CASE COMMENTARY ON ZAHIRAHABIBULLAH SHEIKH AND ANR. V. STATE OF GUJARAT AND ORS. ALSO REFERRED TO AS BEST BAKERY CASE

Written by ***Ananya Rath* & Deviyani Upadhyay*****

** 4th Year BBA LLB Student, National Law University, Odisha*

*** 4th Year BBA LLB Student, National Law University, Odisha*

I. INTRODUCTION

Zahir Habibulla H.Sheik Vs State of Gujarat and Ors is commonly known as "The Best Bakery Case". This case symbolizes the inhumanity of the carnage post Godhara riots which involved killing 1200 people. On 6th June 2005**, Supreme** Court of India extended the term of the Bombay Special Court to conduct the retrial of this case. This was one of the unique cases as the charges were originally brought in various criminal courts in the State of Gujarat as a result of the communal violence which exploded the State in 2002. Before the justice was delivered in Mumbai court, the trial took many enraging twists. The issues raised in this case dealt with contempt of court which has no statutory definition. But as per the definition given in the Contempt of Court act 1971, it has only categorized the contempt of court; the contempt maybe be civil or criminal contempt. The Best Bakery Case deals with criminal contempt which is defined in section 2(c) of the Contempt of Courts act 1971. "Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-

i. scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
ii. Prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
iii. Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

But according to the definition of criminal contempt it's difficult to include any act of a person who tends to interfere with the administration of justice.

The Best Bakery case also gave us an idea of Re-trial and Fair Trial. The concept of Fair Trial was implemented in this case.

II. FACTS OF THE CASES

.

March 1, 2002: Vadodra,Gujarat, the inglorious Best Bakery massacre took place as nearly 1000 rioters pounced on the bakery-cum-residence owned by late Habibullah Sheikh and within couple of hours eleven members of the Sheikh family and three bakery employees were either burned to death or slashed to pieces.

The defence had argued that the FIR lodged on March 1, 2002 by Raizkhan Amin Mohammed Pathan is considered in the Best Bakery case, while the FIR lodged on March 4, 2002 by the"star witness" Zaheera Sheikh is found to be manipulated by the police.

April 2002 The National Human Commission published a report on April 2002 recommending handing over the case to CBI.

May 19, 2003: Zaheera, her mother Sehrunissa and her brothers Nafitullah and Nabiullah retracted their statements in court. Zaheera said that she was on the terrace while the incident took place and couldn't identify the accused.

June 27, 2003: All the 21 accused in the Best Bakery carnage were acquitted by a local court for lack of evidence. Additional Sessions Judge H U Mahida feared the police may have implicated innocents.

This was the first verdict in a case relating to the post-Godhra communal violence. The judgement accepts the argument without even considering the fact that statements similar in import to the March 4th FIR were made by witnesses before several agencies and/or organizations well after March 4, 2002, and affirmed, according to media reports, as recently as February 2003.

The trial in the case began on May 9, 2003 in a fast track court. Delivering his 24-page judgment, Mahida said, "It was proved beyond doubt that a violent mob had attacked the bakery and killed

12 persons. However, there was no legally acceptable evidence to prove that any of the accused presented before the court had committed the crime." Nobody from the complainants' side was present in the court premises when the judgment was pronounced.

July 5, 2003: Zaheera along with her mother told The Sunday Express that she lied in court because she feared for her life.

July 7, 2003: Zaheera said that Bhartiya Janta Party (BJP) MLA Madhu Srivastava and his cousin, Congress councilor Chandrakant Srivastava were behind the threats and sought re-trail outside Gujarat.

July 8, 2003: National Human Rights Commission visited Vadodra to check papers in the Best Bakery case.

July 31, 2003: NHRC moves Special Leave Petition in Supreme Court asking for a retrial outside Gujarat.

April 12, 2004: Supreme Court orders the retrial to be held outside Gujarat in Maharashtra. The orders were passed by Justice Aoraiswamy Rajin and Justice Arijit Pasayat.

September 24, 2004: Charges were framed by Judge Abhay Thipsay.

October 4, 2004: The re-trial begins. Following the examination of formal prosecution witnesses in the first weeks, independent eyewitnesses to the Best Bakery massacre had begun testifying on October 27, 2004.

Among these were Tufel Ahmed, Raees Khan Pathan and Shehzad Khan, all workers in the Best Bakery who were eyewitnesses to the night-long attack.

November 3, 2004: In an affidavit to the High Court, “If we don’t lie as instructed by Teesta, then these people will get me and my family members killed,” Zaheera said with regard to Teesta Setalvad.

She said that after the fast track court had acquitted the 21 accused, two Muslims had barged into

her house and told her that she would have to change her statement in the interest of the community and thereafter she along with brother were taken to Mumbai to Teesta Setalvad.

She however did not divulge the exact date when she was able to flee from Mumbai but said that Teesta has had her held captive and it was she who had made her sign legal papers and the matter was taken to Supreme Court against her wishes.

November 9, 2004: Zaheera went into hiding and even skipped the November 17, 2004 hearing at Mumbai court despite summons being issued to her and her brothers. The silver lining however has come in the form of Zaheera's cousin-Yasmin Sheikh who appeared as a witness on the same date and identified 11 of the 21 accused in the Best Bakery case.

November 29, 2004: Zaheera Sheikh, prime witness in the Best Bakery case, appeared before the trial court in Mumbai amidst tight police security to give her testimony but did not depose as the prosecution chose not to examine her.

Prosecutor Manjula Rao told the designated Judge Abhay Thipsay that she would examine Zaheera at the end of the trial and not at this stage. Thereafter, Zaheera left with her police escort and her lawyer Harshad Ponda assured that she would depose as and when the court summoned her.

Nov 18,2004: Zaheera's brother Nasibullah Sheikh appeared in court only to retract his earlier statement. He confirmed to the designated judge Abhay Thipsay that someone had hit him in the head, and he had gone unconscious. And by the time he could regain his senses the bakery had been burnt and so he does not recognise the accused. Something which he had once refuted.

· Jun 17, 2005: The cross-examination of investigating officer P P Kanani. Mr. Kanani, who took over as investigating officer from Himmatsinh Baria of Panigate Police Station on March 10, 2002, gave details of the case in a chronological order.

August 29, 2005: A Supreme Court appointed Committee indicted Zaheera Sheikh, key witness in the Best Bakery case, as a "liar". The Committee did not mince any words in criticizing Zaheera, who has given a series of flip-flop statements.

The Committee, headed by the Supreme Court Registrar General said in its report, "She has developed an image of self-condemned liar whose statements alone cannot safely be accepted."

III. INVOLVED IN THE CASE

This case has its matrix in an appeal filed by Zahira Habibullah hereinafter referred to as 'Zahira and another namely, Teesta Setelwad' and another appeal filed by the State of Gujarat.In the appeals filed before this Court, the basic focus was that:

- There was absence of an atmosphere conducive to fair trial.
- Zahira who was projected as the star witness made a grievance that she was intimidated, threatened and coerced to depart from the truth and to make statement in Court which did not reflect the reality. But later on, she used to change her statements from time to time.

So, the question before the Apex Court was whether this would amount to the contempt of the court?

Moreover, the Supreme Court also made a significant reference to the importance of "witness protection". Since the star witness of the case turned hostile due to lures and monetary considerations at the instance of those in power, a significant question arose that is there any legally just and fair solution so as to protect a witness from those who do not want the truth to come out?

IV. OBJECTIVE RAISED BY THE APPELLANT

Zahira had objected to acceptance of the Inquiry Officer's report. The grounds on which the objections had been raised essentially as follows:

1. Facts where deliberately omitted and distorted. The Inquiry Officer had tailored the facts to fit into his pre-conceived conclusions.
2. The witness wasn't cross examined even though the Inquiry Officer had examined was permitted.
3. There was no procedure followed and the followed procedure wasn't granted.
4. Intelligent appreciation of facts and objective enquiry wasn't present. There was lack of fair objective and reasonable approach.
5. Teesta Setalwad guided the Inquiry Officer so it was concluded that her approach to the Supreme Court for a fresh trial is wrong.
6. The request for examining the Chairman, NHRC was not accepted without indicating any reason.
7. There were many other except her who had made departure from their stand purportedly recorded during investigation but no action was taken against them. Citizen for Justice and Peace didn't also bother to take up cases even if so many people had died or got injured. But the reason behind chosing her is still is surprise
8. The petition filed before the Supreme Court was not in fact signed by her but was signed by Teesta and the mere fact that she had filed a Vakalatnama would not make her responsible for the statements made in the affidavit.
9. Teesta during a Press Conference made her say that she was under the control of Teesta and was just a mere puppet of Teesta. This activity of Teesta made everything very suspicious. It was Teesta who had spent a lot of money to tutor her to make different statements during different occasions.

V. JUDGEMENT OF THE COURT

The National Human Rights Commission (from now on "the Commission") is an independent statutory body constituted under the Protection of Human Rights Act 1993 and working as per the Paris Principles on the status of national establishments. It has been endowed with forces to ask suomoto or on a request introduced to it by an exploited person or any individual for his benefit,

into protests of (i) infringement of human rights or abetment thereof (ii) carelessness in the counteractive action of such infringement, by a public servant ; to mediate in any progressing including any charge of infringement of human rights pending in the eyes of a Court with the endorsement of such Court; to audit the Constitutional and administrative shields for the security of human rights and prescribe measures for their powerful usage; to make proposals for the viable execution of global settlements and instruments on human rights; and to perform such different capacities as it may consider vital for the advancement of human rights. The Commission has its own examinations group and comparable forces to a common court including summoning and upholding the participation of witnesses and analyzing them on vow; disclosure and generation of reports; accepting confirmation on sworn statements; ordering any open record or duplicate thereof from any court or office; issuing commissions for the examination of witnesses or records.

On 1 March 2002 in light of media reports and an email ask for, the Commission made suomoto move on the human rights circumstance in Gujarat by asking for the Chief Secretary and the Director General of Police of the State of Gujarat to give, inside three days, data on the measures being taken and in examination to forestall further heightening of the circumstance which was bringing about proceeded with infringement of human rights. A further Notice on 6 March 2002 recorded the Commission's failure at the disappointment of the Gujarat State powers to give, in a matter of such desperation and noteworthiness, even a preparatory report showing the move made in this way, because "as a large portion of the State hardware [was] occupied with the peace circumstance it would take eventually to gather the data and assemble the report." The Commission communicated its desire of a "complete reaction at the most punctual."

The Preliminary Comments and Recommendations of the Commission.

On 1 April 2002, after the visit to Gujarat between 19-22 March 2002 of a Commission actuality discovering group which incorporated the Commission Chairperson, Justice J.S. Verma, and receipt of the State of Gujarat's Report of 28 March 2002, the Commission issued Preliminary Comments and Substantive Recommendations to the Central and State Governments in connection to peace, help camps and recovery. The Commission noticed the genuine ramifications of the Gujarat roughness for the nation overall, and the "grave inquiries of loyalty to the Constitution and to settlement commitments" which emerged. In its Preliminary Comments it

emphasized the essential obligation of the State for the insurance of human rights and the reasonable rule of human rights law that the State is capable not just for the demonstrations of its own specialists additionally for the demonstrations of non-State performing artists inside its locale. On the subject of whether the State of Gujarat had released its obligations properly, the Commission, alluding to the historical backdrop of mutual viciousness in Gujarat and the guideline of res ipsa loquitur, put the weight on the State Government to disprove the assumption of State obligation regarding the inability to secure the life, freedom, uniformity and nobility of the populace of Gujarat. It further watched that there was a "far reaching absence of confidence in the respectability of the researching methodology and the capacity of those leading the examinations."

Proposals were made on lawfulness including

(i) entrusting five discriminating cases, including the Best Bakery Case, to the Central Bureau of Investigation; this was because of charges of poor or wrongful recording of First Information Reports (henceforth "FIRs") and impacting of examinations by superfluous contemplations or players, driving the Commission to the perspective that the honesty of the procedure must be restored

(ii) the making of Special Courts to attempt these cases on a normal premise

(iii) the arrangement of Special Prosecutors as required and the reception of techniques to ensure the exploited people and witnesses, particularly ladies and youngsters, in the treatment of such cases

(iv) the formation of Special Cells to track the advancement of those cases not endowed to the CBI

(v) the setting up of police work areas in help camps to get, record and activity FIRs

(vi) activity to distinguish and continue against those open workers who neglected to act properly to control the viciousness or to keep its heightening. The Commission likewise attracted consideration regarding "the deeper inquiry of police change" and the need "to safeguard the honesty of the researching methodology and to protect it from incidental impacts."

Commission additionally recorded Supreme Court applications for exchange of four different cases pending in distinctive Gujarat courts, to comparing courts in some other state.

In the Special Leave Petition the Commission battled that the judgment of the trial court in the Best Bakery case was "confirmation to the disappointment of the criminal equity framework in the State [of Gujarat] and the inability to guarantee a reasonable trial" as cherished in Article 21 of the Constitution of India and in Article 14 of the International Covenant on Civil and Political Rights 1966 to which India is a gathering. As per the Commission it was evident from the breakdown of the indictment case that "the environment in which the trial was directed was not helpful for the arraignment witnesses ousting in a reasonable and brave way" and that the trial was lost "because of the disappointment of the State to ensure the exploited people and key indictment witnesses."

In the Transfer Petitions the Commission emphasized the point that the record of the Best Bakery Case was "affirmation to the complete breakdown of the criminal equity framework bringing about a gross unnatural birth cycle of equity," contending that "it would be a crime of equity if [the other] cases likewise go the Best Bakery route for that would genuinely debilitate the validity of the equity conveyance framework and the principle of law." It fought that given the aftereffect of the Best Bakery trial it was far-fetched that the pending trials "would happen in a free and reasonable air and equity done to the exploited people, and that in the circumstances it was basic for the trials to be led outside the State of Gujarat." As in the Special Leave Petition, the Commission was incredulous of the disappointment of the trial court, confronted with the withdrawal of their affirmations by countless and having transparently recognized the insufficiencies in the police examination, to arrange further examinations before closing the trial, noticing that " a criminal trial is not an insignificant convention" and that when an offense is perpetrated it "turns into the obligation of the court to determine reality and render equity. Inability to do as such results in unsuccessful labor of equity." The Commission additionally censured the Government of Gujarat for neglecting to regard its suggestions of 1 April 2002, and for the conclusion of almost a large portion of the cases initially enlisted

Permitting the National Human Rights Commission's claims, the Supreme Court coordinated:

(i) Re-trial by a court of able locale under the ward of Bombay High Court, named by the Chief Justice of the Bombay High Court

(ii) The arrangement of an alternate open prosecutor by the State of Gujarat, the exploited people and witnesses to have a say in the arrangement in perspective of the surprising calculates the case

(iii)The expenses and all different costs of people in general prosecutor and a partner attorney of his (sic) decision to be paid at first by the State of Maharashtra and from that point repaid by the State of Gujarat

(iv) The State of Gujarat to guarantee the exchange of all reports and records to the court assigned by the Chief Justice of the Bombay High Court

(v) The State of Gujarat to guarantee the creation of the witnesses in the eyes of the said court at whatever point obliged, and to give vital assurance so they can remove openly with no anxiety of danger or compulsion

(vi)The State of Maharashtra to give extra assurance at the solicitation of any witness

(vii) All trial costs to be borne at first by the State of Maharashtra, to be repaid by the State of Gujarat

(viii) The Director General of Police, Gujarat to screen the reinvestigation, if any, to be brought up with direness and most extreme truthfulness.

(ix) The canceling of passage 3 of the judgment of the Gujarat High Court with the exception of the last appendage of the sub section in that.

(x) The come back to guardianship of those blamed who were not on safeguard at the finish of the trial, existing safeguard requests to proceed.

In its judgment the Supreme Court recognized noteworthy defects in the behavior and administration of both the trial and the bid hearing, and made various essential general remarks on the capacities of the criminal equity framework, the obligations of courts, the privilege to reasonable trial and the treatment of witnesses. Remarking on the equity framework and the privilege to reasonable trial, the Supreme Court watched that the fundamental reason for the legal framework is the "disclosure, vindication and foundation of truth". Since the object of a criminal

trial is to "dispense equity, convict the blameworthy and secure the blameless", the trial ought to be a "quest for truth and not a session over details." Furthermore, a trial which is essentially gone for finding out truth must be reasonable to all concerned. This "includes a fragile legal adjusting of contending diversions… … the investments of the denounced and the general population and, as it were, that of the exploited person need to weighed not dismissing people in general premium included in the arraignment of persons who confer offenses."

Subsequently, the Court held, it is not just the charged who must be reasonably managed; exploited people, their relatives and relatives all have an "inbuilt right" to be managed decently in a criminal trial, and dissent of a reasonable trial is as much foul play to the blamed as is to the victimized person. Debilitating witnesses, constraining them to give false proof and inability to hear material witnesses will all outcome in an unjustifiable trial.

The Court was exceptionally incredulous of the first police examination concerning the Best Bakery occurrence, portraying it as: "cursory and anything other than unbiased with no distinct object of discovering reality and conveying to book the individuals who were in charge of the wrongdoing."

People in general prosecutor seemed to the Court to "… have acted more as a defence counsel than one whose obligation was to present reality in the witness of the Court" and the Trial Court "thus had all the earmarks of being a noiseless observer,

The Court watched that despite the fact that the vindications had been maintained by the High Court,

> *"if the acquittal is unmerited and based on tainted evidence, tailored investigation….perfunctory trial and evidence of threatened / terrorize witnesses, it is no acquittal in the eyes of the law and no…..credibility can be attached [to it]*."[1]

Upsetting the discoveries of the High Court, the Supreme Court held that a defective examination is not the issue of the victimized people or witnesses; where the examination is inadequate "the court would not be right in absolving a blamed individual exclusively on record for the

[1]*Ibid*., Para. 64

imperfection; to do as such would be commensurate to playing under the control of the examining officer if the examination is designedly defective" (italics included). The purity or blame of the charged persons in the Best Bakery case could have been built, the Court said, by a reasonable and fair trial.

The Court was especially reproachful of the High Court's refusal, having plainly reasoned that the starting examination was defective, to concede the application for extra confirmation and to arrange a retrial. On this point the Supreme Court took an oppositely inverse position to that taken by the trial court and the High Court:

"The High Court [came] to a positive conclusion that the examination completed by the police was deceptive and defective. That was and ought to have been essentially sufficient defense to direct a re-trial of the case."

The Court additionally held that the High Court had blundered in presuming that the request could just be settled on the premise of the confirmation already before it. It had then aggravated the slip by recording that the sworn statements showed as to the requirement for allowing the extra proof were not truthful. The Supreme Court held that this was a matter for evaluation of proof when conceded. Under the 1973 Criminal Procedure Code and the 1872 Indian Evidence Act the courts have wide optional forces to "make fundamental strides if … crisp proof is vital to the simply choice of the case." Caution is obliged to practice these powersThese forces ought to be practiced with alert; the Supreme Court focused on that "there can't be straight-coat recipe or guideline of general application," and as the procurements under the Code are by method for an exemption the Court needs to deliberately consider the requirement for and attractive quality to acknowledge extra confirmation. Notwithstanding, given that the "capacity of the first court is organization of criminal equity and not to number lapses perpetrated by the gatherings or to discover… who among the gatherings performed better," if "fitting confirmation was not brought on record because of any coincidence, the court ought to be unselfish in allowing such slip-ups to be amended." Appellate courts additionally have energy to acknowledge extra proof if the court supposes it vital in light of a legitimate concern for equity to do as such, and besides this force is not restricted to situations where there has been "only a formal deformity." Nonetheless, the illustrating of extra confirmation won't essentially prompt the conclusion that the judgment of the trial court wasn't

right. That choice is landed at in the wake of surveying the first proof under the watchful eye of the trial court and the extra confirmation. Nor is it the case the case that at whatever point extra proof is acknowledged, retrial is a result. Be that as it may in the moment case, in perspective of the way of the extra proof tried to be cited and the careless way of the trial, the Court held that:

a retrial is a must and essentially called for in order to save and preserve the justice delivery system unsullied and unscathed by vested interests."[2]

As to the area of trial, the Court reaffirmed the standard that equity ought to be carried out yet ought to likewise be seen to be carried out. Therefore where the Court is completely fulfilled that a reasonable and fair trial is unthinkable in a given case and there is a sensible trepidation that equity won't be carried out, an out-of state trial may be coordinated.

On the topic of witnesses, the Court managed finally in its judgment with the significance of witnesses. Citing Bentham, the Court expressed that witnesses are the "eyes and ears of equity." Where witnesses are crippled from acting thusly, for reasons unknown, a reasonable trial is no more conceivable. The State is under an obligation to ensure witnesses in the more extensive diversions of society, particularly in touchy cases; as a defender of its subjects it must guarantee that witnesses can oust securely amid trials without trepidation of repercussions. The Court made reference to the various encounters of courts confronted with witnesses turning unfriendly because of dangers, intimidation, or for budgetary or political addition, the total impact of which is to undermine and demolish open trust in the organization of equity prompting disorder, mistreatment and foul play and the breakdown of the principle of law. The Court particularly required the presentation of administrative measures restricting messing with witnesses and for the constitution of an unprejudiced organization "involving persons of blameless uprightness to perform capacities likened to those of the Director of Public Prosecutions in the UK," including the organization of Witness Protection Programs.

In the moment case the Court dismisses as untenable the reasons given by the High Court for the non-examination of onlookers and harmed relatives at trial, and was additionally reproachful of the examination of one witness by the trial prosecutor sooner than the date settled. The trial court

[2] *Ibid.*

ought to have reviewed and reevaluated the antagonistic witnesses according to its powers under the 1973 Criminal Procedure Code and the 1872 Indian Evidence Act. The Supreme Court additionally discovered the High Court's decision that Zahira Sheik had been utilized by persons with "diagonal thought processes", and that witnesses who documented testimonies were of unsound personality, untruthful and fit for being controlled, was unsupported by any material or sensible and solid premise. The Supreme Court took the opportunity in its judgment to well-spoken its perspectives on the part of the Courts. The Courts, it said, have "an overriding obligation to keep up open trust in the organization of equity." This obligation obliges courts to partake effectively in trials as opposed to being just "tape recorder[s] recording confirmation." Presiding officers ought to assume a dynamic part in the proof gathering procedure and ought to screen and control the processes so that truth, a definitive target, is touched base at and premature deliveries of equity avoided. In situations where the part of the arraigning office itself is put at issue the Court has a considerably more noteworthy obligation and obligation to render equity. Courts additionally have an obligation to keep up legal order. Requesting the canceling of Paragraph 3 of the Appeal judgment which made reference to grievances purportedly communicated at the advance catching wind of the part of the National Human Rights Commission,the Supreme Court was reproachful of the disappointment of the High Court for this situation to look after tolerability, etiquette and legal teach by recording baseless references to persons and established bodies, for example, the NHRC who were not before it. At last and in passing the Supreme Court noted with dismay the practice progressively received by the High Courts of maintaining last requests without a contemplated judgment (as in the moment case), regularly bringing about the usage of the request must be stayed by the Supreme Court pending conveyance of the contemplated judgment.

VI. REASONS GIVEN BY THE COURT

Mr. Sushil Kumar. Learned Senior Advocate then presented that NHRC had specifically approached the Supreme Court against the upbraided judgment and request went by the Trial Court for this situation simply because of media buildup, however the criticized judgment and request of absolution went by the Trial Court is simply, lawful and legitimate. He had gone to that degree by presenting that media and some, with no essential learning and idea of Criminal Law, have just

about discovered the charged liable much before the state offer documented against the reprimanded judgment and request of vindication went by the Trial Court under Sections 386 of the Criminal Procedure Code was even heard and chose by this High Court, which is profoundly disgraceful. Mr. Sushil Kumar had intensely presented that it was terrible that none else however the Chairman of NHRC who is previous Chief Justice of the Supreme Court of India, seriously scrutinized the upbraided judgment and request of exoneration went by the scholarly Trial Judge. For this situation instantly after the judgment was declared by the educated Trial Judge, without actually taking a gander at it he has called it unnatural birth cycle of equity. He presented that motivated by this, one and sundry, began to actually taking a gander at it or applying their psyche and comprehension the right position of law. He had likewise presented that it was profoundly inappropriate from the Chairman of the NHRC to call the judgment as unnatural birth cycle of equity, which may even add up to disdain of the court. He had additionally presented that when the Chairman of Court. He had additionally presented that when the Chairman of the NHRC understood his misstep in the wake of experiencing the judgment and request of absolution, then, just with a perspective to spare the circumstance, under the convincing circumstances, he chose to approach the Supreme Court and in like manner matter was documented by NHRC in the eyes of the Supreme Court and the censured judgment and request of quittance went by the educated Trial Judge has been tested by bypassing this High Court. He likewise presented that after the Chairman of the NHRC put forth the expression that the judgment and request of the scholarly Trial Judge adds up to unsuccessful labor of equity, then there was a colossal weight on him from media, hence, however the judgment and request of the educated Trial Judge was completely simply, lawful and legitimate and there was no premature delivery of equity, NHRC needed to approach the Supreme Court specifically against the judgment and request of quittance went by the Trial Court. He, in this manner, presented that this Court might straightway release the advance and the applications documented in it as there is no substance in any of it. Educated Advocate General Mr. Shelat has presented that one after different witnesses turned unfriendly under the watchful eye of the court that was sufficient to raise a sensible suspicion that under danger or compulsion, they had turned threatening. This accommodation of scholarly Advocate General can't be acknowledged for the straightforward reason that there may be more than one purpose behind the witnesses from exchanging from their alleged proclamations made before the police. It is known to everybody that no mark of the witness is gotten underneath his/ her announcement recorded by

the police under Section 161 of the Code. Mark is gotten just on the dissention. As a matter of first importance, there is nothing to demonstrate that these witnesses had ever constructed their alleged articulations before the police and probability of this case can't be discounted. On the off chance that they had not put forth any expression before the Police, than, there was no doubt of exchanging from their alleged articulations either under danger or compulsion. It might likewise be expressed that in each of the 37 witnesses were proclaimed threatening, out of them seven were none else yet exploited people and observers, three of them had gotten wounds amid the episode. All these 7 witnesses were from Uttar Pradesh and not knowing Gujarati, still their alleged proclamations are recorded by the Police in Gujarati. It is not the case that the said explanations of the witnesses recorded in Gujarati were perused over and disclosed to them in Hindi. The likelihood of these seven witnesses coming clean under the watchful eye of the Court in their proof additionally can't be discounted in light of the fact that they were the exploited people as well as some of them were harmed and lost their close and dear ones in the episode. It was the best open door for them to remove against the blamed, if at all they had seen the respondents charged taking dynamic part in the episode with different persons of the horde of more than 1000 to 1500 then they would have most likely distinguished the denounced persons, who were all that much present in the court, and ousted against them on the grounds that in the court there was no danger or intimidation. We are additionally not arranged to accept that other four onlookers got away unhurt with no harm on their persons when Police guaranteed that they were likewise tied and beaten amid the occurrence. It raises genuine uncertainty about the examination did by the Police for this situation. We neglected to admire the accommodation of educated Advocate General that neither the Prosecutor nor the scholarly Judge had put any inquiries to the witnesses, who were not supporting the arraignment and attempted to know from them that why they were not supporting the indictment case. The Prosecutor is the watchman of the general public, who is concerned with rebuffing the liable and sparing the honest. He needs to secure the enthusiasm of the general public and needs to see that wrong practitioners must be rebuffed, yet in the meantime, pure persons ought not to be rebuffed wrongly. Additionally, neither the Public Prosecutor nor the educated Trial Judge can put any driving inquiries to the witnesses.

VII. CRITICAL ANALYSIS AND CASE COMMENTARY

The roles played by the National Human Rights Commission, non-governmental organizations, the media and the Supreme Court in the progress of the instant case all deserve brief comment. The Indian and international media were instrumental in bringing the immediate post-Godhra communal violence to national and international attention. In its Proceedings of 1 March 2002 the Commission stated that it was taking action "on the basis of media reports, both print and electronic" and an email request for Commission intervention. The Proceedings specifically identified news reports as the source of information about inaction on the part of the state authorities.[3] Its Proceedings of 6 March 2002 made specific reference to media reports as a source of information about the situation in Gujarat.[4] In its Proceedings of 1 April 2002 the Commission emphasised the need to uphold the right to freedom of speech and expression as articulated in Article 19(1)a of the Constitution of India as well as in Article 19 of the ICCPR, and it declared itself "clearly in favour of a courageous and investigative role for the media."[5] It also recommended that the media, especially radio, should be requested to cooperate in efforts to identify and assist destitute women and orphans and those subjected to the trauma of rape.[6] At the same time, having noted the views of the Government of Gujarat in respect of the media[7] and the fact that the constitutional right to freedom of speech is subject to reasonable restrictions under Article 19(2) of the Constitution,[8] the Commission suggested "self-policing" guidelines should be considered to govern the conduct of the media in volatile situations including those of inter-communal violence in order to avoid further inflaming the situation.

[3] *Supra*, n. 68: "News items report a communal flare-up in the State of Gujarat and what is more disturbing, they suggest inaction by the police force and the highest functionaries in the state to deal with this situation."

[4] *Supra*, n. 69

[5] *Supra*, n.71, Para. 20 (xi)

[6] *Supra* n. 71, Para. 21 (III) (v)-(vi)

[7] *Supra*, n. 71, Para. 20 (ix). The Commission noted that in its detailed Report of 28 March 2002 the Government of Gujarat attributed the outbreak of large-scale violence in various cities and towns across the State to "widespread reporting both in the visual as well as the electronic media." The State Report also adds that comments attributed to State officials were taken out of context by the media or were entirely without foundation.

[8] *Supra*, n.71, Para. 20 (xi)

In its Proceedings of 1 April 2004 the Commission emphasised the nature of its intervention as a continuing process to examine, monitor and address the human rights situation in Gujarat, similar to its intervention following the cyclone in Orissa in 1991 and the earthquake in Gujarat in 2001.[9]However there were, it said, fundamental differences between the Gujarat situation and these earlier instances. The latter arose from catastrophic natural disasters which required the Commission to monitor the State's performance to ensure that the human rights of the most vulnerable were protected. The Gujarat situation resulted from large-scale violation of human rights. This required a qualitatively different response from the Commission;[10] in particular it required the Commission in accordance with its Statute to monitor compliance of the State with the rule of law and its human rights obligations.[11]

From the outset the Commission emphasised the responsibility of the State to ensure that human rights are not violated through overt acts, abetment, inaction or negligence, whether of its own agents or non-state actors. It found serious failures of intelligence and action by the State Government in relation to the events leading to the Godhra tragedy and the subsequent violence, particularly in view of the history of communal violence in Gujarat. In its Proceedings of 31 May 2002 the Commission concluded that the Gujarat Government had failed to rebut the presumption of responsibility, that the principle of *res ipsa loquitur* applied and that there was a "comprehensive failure of the State to protect the Constitutional rights of the people of Gujarat,"[12] a view repeated in its Annual Report for 2001-2.[13] The Commission highlighted the State's failure to take appropriate action and to identify local factors and players, the "uneven handling" of major cases arising out of the Godhra incident and the subsequent wide-scale violence, the failure of the State Government in its report of 12 April 2002 to rebut "repeatedly made allegations that senior political personalities were seeking to influence the working of police stations"[14] and the

[9] *Supra*, n.71, Para.7
[10] *Supra*, n.71, Para.8
[11] *Supra*, n.71, Para. 20 (xiv)
[12] *Supra*, n. 85, Para. 10
[13] National Human Rights Commission, Annual Report 2001-2, Para.3.13: "At the time of writing this report, the Commission had concluded that, in its opinion there could be no doubt that there had been a comprehensive failure on the part of the State Government [of Gujarat] to control the persistent violation of the rights to life, liberty, equality and dignity of the people of that State."
[14] *Supra*, n. 86, Para. 10

widespread mis-handling of complaints.[15] The Commission also described itself as "struck by the apparent failure of the Government of Gujarat to follow vigorously" the 1997 *Guidelines to Promote Communal Harmony* issued by Central Government.[16]

The content and tone of the Commission's comments on the crisis in Gujarat reflect its teleological approach to the interpretation of its Statute. In its Annual Report of 2002-3 the Commission, commenting on the first ten years of its existence, observed that it had become increasingly necessary to construe its Statute in a purposive fashion, "in such ways as are most compatible with the high purposes of the Objects and Reasons of the Act." In this it declared itself guided by the well-established principle that the texts of Statutes "must not lend themselves to interpretations that defeat the very intention of the legislation in question, or lead to unreasonable and untenable conclusions."[17]

In August 2004, pursuant to an Application by the Commission, the Supreme Court ordered the Government of Gujarat to establish a Cell to re-open the two thousand cases closed by the local police, to re-investigate those cases where further material warranted and, where it was concluded that further investigation was not warranted, to post on the internet the reasons for concluding that the case should remain closed.[18]

A welcome feature of the Commission Proceedings is the apparently conscious effort to "mainstream" the issue of violence against women and children and gender crimes. This reflects the growing jurisprudence on crimes of gender violence of the ad-hoc Criminal Tribunals for the Former Yugoslavia and Rwanda,[19] the Statutes of the International Criminal Court[20] (to which

[15] *Ibid*., Para. 20
[16] *Ibid*., Para 44
[17] National Human Rights Commission, Annual Report 2002-3, Para. 2.4
[18] National Human Rights Commission v State of Gujarat, Order dated 17 August 2004, Crl.M.P.No.3741/2004 in Writ Petition (Crl.) No. 109/2003
[19] SeeCharlesworth, H. and Chinkin, C. 'Redrawing the Boundaries of International Law' in « The Boundaries of International Law : A FeministAnalysis » ; Manchester University Press, Manchester; 2000; Meron, T. 'Rape as a Crime under International Law' (1993) 87 *American Journal of International Law* 424; Chinkin, C. 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 1; Askin, K. 'Sexual Violence in Decisions and Indictments of the Yugoslav and RwandanTribunals : CurrentStatus' (1999) 93 *American Journal of International Law* 97; Askin, K 'ProsecutingWartimeRape and OtherGender-Related Crimes under International Law : ExtraordinaryAdvances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288
[20] Rome Statute of the International Criminal Court 1998; **U.N. Doc. 2187 U.N.T.S. 90**

India is not a party) and the so-called hybrid or Special Courts,[21] and the increasing willingness of the charter-based mechanisms of the United Nations human rights system to explicitly address crimes of sexual violence in the context of situations of gross human rights abuses.[22] The Commission's recommendation of 1 April 2002 that the media, especially radio, should be involved in the identification of rape victims and the mobilisation of counselling services, is evidence of an innovative and creative approach to the challenge of responding to such crimes.[23] In its further Recommendations of 31 May 2002 the Commission specifically refers to the continued difficulties faced by victims of rape and other acts of brutality in having complaints accurately and fully recorded by the police, a situation compounded by insensitive police questioning and the lack of women police officers. It notes that the State Government's own Report of 12 April 2002 testifies to assaults on dignity "particularly of women and children through acts of rape and other humiliating crimes of violence and cruelty"[24] and reiterates its view that material collected or provided by "credible sources such as NGOs" should be fully taken into account.[25]

The judgment of the Supreme Court in directing the retrial and transfer of the Best Bakery case has been widely described as a "landmark." The Indian Supreme Court has an acknowledged record of judicial activism going back almost three decades, although Professor S.P. Sathe in his book "Judicial Activism in India"[26] argues that its gradual evolution from a "technocratic court" to an "activist court" can be traced back further, to the last fifty years.[27] As Sathe shows, the Supreme Court has played a central role in facilitating access to justice in India, firstly through increasingly liberal interpretation of Constitutional rights and secondly by liberalising the rules on *locus standi*to allow greater public participation in the judicial process.[28] The latter made possible the development of "public interest litigation", also termed "social action litigation" by Professor

[21] See Statute of Special Court for Sierra Leone, U.N. Doc. S/2002/246
[22] See Report of Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences - Visit to the Darfur region of the Sudan, dated 23 December 2004;
E/CN.4/2005/72/Add.5
[23] *Supra*, n.86, Para. 21(IV) (ix)
[24]*Ibid*., Para. 10
[25] *Supra*, n. 86, Paras. 20, 32
[26]Sathe, S.P. "Judicial Activism in India", 2nd Ed.; OUP, New Delhi; 2002; Chapter 1; see also S.K.Verma&Kusum (eds.) "Fifty Years of the Supreme Court of India – Its Grasp and Reach"; OUP, New Delhi; 2003
[27] *Ibid*., at 4-6
[28] *Ibid*., at 16

UpendraBaxi[29] whereby individuals and activist organisations were given access to the Supreme Court on behalf of the poor, the oppressed and the disadvantaged to speak out against human rights violations, illegal acts, poor governance and environmental degradation.[30]Sathe also notes the use of social action litigation by the Supreme Court "for the support of unpopular causes and the protection of politically powerless minorities."[31]

Thus in the instant case the Supreme Court explicitly referred to the link between access to justice and human rights protection[32] and made a number of observations on the role of State Governments and the courts in preserving the integrity of, and public confidence in, the judicial system.[33] It warned of the impact of crimes, which it described as "public wrongs in breach and violation of public rights and duties," on the community as a whole and society in general[34] and spoke of the overriding duty of the courts to "arrive at the truth and subserve the ends of justice." The Court's vision of a justice system which, by upholding the rule of law and preventing anarchy and social chaos, consciously strives to serve the wider interests of society at large, is clear from this judgment.[35] Society at large is characterised by the Court in this judgement as a key "stakeholder" in the justice system, as entitled to justice as is the accused:[36]

"The community acting through the State and the public prosecutor is also entitled to justice. The case of the community deserve (sic) equal treatment at the hands of the court in the discharge of its judicial function." [37]

Thus the notion of fair trial is described as a "triangulation of the interests of the accused, the victim and society", and denial of a fair trial as an injustice to the victim and to society as well as to the accused: "Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses *or the cause which is being tried* (italics added) is eliminated."[38] The Court went

[29] *Ibid*., at 18
[30] *Ibid*., at 17-19
[31] *Ibid*., at 19
[32] *Supra* n.1, Para 36: "The principles of the rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law."
[33]*Ibid*., Paras. 35, 68, 73
[34] *Ibid*., Para 35
[35]*Ibid*., Paras. 35, 46, 49
[36] *Ibid*.
[37]*Ibid*., Para 49.
[38]*Ibid*., Paras. 35, 36

further, saying that "public interest in the administration of justice must be given as much importance, if not more as (sic) the interest of the individual accused."[39] Respect for the rights and needs of victims and recognition of the obligation of society at large to challenge impunity for crimes such as gross human rights violations are the hallmarks of an advanced justice system. At the same time, as the Supreme Court also recognised in its judgment, the fundamental right of the accused to a fair trial as articulated Article 19 ICCPR must be respected. This search for balance between the interests of the accused, the victims and society in general raises the larger question, which it is beyond the scope of this note to discuss, of the potential and limits of prosecutorial mechanisms for pursuing accountability for gross and systematic human rights violations.[40]

Since the handing down of the trial court judgment in June 2003, the Best Bakery case has become a focal point of the legal response to the communal violence in Gujarat in 2002. Without the "star witness" the prosecution case is undoubtedly weaker. Nevertheless the retrial is continuing and prosecution witnesses are still coming forward for examination, including Zahira Sheikh's aunt. In the meantime the BilkisYaqubRasool case may prove ultimately to have greater significance in establishing the responsibility of State Governments for human rights atrocities and in holding individuals, including government officials and agents, accountable for gross human rights violations. The case was transferred by the Supreme Court in August 2004[41] for trial in Bombay by a Special Court, the first of the four cases subject to Supreme Court transfer orders to be transferred. It concerns the murders on 3 March 2002 in Gujarat of fourteen members of the same family and the gang rape of the surviving victim, BilkisYaqubRasool, who was left for dead. The police, political party workers, civil servants, government doctors and ministerial aides have all been implicated in the murders and rape or in the alleged cover-up. At the time of writing (early October 2005) the outcomes of this case and of the Best Bakery case are awaited.

[39] *Ibid*., Para 42.
[40] See Ratner., S. and Abrams., J. "Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy", 2nded; OUP, Oxford; 2001
[41] See "SC transfers Bilkis case to Maharastra", rediff.com, 6 August 2004, URL (consulted 23 December 2005) http://in.rediff.com/news/2004/aug/06guj.htm; "SC transfers BilkisBano rape case to Mumbai", Outlookindia.com, 6 August 2004, URL (consulted 12 December 2005) http://outlook india.com/

VIII. SIGNIFICANCE OF THIS CASE

Bentham said that "witnesses are the eyes and ears of justice".If the witness himself is debilitated from going about as eyes and ears of equity, the trial gets rotted and incapacitated, and it no more can constitute a reasonable trial. The weakening may be because of a few variables, in the same way as the witness being not in a position for reasons out of hand to talk reality in the Court or because of carelessness or obliviousness or some degenerate conspiracy. The part of a witness is imperative in a trial. He is a basic piece of the equity conveyance arrangement of any nation. His every last proclamation is critical as it has an enchantment power to change the course of the entire case. So this judgment has indicated out as how the assurance of witnesses is lacking and has implied the requirement for a witness insurance program.

IX. CONCLUSION

Aside from granting discipline to the appealing party Zahira Habibulla Sheik for prevarication furthermore for the disdain of the Supreme Court, this judgment has turned out to be weighty one. The reason being that through this judgment the Apex Court has been capable in indicating out two extremely critical issues. Firstly, the Court reminded the Parliament to establish a law in order to endorse a system to focus the degree and nature of discipline for scorn of the Supreme Court. Without having any fitting law, all the more frequently the Supreme Court forces brutal discipline upon the contemnor as happened for this situation. Furthermore the Court stressed the requirement for a law restricting messing around with witnesses and that it turns into the need of great importance. The criminal equity framework has ended up wasteful and does not work in a familiar manner. The most overpowering reason of this shortcoming is the arraignment witnesses withdraw from articulations made prior before the police and turn unfriendly. Time has ended up ready to follow up because of various encounters confronted by the courts by virtue of regular turning of witnesses as threatening, either because of dangers, compulsion, draws and money related contemplations at the case of people with great influence, their thugs and workers, political clouts and support and multitudinous other degenerate practices

shrewdly embraced to cover and smother truth and substances turning out to surface rendering truth and equity to wind up extreme setbacks. The State has an unequivocal part to play in securing the witnesses, to begin with at any rate in delicate cases including people with great influence, who have political support and could wield muscle and cash force, to turn away trial getting polluted and crashed and truth turning into a setback. As a defender of its natives it needs to guarantee that amid a trial in Court the witness could securely oust truth with no trepidation of being frequented by those against whom he had removed. Each State has a sacred commitment and obligation to ensure the life and freedom of its natives. That is the basic necessity for recognition of the standard of law. There can't be any deviation from this necessity as a result of any superfluous variables like, position, belief, religion, political conviction or philosophy. Each State should know these essential prerequisites and this needs no countering. Thusly, there is an earnest need to yield a bill of right to protect and secure exploited people'/witnesses' rights, equity and due procedure. Such a bill ought to incorporate the accompanying: To be treated with reasonableness, appreciation, and respect, and to be free from intimidation, badgering, or misuse, all through the criminal equity process. Assurance is additionally important to restore a feeling of human nobility which stands broke in a circumstance like Gujarat massacre.