

1. Criminal Appeal No.1067 of 2006 by accused No.2 and 8, and Criminal Appeal No.1142 of 2006 by accused No.5, of Sessions Case No.23 of 2006 (Old Sessions Case No.108 of 2005), challenges the judgment of conviction and order of sentence dated 29.05.2006 by

the learned 1st Fast Track Court, Anand, where the trial was conducted against nine accused, while accused No.1, 2, 5 and 8 came to be convicted under Section 143 of the Indian Penal Code (IPC) with one month rigorous imprisonment and Rs.100/- fine and in default of payment of fine, seven days simple imprisonment, under Section 147 of the IPC, six months rigorous imprisonment and Rs.100/- fine with default stipulation of seven days simple imprisonment and for the offences punishable under Section 436, read with Section 149 of the IPC, sentenced to five years rigorous imprisonment and fine of Rs.500/- and in default, one month simple imprisonment.

1.1 Criminal Appeal No.1198 of 2006 got abated on 06.03.2020 since the appellant-accused No.1 (Alpesh alias Chako Navinchandra Patel) died on 02.05.2009.

1.2 The sentences were to run concurrently and set off had been granted under Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to in

short as 'Cr.P.C.'). The accused No.3, 4, 6, 7 and 9 were acquitted from the charge under Section 143, 147, 148, 149, 436, 457, 380 of IPC and Section 135 of the Bombay Police Act, giving them benefit of doubt, while the learned trial Court Judge did not find any case under Section 147, 457 and 380 of the IPC and under Section 135 of the BP Act against accused no.1, 2, 5 and 8, finding them guilty under Section 143, 147, 436 read with Section 149 of the IPC.

2. The charge below Exhibit 17 notes that all the nine accused and the persons in the crowd, because of the incident in regard to Ayodhya issue, on 01.03.2002 between 14.00 to 23.00 hours at Anand Lotia Bagod, gathered in concert, for prosecution of common object formed unlawful assembly and being the member of unlawful assembly committed offence punishable under Section 143 of the IPC.

2.1 All the accused and the persons in the crowd, for the issue of the incident of Ayodhya on 01.03.2002, at the

referred time of 14.00-23.00 hours and the referred place of Anand Lotia Bagod assembled for the purpose of prosecution of common object armed with the instruments for setting fire, and with deadly weapons formed unlawful assembly, and the members using force committed riots punishable under Section 147 of IPC.

2.2 At the referred time, place and date, all the accused with a common object assembled, and by forming unlawful assembly, armed with deadly weapons and instruments to cause fire being the member of the unlawful assembly, set complainant's and other witnesses' shop on fire and thereby, committed the offence under Section 436 read with Section 149 of IPC.

2.3 At the referred time, place and date, all the accused assembled, for the prosecution of the common object, formed unlawful assembly, and with deadly weapons and instruments to set fire, being the member of

unlawful assembly armed with deadly weapons broke the shops of the complainant and other witnesses and caused damage by committing theft of goods and materials from the shop, therefore were charged for the offences under Sections 457, 380 read with 149 of IPC. Further, were also charged for the breach of notification of the District Magistrate under Section 135 of the Bombay Police Act.

2.4 The charge was framed on 02.01.2006. Thereafter on 06.02.2006, the learned trial Court Judge raised the charge under Section 148 of IPC alleging riots with the deadly weapons.

3. Learned advocate Mr. Vijay Patel for the appellants of Criminal Appeal 1067 of 2006, also appearing for learned advocate Mr. Chirag Upadhyay in Criminal Appeal No.1142 of 2006, submitted that the conviction of the appellants is absolutely illegal and contrary to law and evidence on record. Learned advocate Mr. Vijay Patel contended that the conviction is contrary to

the principles of criminal jurisprudence and thus, is liable to be quashed and set aside. It is further submitted that the learned Judge has not rightly appreciated the documentary and oral evidence on record for convicting the appellants. It is contended that no panch witnesses have supported the case of the prosecution, nor there are independent witnesses to the alleged offence, and further, stated that the Investigating Agency has failed to conduct Test Identification Parade (TIP), and in absence of TIP, the dock identification of the accused persons by the witnesses would become highly doubtful, more so, when none has been named in the FIR.

3.1 Referring to the facts of the case and to the testimony of the witnesses, learned advocate Mr. Vijay Patel submitted that PW3-Irfan Yusuf Vohra deposed that he had seen the accused person in the mob on 01.03.2002 and on the very same day, he met another witness PW2-Liyakat Karim Vohra and gives the details of the incident, but the said person does not name the

present appellants, nor gives FIR, before police.

3.2 Learned advocate Mr. Vijay Patel contends that the complaint was lodged with Anand Town Police Station on 02.03.2002 by police, while the statement of these witnesses were recorded on 17.03.2002. The delay in recording the statement, with the alleged complaint, gives scope for false implication, and the complaint itself suggests that the appellants have been named in the charge-sheet with a view to harass them, since no connection could be shown of the accused to the crime.

3.3 Referring to the deposition of PW14-Mohammedbhai Jamalbhai, submitted that though the witness was with PW3, he has clearly deposed, that he had not seen any of the accused persons in the mob, he has not identified the accused and in his deposition, it becomes clear, that the spot from where he had seen the incident, is very far from the place of incident and therefore, it is submitted that the case of the

prosecution becomes unbelievable and therefore too, the judgment and order is liable to be set aside.

3.4 Referring to PW2 and PW3, learned advocate Mr. Vijay Patel submitted that both are interested persons, they are related to each other, as brothers-in-law, and though PW2 states that his PW14-Uncle and PW3-brother-in-law after returning from his shop, had informed him about the names of the person who were present, learned advocate Mr. Vijay Patel submitted, that those names are not related to the names of the present appellants, and subsequently a case has been drawn against the accused to falsely implicate them in the alleged offences.

3.5 Learned advocate Mr. Vijay Patel has referred to the decisions in the cases of **Ali Molah and Another v. State of West Bengal** reported in **(1996) 5 SCC 369** and **Girishbhai Mohanbhai Sharma v. State of Gujarat** in **Criminal Appeal No.132 of 2004** to contend that conviction cannot be based on uncorroborated

testimony of eye witness and that the evidence of eye witness if not corroborated cannot be relied upon.

3.6 For the conviction under Section 149 of the IPC, learned advocate Mr. Vijay Patel referring to the decisions in the cases of **K. Nagamalleswara Rao v. State of Andhra Pradesh** reported in **1991 (2) SCC 532** and **Amar Singh v. State of Punjab and Haryana** reported in **1987 (1) SCC 678** submitted that no conviction could follow if the persons convicted are less than five.

3.7 Further, in connection with the provision of Section 313 of Cr.P.C., Mr. Vijay Patel raised an issue that if the incriminating circumstances against the accused are not put to the accused for clarification, such circumstances cannot be used to convict them and such circumstances are required to be excluded from consideration. For that purpose, he relied on the decisions in the cases of **Kanhai Mishra @ Kanhaiya Misra v. State of Bihar** reported in **2001 (3) SCC 451**,

Harijan Magha Jesha v. State of Gujarat in **Criminal Appeal No.135 of 1973** and **Sujit Biswas v. State of Assam** in **Criminal Appeal No.1323 of 2011**.

3.8 For the failure to conduct TIP, learned advocate Mr. Vijay Patel submitted that it would become fatal in a riot case, and dock identification, first time in the Court, would not be evidence safe to rely upon and therefore benefit of doubt should be given, and thus submitted that it cannot be considered that the case has been proved beyond reasonable doubt. For that purpose, learned advocate Mr. Vijay Patel relied upon the decisions in the cases of **P. Sasikumar v. State Rep. by the Inspector of Police** in **SLP (Criminal) No.2756 of 2019**, **Vishwanatha v. State of Karnataka** in **Criminal Appeal No.192 of 2012**, **Wahid v. State Govt of NCT of Delhi** in **Criminal Appeal No.201 of 2020** and **Randeep Singh @ Rana and Anr. V. State of Haryana and Others** in **Criminal Appeal No.297 of 2024**.

4. Per contra, learned Additional Public Prosecutor Ms. Monali Bhatt taking this Court through the deposition of all the witnesses and more specifically, PW2, PW3 and PW14 read with the evidence of PW5-police complainant, PW12-police witness, PW13-Investigating Officer, submitted that even if one person could identify the rioters, then there would not be any necessity to bring extraordinary evidence on record to prove the offence. It is further submitted that the PW3 is the eye witness to the incident whose testimony gets corroborated by the evidence of PW14, then in that case, TIP would not be necessary to corroborate the version of the eye witness. It is also submitted that the learned trial Court Judge has analysed the evidence, and minutely observing the evidence has convicted four accused out of nine and all of the accused were members of unlawful assembly hence, are convicted for the offence.

5. Having heard both the learned advocates, perused the record. The testimony of the complainant-

Parakramsinh Keshubhai Rana as PW5 at Exhibit 38 would note that he was at his duty at Anand Town Police Station on 01.03.2002, there was announcement of Bharat Bandh. He alongwith Police Constable Ratansinh and other staff members were on patrolling. During that period from control room and from PSO, he received a Vardi to reach Vadod Village for providing bandobast. They returned to Anand Town Police Station and as per the instructions of the higher officer, they were in patrolling at a sensitive area of Lotia Bagod Chowki. During that period, they received a Vardi from control room informing that people have gathered near Gamdivad and were setting the shops on fire, therefore, they went to the place with their requisite mobile and saw two peanut shops on fire. The mob had put the shops on fire and according to the witness, the mob fled away from the place so they could not recognise them.

5.1 Thereafter, through control room, they processed to call the Fire Brigade. As per the witness, they were in a

meeting with the representatives of the people. Immediately thereafter, at Sardarganj, near three shops opposite to People's Bank, the mob had gathered and out of them, some had ablazed the shops, who all, seeing the police fled away from the place.

5.2 Thereafter, on Station Road, shops near Gopal Cross Roads were set on fire. As per the witness, the mob had deadly weapons with them. They were breaking the shutters of shops, on seeing the police, they too ran away; at the place they saw burnt goods and materials, so called the Fire Brigade through Control Room.

5.3 Thereafter, proceeding in patrolling towards Gamdivad, they saw a mob putting a stall, on the road opposite the Nagar Palika Office, on fire and also beside that, a peanut cart was put on fire. Witness stated that seeing the police, the mob ran away.

5.4 Thereafter, as per the witness on Hardgud Road, Opposite Agriculture Campus, a stall was set on fire.

Receiving the information, they reached there and found that the crowd had burnt the stall. The incident occurred between 14.00-23.00 hours, he gave the complaint on behalf of the State. Identifying his signature, he produced the complaint at Exhibit 39.

6. As per the deposition of this witness-PW5 on 03.03.2002, between 8.00-10.45 hours, the panchnama was drawn in presence of two panchas describing all the places. The police complainant identifying his signature on the panchnama and that of panch placed it, at Exhibit 40. The complaint was sent for registration and after the panchnama, the investigation was handed over to Keshubhai Rambhai Bhuva. In the cross examination, PW5 stated that on 01.03.2002, there was announcement of Bharat Bandh, he could not recollect that on that day there was curfew in Anand, but affirmed that wherever there were Hindu and Muslim population, bandobast was arranged. The complaint at Exhibit 39 refers to unlawful assembly and the offence of arson with

deadly weapons and damage in furtherance of a common intention. The complaint, referred the witnesses, would be shop owners, and reliance would be on the evidence of damages and police personnel.

7. Panchnama at Exhibit 40 refers to PW9-Husain Shafi Mohammed Shaikh who had shown his peanut shop. The panchnama of the place known as Shabbir Brother Kachwala and Company, was shown by PW6-Isuf Saleh. Irfan Store was identified by one Fakruddin Irfanbhai Vohra. Then the condition of the shop of Rasoolbhai was recorded. He was not present at the time of panchnama. PW7-Abdul Rashid Haji Rasool Vohra showed the peanut shop of Gulam Rasool Jamal. Near Sankalp Complex on the Ground Floor, the door of Everest Auto Electric Works was found burnt, the owner was not present. The tea and snack stall was also burnt, the owner was not found at the place.

7.1 On the same ground floor, south facing was Shop No.G/8 of M/s. Sagar Auto Consultants. The furniture was burnt, the owner was not present, therefore, the damages could not be known. Further, Shop No.5/6 was burnt and they found ashes there.

7.2 Shop No.5 named as 'Charotar Oil' was found to be damaged, the plaster was broken, the owner was not present there to find about the damages. Here it is required, to make a mention, that this is the shop of PW2.

7.3 The panchnama further notes that the damage was also caused to Super Computer Class, the glasses of the office were broken, there was damage to computers and other computer parts. The witness-Riteshbhai Navsibhai Patel assessed the damage to be of Rs.4,00,000/- to Rs.5,00,000/-. The panchnama further refers to the stall opposite Nagar Palika Bhavan which was selling peanuts. In Patel Plastic and Readymade Stores, the lock of the shutter was broken

and the clothes were found scattered. Moving ahead at Borsad Chowkdi Khada, they found south facing houses of Bharwad community, the doors of the houses were found broken with the damages to the bricks and also the iron roof top were found stolen and the doors of the bathroom were broken. Hamidaben, the wife of Alinubhai assessed the damage as of Rs.25,000/-. The panchnama further, records a cycle repairing cabin burnt near the wall of Government Godown. The damages were assessed by Diwan Sultan Shah and Subasha of Rs.15,000/-.

8. PW12-Kamubhai Sajabhai is the police witness examined during the trial, who in the year 2002, was serving at Anand Town Police Station. According to his deposition on 01.03.2002 he alongwith Rana Saheb had gone to Lotia Bhagod in the requisite mobile van and according to the witness, he and police constable Ratansinh were on patrolling at Lotia Bhagod Chowky on 01.03.2002 because of Bharat Bandh announcement on account of the assault on Godhra

Ramsevaks. During that time from the control room, he received a message of reaching Lotia Bhagod for bandobast with the police personnel of mobile Vadod. The police after the bandobast continued with the patrolling at Lotia Bhagod Chowky area.

8.1 According to PW12 during that period, when they were patrolling in Lotia Bhagod Chowky area, they received a message that a crowd has gathered near Gamdivad, therefore with the requisite mobile along with PW5-PSI-Rana they had gone there, at that time, the shop of Shabbir Kachwala and a peanut shop and a shop beside it were on fire, and according to the witness, the materials from the shop were taken away by the crowd, and stated that the mob had fled away, and that they could not recognize them. Thereafter, PSI-Rana through control by V.H.F. called the Fire Brigade, and the process of dousing the fire was undertaken. During that period, while they were on patrolling near Sardar Ganj, they saw shops on fire opposite People's Bank, and on enquiry, they saw three shops set on

fire. The witness stated that Shri. Rana sent a wireless message to the Fire Brigade and thereafter, continued with the patrolling. In between at Gopal Cross Roads, the crowd with deadly weapons were breaking the shops and on seeing the requisite mobile, the mob ran away and therefore, could not identify anyone. While enquiring, it was found that Patel Readymade Stores was set on fire. The process for extinguishing the fire was carried out and thereafter, while going towards Gamdivad, they saw a stall opposite Nagar Palika Office set on fire.

8.2 PW12, as was not at Anand, could not say that on 01.03.2002 there was curfew there, but stated that there was announcement of Bharat Bandh on that day in connection with the event of Sabarmati Express, which was burnt at Godhra on 27.02.2002. The witness could not state whether there was police bandobast in the Hindu and Muslim population area of Anand.

8.3 PW12 was made to refer the statement of PW3-Irfan Yusuf Vohra, which he denied of recording it. He stated that he found the statement in the documents which he received. He affirmed that in the statement it was recorded that on bike, he and his Uncle could not go to the Shop as there was curfew and they had gone to a lane of Ceat Shop through Amul Diary Road. PW12 stated that in the statement before the police it is noted that the sabotage of shop was in progress. But he affirmed that the witness has not stated, that there were cans and buckets of 5 litres oil, which were thrown out and there was attempt to burn and thereafter, fire was set, which was dangerous. He also affirmed that the witness has not stated that thereafter, the public started scattering and people from Sankalp Complex and Super Computers had come there. It was not recorded in the statement that attempts were being made to remove the public and fire brigade people were called, the fire could not be controlled and everything was burnt. The oil which

was thrown out was looted. It was also not recorded in the statement that he had informed the family members about the incident.

8.4 PW12 police witness had corroborated the statement of complainant PW5 with regard to patrolling, and incident of arson at various places, there were mobs at the recorded places, on seeing their requisite mobile vans, the mob fleeing away from the place and therefore, the witness could not identify the arsonists. The evidence of this witness has brought corroboration and even contradictions in the deposition of PW3.

9. The person whose shops, stalls and carts were damaged, and those whose damages were noted in the Panchnama Exhibit 40, few were examined as witnesses during the trial.

9.1 PW4-Imtiaz Uddin Fakhruddin Kazi was having the business of poultry. At the time of the incident, he was at his poultry farm, his 'Best Chicken Shop' is at Borsad Cross Road. He has no knowledge of the date of

incident. The shop was run by two-three men. The person working in his shop told him that the shop was broken and looted, and nothing had remained in the shop. The witness assessed the damage to his shop of Rs.40,000/- to Rs.60,000/-. He had a scooter. He came to know later on that someone had caused the damage, but had not known of any fire, even later. His scooter was safe, it was not burned.

9.1.1 So this witness is not eye witness to the incident. His estimate for the damages are not supported by any documentary evidence. His employee who informed him of vandalism has not been examined as a witness. So the present witness had not heard of damage by fire. He is not the person who could connect the present accused with the incident.

10. In the same way PW6, PW7,PW8, PW9, PW 10 and PW 11 as owner of shops all have given estimate of damages to their property.

10.1 PW6 - Yusufji Saalebhai Rana's business in Glasses was in the name of Sabir Brothers and Kachwala company. He came to know about the incident on 06.03.2002. He came to know about the damage to his shop through the police. Thereafter he had not gone to his shop to enquire. He has no knowledge about the damage to his shop.

10.1.1 This witness does not have any knowledge. He has not even stated of any damage to his shop.

10.2 PW7-Abdul Karim Hazir Solbhai Vora. He has his business at Samarth Cross Road. At the time of incident he was having his office and shop in the name of Messrs Rasool Bhai Haji Bawa and Lovely Agency, Opposite Old Ramji Temple, Anand Gamdiwad. He assessed the damages of Rs.70,000/- for the theft of utensils and damage to his office. He stated in his deposition that he has no knowledge of the persons who caused it.

10.2.1 This witness could only say about the damages while has no knowledge to connect the accused to the Crime.

10.3 PW8-Mohammed Nisar Ibrahim Bhai Saudagar, had a peanut shop opposite Anand municipality at Anand Sardar Ganj area. He stated that the incident had occurred during the time of Godhra incident. Because of the Gujarat Bandh announcement, he was at home, at that time his shop was burned. He sustained the damages of approximately Rs.35,000/-. He does not know who caused the damage.

10.3.1 This witness too could not say about any incident to connect the accused. Except the evidence of damage in the incident and of evidence of damages, nothing more has been stated by this witness.

10.4 PW9-Hussain Bhai Shafi Mohammedbhai Shaikh also was running a peanut shop at Gamdiwad. He states that there was mischief. His peanut shop,'Amit Sing Dana' was looted and burnt. He estimated the damages as Rs.1,50,000./- He is not aware of the

person who has caused the damage.

10.4.1 The evidence of this witness is not of much support to the prosecution.

10.5 PW10-Haji Ali Yakub Ali Syed was declared hostile. He was having a shop of Auto Consultant beside Indo Africa Hall. He states that the incident had happened on 01.03.2002. He doesn't know anything about the incident, and at six in the evening, he came to know that his shop was burnt. Since it was curfew, he could not visit his shop. The damage to his shop was of Rs.40,000/- to Rs.50,000/-.

10.5.1 The evidence of this hostile witness is not of much support to the prosecution.

10.6 PW11-Yaseinbhai Haji Amadbhai had his business in the name of Everest, Auto Electrical Works, Opposite Indo Africa Hall, Sardar Ganj. The witness stated that it was Friday and the incident was of 1-3-2002. he had not opened his shop because of Bharat bandh

announcement. In the afternoon, he came to know that the material of his shop were looted. The shop inside was burned and the old tyres were also put on fire. After 15 days, he had come to his shop, he saw the shutters open. There were ashes inside and burnt tyres. Approximately the damages was of rupees 3 lakhs. He stated that he does not recollect of having received names through the news.

10.6.1 This witness has also not named the accused. The facts of the shop being burned, assessment of the damages has been deposed.

11. PW13 is the Investigating Officer Keshubhai Rambhai Bhuva at Exhibit 48. He on 27.02.2002 was entrusted the investigation from Police Inspector P.R. Bhatt in connection to C.R. No.91 of 2002 of Anand Town Police Station. The accused No.5, 6 and 9 were under anticipatory bail and thereafter, he filed charge-sheet against all the accused. He received the copy of the proclamation under Section 37(1) of the Bombay

Police Act, 1951 which he produced on record at Exhibit 59. As per his deposition, the Police Inspector Mr. P.R. Bhatt, being deceased, since he had worked with him, recognizing his signature in Exhibit 50, the witness stated that requisition was sent to the learned Judicial Magistrate First Class, Anand to invoke Sections 436, 454, 457, 380, 427 and 188 of IPC.

11.1 The Investigating Officer identified three accused whom he had arrested. In the cross examination, it is stated that he had received the information, that opposite the Agriculture Campus, there was fire, and on enquiry, they found that a cabin was burnt, all the shops and stalls were burnt by the mob. PSI-Parakramsinh Kesubha Rana had given a complaint on behalf of the Government against the mob. In the cross examination, he affirms that during the patrolling, they had not arrested any accused.

12. The complainant-PW5, PW12-police witness and PW13- Investigating Officer, none of them could state

about the saboteurs. Nor the police witnesses had given evidence about those engaged in the sabotage as described by them. These police witnesses have not named the present accused. The complaint Exhibit 39 by PW5-Parakramsinh Keshubha Rana notes that it was against people in crowd who had formed unlawful assembly on Ayodhya issue, armed with deadly weapons had caused destruction and in furtherance of common object ablazed different places.

13. Panch witness-PW1-Arifbhai Mohammedbhai Shafibhai Vohra had not supported the panchnama dated 03.03.2002 and it was stated that he was called at the police chowky of Anand Town Police. He identified the signatures at Mark 27/4 and denied of any panchnama executed by the police.

14. The only evidence that remains now, which had been relied on by the learned trial Court Judge is of PW3, with the supporting evidence of PW14 and PW2.

15. PW2-Liyakatbhai Karimbhai Vohra is not the eye witness, but is the complainant by way of Exhibit 35, which he states was given to Anand Town Police P.I., Anand Town Police Station, Anand. Exhibit 35 does not bear the date of complaint. It is not the case of PW5-the complainant Shri Rana, of having received the application in the form of complaint. It is also not the case of PW5-the complainant, that based on the application Exhibit 35, the investigation was conducted. PW5-the complainant Parakramsinh Keshubhai Rana P.S.I. Anand Town Police Station gave his complaint on 02.03.2002, there is reference of the store 'Charotar Oil', Shop No.5 in the panchnama drawn on 03.03.2002, but at the time of the panchnama, the owner of the shop PW2 was not present there, the damage was to the plaster of the wall. Shop number 5 and 6 got blackened and there were ashes, while no further damage has been recorded in the panchnama for the shop of PW2. PW2 though being the owner of the business, is not the

person who is personally running the business. In Sankalp Complex, he is having his shop named 'Charotar Oil', Opposite People's Bank. Shop No.5 of his ownership was running the business of lubricating oil. He deposed that he opens his shop at 8.00 in the morning and closes at 7.30 in the evening.

15.1 Referring to the incident of Friday-01.03.2002, the witness PW2 stated that because of the riots, since the last three days, he had not opened his shop. The shop contained files, papers and cash, and the management of the shop was with his brother-in-law. According to this witness, his brother-in-law and he himself had gone to procure files, paper and cash. He further improvises stating that he had not gone to the shop. His uncle-PW14-Mohammedbhai Jamalbhai and his PW3-brother-in-law had gone to the shop. The evidence of this witness is not of an eye witness, though he states that he had gone alongwith his brother-in-law to recover the files, paper and cash, he, in the same breath, says that it was not him, but his

uncle and brother-in-law.

15.2 When PW3 and PW14 returned back, they informed PW2 that the shop was burnt and there was nothing there. His brother-in-law and uncle came, and had informed him. They had given certain names, which were, Chako, Mitul, Dhobhi, Rinku and he had written down the names of five persons. Over and above, there were other persons.

15.3 During the trial, he has given four names, as Chako, Mitul, Dhobhi and Rinku, meaning thereby that PW3 and PW14 had named only four persons. How are these four, associated with the nine accused arrayed in the trial becomes an essential aspect to be considered . The witness further states that PW3 and PW14 gave the five names in writing. As per PW2, all these people had vandalised his shop and had set it on fire. After some time, he had gone to the Town Police Station and had given in writing the details of the incident. He identified his typed application–Mark 27/2, which was

produced in evidence at Exhibit 35. The charge-sheet refers to this witness, as witness No.6 but does not refer to the complaint Exhibit 35. Mark 27 is the list of documents produced by the learned Public Prosecutor, the reference at Mark 27/2 is of this application given by the witness. There is no evidence of Exhibit 35 being received by Anand Town P.I. There is no endorsement of inward number nor any seal or stamp of the Police Station. Whether this application was actually given to the police does not become clear. The said application does not bear the date. The requisition of Police Inspector at Exhibit 50 dated 09.03.2002 addressing the learned Judicial Magistrate First Class, Anand to add Sections 436, 454, 457, 380, 427 and 188 of IPC in the complaint of Anand Town Police Station as I-C.R. No.91 of 2002 which is dated 09.03.2002, does not refer to the complaint application Exhibit 35. Further police had not drawn any panchnama accepting Ex. 35 of PW 2.

16. The charge-sheet was received by the Court on 07.03.2003. The complaint at Exhibit 35, since does not bear the endorsement of the receipt of the police, how it came in the custody of learned Public Prosecutor to place it under the List at Exhibit 27, to consider it as a valid document, becomes a questionable fact. Though no such question has been raised by the defence lawyer in the cross examination, but the witness denied the suggestion that the same was prepared by a lawyer. The witness PW2 in the cross examination said that he has no personal knowledge about the incident, and from where he got the application-Exhibit 35 typed. In view of the ignorance shown by the witness, it further becomes questionable as to how this document-Exhibit 35 was entertained during the trial. According to this witness, the sections of IPC as noted in the complaint, were dictated by his Uncle and he affirmed that details in Exhibit 35, were given by his uncle and brother-in-law-Irfan. PW2 deposition of giving Ex.35 to Anand Police

does not get the corroboration from the Anand Town Police P.S.I. The document at Exhibit 35 shows the copy to have been forwarded to P.I. Anand, DSP Anand, I.G. Anand and Home Minister Gujarat. The witness had not produced any endorsement from any other Department or any postal acknowledgment slip of sending his complaint to different Departments. His deposition states that there were some files and cash in the shop, while in the details of damages at Exhibit 35, referring to his establishment as 'Charotar Oil', the description are :- (i) Castrol, Veedol, Gulf, Indomix, Mico Company Oil – 20 litres, 10 litres bucket, drum seal packed (ii) Revolving chairs–2 , Table–2, Cordless telephone-2, Fans-2, Aluminum cabin rack for goods-4 and Showcase-1. The witness has stated that police had recorded his statement. He is not stating that during his statement before the Police, he had informed about Exhibit 35 being given to the Anand Town P.I. and the copy were sent to different authorities.

17. In the deposition, the witness-PW2 stated that he could identify few of the persons he had named. Before the Court, he could know Alpesh Chako and Dhobhi, and the rest, he could not identify. The witness in the deposition could identify Alpesh Chako and accused-Neelkanth as Dhobhi. He further stated that he would know the accused but could not identify them by names. He assessed the damages of his shop to be of Rs.5,50,000/-.

17.1 In the cross examination, this witness PW2 states that he does not know the fact, that at the time of the incident, accused No.1-Alpesh was a member of the Anand Nagar Palika, but further stated that presently he was a member. The six names given by uncle and brother-in-law, whether those were residents of Anand or not, he does not know, and he states that he did not have any personal talk with accused No.1-Alpesh and the one whom he has referred to as Dhobhi. He denied the suggestion that his uncle gave false names and on that basis, a false complaint has been given.

18. PW2's application Exhibit 35, was according to him, as instructed by his brother-in-law and uncle. He himself had not seen any of the accused at the place of incident, since he is not an eye witness. How he could identify two of the accused, one as Alpesh Chako and another as Dhobhi as Neelkanth. His act of identification itself clears, that he identified Accused Alpesh Chako as he was member of Anand Nagar Palika. Neelkanth could have been known to the witness as he was Dhobhi. The PW2 has not identified any other accused in the Court, though he had named six in the application Exhibit 35, as No.1 Sachin (father's name not known), No.2 Rinku Patel (father's name not known), No.3 Alpesh alias Chako (father's name not known, Anand Municipal Councillor aged about 35, residence: Anand), No.4 Ashok Banarasi alias Kodilo (father's name not known, profession business, aged about 35 years, residence Anand), No.5, Vipul Patel (father's name not known, profession Khaman Shop at Gamdivade, aged about 35

years, residence Anand), No.6 Mitesh Dhobhi and other 5 to 7 persons whom witnesses could identify on scene. The complaint-Exhibit 35 is with the subject IPC Sections 147, 148, 149, 436, 395, 398 etc.

18.1 The witness though states that the name of the accused noted in Exhibit 35 were given by the brother-in-law and uncle, Exhibit 35 has not been identified and affirmed by PW3 and PW14, the brother-in-law and the uncle. The witness PW2 was informed about the incident on the very same day, but he had not given any FIR. It appears that this application Exhibit 35 has been brought to claim damages where according to the witness, he sustained damage of Rs.5,50,000/- while the panchnama which was drawn by the police of various places, as referred hereinabove, under Exhibit 40 does not mark any pilferage or even theft in the witness shop. The damage has been noted of the shop, with the only mention of breakage of plaster and blackening of shop. The panchnama of various places were drawn, but

nothing is recorded of shop owner no.5 'Charotar Oil' being burnt with the oil of the shop. PW2 being the owner of the shop is not referring to any oil buckets or drums or oil cans, in his deposition. He only refers to files, papers and cash. The witness has not even verified prior to giving application-Exhibit 35 about those names cited in the application, whether they were resident of Anand or not. He has affirmed in the cross examination that he was personally knowing accused No.1-Alpesh and the accused-Dhobhi.

19. PW2 has distanced himself in giving any evidence with regard to the contents of Exhibit 35 and had referred to his damages of Rs.5,50,000/- to his shop. The identification of accused in the court is not on account of his own version. He is not the eye-witness.

20. In the panchnama at Exhibit 40,as becomes noticeable the amount of damages had been assessed by the panchas, however, no such mention is made about the loss to witness-PW2. There is no independent

panchnama of his Shop No.5 'Charotar Oil'. It has not come on record that after receiving Exhibit 35, the police had drawn any panchnama of the shop of PW2.

21. The witness-PW2 had affirmed that it was his uncle and brother-in-law who had informed him about the incident and had given the names of the persons involved. The uncle at PW14- Mohammedbhai Jamalbhai, his deposition is of what he saw for about 2 days, i.e on the day of the incident, 01.03.2002, and the day next 02.03.2002. He at the time of the incident, and also at the time of deposition was staying Anand Polson Diary. He stated that he knows PW2-Liaquatbhai Haji Karimbhai. He is the younger brother-in-law of his daughter, who has his business as 'Charotar Oil' at Sardarganj. He also stated that he knows PW3-Irfan Yusuf Vohra, who is the brother-in-law of PW2. The witness stated that Irfanbhai is an employee at 'Charotar Oil'.

21.1 On 01.03.2002, Friday, PW3-Irfanbhai came to call him at about 2.30, who informed him, that people were vandalizing and looting, he was asked to join, therefore, witness PW14 and PW3 went together, they stood little away from Bharat Tyre at Sardargunj. PW14 stated that they saw the crowd of 100-150 people, some were burning, while some persons were engaged in extinguishing the fire. They waited there for about half to one hour.

22. So as per the deposition of PW14, they had not gone at their shop, nor near their shop. They were waiting little far from Bharat Tyres. From there, they could see the mob. According to the witness, some of them were setting fire, while some were extinguishing the fire. They stood there for more than half an hour. The witness could not identify any person from the crowd. He has not stated or named any of them as recorded in Exhibit 35, though according to PW2, it was this Uncle who had given them the names. However, the evidence clarifies that all the persons in the crowd were not

responsible for the arson, few of them were extinguishing the fire.

22.1 The witness further states that on the next day, when they visited the shop, they saw that, nothing remained. However, the witness could state that the bill books came in their hand and thereafter, they returned home and informed PW2. So the evidence of this witness if observed minutely, would clarify that on 01.03.2002, he had not informed anything to PW2-Liyakatbhai Vohra. On 01.03.2002, he had not seen any accused in the mob whom he could identify, he has not named any person in the deposition. While according to him, on the next day, only after visiting the shop and taking the bill books in hand, he informed PW2 about the facts. He stated that he had seen 100-150 people in the crowd, but he could not recognize anyone in the crowd. He even specifically clarifies that he had not seen any of the accused in the crowd.

22.2 This witness-PW14 has not been declared hostile. In the cross examination it has come on record, that , when he has reached the place of incident, the police had come there. He also affirms that the place of incident was very far from the place where he was standing. And 100-150 people crowd was also very far. He has no information whether the police had arrested any of them. This evidence of PW14 clarifies that police was present at the time of incident, and thus, it would be known to this witness about the Panchnama at Exhibit 39, that was drawn by the police on 03.03.2002. The complaint by PW5 is dated 02.03.2002 whereas as per the complainant-PW5, the incident had taken place on 01.03.2002 between 14.00-23.00 hours.

22.3 PW14 has not given any evidence with regard to loss of oil drums, oil buckets or oil cans nor of any damage as referred in Exhibit 35. This fact becomes relevant to bring on record, the motive behind Exhibit 35. Exhibit 35 appears to be a lawyer assisted drafting. In the

cross examination of PW2, he stated the sections of IPC were dictated by his uncle-PW14, while PW14 has not made any such mention in his deposition, rather PW14 clearly states that he had not seen any of the accused in the crowd.

23. The learned trial Court Judge while referring to the evidence of PW14-Mohammedbhai Jamalbhai has merely observed his deposition of having not identified the persons from the crowd, but trial court had not come to any conclusion, as to why it was not ready to believe PW14, though PW14 and PW3 both had gone on the same bike at the same place.

24. The conviction is totally based on PW3-Irfan Yusuf Vohra. The learned trial Court Judge had convicted 4 out of 9 and released 5 accused.

25. Learned advocate Mr. Vijay Patel has raised the contention that Section 149 of the IPC would not apply if less than 5 persons are convicted. He has made reference to the decisions in the cases of **K.**

Nagamalleswara Rao v. State of Andhra Pradesh (supra) and **Amar Singh v. State of Punjab and Haryana** (supra) in the context of invocation of Section 149 of IPC.

26. In the case of **K. Nagamalleswara Rao v. State of Andhra Pradesh** (supra), in Paragraph 8 it was observed as under :-

> *8. However, the learned Judges over-looked that since the accused who are are convicted were only four in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, section 149 cannot be invoked for convicting the four appellants herein. The learned Judges were not correct in stating that A1, A2, A5 and A11 "can be held to be the members of the unlawful assembly along with some others unidentified persons' on the facts and circumstances of this case. The charge was not that accused 1, 2, 5 and 11 "and others' or "and other unidentified persons" formed into an unlawful assembly but it is that "you accused 1 to 15" who formed into an unlawful assembly. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object."*

27. The facts in **Amar Singh's** case (supra) in short were that seven accused were charged for murder under

section 302 read with section 149 IPC. Two out of the seven accused were acquitted by the Trial Court and on appeal the High Court acquitted one more accused. However, the High Court convicted four of the accused under section 302 read with section 149 IPC and sentenced them for life imprisonment. On behalf of the four convicted accused it was contended that after the acquittal for three accused persons out of seven, the appellants who were remaining four cannot be held to have formed an unlawful assembly within the meaning of Section 141, IPC and accordingly the charge under section 149 was not maintainable.

27.1 In the case of **Amar Singh v. State of Punjab and Haryana** (supra), in Paragraph 9 it was held as under :-

> *"9. In our opinion, there is much force in the contention. As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other poisons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an*

> *"unlawful assembly" is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained."*

28. Section 149 of the IPC is reproduced herein for ready reference.

> ***"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—***
>
> *If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."*

28.1 The above Section has the following essential ingredients : - (i) there must be an unlawful assembly (ii) commission of any offence of an unlawful assembly and (iii) such offence must have been committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew likely to be committed.

29. In cases of large scale rioting, it would be a challenge to identify the individual participants and their role. Establishing a common object among the members of the unlawful assembly can be difficult. Witness

testimony may be unreliable or influenced by various factors such as fear, bias or personal interest. For the purpose of application of Section 149 of the IPC, the prosecution has to prove the presence and participation in an unlawful assembly. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

30. Inference of a common object has to be drawn from various factors such as weapons carried with them, their movements, the acts of violence committed by them and the result, as observed in the case of **Surendra v. State of Uttar Pradesh** reported in **(2012) 4 SCC 776.**

31. In the evidence of PW14-Mohammedbhai Jamalbhai, it has come in his deposition that on 01.03.2002, when he had gone alongwith PW3, he had seen a mob of

100-150 persons, according to the witness PW14, some were engaged in setting fire, while others were extinguishing the fire. So here now, it becomes necessary for the prosecution to establish that the accused were the members of unlawful assembly, and that the accused had done incriminating act to accomplish common object of unlawful assembly. The prosecution was required to prove that it was in the knowledge of the other co-accused that they were likely to commit such incriminating act in prosecution of the common object. The knowledge and awareness of the members of the unlawful assembly of a likelihood of a particular offence being committed in prosecution of common object, would make them liable for prosecution under Section 149 of the IPC.

32. In the case of **Nityanand v. State of U.P. & Another reported in 2004 (57) ALR 290** rendered in Criminal Appeal no.1348 of 2014 dated 04.09.2024, the Hon'ble Supreme Court, while referring to Sections 141, 146 and 148 IPC, considering Section 149 IPC as pivotal

section, observed that every member of an unlawful assembly shall be guilty of an offence committed in prosecution of the common object. Section 149 IPC says that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly likely to be committed in prosecution of that object, every person, at the time of committing of that offence, is a member of the said assembly; is guilty of that offence. The judgment refers to the case of **Krishnappa v. State of Karnataka reported in (2012) 11 SCC 237**, where the Court while examining Section 149 IPC, has observed in Paragraphs 20 and 21 as under:-

> *"20. It is now well-settled law that the provisions of Section 149 IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly*

knew that offence is likely to be committed in prosecution of that object.

21. The factum of causing injury or not causing injury would not be relevant, where the accused is sought to be roped in with the aid of Section 149 IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not."

33. Finally, the Hon'ble Supreme Court in the case of **Nitya Nand** (supra) has observed in Paragraph 30.1 as under:-

"30.1. Thus, this Court held that Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. By application of this principle, every member of an unlawful assembly is roped in to be held guilty of the offence committed by any member of that assembly in prosecution of the common object of that assembly. The factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of Section 149 IPC. The question which is relevant and which is required to be answered by the court is whether the accused was a member of an unlawful assembly and not whether he actually took part in the crime or not."

34. The Hon'ble Supreme Court observes that Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful act committed pursuant to the common object by any other member of that assembly. Every member, thus, of an unlawful assembly is to be held guilty for the

offence committed by any member of that assembly in prosecution of the common object of that assembly. The Hon'ble Supreme Court clarifies about the question which would be relevant for the Court to answer, whether the accused was a member of an unlawful assembly and not whether he actually took part in the crime.

35. The Hon'ble Supreme Court has also in **Nitya Nand** (supra) referred to the case of **Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel** reported in **(2018) 7 SCC 743**, wherein it was observed that Section 149 IPC does not create a separate offence, but only declares vicarious liability of all members of unlawful assembly for acts done in common object. The Hon'ble Supreme Court has observed in Paragraphs 20, 22 and 34 as under :-

> *"20. In cases where a large number of accused constituting an "unlawful assembly" are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on*

record justifies. The mere presence of an accused in such an "unlawful assembly" is sufficient to render him vicariously liable under Section 149 IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149 IPC for the offence punishable under Section 302 IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get away with the crime.

** * * * **

22. When a large number of people gather together (assemble) and commit an offence, it is possible that only some of the members of the assembly commit the crucial act which renders the transaction an offence and the remaining members do not take part in that "crucial act" — for example in a case of murder, the infliction of the fatal injury. It is in those situations, the legislature thought it fit as a matter of legislative policy to press into service the concept of vicarious liability for the crime. Section 149 IPC is one such provision. It is a provision conceived in the larger public interest to maintain the tranquility of the society and prevent wrongdoers (who actively collaborate or assist the commission of offences) claiming impunity on the ground that their activity as members of the unlawful assembly is limited.

** * * * **

34. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed."

36. Here in the present case the section invoked in the charge against accused also included Section 148 IPC

for rioting, armed with deadly weapon. Section 148 reads thus :-

> *"**148. Rioting, armed with deadly weapon**.—Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

36.1 The case of offence by use of deadly weapons likely to cause dead has not been proved by prosecution. People had gathered there. Some were burning things and some were in extinguishing fire. The prosecution then would have to prove that the present appellants were in unlawful assembly and appellants as accused had actually taken part in the arson. PW14-Uncle has totally denied the presence of appellants in the crowd, who had gone alongwith PW3 at the same place and were standing together at the place distant from the place of offence.

37. In the case of **Chanda v. State of U.P.** reported in **(2004) 5 SCC 141**, the law on Sections 141 and 149 of IPC has been very clearly dealt with and the Hon'ble Supreme Court's observations are as under:-

"Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. (Para 8)

An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. (Para 10 and 9)

It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot eo instante. (Para 9)

A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the

assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly. (Para 8)

The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. (Para 8 and 9)

Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. (Para 10)

When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In

> *every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part; but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (Para 10)*

38. PW-3 Irfan Yusuf Vohra the brother-in-law of PW2 stated that he had gone alongwith PW14. The witness states that he was at home alongwith his PW2-brother-in-law. He is the resident of Anand. During the period of the incident, he was sitting at the shop of PW2 and was handling his business of lubricating oil, opposite People's Bank in Sankalp Complex known as 'Charotar Oil'. The witness PW3 states that incident had occurred on 01.03.2002. It was the day of Bandh. Their shop was closed. The Bandh was on account of Godhra carnage. It was a Friday and after the Juma Namaaz, he had come back at his Society, and he came to know that the atmosphere in Anand was grave. What would happen was not known? Their shop was in a different area of Ganj.

38.1 The witness-PW3 stated that important documents, files and cash amount were there and because of the anxiety, he went to his Uncle-PW14-Mohammed Jamal Vora. PW14 told him that he was joining him, therefore, PW3 and his Uncle-PW14 both went to the shop on the bike.

38.2 The witness-PW3 stated that it was not possible to go to the shop, there was curfew, they through Amul Diary Road, entered the lane of Ceat Shop. On the four sides of the Complex, they saw, total public and vandalism was going on in their shop and the neighbour's shop. The damage of two shops on the ground floor was in progress, they were throwing out the materials from the shop. The witness stated that there were oil buckets and oil cans of their shop which were of 5 litres, thrown out and set on fire. He stated that it was a terrific fire. Then the public started to scatter, and at that time, people from Sankalp Complex and Super Computers had come there.

Attempt was made to remove them and to extinguish the fire.

38.3 Here the witness-PW3 states about public everywhere around the complex, people from Sankalp Complex and Super computers had also come, attempts were made to remove the public to extinguish fire.

39. The evidence of PW3 states that oil buckets and cans of 5 litres were thrown out from the shop, it was put to fire, public started scattering. This he saw from the lane of Ceat Shop. The presence of people of Sankalp Complex and Super Computers had been brought by this witness in his deposition. None of them from Sankalp Complex and Super Computers have been examined to corroborate the evidence of PW3. Though PW14-Mohammedbhai Jamal was with PW3, he is not corroborating the evidence of PW3. PW14 stated that they stood at a distance, from Bharat Tyres in Sardargunj. That specification of the area is not coming in the evidence of PW3. He was standing in

the Ceat Shop lane. Whether both this area near Bharat Tyres and Ceat Shop is the same does not get corroboration from both these witnesses nor from others, however, the fact remains that PW3 and PW14 had gone at the same place. The description of the event varies in the testimony of both the witnesses. PW14 only refers to the crowd of 100-150 people but he does not depose of the miscreants throwing, 5 litres oil buckets or oil cans. According to PW14, some were burning things, while others were dousing. PW14 had not recognized accused in the mob.

39.1 PW3 further states that the public were trying to extinguish the fire, the fire brigade was called there, PW3 deposed that the fire was fierce, it could not be brought under control and everything got destroyed. The evidence further states that the oil which was out, were looted by the public. He assessed the damage of Rs.5,50,000/-. His deposition states that the credit book, cash, cheque book and files etc. everything was destroyed. The evidence of PW14 states that while they

had gone the other day, they could bring bill books. This evidence does not get corroboration from PW3 since on that very day, i.e. on 01.03.2002, he had not gone near his shop, he was watching things from a distance, standing in the lane of Ceat Shop. Two shops he said were damaged by the people. He also says that public was extinguishing fire. He clarifies that he could not go near the shop, and as he got frightened, therefore, returned back home. He informed about the incident to the family members at home. But no complaint was given to the police, there is no FIR lodged by him.

39.2 There was a crowd of 100-200 people, in that he had given the names Alpesh Chako, Ashok Kodilo, Rinku Patel, Mitul Patel, Sachin, Mitesh Dhobhi. The only name which gets tallied from the accused is Alpesh Chako-deceased accused No.1 who was member of Anand Nagarpalika. He refers to Ashok Sheth and Ashok Kodilo. How had he identified such person. How, Ashok Sheth, Ashok Kodilo got identified before

the police, for them to be charge-sheeted, is not coming on record. Admittedly, there was no TIP. He had named one person as Sachin, but has not given the full name and another as Mitesh Dhobhi. The witness stated that he was knowing these persons. The rest of them in the crowd were not known to him.

40. The cases of **P. Sasikumar v. State Rep. by the Inspector of Police** in **SLP (Criminal) No.2756 of 2019**, **Vishwanatha v. State of Karnataka** in **Criminal Appeal No.192 of 2012**, **Wahid v. State Govt of NCT of Delhi** in **Criminal Appeal No.201 of 2020** have been referred by learned advocate Mr. Vijay Patel to support his argument, that in absence of identification of the accused without the TIP, mere identification in the Court would not be sufficient and when there is contradiction in the testimony of the eye witness without TIP, it cannot be said that the case has been proved beyond reasonable doubt.

41. In the case of **P. Sasikumar** (supra), in Paragraphs 10, 12, 13, 15 and 16 it has been observed as under :-

> *"10. The admitted position in this case is that the test identification parade (hereinafter referred to as 'TIP') was not conducted. All the prosecution witnesses who identified the accused in the Court such as PW-1 and PW-5 were not known to the present appellant i.e., accused no.2. They had not seen the present appellant prior to the said incident. He was a stranger to both of them. More importantly, both of them have seen the appellant/accused No. 2 on the date of the crime while he was wearing a "green colour monkey cap"!*
>
> *12. It is well settled that TIP is only a part of Police investigation. The identification in TIP of an accused is not a substantive piece of evidence. The substantive piece of evidence, or what can be called evidence is only dock identification that is identification made by witness in Court during trial. This identification has been made in Court by PW-1 and PW-5. The High Court rightly dismisses the identification made by PW-1 for the reason that the appellant i.e., accused no.2 was a stranger to PW-1 and PW-1 had seen the appellant for the first time when he was wearing a monkey cap, and in the absence of TIP to admit the identification by PW-1 made for the first time in the Court was not proper. However, the High Court has believed the testimony of PW-5 who has identified accused no.2 under similar circumstances! The appellant was also stranger to PW-5 and PW-5 had also seen the accused i.e., the present appellant for the first time on that fateful day i.e. on 13.11.2014 while he was wearing a green colour monkey cap. The only reason assigned for believing the testimony of PW-5 is that he is after all an independent witness and has no grudge to falsely implicate the appellant. This is the entire reasoning. We are afraid the High Court has gone completely wrong in believing the testimony of PW-5 also the identification of the appellant. In cases where accused is a stranger to a witness and there has been no TIP, the trial court should be very cautious while accepting the dock identification by such a witness* ***(See : Kunjumon v. State of Kerala (2012) 13 SCC 750)****.*

13. After considering the peculiar facts of the present case, we are of the opinion that not conducting a TIP in this case was a fatal flaw in the police investigation and in the absence of TIP in the present case the dock identification of the present appellant will always remain doubtful. Doubt always belongs to the accused. The prosecution has not been able to prove the identity of the present appellant i.e. A-2 beyond a reasonable doubt. The relevance of a TIP, is well-settled. It depends on the fact of a case. In a given case, TIP may not be necessary. The non conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused. It would all depend upon the facts of the case. It is possible that the evidence of prosecution witness who has identified the accused in a court is of a sterling nature, as held by this Court in the case of ***Rajesh v. State of Haryana (2021) 1 SCC 118*** *and therefore TIP may not be necessary. It is the task of the investigation team to see the relevance of a TIP in a given case. Not conducting TIP in a given case may prove fatal for the prosecution as we are afraid it will be in the present case.*

15. In the facts of the present case, the identification of the accused before the court ought to have been corroborated by the previous TIP which has not been done. The emphasis of TIP in a given case is of vital importance as has been shown by this Court in recent two cases of ***Jayan v. State of Kerala (2021) 20 SCC 38 and Amrik Singh v. State of Punjab (2022) 9 SCC 402****. In Jayan (supra), this Court disbelieved the dock identification of the accused therein by a witness and while doing so, this Court discussed the aspect of TIP in the following words :*

"It is well settled that TI parade is a part of investigation and it is not a substantive evidence. The question of holding TI parade arises when the accused is not known to the witness earlier. The identification by a witness of the accused in the Court who has for the first time seen the accused in the incident of offence is a weak piece of evidence especially when there is a large time gap between the date of the incident and the date of recording of his evidence. In such a case, TI parade may make the identification of the accused by the witness before the Court trustworthy...." (Para 18)

16. Under these circumstances, we hold that the identity of the present appellant is in doubt. The appellant could not have been convicted on the basis of a very doubtful evidence as to the appellant's identity. The appeal is allowed and the impugned order of the High Court dated 12.01.2017 is hereby set aside. The appellant has been in jail for about 8 years as we have been told at the Bar, he shall be released forthwith unless he is required in some other case. We make it absolutely clear that this decision of acquittal is based on the evidence, or lack thereof, which the prosecution has against accused no. 2 i.e. the present appellant. This will absolutely have no bearing on the case of accused no.1."

42. In the case of **Vishwanatha** (supra), in Paragraphs 16, 17 and 18, it has been observed as under :-

"16. Coming back to the facts and circumstances of the present case, it is an admitted fact that Ravikumar (Accused No.1, now deceased) was known to the eyewitnesses and was also related to the complainant. Hence, there was no requirement of TIP as regard to Ravikumar (accused no.1). But the case of appellant-Vishwananth stands on a different footing. He was a total stranger to the two eye witnesses i.e. PW-1 and PW-2. The name 'Vishwanath' came to their knowledge, only after Ravikumar (Accused no. 1) called his co-accused, by name exhorting him to run. In a case where the identity of the accused is not known and TIP has not been conducted, the court has to see if there was any description of the accused either in the FIR or in any of the statement of witness recorded during the investigation. There is none in the present case.

The identification of an accused in court is acceptable without a prior TIP and absence of TIP may not be fatal for the prosecution. It would depend on facts of each case. In the case at hand, though the appellant was identified in court by PW-1 and PW-2, the Trial Court did not attach much weight to it, as no identification proceedings were conducted, and the Court found it unsafe to acknowledge the identity merely on the basis of identification in the

Court.

In the present case, where there are six persons by the name of 'Vishwanatha' in the locality and where this Court has doubts on the presence of the two star witnesses PW-1 and PW-2 (who have identified the accused), we are of the opinion that the identity of the present appellant remained in doubt.

17. Another fact which casts a doubt on the identity of the present appellant, is that there is no description in the FIR of 'Vishwanatha' except that his name is mentioned. He then becomes the first of the two to be arrested by the police. Learned counsel of the appellant would submit that there were six persons by the name of 'Vishwanantha' in Kudupu village at the relevant point of time, a fact which was placed by the defence during trial, which has not been confronted. In such a situation, it was the duty of the prosecution to show as to how and on what basis, the appellant came to be apprehended by the police. The Sub-Inspector, PS-Mangalore Rural (PW-19), who apprehended the appellant, had also failed to explain how he came to apprehend the appellant without any information regarding his description. In his examination-in-chief, the Sub-Inspector (PW-19) explained the arrest of the appellant in the following manner:

"2. In respect of this case, crime no.388-2000 on 26.12.2000 my inspector instructed me to find out the accused. The same day myself and my staff taken into custody the accused Vishwananth at 4:30 PM near Goraksha Jnana Mandira, Near Kadri Park, Mangalore. Said accused is before the Court. I identify him. With the help of Vishwanath we had arrested another accused, Ravi Kumar at 5 P.M in a 'Galli' near State Bank of Mysore, Silver gate, Kulashekara, Mangalore..."

A perusal of the testimony of the Sub-Inspector/PW-19 indicates that there is not even a whisper as to what formed the basis of the appellant's arrest. He was cross-examined and what was gathered from his cross-examination is that the appellant was arrested in absence of any independent witnesses and without preparing any arrest memo. All these facts combined together cast a doubt on the identity of the

appellant. Thus, it is not safe to convict the appellant solely only on the basis of the testimony of PW1 and PW2, which itself."

18. Another aspect which needs to be considered is that the prosecution case rests primarily on the evidence of PW-1 and PW-2, who were the star witnesses. The admitted case of the prosecution is that PW-1, who is the daughter of the deceased, had gone out for some household work and there was no one in the house when the crime was committed. First, PW-1 had gone to a place named 'Kulshekara' and then to the Post Office, and in the end to her uncle's house at 'Ullal'. The distance between her residence at Kudupu and Ullal is about 20 km. She first walks some distance and then catches a bus to reach Kulshekara and from there she went to the post office, and after attending to her work, she takes a bus to go to her uncle's house at Ullal. Finally, she returned home in Kudupu and all of this was done by her within a period of 2½ hours. But this is not enough, as per the prosecution version, she also reached her house at the very moment when the deceased was being strangulated and then peeping through the window pane, she witnessed the two accused pulling the two ends of the rope. She called Accused no. 1-Ravikumar by his name, which led to the two accused fleeing from the spot and PW-2 who is the neighbour, chased them but in vain. This whole story of the prosecution is unbelievable for more reasons than one. Even if it is assumed for the sake of argument that PW-1 had reached the house at the exact time when the crime was being committed, the testimony to the effect that her mother was strangulated to death by a rope-like material, in the manner narrated by her, is not corroborated by the post-mortem report where ligature marks on the neck were not found to be encircling the neck in a round manner, as it should have been in such a case of strangulation. There were no ligature marks on the back of the neck. As discussed earlier, the marks were only on the front side extending from one angle of the mandible to the other. We therefore conclude that the prosecution has not been able to prove its case beyond reasonable doubt."

43. In the case of **Wahid** (supra), in Paragraphs 14, 23 and 24, it has been observed as under :-

"14. In cases where the FIR is lodged against unknown persons, and the persons made accused are not known to the witnesses, material collected during investigation plays an important role to determine whether there is a credible case against the accused. In such type of cases, the courts have to meticulously examine the evidence regarding (a) how the investigating agency derived clue about the involvement of the accused in the crime; (b) the manner in which the accused was arrested; and (c) the manner in which the accused was identified. Apart from above, discovery/ recovery of any looted article on the disclosure made by, or at the instance of, the accused, or from his possession, assumes importance to lend credence to the prosecution case. Manner in which accused persons were arrested and recovery effected appears doubtful.

23. As far as dock identification by the remaining two eye witnesses is concerned, they identified the accused persons during their deposition in court in the year 2015, that is, after nearly 4 years of the incident. PW-6, though stated that he identified the accused persons on 06.12.2011 while they were in the police lock-up, admitted that he went to the police station without being summoned. Interestingly, as per his description in the record, he is a resident of Aligarh. During cross-examination, he stated that he visited the police station on 06.12.2011 at 07:30 a.m. Considering that he is a resident of Aligarh, his statement that he visited the police station without summons on 06.12.2011 at07:30 a.m. does not inspire our confidence. Admittedly, memory of those witnesses was not tested through a test identification parade. In such circumstances, when three eye witnesses stated that accused persons were not the ones who committed the crime and another one stated that it was too dark, therefore, he could not recognise, bearing in mind that the accused persons were not known to the eye witnesses from before, not much reliance can be placed on the dock identification.

24. In such circumstances, and in absence of corroborative evidence of recovery of looted articles at the instance of or from the accused persons, in our view, this was a fit case where the appellants should have been given the benefit of doubt."

44. On careful reading of the judgments referred by learned advocate Mr. Vijay Patel in regard to identification of the accused by the witnesses in the Court and on analysis of the proposition of law, it can be observed that in cases where accused is a stranger to the witness and there has been no TIP, the trial Court should be very cautious while accepting the dock identification by such a witness. In absence of TIP, the dock identification of accused will always remain doubtful. Absence of TIP may not prejudice the case of the prosecution or affect the identification of the accused, if the evidence of the prosecution witness who has identified the accused in the Court is of a sterling quality. Otherwise identification of the accused before the Court ought to have been corroborated by the previous TIP. The question of holding TIP arises when the accused is not known to the witness.

45. There was no test identification for all the referred names. How PW3 was knowing these people, has not

been stated, nor the witness had stated about the role of all the individual accused whom he had seen in the crowd of 100-200 people. The law presupposes the existence of unlawful assembly and has to prove that the accused being the member of unlawful assembly, who in prosecution of common object has committed offence or that they had the knowledge what was likely to be committed in prosecution of their common object. As referred earlier, PW14 had stated in his deposition, few of them were extinguishing the fire. If the present referred people were there in burning the shops and more specifically, burning the shop of his employer, this employee-PW3 as brother-in-law was required to give evidence of the act of each and every referred accused, more so when since they were charged for rioting with deadly weapons. The identification could have been of the deadly weapon, in the hands of the accused.

46. Section 141 of the IPC defines unlawful assembly as under :-

> *"141. **Unlawful assembly**.— An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—*
>
> *First— To overawe by criminal force, or show of criminal force, 1the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or*
> *Second— To resist the execution of any law, or of any legal process; or*
> *Third— To commit any mischief or criminal trespass, or other offence; or*
> *Fourth— By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or*
> *Fifth— By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.*
> *Explanation.— An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."*

47. In view of the definition the assembly of five or more persons with a common object of burning the place was required to be delineated to be recounted as "unlawful assembly". The conduct of each individual referred in the deposition of PW3 was required to be stated. The provision of Section 148 was though invoked, the accused have been given benefit of doubt under Section 148 of IPC and thereby, the accused were not believed to be armed with deadly weapons for

rioting. Even the offence under Section 457 of the IPC of lurking house trespass or house breaking in order to commit offence had not believed against the accused, nor Section 380 of the IPC of theft in any building is believed. PW3 has also stated that few of them had looted and had taken away materials of their shop. There is no investigation in this direction. Nothing has come on record that the looted articles were found from the possession of the named persons.

48. PW3–Irfan Yusuf Vohra as witness in the Court has identified the accused by referring to the name as per the following schedule:-

Sr. No	Named by the witness in the Court	Identified in the Court by the witness	Recorded by the Court
1	Alpesh Chako	Accused no.1	(Alpesh @ Chako Navinchandra Patel)
2	Ashok Sheth	Ashok Jasabhai Patel	(A8)
3	Ashok Kodhilo	Accused no.5	(Ashokbhai @ Banarasi Bharatbhai Gupta)
4	Rinku Patel	Accused no.9 – Hetal Satishkumar Patel	(Hetalkumar Satishkumar Patel)

5	Mitul Patel	Accused no.3 – Pritul Jayantibhai Patel	Identified
6	Sachin	Accused no.2 – Sachin Hasmukhbhai Patel	Identified
7	Mitesh Dhobi	Nilkanth Ratilal Chaudhari	----------

49. PW3 could not identify the accused with their full name. Even the identification by name does not match with the mononyms. He could even not identify rest of the two accused nos.4 and 7. In his deposition, he stated that the person, whom he had named as above, were in the crowd, while rest of them whether were in the crowd or not, he could not recollect.

50. In the cross-examination, the witness was confronted with the question, which he affirmed in affirmative, that from the crowd, he could not state which of the person was causing the destruction, but he voluntarily stated that each member of the crowd had taken part and all were in the act of vandalism and further stated that certain persons had set the fire.

51. The witness is not sure about the act of the members of the crowd. According to him, all the members of the crowd, which was a crowd of 150 to 200 people, were engaged in sabotage. He denied the suggestion that only four shops were broken and stated that he could not state as to who had caused destruction of which shop, further stating that he could only tell the names of the persons who had destroyed his shop.

52. The witness was put to question that he had no occasion earlier to meet the accused, which he affirmed, nor had he any relation with the accused earlier. He also stated that he does not recognize all the people of Anand.

53. Here the witness has not specifically stated the role of each of the accused in the incident. In order to fasten criminal liability upon an accused, there must be identification of the accused with certainty. When more than one accused are involved in a crime, the occurrence witness must identify them specifically .

Here the witness – PW3 could not give the full name of the accused. It is not his case that the police had undertaken any process of identification of the accused as per the mononyms. The accused were referred by the mononyms by PW3, when he actually had no occasion to meet them earlier, nor had any relation with them. He had seen the incident on 01.03.2002, but till 17.03.2002, he had not gone to the Police Station. He denied the suggestion that till 17.03.2002, he had not given the names of these persons to anyone, but stated that he had informed the members of the family, inspite of knowing about the incident, more so, as per his say witnessing the incident and even identifying the miscreant, he had not informed the police, which as per his deposition, the police was present there at the time of the incident. He, for the first time, had gone to the Police Station on 17.03.2002. He and his brother-in-law both were having telephone at home. They had not phoned the police of the incident. The witness clarifying for not

informing the police stated that the police was present at the place and was doing nothing.

54. His evidence also states that the oil thrown out, was looted. However, that fact was not stated before the police. PW12 – Kamubhai Sajabhai, the police had the statement of this witness and on examination of the statement, he deposed before the Court during the trial that PW3-Irfan Yusuf Vohra had not stated in the police statement of oil buckets and canes of 5 Ltrs. thrown out and there was attempt to cause fire and thereafter, actually, they had set the fire and the fire was fierce. The learned Trial Court has not believed the case under Section 380 IPC of theft in any building. The police could not even connect any of the accused, with any of the property of the present witness PW3 or PW2. The deposition in the cross-examination also further clarifies that there were many shops opposite People's Bank and out of those shops, there were two shops, one his and another. Both the shops were oil shops. The witness from another shop was not

examined during the trial. He has also affirmed that the police had not conducted TIP. In absence of evidence of the destruction and loss to the adjoining oil shops and when there is no specification of the individual act of the accused with the identification of their name and clarity of the act of the accused in the mob, which could be considered as an unlawful assembly, no conviction can follow. The crucial evidence is the identification of the saboteur. The identity of the accused had not been established during the trial to fasten the criminal culpability.

55. The evidence of PW3 and PW14, though were standing together at the same place, had gone together on the bike, do not corroborate each other. Both are considered as eye-witnesses. PW3 is not telling anyone about the occurrence till 17.03.2002. For the first time, PW2 and PW3 had gone to the Police Station on 17.03.2002. The relation though was of brothers-in-law, but the evidence on record shows them as employer and employee. Both the witnesses, by

forwarding Exh.35, appears to have put a claim of their damages, which they had assessed of Rs.5,50,000/-. In the application Exh.35 they had given mononyms of six persons, while the trial was against nine, the learned Judge convicted four of them. Exh.35 as alleged to have been given by PW2 states that the persons named had come with weapons, while no such evidence has been given by PW3 of the accused being armed with weapons.

56. Analysing the evidence of PW2-Liyakat Karim Vohra, the trial Court has made observation that Exhibit 35 is not dated. However, the application seems to be addressed to the Anand Town Police Inspector and there in, names of Rinku Patel, Sachin, Ashok Banarasi, Pitul Patel and Nitish Dhobi have been mentioned.

57. The document-Exhibit 35 had not been produced alongwith the charge-sheet, to infer that the document-Exhibit 35 was in the custody of police and

had become the part of the charge-sheet. Without any endorsement of its receipt, such assumption cannot be made by the Court of it being given to the police, as addressed. Further, PW13-the Investigating Officer has not referred to Exhibit 35, who had received the investigation from deceased Police Inspector-P.R. Bhatt. PW13 had verified Exhibit 50 by Police Inspector-P.R. Bhatt dated 09.03.2002 making a prayer to Judicial Magistrate First Class, Anand to invoke Sections 436, 454, 457, 380, 427, 188. Further, witness-PW2 has not stated on what date he had given Exhibit 35 to Anand Town Police Inspector.

58. Exhibit 35 cannot be accepted in evidence unless the recipient of the document admits of having received it, otherwise in every trial, witnesses would produce such statement to improvise their case and Court would be relying on it for their conclusion, which is not permissible in law. The document Exhibit 35 produced during the trial after the completion of investigation and filing of chargesheet, cannot be

considered as a previous statement.

59. Section 145 of the Indian Evidence Act, 1872 is provided with regard to cross examination as to previous statement in writing. Section 145 contemplates statement made by a person to some authority. Mere statement written by him addressing some authority and not forwarding or handing it to the concerned addressee cannot be considered as a previous statement of any witness.

60. In the case of **State (NCT of Delhi) v. Mukesh** reported in **(2014) 15 SCC 661**, it was observed that it must be confined to statements made by witness before the police during investigation and not thereafter and in Paragraph 10, it was observed as under :-

> *"10. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that, from the scheme of the Code of Criminal Procedure and the Evidence Act, it appears that the investigation and the materials collected by the prosecution prior to the filing of the charge-sheet under Section 161 of the Code, are material for the purposes of Section 145 of the Evidence Act, 1872. The expression "previous statements made" used in Section 145 of the Evidence Act, cannot, in our view, be extended to include statements made by a witness, after the filing of the charge-sheet. In our view, Section 146 of the Evidence Act also does*

> *not contemplate such a situation and the intention behind the provisions of Section 146 appears to be to confront a witness with other questions, which are of general nature, which could shake his credibility and also be used to test his veracity. The aforesaid expression must, therefore, be confined to statements made by a witness before the police during investigation and not thereafter."*

61. Thus, the basic necessity for the prosecution was to prove that the statement was before police. None of police witnesses-PW5, PW12 or PW13 said that the statement-Exhibit 35 was given before them.

62. Section 157 of the Indian Evidence Act is in context to the former statement, which reads as under :-

> ***"157. Former statements of witness may be proved to corroborate later testimony as to same fact.***
> *In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."*

63. As noted in the case of **State of Tamil Nadu v. Suresh** reported in **(1998) 2 SCC 372**, Section 157 envisages two categories of statement which can be used for corroboration. First is the statement made by a witness to any person at or, about the time when the fact took place. The second is the statement made by

him to any authority legally bound to investigate the fact. If the statement is made to an authority competent to investigate the fact, such statement gains admissibility, no matter that it was made long after the incident. But if the statement was made to a non-authority, it looses its probative value due to lapse of time.

64. The meaning of expression "at or about the time when the fact took place" in Section 157 of the Evidence Act should be understood in the context to the facts and circumstances of each case. The test to be adopted, therefore, is to see whether the witness had the opportunity to concoct or to have been tutored. For that observation, reliance is placed in the **State of Tamil Nadu v. Suresh** (supra), where the observation recorded is as under in Paragraph 28.

> ***28.*** *We think that the expression "at or about the time when the fact took place" in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is this: Did the witness have the opportunity to concoct or to have*

> *been tutored? In this context the observation of Vivian Bose, J. in Rameshwar v. State of Rajasthan [1951 SCC 1213 : AIR 1952 SC 54 : 1952 Cri LJ 547] is apposite:*
>
> *There can be no hard and fast rule about the 'at or about' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction."*
>
> *(emphasis supplied)*

65. Exhibit 35 is not the statement of the witness based on his own knowledge, by way of observing and seeing the incident. PW2 says that the averment in the document and names as noted in this document at Exhibit 35 were as given by PW3-brother-in-law and PW14-uncle. While PW14 though had informed about the incident to PW2, but PW14 had very explicitly given evidence that he had not seen any of the accused in the mob. The trial Court has not concluded in the reasoning as to why PW14 should not be believed.

66. The evidence has also been recorded by the learned Judge that whatever oil was there, was looted. PW2 was in the business of lubricating oil. There is no investigation in this respect, if the oil was looted by the accused, then the actual connection to the crime of the

accused could have been proved.

67. PW3-Irfan Yusuf Vohra who has been believed by the trial Court for ordering conviction, has though stated that the oil bucket and oil cans were thrown out from both the shops and put to fire, the panchnama at Exhibit 40 does not show the presence of oil near Shop No.5 and 6. PW2 is the owner of the shop and had not gone to the place of incident and to his shop. PW3-Irfan Yusuf Vohra (brother-in-law) who was the employee of PW2, stated in the cross examination that he had not gone to police to give complaint of the incident. And for the first time after the incident on 01.03.2002, he went to the police station on 17.03.2002.

68. The learned trial Court Judge has made a observation of the deposition of PW3 whereby he has affirmed that he cannot definitely say about the part played and who was involved in the breakage. PW3 generalized by deposing that all the members of the mob were

breaking things.

69. PW3's evidence named the person who had broken his shop. Merely naming the person without describing about the prosecution of common object would not be sufficient enough to implicate the persons as accused, as contemplated under Section 141 IPC.

70. More specifically when charge under Section 148 IPC of rioting with deadly weapon had been invoked, to find whether the accused had gathered in an unlawful assembly in prosecution of common object, with deadly weapons, or instruments used to cause fire.

71. The motive of the witness PW2 and PW3 could also be gathered as their evidence was for quantifying the damages to Rs.5,50,000/-. The panchnama at Exhibit 40 by police has not recorded such damages at their shop, nor the form of damage to oil buckets and oil cans. The person from neighboring shop No.6 who also was in the business of oil has not come forward to depose such facts. The witness-PW3-Irfan Yusuf

Vohra is a partisan witness, his evidence cannot be believed without corroboration from other witness, which in this case PW14 who was an eye witness with PW3, who both had gone on same bike, has not supported PW3. The conviction on the basis of the deposition of PW3 by the trial Court is not safe without corroboration. The witness-PW3 has gone to Police Station only on 17.03.2002. He has the motive to gain compensation for his shop. Further the incident by the mob is the aftermath of Godhra incident and when a mob of 100-150 persons were involved, without corroboration and the specific evidence of individual act of each appellant-accused no conviction can sustain.

72. In the case of **Ali Molah and Another** (supra) relied upon by learned advocate Mr. Vijay Patel, it was held by the Hon'ble Apex Court that the conviction can be based on the testimony of single eyewitness if he is wholly reliable. Corroboration is required when he is only partly reliable. The conduct of the witness in not

telling anyone about the occurrence till next day was found unnatural, creating an impression that he had not witnessed the incident. The witness had not appeared before the Investigating Officer who was camping in his village. Hence, his plea that he was frightened and had no courage to inform anyone about the occurrence was not found maintainable. In the circumstance of the case, it was held that no conviction could be found on his uncorroborated testimony.

73. The decision of **Girishbhai Mohanbhai Sharma** (supra) was referred by learned advocate Mr. Vijay Patel, in Paragraphs 30 and 31, it was held as under :-

> *"30. Their evidence also suffers from the same effect of nondisclosure of the incident for three days. They do not disclose to anyone about having witnessed such an incident. It is only after the police arrived then they claimed to be eye witnesses.*
>
> *31. In the opinion of this Court, therefore, the prosecution cannot be said to have proved the guilt of the accused to the hilt, howsoever gruesome the crime may be. Only the guilty can be punished and that guilt has to be established by prosecution beyond reasonable doubt. In the instant case, the evidence of eye witnesses is shaky and is not supported by any corroborative piece of evidence. The conduct of the eye witnesses makes their evidence more shaky. We are therefore, of the view that the trial Court erred in relying upon such*

evidence and in recording conviction."

73.1 In the instant case PW2 and PW3, sat tight, and only on 17.03.2000, they said to have gone to the police. The police at the place of incident was the one engaged in bandobast, but Anand is a small place, where Police Station would be at a reasonable distance. Till 17.03.2000, PW2 and PW3, had not disclosed the name. They had not disclosed to anyone of having witnessed the incident. The evidence of PW3 as eye-witness is not corroborated by any other witnesses examined much less PW14 who had accompanied him. So no reliance can be placed as the un-corroborated evidence of PW3 who even had failed to identify the accused in the Court.

74. Contention was also raised about non-referring the circumstances formed on vital evidence recorded against the accused under Section 313 of Cr.PC. The accused were not confronted with the evidence against them. It was argued that the evidence upon which conviction is based had not been put to the accused to

be confronted and explained. The evidence of PW3-Irfan Yusuf Vohra giving names of accused had not been put to the present appellants, thus, learned advocate Mr. Vijay Patel contended that the trial gets vitiated. Nine accused before the trial Court were individually asked to explain circumstances appearing in the evidence against them. Section 313 of Cr.PC is an enabling provision. Under Section 313, the accused has a duty to furnish an explanation in his statement regarding any incriminating material that has been produced against him. The accused has the freedom to remain silent during the investigation, as well as before the Court and the accused may even choose to remain silent or even remain in complete denial when his statement under section 313 is being recorded. However, in such an event, the Court would be entitled to draw an inference including such adverse inference, against the accused as may be permissible in accordance with law. This observation gets support from the decision of **Phula Singh v. State of Himachal**

Pradesh reported in **AIR 2014 SC 1256**.

75. Section 313 of Cr.PC is reproduced hereinunder for ready reference:-

> ***"313. Power to examine the accused.***
> *(1)In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -*
> *(a)may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;*
> *(b)shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case :Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
> *(2)No oath shall be administered to the accused when he is examined under sub-section (1).*
> *(3)The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.*
> *(4)The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*
> *(5)[The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.] [Inserted by Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 22.]*

76. The law is summarized on the subject, of the consequences of omission to put questions on incriminating circumstances appearing in the

prosecution evidence and the ways of curing the same in the case of **Raj Kumar @ Suman v. State (NCT of Delhi)** reported in **(2023) SCC Online SC 609** wherein Paragraph 17 reads thus :-

> *"The law consistently laid down by this Court can be summarized as under:*
>
> *(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;*
>
> *(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;*
>
> *(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;*
>
> *(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;*
>
> *(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;*
>
> *(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and*
>
> *(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of Cr.PC.*
>
> *(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in*

raising the contention is only one of the several factors to be considered."

77. It is also relevant to refer to paragraph 20 of the decision in **Raj Kumar's** case (supra) and it reads thus :-

"20. Even assuming that the defect or irregularity was curable, the question is whether today, the appellant-accused can be called upon to explain the said circumstance. More than 27 years have passed since the date of the incident. Considering the passage of time, we are of the view that it will be unjust now at this stage to remit the case to the Trial Court for recording further statement of the appellant under Section 313 of CrPC. In the facts of the case, the appellant cannot be called upon to answer something which has transpired 27 years back. There is one more aspect of the matter which persuaded us not to pass an order of remand. The said factor is that the appellant has already undergone incarceration for a period of 10 years and 4 months."

78. Here in the present case, the evidence of PW3 who was examined as an eye witness to incident, and relying on his evidence, the learned trial Court Judge has convicted the appellants. The vital evidence of PW3 naming the accused as Alpesh Chako, Ashok Sheth, Ashok Kodilo, Rinku Patel, Mitul Patel, Sachin, Mitesh Dhobhi, and PW3 knowing them had not been put to the appellants, as an accused during the trial for their

further statement under Section 313 of Cr.PC. The accused were not confronted with this part of evidence recorded during the trial. As noted in **Raj Kumar** (supra), if there is failure to put material circumstances to the accused, then it would amount to serious irregularities which would vitiate the trial if it is shown to have prejudiced the accused. Paragraph 20 in the case of **Raj Kumar** (supra) as referred hereinabove, has dealt with the issue of remitting the case to the trial Court to correct the irregularity or defect. Here the present matter is of the year 2005, the judgment was delivered on 29.05.2006 and now it has been more than 19 years which has passed, therefore, it would not be in the interest of the accused to remit or remand the matter to the trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of Cr.PC. The evidence which was omitted to be raised before the accused of the witness naming them and connecting them to the crime whether has resulted into material

prejudice to the accused is required to be examined on the facts of the case depending whether the accused had the opportunity to cross examine the witness. From the cross examination on record, it would transpire that the accused had cross examined the witness at length and the said evidence was before the accused during the trial. The charge was framed and the accused faced the trial. Hence, it cannot be said that there was any material prejudice, however, it can be considered that the accused were adversely affected since they had no opportunity themselves to deny this evidence against them. But it will not only on that count vitiate the whole trial.

79. In the case of **Kalicharan and Others v. State of Uttar Pradesh** reported in **2022 Live Law (SC) 1027**, the Hon'ble Supreme Court observed that while questioning an accused under Section 313 Cr.PC, he must be explained the circumstances in the evidence appearing against him. The observation of the

Hon'ble Supreme Court is quoted as "If the accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be based, the accused will not be in a position to explain the said circumstances brought on record against him. He will not be able to properly defend himself."

79.1 In the judgment of **Kalicharan** (supra), it has been noted as under :-

> *"Questioning an accused under Section 313 Cr.PC is not an empty formality. The requirement of Section 313 Cr.PC is the accused must be explained the circumstances appearing in the evidence against him so that accused can offer an explanation. After an accused is questioned under Section 313 Cr.PC, he is entitled to take a call on the question of examining defence witnesses and leading other evidence. If the accused is not explained the important circumstances appearing against him in the evidence on which his conviction is sought to be based, the accused will not be in a position to explain the said circumstances brought on record against him.*

80. It is only after the entire evidence is rolled out, the accused would be in a position to express his defence and to give explanation to the circumstances appearing in evidence against him. Such an

opportunity given to the accused is part of a fair trial, but if no due consideration is given and such exercise of questioning the accused is done in an unsatisfactory manner then it may result in imperfect appreciation of evidence. Explanation given by the accused, to the circumstances appearing in the evidence against accused, the answers given by the accused may be taken into consideration. Failure to put material circumstances to the accused amounts to serious irregularity, which may vitiate the trial if the irregularity has prejudiced the accused.

81. Remanding back the matter for recording the explanation of the accused would not be ideal, but it can be necessarily be said that omission to refer those circumstances has effected the appreciation by the trial Court Judge.

82. The contention of learned advocate Mr. Vijay Patel for the appellants that conviction of less than five persons cannot sustain under Section 149 IPC, the same can

be dealt with by answering that if the unlawful assembly of more than five persons have been put to trial and large number of accused are acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if the Court has taken care to find that there were other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number. As laid down in the case of **Dharam Pal v. State of U.P.** reported in **(1975) 2 SCC 596**, where the Hon'ble Supreme Court held as under :-

> *"...If, for example, only five known persons are alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number..."*

83. The learned Trial Court Judge had erred in the appreciation of the evidence. Conviction is not based on reliable and corroborative evidence. The identification of the accused have not been proved during the trial. The present appellants whether were the member of the unlawful assembly was not proved, and that they had common object of creating arson had not been proved, and any act of the appellants-accused in prosecution of the common object, of setting things on fire and damaging the private and public property had not been proved during the trial.

84. In sequitur on the basis of what has been discussed hereinabove and for the reasons given, the appeals must succeed.

85. The appeals are allowed. The judgment of conviction and order of sentence dated 29.05.2006 passed by the learned 1st Fast Track Court, Anand in Sessions Case No.23 of 2006 (Old Sessions Case No.108 of 2005) is quashed and set aside. The appellants herein are

acquitted of all the charges leveled against them. Bail bond stands discharged. The amount of fine, if any paid, be refunded to the appellants herein. Record and proceedings be sent back to the concerned Trial Court forthwith.

(GITA GOPI,J)

Caroline / Maulik