

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CRL.) No.1088 of 2008

IN THE MATTER OF:-

Jakia Nasim Ahesan & Anr.

...PETITIONERS

VERSUS

State of Gujarat & Ors.

...RESPONDENTS

**REPORT BY THE *AMICUS CURIAE* DATED 25.07.2011
SUBMITTED PURSUANT TO THE ORDER OF THIS HON'BLE
COURT DATED 05.05.2011**

INDEX

Section Number	Heading of Section	Page Number(s)
I.	Introduction and Background	2 - 6
II.	Assessment of statements of witnesses about meeting at the Chief Minister's residence on 27.02.2002	7 - 16
III.	Assessment of the role of Shri M.K. Tandon, the then Joint Commissioner of Police, Ahmedabad and Shri P.B. Gondia, the then Deputy Commissioner of Police, Ahmedabad	17 -19
IV.	Nature of offence(s) <i>prima facie</i> made out	20 - 23
V.	Submission on the procedure that may be adopted	24 - 27
VI.	Other findings of the SIT (as summarized in the Chairman's remarks dated 24.04.2011) which are acceptable	28 - 29
VII.	Schedule [Relevant Sections of the Indian Penal Code, 1860]	30 - 31

**SUBMITTED BY:
RAJU RAMACHANDRAN, SENIOR ADVOCATE
(*AMICUS CURIAE*)**

I. **INTRODUCTION AND BACKGROUND:**

1. This Hon'ble Court vide order dated 27.04.2009 directed the Special Investigation Team [hereinafter 'SIT'] to "look into" the complaint submitted by the Petitioner No. 1 on 08.06.2006 (to the Director General of Police of Gujarat, against 63 persons) alleging that the persons mentioned therein had committed offences *inter alia* under Section 302 read with 120B Indian Penal Code, 1860 [hereinafter 'IPC']. This allegation was made in relation to the riots which took place in the State of Gujarat between February, 2002 and May, 2002 after the Godhra incident on 27.02.2002.
2. Pursuant to the aforesaid direction, Shri A. K. Malhotra, former DIG, CBI and a Member of the SIT, examined more than 160 witnesses and looked into a large number of documents made available to him. He gave his findings qua the 32 allegations made by the complainant. A report was submitted to this Hon'ble Court on 12.05.2010. The Chairman, SIT has, vide separate remarks dated 14.05.2010, concurred with the findings of Shri Malhotra.
3. The enquiry conducted by Shri A.K. Malhotra was in the nature of a Preliminary Enquiry in which he recorded the statements of witnesses [which are signed by the witnesses] and also collected a number of documents. This was not a statutory investigation under the provisions of the Criminal Procedure Code, 1973.
4. In his report dated 12.05.2010 (hereinafter referred to as the "Preliminary Report"), Shri A.K. Malhotra *inter alia* recommended further investigation under Section 173 (8) of the Code of Criminal

Procedure, 1973 [hereinafter 'Cr.P.C.'] against (1) Shri M.K. Tandon, the then Joint Commissioner of Police, Ahmedabad City, (2) Shri P.B. Gondia, the then Deputy Commissioner of Police, Ahmedabad and (3) Shri Gordhan Zadafia, the then Minister of State of Home, Government of Gujarat. This further investigation under Section 173 (8) Cr.P.C. was conducted by another officer, namely Shri Himanshu Shukla, DCP and supervised by Shri Y.C. Modi, IGP and Member, SIT. In the Further Investigation Report dated 17.11.2010 [hereinafter 'Further Investigation Report'], the SIT stated that the material available was not sufficient to prosecute these 3 individuals. However, it was stated that the conduct of Shri M.K. Tandon and Shri P.B. Gondia was totally unprofessional and unbecoming of senior police officers. Hence, it was recommended to the Government of Gujarat that it launch departmental proceedings for major penalty against Shri Tandon and Shri Gondia. The same conclusion is affirmed by the Chairman, SIT vide his remarks dated 26.11.2010.

5. Around the same time, on 23.11.2010, I was appointed *amicus curiae* in the above Petition and consequently given (1) copies of the statements of witnesses recorded by Shri Malhotra, (2) copy of the Preliminary Report of Shri Malhotra, (3) statements of the witnesses recorded by Shri Shukla, and (4) the Further Investigation Report submitted by Shri Shukla. I had meetings with Shri A.K. Malhotra and Shri Y.C. Modi in December, 2010 and January, 2011. I also had a meeting with Ms. Teesta Setalvad and Ms. Aparna Bhat, Advocate. A number of documents were received by me from Ms. Teesta Setalvad, Ms. Aparna Bhat, Advocate and Shri R.B. Sreekumar, former DGP, Gujarat.

6. The most important allegation in the complaint, which is required to be considered in detail by this Hon'ble Court, is the allegation made against the Chief Minister of Gujarat, Shri Narendra Modi. It is alleged that, in a high-level meeting held at about 11.00 P.M. on 27.02.2002 at Mr. Narendra Modi's residence, illegal instructions were issued to senior police officers and bureaucrats "not to deal with the Hindu rioting mobs". It is also alleged that the Chief Minister had influenced the police at the time of the riots, as two of his cabinet colleagues were placed in the State Police Control Room and the Ahmedabad City Police Control Room respectively on 28.02.2002.

7. The SIT, in its Preliminary Report dated 12.05.2010, concluded that there was no reliable material available to prove that Shri Narendra Modi had issued any instruction to the officers on 27.02.2002 to the effect that Hindus should be permitted to vent their anger. The said conclusion has been endorsed by the Chairman, SIT in his comments dated 14.05.2010.

8. In my note submitted to this Hon'ble Court on 20.01.2011, it was pointed out that there were a number of circumstances which required a more detailed investigation to determine if, indeed, such a instruction had been given by Shri Modi or not. It was suggested that a further investigation should be conducted under Section 173 (8) Cr.P.C. in the pending Gulberg Society and/or Naroda Patiya cases and the statement of Shri Sanjiv Bhatt, DIG, the then Deputy Commissioner (Intelligence) should be recorded. (The said note also indicated the aspects on which the SIT's Preliminary Report dated 12.05.2010 could be accepted.)

9. This Hon'ble Court vide order dated 15.03.2011 directed the SIT to submit its report on the observations made by me in my note dated 20.01.2011. It was also observed by this Hon'ble Court that the SIT would be free to carry out any further investigation in light of the observations made in my note.

10. Pursuant to the aforesaid order, the SIT conducted further investigation under Section 173 (8) of the Cr.P.C. in Meghaninagar P.S. Crime C.R. No.67 of 2002 [Gulberg Society case]. The SIT recorded the statements of 48 witnesses. These statements were recorded under Section 161 Cr.P.C. A number of documents were also looked into. A Further Investigation Report was submitted to this Hon'ble Court on 24.04.2011, signed by Shri Y.C. Modi, Shri A.K. Malhotra and Shri Himanshu Shukla. The Chairman of SIT, Shri R.K. Raghavan, also gave forwarding remarks on the same day, agreeing with the findings in the said Report.

11. On 05.05.2011, this Hon'ble Court passed the following order:-

"Pursuant to our order dated 15th March, 2011, the Chairman, Special Investigation Team (SIT) has filed report on the further investigations carried out by his team along with his remarks thereon. Statements of witnesses as also the documents have been placed on record in separate volumes. Let a copy of all these documents along with the report of the Chairman be supplied to Mr. Raju Ramachandran, the learned Amicus Curiae.

The learned Amicus Curiae shall examine the report; analyze and have his own independent assessment of the statements of the witnesses recorded by the SIT and submit his comments thereon. It will be open to the learned Amicus Curiae to interact with any of the witnesses, who have been examined by the SIT, including the police officers, as he may deem fit.

If the learned Amicus Curiae forms an opinion that on the basis of the material on record, any offence is made out against any person, he shall mention the same in his report.

List on 28th July, 2011 at 3:00 p.m."

II. ASSESSMENT BY AMICUS CURIAE OF STATEMENTS OF WITNESSES ABOUT MEETING AT THE CHIEF MINISTER'S RESIDENCE ON 27.02.2002:

12. Pursuant to the aforesaid order, copies of statements of witnesses recorded by the SIT during the course of the further investigation under Section 161 Cr.P.C., documents collected by the SIT and the Further Investigation Report dated 24.04.2011 were made available to me on 11.05.2011.
13. The Further Investigation Report and the remarks of the Chairman of SIT find that a meeting was indeed held at the residence of the Chief Minister, Shri Modi, on the night of 27.02.2002 at around 11:00 P.M. in which senior bureaucrats and senior police officials were present. The report concludes that the claim made by Shri Sanjiv Bhatt, the then Deputy Commissioner of Police (Intelligence) that he was present at the said meeting was incorrect. It further concludes that no statement was made by the Chief Minister, Shri Modi in the said meeting, as alleged by the complainant, and no illegal instruction was issued by Shri Modi to the effect that Hindus should be permitted to vent their anger. It may be mentioned that Shri Sanjiv Bhatt, who is a serving officer in the IPS cadre of the State of Gujarat, had stated in his statement given to the SIT under Section 161 Cr.P.C. that he was present in the said meeting on 27.02.2002 and the Chief Minister had made such statement, as alleged by the Complainant.
14. It was also concluded by the SIT in its Further Investigation Report that the 2 ministers, who were posted at the State Police Control Room and Ahmedabad City Police Control Room, did not in any manner influence

the working of the police officers at the time of the riots and, therefore, it cannot be concluded that these Ministers were posted with a view to carrying out the alleged illegal instruction of Shri Modi.

15. There are other findings in the Further Investigation Report, *inter alia* that no offence of criminal negligence under Section 304 A IPC is made out against Shri M.K. Tandon, the then Joint Commissioner of Police, Ahmedabad and Shri P.B. Gondia, the then Deputy Commissioner of Police, Ahmedabad. However, it was concluded [in paragraph 188 of the Report] that the conduct of these 2 police officers was unprofessional and unbecoming of senior police officers, and would attract departmental proceedings. (It may be recalled that I had, in my note dated 20.01.2011, suggested that the material available indicated that the said 2 police officers should be proceeded against for the offence of criminal negligence under Section 304A IPC.)

16. As already stated in paragraph 6, the most serious allegation levelled by the complainant was regarding the alleged statement made by Shri Modi in the meeting convened on 27.02.2002. Therefore, an interaction with the witnesses who could throw some light on the said meeting was necessary. Similarly, witnesses relating to the positioning of the 2 Cabinet Ministers were also relevant. Accordingly, an interaction took place with the following witnesses at Gandhinagar on 18th and 19th June, 2011, namely (1) Shri Sanjiv Bhatt, (2) Smt. Swarnakanta Verma, (3) Shri K. Chakravarthi, (4) Shri G.C. Raiger, (5) Shri P.C. Upadhyaya and (6) Shri P.C. Pande, the then Commissioner of Police.¹ (The first of

¹ It may be indicated that the cost for boarding and lodging for both the *amicus curiae* at BSF Mess, Gandhinagar as well as the cost for local transportation by private taxi was arranged by the SIT. However, none of the officials of the SIT were present during the closed-door interaction which the *amicus curiae*

whom, as already stated, claims to have been present at the meeting at the Chief Minister's residence on 27.02.2002, and stated that the Chief Minister gave illegal instructions, while the remaining persons do not accept his presence.)

17. While at Gandhinagar, messages were received from Shri Rahul Sharma, IPS and Ms. Rupa Modi requesting to meet me, but due to time constraints, it was not possible to meet Shri Sharma or Ms. Modi at Gandhinagar.² Subsequently, at my request, Mr. Rahul Sharma came to Delhi and met me in my NOIDA office on 26.06.2011, for an interaction. Similarly, Ms. Rupa Modi, Shri Firoz Gulzar & Mrs. Sayraben Gandhi along with their advocate Shri S.N. Vohra met me in my Supreme Court chamber on 16.07.2011.³ I also thought it fit to interact with Ms. Teesta Setalvad, who also met me on 16.07.2011 in my Supreme Court chamber. During this period, I also interacted on different occasions with Shri Malhotra and Shri Y.C. Modi, Members of

had with the witnesses. The interaction took place at the Conference Room of BSF Frontier Headquarters at Gandhinagar. The cost of travel from Delhi to Ahmedabad and back (for both the Advocates) was borne by the *amicus curiae*. In all the interactions with the witnesses, my colleague Shri Gaurav Agrawal, Advocate was present.

² Shri Rahul Sharma, IPS was SP Bhavnagar at the time of the riots, but later transferred to Ahmedabad as DCP (Control Room). He had been asked to associate himself with the investigations being conducted by the Crime Branch in the riot cases of Ahmedabad, including the Gulberg Society case. He called for the mobile phone call records from the cellphone companies and analysed the same. Ms. Modi is an eye witness in the Gulberg Society case, and lost her 13 year old son in the riots.

³ However, these persons (who are family members of the victims), only expressed grievances regarding the conduct of the trial and the prosecution, an area with which I am not concerned in the present task.

the SIT, and a number of clarifications were sought and obtained from them.

18. It may be mentioned that Shri Bhatt brought along with himself his former driver, Shri Tarachand Yadav. He also submitted an affidavit of Shri Tarachand Yadav, sworn on 17.06.2011, stating that the same had been sent for filing in this Hon'ble Court. The said affidavit seeks to support Shri Bhatt's assertion that he had gone to the residence of the Chief Minister on 27.02.2002. Shri Bhatt also submitted an affidavit of Shri K.D. Panth, Police Constable, affirmed on 17.06.2011, again stating that the same had been sent for filing in this Hon'ble Court. The said affidavit seeks to support Shri Bhatt's version about going to the Chief Minister's residence on the night of 27.02.2002. Shri Rahul Sharma submitted an analysis of the call records of senior police officers which, according to Shri Sharma, corroborates Shri Bhatt's statement. These documents were taken by me only with a view to help me in understanding the statements recorded by the SIT.
19. It is necessary to state that the interaction was in order to understand and appreciate the statements already made by the witnesses to the SIT and, therefore, no fresh statements were either recorded or got signed by me. The witnesses more or less reiterated what they had stated in their Section 161 Cr.P.C statements.
20. The most vital material, supporting the allegation made by the Petitioner against Shri Modi, is the statement of Shri Sanjiv Bhatt, the then DCP (Intelligence). The SIT has concluded that his version is not believable for various reasons, *inter alia* that (a) the other senior officers present in the said meeting have not supported his statement,

(b) his silence for more than 9 years without any proper explanation appears to be suspicious, (c) a number of departmental and criminal proceedings have been instituted by the Government and hence, Shri Bhatt has an axe to grind with the Government of Gujarat. Therefore, the SIT opines that his statement is motivated and cannot be relied upon. The SIT also points out discrepancies in Shri Bhatt's versions about the exact language said to have been used by the Chief Minister. The SIT also discredits Shri Bhatt by pointing out that his version about a subsequent meeting at the Chief Minister's residence on 28.02.2002 at about 10:30 hours cannot be believed because his mobile phone records show that he was at Ahmedabad at 10:57 A.M., and therefore could not have reached Gandhinagar before 11:30 A.M.

21. The SIT has further pointed out that Shri Bhatt has tried to tutor witnesses (Shri Tarachand Yadav and Shri K.D. Panth) to support his version. I have also received a copy of a letter (marked confidential) dated 22.06.2011 from the Under Secretary, Home Department to the Chairman, SIT. In the said letter, the Government of Gujarat has stated that it has "retrieved" several emails of Shri Sanjiv Bhatt (I am not commenting on the legality of such "retrieval"). According to the Government of Gujarat:

"It leaves no room for doubt that it is a systematic and larger conspiracy, through Shri Sanjiv Bhatt, involving top leaders of Congress Party in Gujarat, vested interest groups surviving on anti-Gujarat campaign and electronic and print media reporters all of whom have started final efforts to keep the Godhra riot issue live based on concocted facts and Shri Sanjiv Bhatt, through all of them, is trying to build up a story at a stage when after almost 10 long years the Hon'ble Supreme Court has virtually concluded the judicial proceedings after undertaking

tremendous judicial exercise as elaborately pointed out in the affidavit of the State Government.”

22. I am conscious of the fact that though Shri Bhatt has been contending that he would speak only when under a legal obligation to do so, his conduct after making his statement under Section 161 Cr.P.C. has not been that of a detached police officer who is content with giving his version. I am left with no doubt that he is actively “strategizing”, and is in touch with those who would benefit or gain mileage from his testimony. But these factors, in my view, cannot be grounds for ignoring his statement at this stage.

23. In my opinion, despite the aforesaid background, it does not appear very likely that a serving police officer would make such a serious allegation against Shri Modi, the Chief Minister of the State, without some basis. There is no documentary material of any nature whatsoever which can establish that Shri Bhatt was not present in the meeting on 27.02.2002. In the absence of the minutes of the meeting, there is again no documentary material available as to the participants in the meeting and what transpired at the said meeting. Therefore, it is the word of Shri Bhatt against the word of other officers, senior to him. The SIT has chosen to believe the word of the senior officers, i.e. senior bureaucrats and police officers. However, I find that the SIT itself, in its Preliminary Report, has observed as follows [at p.13]:-

"(3) Some of the public servants, who had retired long back, claimed loss of memory as they did not want to get involved in any controversy.

(4) The other category of public servants, who have recently retired and provided with good post-retirement assignments, felt obliged to the State Government and

the present Chief Minister and therefore their testimony lacks credibility.

- (5) The serving public servants, who have been empanelled for the higher posts, did not want to come into conflict with the politicians in power and incurred their wrath which affected their frank response."

24. I also find it difficult to accept the conclusion of the SIT that Shri Bhatt's statement is motivated, because he has an axe to grind with the State Government over issues concerning his career. Further, in my opinion, it may not be proper to disbelieve Shri Bhatt at this stage, only because the other officers have not supported his statement. Similarly, the delay in making the statement cannot be the sole ground to disbelieve the statement at this stage, especially in view of his explanation that as an Intelligence Officer who was privy to a lot of sensitive information, he would make a statement only when he was under a legal obligation to do so.

25. It may be recalled that, in the aftermath of the Godhra carnage, the law and order meeting in question was called by the Chief Minister at about 11:00 P.M. It seems quite natural for an officer from the Intelligence to be called: The Chief Minister would, after all, have to be made aware of the intelligence gathered by the police till then. It is also an admitted position that Shri G.C. Raiger, the then ADGP (Intelligence) was on leave on that day. The DGP, Shri Chakravarthi does not state that he had gathered intelligence from the office of Shri Raiger. It is also on record that Shri P.C. Upadhyay, the DC (Political and Communal) was also on leave on 27.02.2002 and Shri Bhatt was looking after the work of DC (Political and Communal). Shri Raiger states in his statement under Section 161 Cr.P.C. that Shri Bhatt had accompanied him, in the past, to meetings called by the Chief Minister, though he says he used

to wait outside with files or information. Thus, it is quite possible that Shri Bhatt was directed to attend the meeting on 27.02.2002 at the residence of the Chief Minister. The phone call records do not contradict the statement given by Shri Bhatt to the SIT. Considering the important and emergent nature of the meeting, the relative “juniority” of Shri Bhatt need not have come in the way of his attending the meeting, especially since the ADGP (Intelligence), Shri Raiger was not available. It is anybody’s guess as to why, in the absence of Shri Raiger, Shri O.P. Mathur [IGP (Security & Administration)], who was next in seniority, was not called for the meeting. This aspect, in my view, is of little significance in the context of an emergency meeting called at short notice in response to an escalating situation. Similarly, discrepancies about the exact language used or the time of the meeting at the Chief Minister’s residence at Gandhinagar on 28.02.2002 (because he was at Ahmedabad at 10:57 A.M.) are inevitable, considering the lapse of time. (Significantly, there is no material to suggest that Shri Bhatt was either at Ahmedabad or some place other than Gandhinagar at any time after 10:57 A.M. on 28.02.2002.) There could be a discrepancy about the time of the meeting on 28.02.2002. Hence, I disagree with the conclusion of the SIT that Shri Bhatt should be disbelieved at this stage itself. On the other hand, I am of the view that Shri Bhatt needs to be put through the test of cross-examination, as do the others who deny his presence.

26. Though the SIT, as the investigating agency, has taken a view, the question whether Shri Bhatt was present at the meeting on 27.02.2002 and whether Shri Modi had indeed made such a statement (as spoken to by Shri Bhatt) can only be decided by a court of law. It would not be correct to disbelieve the version of Shri Bhatt, at this *prima facie* stage,

on the various grounds set out by the SIT or because other participants in the meeting have denied (either categorically, or to the best of their memory) his presence and the alleged statement made by Shri Modi. If Shri Bhatt stands the test of cross-examination, then regardless of the fact that other witnesses have not supported his statement, a court of law may return a finding that Shri Bhatt indeed was present at the meeting on 27.02.2002, and that Shri Modi did make a statement as is being alleged by Shri Bhatt.

27. Under the Cr.P.C., if there is some material which supports the allegation being made by the Complainant, a case for proceeding further is made out against the accused. Section 204 Cr.P.C. uses the expression "sufficient ground for proceeding". This Hon'ble Court has held that the learned Magistrate can proceed further, if there is a *prima facie* case against the accused. [See *Dy. Chief Controller of Import & Export vs. Roshanlal Agrawal*, (2003) 4 SCC 139, *M.N. Damani vs. S.K. Sinha*, (2001) 5 SCC 156]
28. The stage for believing or disbelieving a witness arises after trial i.e. once the entire evidence is placed before the court for its consideration. It would not be correct to conclude, at this stage, that Shri Bhatt should be completely disbelieved unless there is clinching material available to the contrary, for example, if there is indisputable material which proves that he was not present at the meeting, but somewhere else. No such material has been found. Hence, it cannot be said, at this stage, that Shri Bhatt should be disbelieved and no further proceedings should be taken against Shri Modi.

29. I reiterate here that I am fully conscious of the fact that the statement made by Shri Bhatt has possible limitations *inter alia* (a) the delay of 9 years in coming out with his version, and (b) the statements of other senior officers contesting his claim. I am also fully conscious of the fact that Shri Bhatt has made attempts to get other witnesses (i.e. Shri Tarachand Yadav, Shri K.D. Panth etc) to support his case, and has been part of a “strategizing” effort. However, it is ultimately for the competent court to decide whether Shri Bhatt is to be believed or not. As long as some material indicates that the allegation may be true, the case must proceed further in accordance with law.

III. ASSESSMENT OF THE ROLE OF SHRI M.K. TANDON, THE THEN JOINT COMMISSIONER OF POLICE, AHMEDABAD AND SHRI P.B. GONDIA, THE THEN DEPUTY COMMISSIONER OF POLICE, AHMEDABAD:

30. The SIT has further examined the role of the 2 police officers, namely Shri M.K. Tandon, the then Joint Commissioner of Police, Sector-II Ahmedabad and Shri P.B. Gondia, the then Deputy Commissioner of Police, Zone – IV Ahmedabad and has reiterated its view that no criminal offence is made out against these officers.
31. I had, in my note dated 20.01.2011, suggested that *prima facie* a case under Section 304A IPC was made out against these 2 officers. I have gone through the statements recorded by the SIT, and also discussed the same in my interaction with the witnesses and the SIT. There are a number of factors which persuade me not to accept the SIT's conclusions, and I may mention only a few of them below:
- a) There is no reason for Shri M.K. Tandon to have left the Gulberg/ Naroda area in the absence of a much greater problem elsewhere in his jurisdiction at the relevant time (i.e. around 12:40 P.M.).
 - b) There is no reason for Shri M.K. Tandon not to have rushed back to Gulberg after 2 P.M., when he knew the situation was getting out of control, and that the situation in the area where he was situated was not that grave. In any event, there is a complete absence of any supervision by him (of the situation in

the Gulberg area between 2 P.M. and 3:45 P.M.), which *prima facie* shows negligence.

- c) There was no reason for Shri P.B. Gondia to have left Naroda Patiya area at 2:20 P.M. when the situation was explosive and police firing had been resorted to, in the absence of a more critical situation somewhere else.

32. In fact, in paragraph 19 of the Further Investigation Report, the SIT has stated that "...it can be safely concluded that both these officers were negligent in their duties"; nevertheless, the SIT concludes that no offence under Section 304A IPC is made out. I am not able to persuade myself to agree with this conclusion, and am of the view that a case under Section 304A IPC as well as under Section 166 IPC is made out, at this *prima facie* stage. However, due to subsequent developments, this issue may not be required to be looked into further by this Hon'ble Court.

33. It has been brought to my notice that, on the basis of evidence led during the course of trial in the Gulberg Society case, an application under Section 319 Cr.P.C. has been filed by the victims to summon the police officers, including Shri P.C. Pande, Shri M.K. Tandon and Shri P.B. Gondia, as accused, to face charges *inter alia* under Section 302 IPC. The trial court, however, made the following order on the said application on 31.05.2011:-

"12. As discussed above, the SIT has further investigated the case and report of the investigation is submitted before the Hon'ble Supreme Court and Hon'ble Supreme Court has seized with the matter about Mr. M.K. Tandon and other police officers and other persons may be arranged as accused or not and

therefore at this stage this Court cannot entertain this application."

34. I am not privy to the evidence led before the Trial Court which purportedly goes to show that there is criminal liability of the said police officers. It would be appropriate for this Hon'ble Court to direct the Trial Court to consider the said application on the evidence which has been brought before it. The Trial Court may also be directed to consider the Further Investigation Report submitted by Shri Himanshu Shukla to this Hon'ble Court on 26.11.2010, and the statements recorded by him, and to pass appropriate orders in accordance with law. The Trial Court may also be directed to consider whether an offence under Section 304A IPC is made out. It is respectfully submitted that, since the SIT has conducted a statutory investigation under Section 173 (8) Cr.P.C., the report is required to be filed in Court, and it is for the competent court to pass necessary orders after hearing the concerned parties.

IV. NATURE OF OFFENCE(S) PRIMA FACIE MADE OUT:

35. The next question which arises is that, if the statement of Shri Bhatt is to be believed, then what offence(s) are made out against Shri Modi. The direct role of Shri Modi is limited to allegedly making this statement on 27.02.2002. Though it is alleged that, with a view to ensuring that his instructions were carried out by the Police Department, Shri Modi had positioned 2 of his cabinet colleagues at the State Police Control Room and the Ahmedabad City Police Control Room respectively, the SIT has come to the conclusion that the Ministers did not interfere in any manner with the functioning of the Police. The material collected by the SIT does not indicate that these 2 ministers interfered with the working of the police department at the time the riots were taking place. However, there is the possibility that the very presence of these 2 Ministers had a dampening effect on the senior police officials, i.e. the DGP and the Commissioner of Police, Ahmedabad, if indeed Shri Modi had made a statement (as alleged) the previous night. This is again one of the circumstances which can be taken into account and examined during the course of trial.
36. The Chairman, SIT in his earlier comments dated 14/05/2010, found as follows [at p. 5]:

“It has been conclusively established that the two Ministers were indeed operating from the two Control Rooms for a few days from 28.02.02 onwards. There is however no information to establish that they interfered with police operations during the time they were there. Nor is there information that this arrangement was at the instance of the Chief Minister himself, although there is every likelihood that this had at least his tacit approval. It is quite possible that DGP Chakravarthi was unhappy with this arrangement. He has, however, denied that he

ever gave expression to his resentment, as suggested by Shri R.B. Sreekumar, the then ADGP in his Affidavit before the Nanavati Commission and statement made before the SIT. (*Vide pages 28-32 of the enquiry report*)”

37. However, in the present forwarding remarks to the Further Investigation Report, the Chairman, SIT has taken the view that [at p. 5]:

“It is true that two Ministers, Shri I.K. Jadeja and Late Ashok Bhatt, were positioned reportedly to monitor the law and order situation. One of them, viz., I.K. Jadeja remained at the Police Headquarters for about two to three hours on 28.02.2002. The presence of a second Minister, viz., Ashok Bhatt, supposed to be stationed at Ahmedabad City Police Control Room on 28.02.2002 was not established. No evidence is available to suggest that they ever interfered with the Police operations to bring the situation under control, or that they conspired in the perpetration of the riots.”

38. Thus, it would appear that – in respect of Shri Ashok Bhatt – the Further Investigation Report is at variance with the Preliminary Report. It is pertinent to point out that the Preliminary Report had relied on Shri Ashok Bhatt’s own statement that he visited the Control Room on 28.02.2002 for about 10 minutes, and concluded that “the allegation about the positioning of Shri Ashok Bhatt, the then Health Minister, in the Control Room, Ahmedabad City appears to be correct, but there is no evidence to prove his interference in the Police work.” In light of this admission, the doubt expressed by the SIT in the Further Investigation Report about the presence of Shri Ashok Bhatt in the Control Room on 28.02.2002 is without basis. Thus, it stands established, as per the SIT’s Preliminary Report, that the 2 Ministers were present in the Police Control Rooms at Gandhinagar and Ahmedabad respectively.

39. If Shri Sanjiv Bhatt is to be believed, the message conveyed by the Chief Minister (at the meeting held at his residence on 27.02.2002), was further conveyed by the very stationing of the 2 Ministers in the Police Control Rooms. While there is no direct material to show how and when the message of the Chief Minister was conveyed to the 2 Ministers, the very presence of political personalities unconnected with the Home Portfolio at the Police Control Rooms is circumstantial evidence of the Chief Minister directing, requesting or allowing them to be present. As already noted, the Chairman, SIT himself has found that their positioning in the Police Control Rooms had, at least, the Chief Minister's "tacit approval".
40. However, there is no material to show that the Ministers interfered with the functioning of the Police Department or gave any instructions to the senior police officers. Even Shri Bhatt, who claims to have been present in the Police headquarters at that time, says that Shri Jadeja did not remain in the office of the DGP for a very long time. There is an absence of material to indicate that the statement of Shri Modi, allegedly made in the meeting on 27.02.2002, had been actively implemented by the Ministers or the 2 police officials who participated in the said meeting.
41. Hence, the question to be examined is whether the making of the statement by the Chief Minister in the meeting on 27.02.2002, by itself, is an offence under law. In my opinion, the offences which can be made out against Shri Modi, at this *prima facie* stage, are offences *inter alia* under **Sections 153A (1) (a) & (b), 153B (1) (c), 166 and 505 (2) of the IPC**. (For convenience of reference, these statutory provisions are

set out in a Schedule annexed hereto.) However, it would be for the Court of competent jurisdiction to decide whether Shri Modi has to be summoned for any or all of these offences, or for any other offence(s).

V. SUBMISSION ON THE PROCEDURE THAT MAY BE ADOPTED:

42. The next question to be answered is what further is to be done in relation to the SIT Report(s). I may mention that there are now two types of Reports before this Hon'ble Court, namely (a) 1 Preliminary Enquiry Report dated 12.05.2010, (b) 2 Further Investigation Reports, i.e. Report made under Section 173 (8) Cr.P.C. Insofar as the Preliminary Enquiry Report is concerned, submissions shall be made at the time of hearing of the Special Leave Petition.
43. However, insofar as the 2 statutory Further Investigation Reports are concerned, the same would have to be acted upon in accordance with the Cr.P.C. The proper course of action would be to place the material before a court of competent jurisdiction, and leave it to such Court to pass appropriate orders in accordance with law. In my opinion, the SIT may be directed to place (1) the statements of the witnesses recorded under Section 161 Cr.P.C., (2) the documents collected, and (3) its findings, before the competent Court, and such Court should pass appropriate orders in accordance with law. This procedure would be fair to the SIT and to the Complainant (as also to the accused). Any order passed by such Court would, of course, be amenable to correction by superior courts.
44. This Hon'ble Court initially directed the SIT to "look into" the matter. However, the further investigation has been conducted by the SIT, and rightly so, by exercise of powers under Section 173 (8) Cr.P.C. in the Gulberg Society case. Hence, the said further investigation must be followed to its logical conclusion by submitting the Report before the competent court, for necessary orders. I would respectfully submit that

this Hon'ble Court ought not to express any view on the merits. Any finding by this Hon'ble Court in these proceedings, even *prima facie*, would be detrimental to the accused or the Complainant, as the case may be. This Hon'ble Court may leave the matter to be adjudicated by a court of competent jurisdiction.

45. In sum and substance, the SIT proposes to file a "Closure Report" in regard to the allegations against Shri Modi. Therefore, in accordance with the law laid down by this Hon'ble Court in *Bhagwant Singh vs. Commissioner of Police*, (1985) 2 SCC 537, copies of the statements of witnesses, documents and the investigation report should be made available to the Complainant, and it should be left to the court of competent jurisdiction to decide whether a case for taking cognizance and issuing process to the accused has been made out or not. A procedure has been prescribed in law where the Investigating Agency proposes to close the case, and the same may be followed in this case as well. This Hon'ble Court in *Bhagwant Singh vs. Commissioner of Police*, held as follows:-

"4. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to

adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognized by the provisions contained in sub-section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the

Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report...."

It is submitted that the law laid down in *Bhagwant Singh vs. Commissioner of Police* is applicable in the present context, and the procedure suggested above may thus be adopted.

VI. OTHER FINDINGS OF THE SIT (AS SUMMARIZED IN THE CHARIMAN'S REMARKS DATED 24.04.2011) WHICH ARE ACCEPTABLE:

46. I may now deal with the other findings of the SIT and give my comments on the same. Though I had observed in my note dated 20.01.2011 that late Shri Haren Pandya (who supported Shri Sanjiv Bhatt), could have been present in the meeting on 27.02.2002, considering the material gathered by the SIT and the Further Investigation Report of the SIT, I agree with the SIT (in paragraph 106 of its Report) that Shri Haren Pandya could not have been present in the meeting on 27.02.2002. Therefore, his statement regarding the alleged statement made by Shri Modi in the said meeting may be disregarded.
47. Similarly, I would also agree with the finding of the SIT (in paragraphs 107 to 117 of its Further Investigation Report) that the statement made to Shri R.B. Sreekumar, the then ADGP (Intelligence), by Shri Chakravarthi, the then DGP, on 28.02.2002 would be hearsay evidence, not saved by *res gestae*, and, therefore, would be inadmissible in evidence.
48. As far as the SIT's conclusion with regard to the steps taken by the Chief Minister Shri Modi to control the riots in Ahmedabad is concerned, the same may be accepted, in the absence of any evidence to the contrary.
49. As far as the SIT's observations with regard to the alleged inaction of Shri P.C. Pande, the then Commissioner of Police, Ahmedabad are

concerned, no comment by me is necessary at this stage, since an application under Section 319, Cr.P.C. has been filed in respect of Shri P.C. Pande also, and the same may be dealt with by the concerned Court in accordance with law, in the same manner as suggested by me in respect of Shri M.K. Tandon and Shri P.B. Gondia.

50. As far as the observations of the Chairman, SIT on the handing over of the bodies of the Godhra victims to Shri Jaydeep Patel are concerned, the same may be accepted.
51. Similarly, as far as the observations of the SIT with regard to the Chief Minister's statement on television on 01.03.2002 are concerned, the same may be accepted.

[RAJU RAMACHANDRAN]
SENIOR ADVOCATE

NEW DELHI

DATED: 25th July, 2011

SCHEDULE

[RELEVANT SECTIONS OF THE INDIAN PENAL CODE, 1860]

"153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony

- (1) Whoever
 - (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
 - (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or...

shall be punished with imprisonment which may extend to three years, or with fine, or with both."

"153B. Imputations, assertions prejudicial to national integration

- (1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise, -...
 - (c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both."

"166. Public servant disobeying law, with intent to cause injury to any person

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

"505. Statements conducing to public mischief

...(2) Statements creating or promoting enmity, hatred or ill-will between classes –

Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both."