DINUBHAI BOGHABHAI SOLANKI

v.

STATE OF GUJARAT & ORS.

(Criminal Appeal No. 492 of 2014)

OCTOBER 30, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Administration of criminal justice: Order of retrial – Maintainability of – Murder of an activist who had been complaining against the illegal mining in and around Gir Forest Sanctuary – The names of appellant and his nephew appeared in the said murder – The complainant, father of the activist dissatisfied with the investigation, approached High Court for directions for proper investigation – High Court transferred the case to CBI – When the trial took place, out of 195 witnesses examined, as many as 105 witnesses turned hostile – Complainant approached High Court seeking de novo trial – By impugned order, High Court directed de novo trial of the case in exercise of writ jurisdiction under Art.226 on the ground that all the important witnesses including eye-witnesses resiled from their statements made before the police and various complaints were made alleging threats being administered by the main accused-appellant as well as his accomplice – On appeal, held: High Court was right in holding that the instant case was one of those exceptional cases where there was possibility of witnesses getting hostile because of inducement or threats – Thus, it is necessary to ensure that trial is conducted fairly where witnesses are able to depose truthfully and fearlessly – However, examination of all the witnesses once again in de novo trial is not appropriate in the circumstances of this case – In the interest of fair trial, at least crucial witnesses need to be examined again – The CBI stated that apart from 8 eye-witnesses, 18 more witnesses need to be necessarily examined – Out of those, 15 persons are witnesses for circumstantial evidence and 3 are panch witnesses relating to various panchnamas – The CBI was categorical that when all 8 eye-witnesses are examined afresh along with other 18 witnesses, it would subserve the purpose for which trial is reordered – Thus, 26 witnesses should be re-examined – In order to ensure that there is a fair trial in literal sense of the term, at least till the time 8 eye-witnesses are re-examined,

A *the appellant should remain in confinement and he be released thereafter with certain conditions, pending remaining trial – Constitution of India – Art.226.*

Administration of criminal justice: Victim-centric approach – The basic aim of any good legal system is to do justice, which is to
B *ensure that injustice is also not meted out to any citizen – This calls for balancing the interests of accused as well as victims, which in turn depends on fair trial.*

Code of Criminal Procedure, 1973: s.386 – Normally a retrial has to be ordered by the Appellate Court while dealing with the
C *validity and correctness of the judgment of the trial court as this power is expressly conferred upon the Appellate Court by s.386 of the Cr.P.C. – However, in exceptional circumstances, such a power can be exercised by the High Court under Art.226 or by Supreme Court under Art.32 of the Constitution of India.*

D *Strictures: Adverse remarks against the Presiding Officer – Whether High Court is justified in passing strictures against the Presiding Officer of the trial court – Held: No fault can be formed about the general observations of the High Court about the role of the trial court judge who is not supposed to be a mute spectator when he finds that witnesses after witnesses are turning hostile –*
E *At the same time, condemnation of the Presiding Officer and going to the extent of damning him, albeit, in an oblique manner, may not be justified in the facts of this case – No doubt, it was expected of the Presiding Judge to play more active and positive role – However, if error is committed on that front, it is also not appropriate to arrive*
F *at other extreme conclusions against that Presiding Officer in the absence of any cogent evidence against him – The said Presiding Officer is to retire within a couple of months, after rendering long service of more than 30 years – The direction to take up the matter against him on administrative side is set aside.*

G *Bail: Cancellation of – Application by the complainant for cancellation of bail on the ground that the appellant had been threatening the witnesses, the complainant and his family members – Bail granted to the appellant cancelled and direction to take him into custody and remain in custody during the period of re-examination of 8 eye-witnesses – Once their depositions in the form*
H *of examination-in-chief and cross-examination are recorded, the*

appellant shall be released on bail again on the same terms and conditions on which he was granted bail earlier – After the appellant comes out on bail, there shall be an additional condition, namely, till the recording and completion of the statements of other witnesses, he shall not enter the State of Gujarat.

Disposing of the appeals, the Court

HELD: 1.1 Normally such a retrial has to be ordered by the Appellate Court while dealing with the validity and correctness of the judgment of the trial court as this power is expressly conferred upon the Appellate Court by Section 386 of the Cr.P.C. However, in exceptional circumstances, such a power can be exercised by the High Court under Article 226 or by this Court under Article 32 of the Constitution of India. There are no shackles to the powers of the Constitutional Court under these provisions, except self-imposed restrictions laid down by Courts themselves. But for that, these powers are plenary in nature meant to do complete justice and to inhibit travesty of justice. Therefore, the High Court was right in holding that the present case was one of those exceptional cases where possibility of witnesses getting hostile because of inducement or threats cannot be ruled out. However, it is not suggested that the appellant and his nephew are the persons responsible for the murder. That charge which is levelled against them and other accused persons has to be proved in the trial by cogent evidence. No doubt, standard of proof that is required in such criminal cases is that the guilt has to be proved beyond reasonable doubt. However, at the same time, it is also necessary to ensure that trial is conducted fairly where witnesses are able to depose truthfully and fearlessly. Old adage judicial doctrine, which is the bedrock of criminal jurisprudence, still holds good, viz., the basic assumption that an accused is innocent till the guilt is proved by cogent evidence. At the same time, victim is also an important stakeholder in the criminal justice and welfare policies. It is for this reason that "victim justice" has become equally important, namely, to convict the person responsible for a crime. This not only ensures justice to the victim, but to the society at large as well. [Paras 30, 31, 32] [1006-B-H; 1007-A-B]

A 1.2 There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim oriented policies are introduced giving better role to the victims of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now B recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by providing adequate compensation to the victims. The result is that private parties are now able to assert "their claim for fair C trial and, thus, an effective 'say' in criminal prosecution, not merely as a 'witness' but also as one impacted". That apart, it is in the larger interest of the society that actual perpetrator of the crime gets convicted and is suitably punished. Those persons who have committed the crime, if allowed to go unpunished, this also leads to weakening of the criminal justice system and the D society starts losing faith therein. Therefore, the first part of the celebrated dictum "ten criminals may go unpunished but one innocent should not be convicted" has not to be taken routinely. No doubt, latter part of the aforesaid phrase, i.e., "innocent person should not be convicted" remains still valid. However, that does E not mean that in the process "ten persons may go unpunished" and law becomes a mute spectator to this scenario, showing its helplessness. In order to ensure that criminal justice system is vibrant and effective, perpetrators of the crime should not go unpunished and all efforts are to be made to plug the loopholes which may give rise to the aforesaid situation. [Paras 33, 34] F [1007-F-G; 1008-A-B]

2. While judging as to whether a particular accused is guilty of an offence or not, emotions have no role to play. Whereas, victims, or family of victims, or witnesses, may become emotive in their testimonies, in a given case, as far as the Court is G concerned, it has to evaluate the evidence which comes before it dispassionately and objectively. At the same time, it is also a fact that emotion pervades the law in certain respects. Criminal trials are not allusive to the fact that many a times crimes are committed in the 'heat of passion' or even categorised as 'hate crimes'. H Emotions like anger, compassion, mercy, vengeance, hatred get

entries in criminal trials. However, insofar as the Judge is concerned, most of these emotions may become relevant only at the stage of punishment or sentencing, once the guilt is established by credible evidence, evaluated objectively by the Court. The aforesaid factors, then, become either mitigating/extenuating circumstances or aggravating circumstances. The manner in which the murder of the victim-deceased activist is committed may be cruel or ruthless. However, in the first instance it has to be examined as to whether the accused persons are responsible for the said murder or they (or some of them) are innocent. [Para 36] [1009-A-E]

3. The victim had filed a Public Interest Litigation (PIL) in the High Court against illegal mining within 5 kms. radius from the boundary of the Gir Sanctuary. In that petition, he had pleaded for protection of environment generally and the biodiversity of Gir Forest, in particular. The appellant and his nephew were got impleaded in the said PIL whose names emerged during the pendency of that petition. After the murder of the said activist, the case was registered but the investigation was lackadaisical. The complainant was forced to approach the High Court to seek necessary directions for proper investigation. The High Court was compelled to intervene and it transferred the investigation to an independent investigating agency, i.e., CBI. It was only thereafter that investigation progressed and chargesheets were filed. Soon after the appellant was released on bail, application for cancellation of bail was filed by the complainant with the allegations that the appellant was extending threats to the complainant, his family members as well as witnesses. Even some witnesses complained to this effect. What is revealing that this application was supported by the CBI affirming the stand of the complainant to the effect that witnesses are threatened. [Paras 37, 38] [1009-G-H; 1010-C-D]

4. Trial is expedited on the directions of the Court and witnesses start turning hostile. It is difficult to say, at least, *prima facie*, that in the given scenario, the CBI, during investigation, would have compelled the witnesses to give statements against the accused persons. In any case, that is also a matter to be finally tested at the time of trial. However, it is stated that

A requirement of a fair trial has to be fulfilled. When the trial took place, as many as 105 witnesses turn hostile, out of 195 witnesses examined, is so eloquent that it does not need much effort to fathom into the reasons there for. However, when the aforesaid facts are considered cumulatively, it compels to take a view that in the interest of fair trial, at least crucial witnesses need to be B examined again. [Para 39] [1010-E-F]

5. (i) Whether it was a case where entire *de novo* trial is necessitated? (ii) Whether the High Court is justified in passing strictures against the Presiding Officer of the trial court?

C 5.1 Insofar as first aspect is concerned, it transpires that the CBI had stated before the High Court that *de novo* trial may not be necessary and the purpose would be served by recalling 46 witnesses, out of which 8 witnesses are cited as eye-witnesses. It is true that the examination of all the witnesses once again in *de novo* trial may not be appropriate in the circumstances of this D case. On the order passed by this Court for conducting day to day trial, the trial court could record the deposition of 195 witnesses over a period of one year. Obviously, in the process of giving priority to this case by fixing it for evidence, practically on every working day, same would have happened at the cost of E adjourning many other cases. Directing a trial court to spend this kind of time once again is a tall order and the same purpose which is sought to be achieved by the High Court could be served by re-examining only those witnesses which are absolutely necessary. After all, out of 195 witnesses, if 105 witnesses have been declared hostile, 90 other witnesses have been examined F and cross-examined and their deposition is not required to be recorded again. Further, among them, there would be many officials/formal witnesses as well. Likewise, some of the witnesses though turned hostile, their testimony may not have much bearing. The CBI stated that apart from 8 eye-witnesses, 18 more G witnesses need to be necessarily examined. Out of those, 15 persons are witnesses for circumstantial evidence and 3 are panch witnesses relating to various panchnamas. The CBI was categorical that when all 8 eye-witnesses are examined afresh along with other 18 witnesses as aforesaid, it would subserve the purpose for which trial is reordered. [Paras 40, 41] [1010-A-F; H 1010-G-H]

5.2 As regards the second aspect of remarks against the Judge, no fault can be formed about the general observations of the High Court about the role of the trial court judge who is not supposed to be a mute spectator when he finds that witnesses after witnesses are turning hostile. At the same time, condemnation of the Presiding Officer and going to the extent of damning him, *albeit*, in an oblique manner, may not be justified in the facts of this case. No doubt, it was expected of the Presiding Judge to play more active and positive role. However, if error is committed on that front, it is also not appropriate to arrive at other extreme conclusions against that Presiding Officer in the absence of any cogent evidence against him. The said Presiding Officer is at the verge of retirement and is going to retire within a couple of months, after rendering long service of more than 30 years. This Court has time and again stated that the High Court should not lightly pass strictures against the judges in the subordinate judiciary. The direction to take up the matter against him on administrative side does not seem to be appropriate. The direction of the High Court is modified in respect of two aspects. In the first instance, instead of entire *de novo* trial, only 26 witnesses would be examined afresh as per the list furnished by the CBI. Secondly, direction to look into the matter against the Presiding Judge on administrative side of the High Court is set aside. [Paras 42-45] [1011-H; 1012-A-B; 1013-A-F]

Awani Kumar Upadhyay v. High Court of Judicature of Allahabad and Others **(2013) 12 SCC 392 : [2013] 3 SCR 416 – relied on.**

6. As regards the application filed by the complainant for cancellation of bail on the ground that the appellant had been threatening the witnesses; threats have been extended to the complainant and his family members as well for whose protection CBI had written to the DGP, Gujarat and it is also stated that apprehension of the complainant expressed earlier which can be discerned from the events that have taken place, coupled with that, a very pertinent and significant factor that even CBI has affirmed the said plea of the complainant with categorical assertion that the witnesses are threatened by the appellant, *prima facie* case for cancellation of bail has been made out. [Para 46] [1013-G-H; 1014-A-B]

A *State of Bihar v. Rajballav Prasad Alias Rajballav Prasad Yadav Alias Rajballabh* (2017) 2 SCC 178 : [2016] 9 SCR 652 ; *Masroor v. State of Uttar Pradesh and Another* (2009) 14 SCC 286 : [2009] 6 SCR 1030 – relied on.

B **7. In order to ensure that there is a fair trial in literal sense of the term, at least till the time eight eye-witnesses are re-examined, the appellant should remain in confinement and he be released thereafter with certain conditions, pending remaining trial. Bail granted to the appellant stood cancelled for the time being. The trial court shall summon 26 witnesses who are to be** C **examined afresh. In the first instance, 8 eye-witnesses shall be summoned and examined on day to day basis. Once their depositions in the form of examination-in-chief and cross-examination are recorded, the appellant shall be released on bail again on the same terms and conditions on which he was granted** D **bail earlier by this Court. After the appellant comes out on bail, there shall be an additional condition, namely, till the recording and completion of the statements of other witnesses, he shall not enter the State of Gujarat. [Para 48] [1017-B-D]**

E *Dinubhai Boghabhai Solanki v. State of Gujarat* (2014) 4 SCC 626 : [2014] 3 SCR 932 ; *State of Maharashtra v. Dr. Praful B. Desai,* (2003) 4 SCC 601 : [2003] 3 SCR 244 ; *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158 : [2004] 3 SCR 1050 ; *Asha Ranjan v. State of Bihar* (2017) 4 SCC 397 ; *Ajay Singh and another v. State of Chhattisgarh,* F (2017) 3 SCC 330 : [2017] 1 SCR 286 ; *Swaransingh v. State of Punjab* AIR 2000 SC 2017 : [2000] 3 SCR 572; *Javed Alam v. State of Chhattisgarh & Anr.* (2009) 6 SCC 450 : [2009] 8 SCR 398 ; *Ramesh and others v. State of Haryana* (2017) 1 SCC 529 : [2016] 8 SCR G 936 ; *Ayodhya Dube v. Ram Sumer Singh* (1981) Supp. SCC 83 ; *K. Chinnaswamy Reddy v. State of Andhra Pradesh* AIR 1962 SC 1788 : [1963] SCR 412 ; *Rudul Sah v. State of Bihar* (1983) 4 SCC 141 : [1983] 3 SCR 508; *Delhi Domestic Working Women's Forum v. Union*

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of India **(1995) 1 SCC 14 : [1994] 4 Suppl. SCR 528 ;** *D.K. Basu v. State of West Bengal* **(1997) 1 SCC 416 : [1996] 10 Suppl. SCR 284 ;** *Suresh & Anr. v. State of Haryana* **(2015) 2 SCC 227 ;** *Amar Pal Singh v. State of Uttar Pradesh and Another* **(2012) 6 SCC 491 : [2012] 5 SCR 1154 – referred to.**

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B

Case Law Reference

[2014] 3 SCR 932	referred to	Para 2
[2003] 3 SCR 244	referred to	Para 14
[2004] 3 SCR 1050	referred to	Para 14
(2017) 4 SCC 397	referred to	Para 14
[2017] 1 SCR 286	referred to	Para 14
[2000] 3 SCR 572	referred to	Para 17
[2009] 8 SCR 398	referred to	Para 17
[2016] 8 SCR 936	referred to	Para 21
(1981) Supp. SCC 83	referred to	Para 24
[1963] SCR 412	referred to	Para 24
[1983] 3 SCR 508	referred to	Para 32
[1994] 4 Suppl. SCR 528	referred to	Para 32
[1996] 10 Suppl. SCR 284	referred to	Para 32
(2015) 2 SCC 227	referred to	Para 32
[2013] 3 SCR 416	relied on	Para 43
[2012] 5 SCR 1154	relied on	Para 43
[2016] 9 SCR 652	relied on	Para 46
[2009] 6 SCR1030	referred to	Para 47

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 492 of 2014.

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From the Judgment and Order dated 25.09.2012 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 1925 of 2010.

WITH

CRL. A. Nos. 1854, 1855, 1856 and 1857 of 2017.

Mukul Rohatgi, S.V. Raju, N.D. Nanavati, S. Prasad, Sr. Advs, Mahesh Agrawal, Ms. Neeha Nagpal, Shashav Pandit, Niral Mehta, Ms. Devanshi Singh, Ms. Aashtha Mehta, E.C. Agrawala, Santosh Krishnan, Rudreshwar Singh, Gautam Singh, Ms. Isha Singh, Ms. Snehil Sonam, Aditiya Vikram Singh, Kaushik Poddar, Nikhil Nayyar, N. Sai Vinod, Dhananjay Baijal, Ms. Smriti Shah, Divyanshu Rai, Advs for the Appellant.

A.N.S. Nadkarni, ASG, Ms. Geeta Luthra, Anand Grover, Sr. Advs, Ms. Rukhmini Bobde, Mukul Singh, P.K. Dey, Ujjwal Jain, Anshul Duggal, Pranav Malhotra, Mukesh Kumar Maroria, Prashant Bhushan, Ms. Kamini Jaiswal, Rohit Kumar Singh, Abhimanue Shrestha, Ms. Rani Mishra, Jatinder Pal Singh, Ms. Shruti Dutt, Ms. Hemantika Wahi, Ms. Jesal Wahi, Ms. Puja Singh, Ms. Mamta Singh, Rohit Kumar Singh, Advs for the Respondent.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted in SLP(Criminal) No. 4965 of 2017, SLP(Criminal) No. 5086 of 2017, SLP(Criminal) No. 5309 of 2017 and SLP(Criminal) No. 5321 of 2017.

2. One, Amit Jethwa, stated to be an activist, who was complaining against the illegal mining in and around Gir Forest Sanctuary, was murdered. FIR being I-C.R. No. 163 of 2010 was registered on July 20, 2010 at Sola Police Station under Sections 302 and 114 of Indian Penal Code, 1860 (IPC) read with Section 25(1) of Arms Act, 1959. In this FIR, amongst others, Dinubhai Boghabhai Solanki (for short 'Mr. Solanki') and his nephew were also implicated. As per the father of Amit Jethwa (who was the complainant), State's Police showed slackness in investigating the said case. He approached the High Court for transfer of investigation and vide order dated September 25, 2012, his petition was allowed and investigation was transferred to CBI. On transfer, CBI registered RC.11(S)/2012 SCU.V/SC.II/CBI and undertook the investigation. The aforesaid order dated September 25, 2012 passed by

the High Court was challenged by Mr. Solanki as well as State of Gujarat by filing special leave petitions in this Court. In the petition filed by Mr. Solanki, he had prayed for stay of operation of the judgment and order dated September 25, 2012. This miscellaneous application was dismissed and CBI was given liberty to complete the investigation. After the dismissal of his application, Mr. Solanki was arrested on November 5, 2013. Status report of the investigation was submitted by the CBI in this Court and after completion of the investigation, a supplementary chargesheet under Section 302 read with Section 120B IPC was filed before the concerned Court in January, 2014. In the chargesheet, Mr. Solanki has been arrayed as one of the main conspirators along with his nephew Pratap @ Shiva Solanki and few others. The Criminal Appeal No. 492 of 2014 arising out of SLP (Crl.) No. 8406 of 2012 filed by Mr. Solanki as well as Criminal Appeal No. 493 of 2014 arising out of SLP (Crl.) No. 8292 of 2012 filed by the State of Gujarat, challenging the order dated September 25, 2012 of the High Court, were ultimately dismissed by this Court by a detailed judgment and order dated February 25, 2014 which is reported as ***Dinubhai Boghabhai Solanki*** v. ***State of Gujarat***[1]. However, at the same time, bail was granted to Mr. Solanki on certain conditions mentioned in Para 65, relevant portion whereof is reproduced below:

> "65. We are not much impressed by the submission of Mr Rohatgi that the appellant-petitioner ought to be released on bail *simply* because he happens to be a sitting MP, nor are we much impressed by the fact that further incarceration of the appellant-petitioner would prevent him from performing his duties either in Parliament or in his constituency. So far as the Court is concerned, the appellant-petitioner is a suspect/accused in the offence of murder. No special treatment can be given to the appellant-petitioner *simply* on the ground that he is a sitting Member of Parliament. However, keeping in view the fact that CBI has submitted the supplementary charge-sheet and that the trial is likely to take a long time, we deem it appropriate to enlarge the appellant-petitioner on bail, subject to the following conditions:
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> (i) On his furnishing personal security in the sum of Rs 5 lakhs with two solvent sureties, each of the like amount, to the satisfaction of the trial court.

[1](2014) 4 SCC 626

A (ii) The appellant-petitioner shall appear in court as and when directed by the court.

(iii) The appellant-petitioner shall make himself available for any further investigation/interrogation by CBI as and when required.

B (iv) The appellant-petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to the investigating agency or to any police officer.

C (v) The appellant-petitioner shall not leave India without the previous permission of the trial court.

(vi) In case the appellant-petitioner is in possession of a passport, the same shall be deposited with the trial court before being released on bail."

D 3. Pursuant to the said order, Mr. Solanki was enlarged on bail on February 26, 2004.

4. The complainant has filed Criminal Miscellaneous Petition No. 14006 of 2015 seeking cancellation of the aforesaid bail primarily on the ground that after the release of Mr. Solanki on bail, he is not only E indulging in the acts which amount to violation of the conditions imposed by this Court but is also threatening and influencing the witnesses. It is further alleged that because of these reasons, the trial could not progress and was being delayed or influenced thereby affirming the apprehension expressed by the complainant at the time of opposing the bail F application.

5. Notice in the aforesaid criminal application, seeking cancellation of bail, was issued. During hearings, it transpired that there were three Sessions Cases i.e. 02/2014, 03/2014 and 01/2014 and trial had not started because CBI had filed application before the Principal G Judge, Ahmedabad seeking consolidation of these cases. Taking note of this fact, on December 7, 2015, direction was given by this Court to the concerned Session Judge to pass appropriate order on application pending before it expeditiously and not later than 10 days from the date of the order. The trial was consolidated at the time of the framing of the charge. Mr. Solanki filed an application for his discharge which was H

dismissed by the trial court. Against that order, revision petition had been filed before the High Court but no stay was granted. Taking note of these facts, this Court passed the order dated May 10, 2016 directing the trial court to proceed to frame the charges and start the trial on day to day basis. This application for cancellation of bail, thereafter, kept on getting adjourned at the behest of one party or the other. In the mean-time, trial proceeded with utmost expedition, pursuant to the aforesaid directions given by this Court.

6. During the trial, it transpired that most of the witnesses had turned hostile. This further prompted the complainant to approach the High Court of Gujarat with an appropriate writ petition seeking certain reliefs including that of *de novo* trial. The parties requested that the hearings in the aforesaid criminal miscellaneous application (seeking cancellation of bail) be deferred to await the decision of the High Court. The High Court has decided the writ petition filed by the complainant vide its detailed judgment dated June 29, 2017. Allowing the said writ petition, the High Court has directed *de novo* trial of the case with the following specific directions:

> "95. This writ application is disposed of with the following directions:
>
> (1) The High Court on the administrative side shall pass an appropriate order transferring all the three CBI Sessions cases i.e. CBI Sessions Cases Nos. 1 of 2014, 2 of 2014 and 3 of 2014 as on date pending in the Court of the Presiding Officer, namely, Shri Dinesh L. Patel, CBI Courts, Court No. 4, Ahmedabad to any other CBI Court. On all the three CBI Sessions cases referred to above being transferred to a particular Court, the Presiding Officer concerned shall retry all the accused persons on the selfsame charge framed.
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> (2) The prosecuting agency i.e. the CBI shall obtain the witness summons from the Court concerned and start examining the witnesses a fresh.
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> (3) The retrial shall commence at the earliest and shall proceed on the day-to-day basis.
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> (4) The retrial shall be in-camera proceedings.

A (5) The prosecuting agency i.e. the CBI as well as the State police machinery is directed to ensure that full protection is given to each of the witnesses and they be assured that no harm would befall upon them in any manner. For ensuring of a sense of confidence in the mind of the witnesses, and to ensure that they depose freely and fearlessly before the Court, the following steps B shall be taken:

(i) Ensuring safe passage for the witnesses to and from the Court precincts.

(ii) Providing security to the witnesses in their place of residence C wherever considered necessary, and

(iii) Relocation of witnesses to any State or to any other place, as thought fit, wherever such a step is necessary.

Let me at this stage clarify something important. It could be argued that the directions issued by this Court amounts to directly D or indirectly exerting pressure on the witnesses, but the answer to this is an emphatic 'No'. These directions are necessary and are in line of doing complete justice.

xxx xxx xxx

E "96. I conclude this judgment reminding one and all that justice is a concept involving the fair, moral and impartial treatment of all persons. In its most general sense, it means according individuals what they actually deserve or merit, or are in some sense entitled to. Justice is a particularly foundational concept within most systems of "Law". From the prospective of pragmatism, it is a F name for a fair result. Injustice anywhere is a threat to justice everywhere."

7. Challenging that order, Mr. Solanki and few other co-accused persons have filed Special Leave Petitions bearing SLP(Criminal) No. 4965 of 2017, SLP(Criminal) No. 5086 of 2017, SLP(Criminal) No. 5309 G of 2017 and SLP(Criminal) No. 5321 of 2017. The events described aforesaid indicate that the issues in these proceedings are interconnected with each other. For this reason, Criminal Miscellaneous Petition and the Special Leave Petitions have been heard together and we proceed to decide all these cases by the instant common judgment.

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8. We have already indicated, in brief, the grounds on which complainant has filed the applications seeking cancellation of Mr. Solanki's bail. Let us, at this stage, record the reasons which prevailed with the High Court in ordering *de novo* trial. The High Court noted one crucial and very pertinent occurrence that had taken during the trial viz. out of 195 witnesses examined by the prosecution during trial, as many as 105 witnesses were declared hostile. The break-up of the witnesses examined is as under:

Total 105 Witnesses
61 Witnesses are hostile including 8 eye witnesses 16 Police witnesses
47 Panch witnesses 45 Hostile
21 official witnesses
4 Magistrates
1 Complainant
1 Doctor
Total 195 Witnesses Examined. 105 witnesses hostile.

9. The High Court found that all the important witnesses including the eye-witnesses resiled from their statements made before the Police. On that basis, it was contended by the complainant before the High Court that it was a case where the main accused (Mr. Solanki) who is a former Member of Parliament had won over all the witnesses including the eye-witnesses by his sheer power and position. Therefore, according to him, it was a fit case for directing retrial by the High Court in exercise of its extraordinary powers under Article 226 of the Constitution of India or the supervisory jurisdiction under Article 227 of the Constitution of India. Insofar as allegation of the complainant in the writ petition that witnesses were turning hostile due to the influence exercised by Mr. Solanki, the High Court has taken note of the aforesaid application for cancellation of bail preferred by the complainant in this Court in which two affidavits were filed by the CBI, supporting the stand of the complainant. In one of the affidavits filed by the CBI duly affirmed by one Mr. Basil Kerketta, the Superintendent of Police, Central Bureau of Investigation, Special Crime II, New Delhi, the following has been stated:

> "2. That the contents of para 3 are wrong and denied. It is submitted that before investigation by CBI, the case was investigated by Crime Branch of Ahmedabad and they had filed

A two charges sheets and they had mentioned 1512 witnesses. Thereafter, on transfer of case from Gujarat Police CBI conducted further investigation in compliance of direction/order vide dated 25.09.2012 of High Court of Gujarat and filed Supplementary chargesheet on 21.12.2013 on conclusion of the investigation. CBI has relied upon 121 Prosecution Witnesses. It is further submitted that till 24.11.2016 Eighty Nine (89) Prosecution Witnesses have been examined and out of these 40 witnesses have turned hostile due to the influence/threat of the accused applicant. The important witnesses including police officers are yet to be examined.

3. That the contents of para 4 are wrong and denied. It is submitted that the accused applicant is the main conspirator and kingpin in the instant case. The PW-26 has clearly deposed before the trial court about the role played by the accused applicant in the murder of Amit Jethwa. It is further submitted that the accused applicant is trying to give a political colour to the statement of the PW-26, where as the PW has no connection with any political party at the time of recording of his statement. It is further submitted that the instant case was registered by CBI on 06.10.2012 and thereafter the witnesses were examined again as fresh and statements recorded accordingly during the course of further investigation.

4. That with regard to para 5 of the additional affidavit, it is submitted that on 15.10.2016, one PW was to be examined and prior to his examination, he filed a complaint to CBI stating therein that accused applicant and his nephew Pratapbhai Shivabhyai Solanki (Co-accused) were undue pressuring his family and elder brother of the PW on 12.10.2016 to change his version to turn hostile in the Court. A true copy of the complaint dated 14.10.2016 is annexed herewith and marked as Annexure-R-1. Further on the complaint of PW, the Trial Court passed order to Director General of Police, Gujarat to verify the substance and to take a decision on the complaint A. true copy of the order dated 15.10.2016 passed by the Specia Judge CBI Court, Court No. 4, Ahmedabad in CBI Sessions Case No. 2/14 is annexed herewith and marked as Annexure-R-2. However, decision in the matter is still pending at the end of DGP, Gujarat.

5. That para 06 of the additional affidavit is the matter of record. Further it is submitted that the accused applicant was released on bail vide order dated 25.02.2014 by this Hon'ble Court wherein it

was clearly mentioned at para 61(IV) that the petitioner - appellant shall not directly or indirectly make any inducement, threat or promise to persons acquainted with the facts of the case. It is pertinent to mention here that the accused applicant started threatening the witnesses and on the complaint of the witnesses, CBI wrote a letter to Director General of Police, Gujarat and Supdt. Of Police, Distt. Gir Somnath to provide adequate security to the witnesses that they are getting threats to life from the accused applicant. A true copy of the letter dated 9.10.2013 is annexed herewith and marked as Annexure-R-3 and a true copy of the letter dated 5.03.2014 is annexed herewith and marked as Annexure-R-4 and a true copy of the letter dated 30.09.2015 is annexed herewith and marked as Annexure-R-5. Thus, the acts and conduct of the accused applicant have violated the conditions as imposed by this Hon'ble Court while granting bail to him.

6. That para 7 of the additional affidavit is wrong and denied, it is submitted that out of 89 witnesses examined, 49 witnesses have supported the prosecution case fully and 40 witnesses have turned hostile due to the influence of the accused applicant. It is further submitted that actual position of the deposition is a matter of record.

8. That with regard to para 9, it is submitted that 126 witnesses including important witnesses are yet to be examined. Further, the accused applicant is on bail, he is making all possible efforts to influence the remaining witnesses by way of inducement promise and there is a strong possibility that the remaining witnesses may turn hostile. Till now, due to his influence, 40 witnesses have turned hostile. Keeping in view of above circumstances, it is further submitted that the bail of the accused applicant may be cancelled in the interest of justice. It is further submitted that more witnesses may be examined if necessary as this is the prerogative of the prosecution in the interest of the case.

9. It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to cancel the bail granted to Dinubhai Boghabail Solanki vide order dated 25.02.2014 passed by this Hon'ble Court in Crl. Misc. Petition No. 23723 of 2013 or pass any other order as this Hon'ble Court may deem fit and proper in the interest justice. As the accused applicant don't deserve any leniency as he violated the conditions of the bail in the interest of justice."

A 10. In one another affidavit filed on behalf of the CBI before this Court duly affirmed by Shri. S.S. Kishore, the Superintendent of Police, Central Bureau of Investigation, Special Crime II, New Delhi, the following assertion is made:

> "6. In response to the para 14 of the petition, it is submitted that
> B some of the witnesses have intimated regarding threats given by Shri. Dinubhai Boghabhai Solanki to them and to influence them and thereafter CBI as written letters on 09.10.2013 and 05.03.2014 to DGP of Gujarat Police for providing adequate security to the witnesses as they were under threat witnesses as they were under threat from Dinubhai Boghabhai Solanki.
>
> C
>
> 7. That the contents of para 15 of the petition are matter of record. The complaint lodged with concerned police station against Sh. Dinubhai Boghabhai Solanki and others for their alleged atrocities over the witnesses pertains to the jurisdiction of local police.
>
> D
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> 10. That in para 1 of the petition, the petitioner has alleged that the shooter in the instant case i.e. Shailesh Pandya, who is presently lodged in Patan Sub Jai, is running an extortion business from the jail itself. These allegations pertain to Sub Jail Patan and concerned Jail Authorities of Patan may take immediate action in this respect.
>
> E
>
> 14. That the apprehension of complainant in para 22 of the petition appears to be genuine witnesses have reported about the threats given to them by Dinubhai Boghabhai Solanki and for that local police respondent no. 3 is competent authority to take necessary steps."

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11. The High Court also took note of various complaints which were made by the witnesses alleging threats being administered by Mr. Solanki as well as his accomplices. All those complaints are reproduced verbatim by the High Court in the impugned judgment. Even the Special Director, CBI had addressed letters to Director General of Police (DGP),
G Gandhinagar, Gujarat mentioning about the alleged threats which the complainant and his family members were receiving and requested the DGP to provide necessary police protection. So much so, the trial court was also compelled to pass orders for according protection to certain witnesses.

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12. We may point out at this stage that the accused persons had opposed the prayer of the complainant in the said writ petition *inter alia* on the ground that such writ petition was not maintainable and the Court could not order retrial before the judgment is pronounced by the trial court. It was argued that Section 386 of the Code of Criminal Procedure, 1973 (Cr.P.C.) confers powers on the appellate court to order retrial and, therefore, it was necessary to await the judgment of the trial court and if the circumstances warranted, depending upon the outcome of the trial court verdict, such a plea could be taken in the appeal only. It was also argued that allegations levelled by the writ petitioner (complainant) of tempering with the prosecution witnesses could not be looked into in the writ proceedings as these were disputed questions of facts. It was also submitted by the counsel of the accused persons that even those witnesses who had alleged complaints against Mr. Solanki extending threats and inducements to them, did not support the case of the prosecution except one. The trial court had yet to appreciate the evidence of the hostile witnesses and just because these witnesses had turned hostile, was no ground or reason to discard their entire evidence. It was also argued that witnesses turn hostile for various reasons and no inference can be drawn that this phenomenon occurred only because of alleged threats or inducement and such a plea of the complainant was only presumptuous and assumptious. Allegations of extending any threats or inducement to these witnesses by approaching these witnesses were denied by the accused persons.

13. After taking note of the aforesaid facts and submissions, the High Court pointed out that moot question was as to whether it could order retrial in exercise of writ jurisdiction under Article 226 of the Constitution of India. With this poser, the High Court has analysed the said issue under the following heads:

(i) Concept of fair trial.

(ii) Hostile witnesses – a menace to the criminal justice system.

(iii) Exercise of writ jurisdiction for the purpose of retrial.

(iv) Sections 311 and 391 of Cr.P.C. and Section 165 of the Indian Evidence Act, 1872.

14. The High Court has given a detailed discourse on the necessity to have a fair trial, as a backdrop of the rule of law as well as for dispensation of criminal justice. Taking cognizance of so many

A judgments[2] of this Court wherein the concept of fair trial with the sole idea of finding the truth and to ensure that justice is done, and extensively quoting from the said judgments, the High Court has emphasised that free and fair trial is *sine qua non* of Article 21 of the Constitution of India. It has also remarked that criminal justice system is meant not only safeguarding the interest of the accused persons, but is B equally devoted to the rights of the victims as well. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial C judge conducting the trial, an honest and fair defence counsel and equally honest and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence.

15. The High Court has also highlighted that the role of a judge in D dispensation of justice, after ascertaining the true facts, is undoubtedly very difficult one. In the pious process of unraveling the truth so as to achieve the ultimate goal of dispensing justice between the parties, the judge cannot keep himself unconcerned and oblivious to the various happenings taking place during the progress of trial of any case. It is his judicial duty to remain very vigilant, cautious, fair and impartial, and not E to give even a slightest of impression that he is biased or prejudiced, either due to his own personal convictions or views, in favour of one or the other party. This, however, would not mean that the Judge will simply shut his own eyes and be a mute spectator, acting like a robot or a recording machine to just deliver what is fed by the parties. Although, F the Courts are required to remain totally unstirred, unaffected and unmoved amidst the storms and tribulations of various corrupt and flagitious activities happening around them involving the police, the prosecutor or the defence counsel or even the whirlwind publicity of a high profile case which affects the public opinion and motivates media trial, but it cannot be expected of them not to deprecate or condemn G such misdeeds of those culprits who are hell bent to pollute the stream of judicial process.

[2] State of Maharashtra v. Dr. Praful B. Desai, [(2003) 4 SCC 601];
Zahira Habibulla H. Sheikh v. State of Gujarat, [(2004) 4 SCC 158];
Asha Ranjan v. State of Bihar, [(2017) 4 SCC 397]; and
H Ajay Singh and another v. State of Chhattisgarh, [(2017) 3 SCC 330]

16. It is not necessary to reproduce those copious quotes from various judgments which have been incorporated by the High Court. However, following passage from the judgment in ***Ajay Singh*** needs reiteration as it sums up the entire fulcrum astutely:

> "Performance of judicial duty in the manner prescribed by law is fundamental to the concept of rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate peccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the accused faces a charge in a court of law, he expects a fair trial The victim whose grievance and agony have given rise to the trial also expects that justice should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the credibility in the institution is maintained."

17. The High Court, thereafter, described the phenomena of hostile witnesses which have assumed alarming proportion to the criminal justice system in India and adversely affecting the fair trial and justice

A dispensation system. In the process, the High Court has again referred to various judgments[3].

18. After making general remarks in respect of witnesses turning hostile which has started happening too frequently in the cases tried in Courts in India, including the evil of perjury which has assumed alarming
B proportions in case after case coming before the Courts, the High Court summed up the events which took place in the instant case in the following words:

> "58. The facts narrated above are glaring and shocking. Right from the day, the son of the writ applicant came to be murdered,
> C till this date, the manner and method in which the accused persons, more particularly, Dinu Bogha Solanki have dominated the proceedings speak volumes of the power they are able to wield. The present factual conspectus leaves one with a choice either to let the ongoing trial casually drift towards its conclusion with the strong possibility of offence going unpunished or to order a retrial
> D belated though, to unravel the truth, irrespective of the time that may be consumed. As it is, every offence is a crime against the society and is unpardonable, yet there are some species of ghastly, revolting and villainous violation of the invaluable right to life which leave all sensible and right minded persons of the society shell-
> E shocked and traumatized in body and soul. One fails to understand that how could 105 witnesses turn hostile..."

19. The High Court has also mentioned about the bold and honest stand of the CBI in this case by filing two affidavits wherein CBI had stated that witnesses were being threatened and on account of which,
F not a single witness was ready and willing to depose.

20. In this backdrop, argument of the accused persons predicated on Section 368 of Cr.P.C. (as noted above) is answered as follows:

> "60. In the gross facts which I have highlighted, should I tell the devastated and crestfallen father that although the trial has been
> G a farce, yet the Appeal Court will look into the matter if necessary in exercise of its powers under Section 386 of the Cr. P.C? It is like telling the victim to undergo an unfair trial because there is an Appellate Court to give him a fair hearing and the necessary relief.

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[3] ***Swaransingh*** v. ***State of Punjab***, [AIR 2000 SC 2017] and ***Javed Alam*** v. ***State of***
H ***Chhattisgarh & Anr.***, (2009) 6 SCC 450

Should I ask the writ applicant to adduce materials in the form of proof beyond reasonable doubt as regards the tampering of the witnesses? Is the material on record not sufficient for this Court to draw a legitimate inference that it is only on account of sheer power and position of the main accused that the entire trial has been reduced to a farce and could be termed as a mock trial? I have no hesitation in rejecting the arguments of the learned counsel appearing for the accused persons that merely because the witnesses turned hostile, the Court cannot order a retrial in exercise of its extraordinary powers under Article 226 of the Constitution of India. A very feeble argument has been canvassed before me that none of the witnesses complained to the Presiding Officer that they were being threatened or induced by the accused persons. A witness, who has been administered dire threats or won over would never dare to utter a single word. It was for the Presiding Officer and the prosecuting agency to look into the matter and see to it that all the witnesses deposed freely and without any fear in their mind."

21. Quoting extensively from the judgment of this Court in ***Ramesh and others*** v. ***State of Haryana***[4] wherein a serious note of witnesses turning hostile in criminal cases has been highlighted and various reasons noted therein making the witnesses retract their statements before Court and turning hostile, the High Court has stated that in the instant case, the realistic view of the matter would demonstrate that the major cause for turning witnesses hostile was the result of threat and intimidation. We may mention that in para 44 of the judgment in the case of ***Ramesh and others***, following reasons were assigned for witnesses turning hostile:

"44. *On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:*

"(i) Threat/intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of Stock Witnesses.

(v) Protracted Trials.

[4](2017) 1 SCC 529

A *(vi) Hassles faced by the witnesses during investigation and trial.*

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

B *45. Threat and intimidation has been one of the major causes for the hostility of witnesses..."*

22. The High Court has commented about the present case as under:

"63. The case on hand is not one in which the witnesses turned C hostile on account of the "culture of compromise", as explained by the Apex Court. The case on hand is one in which threats and intimidation have been the major causes for the hostility of the witnesses. The Court, therefore, is expected to deal with this type of cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually loose D faith in the efficacy of the system of the judiciary itself, which, if it happens, will be a sad day for any one to reckon with one."

23. At the same time, discussing the law governing *de novo* trial, the High Court has accepted the fact that such *de novo* trial or retrial of the accused should be ordered in exceptional and rare cases where E such courts becomes indispensable to avert the failure of justice. Keeping in view this caution, the High Court proceeded to discuss the issue as to whether such a power of directing retrial can be exercised in writ jurisdiction. Answering this question in affirmative, the High Court took support of the judgment of Punjab and Haryana High Court wherein it F had taken *suo moto* cognizance of a matter in which the accused persons came to be acquitted and the State also did not prefer any appeal against the acquittal. A news item in this regard was published in The Hindustan Times dated November 14, 2007 on the basis of which cognizance was taken and the Court declared trial of the accused persons to be wholly vitiated and *non est* in law. While doing so, in exercise of power under G Article 226 of the Constitution of India, the Court had explained the contours of this power in the following words:

"33. *We are conscious of the fact that in the present case, we are essentially exercising our jurisdiction under Article 226 of the Constitution and we are not acting as an appellate* H *court under the provisions of the Code of Criminal Procedure.*

The question that will, therefore, arise is the availability of the writ power to deal with the situation and to issue necessary and appropriate directions in the matter.

34. The power under Article 226 of the Constitution is incapable of a precise definition as to its contours and extent. The jurisdiction under Article 226 may require a severely circumscribed exercise in a given case though, in another, the use of the power could be wide and expansive. ***The extent to which the writ power is to be exercised will depend upon the facts of a given case, though the ultimate objective of such exercise would always be to secure justice and to strike at injustice. The Courts, therefore, will have to rise to the occasion or else they may fail as the learned trial Court did in the present case. In a situation where the trial held against the two accused clearly depicts monstrous perversities and gross abuse of process of law and yet no appeal against the acquittal of the two accused had been preferred, the Court can remain a passive onlooker only at the cost of being faulted by posterity. The exercise of the writ jurisdiction to interfere with the verdict of a criminal trial must, therefore, be made. New paths will have to be chartered and innovations made to deal with the myriad situations that may arise from time to time.***"

24. The High Court also referred to the decision in the case of ***Ayodhya Dube*** v. ***Ram Sumer Singh***[5], wherein a three-Judge Bench of the Supreme Court, while explaining the decision in the case of ***K. Chinnaswamy Reddy*** v. ***State of Andhra Pradesh***[6] observed that:

"...we only wish to say that the criminal justice system does not admit of 'pigeon holing'. Life and the Law do not fall neatly into slots. When a court starts laying down rules enumerated (1), (2), (3), (4) or (a), (b), (c), (d), it is arranging for itself traps and pitfalls. Categories, classifications and compartments, which statute does not mention, all tend to make law 'less flexible, less sensible and less just.'"

25. Many more judgments touching upon the expansive powers of the Constitutional Courts under Articles 32 and 226 of the Constitution

[5] (1981) Supp. SCC 83
[6] AIR 1962 SC 1788

A of India are also cited and argument of the counsel for the accused persons that High Court should not indict the trial court proceedings at this stage is brushed aside with the following discussion:

> "85. In view of the above, the contention canvassed on behalf of the accused persons that the writ application under Article 226 of
B the Constitution of India seeking a retrial even before the pronouncement of the judgment by the Trial Court is not maintainable, is rejected. To tell the writ applicant that he should wait for the final outcome of the trial, and if ultimately, the accused persons are acquitted, he may file an appeal before the Appellate
C Court will be nothing, but adding insult to the injury. It is a matter of common experience that the criminal appeal, be it one of conviction or acquittal takes years before the same is disposed of finally. The passage of time by itself would prove detriment to the interest of the prosecution. It is very easy for the learned counsel appearing for the accused persons to argue that the Trial Court
D has to yet appreciate the evidence on record and reach to an appropriate conclusion. In my view, what is left now to appreciate when 105 witnesses outright have been declared hostile. It is the brazen highhandedness on the part of the accused persons which warrants retrial. The distortion in the present case is so brazen that even the worms turned. Ultimately, whatever may be the
E outcome of the retrial, the Court should not shut its eyes and raise its hands in helplessness saying that what can be done. The witnesses should also be made to realise that they cannot take things lightly and owe a great responsibility when they are appearing before the Court to depose in a trial where the accused
F persons are charged with a serious offence of murder. If such would be the attitude of the Courts, the judiciary will be reduced to a mere laughing stalk."

26. The aforesaid thought process is carried further by the High Court while discussing another related argument of the accused persons,
G namely, the prosecuting agency could have preferred an application under Section 311 of the Cr.P.C. for recalling of the witnesses and further that even in an appeal, the prosecution was at liberty to pray for leading additional evidence under Section 391 of the Cr.P.C. and, therefore, the Court should not order retrial. This argument has also been authoritatively and emphatically rejected with detailed discussion. We are not taking
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note of those details as this argument was not pressed before us by the counsel for the accused persons in their appeals.

27. Summing up the discussion, the High Court concluded that in this case retrial was the only solution to prevent the miscarriage of justice. In the process, the High Court has also directed that the Presiding Officer who was conducting a trial should not be allowed to continue. Since, a plea was raised by the learned senior counsel appearing for the appellants that the adverse remarks which are made by the High Court against the Presiding Officer should be expunged, we are reproducing below the observations of the High Court in this behalf:

> "94. I have reached to the conclusion without any hesitation that retrial is the only solution to prevent the miscarriage of justice. If ultimately retrial is to be ordered, the same should be conducted by any other Presiding Officer because this Court has lost confidence in the present Presiding Officer. I could have observed many things as regards the Presiding Officer, but, for one good reason, I have restrained myself. My observations would have only brought a bad name for this institution. For me, the image and prestige of this institution and the judiciary as a whole is supreme. It is said that the life of law is justice and it is for the Judge to breath life into law. Men of character inspired by high ideals are needed to infuse life and spirit in the skeleton of law. Let the High Court on its administrative side look into the matter."

28. The aforesaid discussion led to allowing the writ petition and passing the directions for *de novo* trial which have already been reproduced.

29. We have discussed the judgment of the High Court, impugned in these appeals, at some length, with a specific purpose in mind. It would be relevant to point out that the arguments addressed by learned senior counsel M/s. Mukul Rohatgi, Neeraj Kishan Kaul and N.D. Nanavati appearing for different accused persons, were the same arguments which were advanced before the High Court and, therefore, we deemed it proper to narrate the manner in which the High Court has dealt with these arguments. Another related objective for discussing the judgment of the High Court in some detail was that since we are in complete agreement with the approach of the High Court in the manner in which the issue of retrial has been dealt with in the facts of this case,

A it would not be necessary for us to spell out and restate those very reasons which have prevailed with the High Court.

30. We may hasten to add that normally such a retrial has to be ordered by the Appellate Court while dealing with the validity and correctness of the judgment of the trial court as this power is expressly B conferred upon the Appellate Court by Section 386 of the Cr.P.C. However, in exceptional circumstances, such a power can be exercised by the High Court under Article 226 or by this Court under Article 32 of the Constitution of India. In fact, there are judicial precedents to this effect which have already been mentioned above. There are no shackles to the powers of the Constitutional Court under these provisions, except C self-imposed restrictions laid down by Courts themselves. But for that, these powers are plenary in nature meant to do complete justice and to inhibit travesty of justice. Therefore, we are largely in agreement with the conclusion arrived at by the High Court to the effect that the present case was one of those exceptional cases where possibility of witnesses D getting hostile because of inducement or threats cannot be ruled out.

31. We are not suggesting that Mr. Solanki and his nephew are the persons responsible for the murder of Amit Jethwa. That charge which is levelled against them and other accused persons has to be proved in the trial by cogent evidence. We are also mindful of the principle E that standard of proof that is required in such criminal cases is that the guilt has to be proved beyond reasonable doubt. However, at the same time, it is also necessary to ensure that trial is conducted fairly where witnesses are able to depose truthfully and fearlessly. Old adage judicial doctrine, which is the bedrock of criminal jurisprudence, still holds good, viz., the basic assumption that an accused is innocent till F the guilt is proved by cogent evidence. It is also an acceptable principle that guilt of an accused is to be proved beyond reasonable doubt. Even in a case of a slight doubt about the guilt of the under trial, he is entitled to benefit of doubt. All these principles are premised on the doctrine that 'ten criminals may go unpunished but one innocent person should G not be convicted". Emphasis here is on ensuring that innocent person should not be convicted. Convicting innocence leads to serious flaws in the criminal justice system. That has remained one of the fundamental reasons for loading the processual system in criminal law with various safeguards that accused persons enjoy when they suffer trials. Conventional criminology has leaned in favour of persons facing trials, H with the main objective that innocent persons should not get punished.

32. At the same time, realisation is now dawning that other side of the crime, namely, victim is also an important stakeholder in the criminal justice and welfare policies. The victim has, till recently, remained forgotten actor in the crime scenario. It is for this reason that "victim justice" has become equally important, namely, to convict the person responsible for a crime. This not only ensures justice to the victim, but to the society at large as well. Therefore, traditional criminology coupled with deviance theory, which had ignored the victim and was offender focussed, has received significant dent with focus shared by the discipline by victimology as well. An interest in the victims of the crime is more than evident now[7]. Researchers point out at least three reasons for this trend. First, lack of evidence that different sentences had differing impact on offenders led policy-makers to consider the possibility that crime might be reduced, or at least constrained, through situational measures. This in turn led to an emphasis on the immediate circumstances surrounding the offence, of necessity incorporating the role of the victim, best illustrated in a number of studies carried out by the Home Office (Clarke and Mayhew 1980). Second, and in complete contrast, the developing impact of feminism in sociology, and latterly criminology, has encouraged a greater emphasis on women as victims, notably of rape and domestic violence, and has more widely stimulated an interest in the fear of crime. Finally, and perhaps most significantly, criticism of official statistics has resulted in a spawn of victim surveys, where sample surveys of individuals or households have enabled considerable data to be collated on the extent of crime and the characteristics of victims, irrespective of whether or not crimes become known to the police. It is for this reason that in many recent judgments rendered by this Court[8], there is an emphasis on the need to streamline the issues relating to crime victims.

33. There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim oriented policies are introduced giving better role to the victims

[7] S.357A, Cr.P.C. provides for 'Victim Compensation Scheme' which is inserted by Amendment Act 5 of 2009 w.e.f. 31-12-2009.

[8] (a) Rudul Sah v. State of Bihar; (1983) 4 SCC 141
(b) Delhi Domestic Working Women's Forum v. Union of India; (1995) 1 SCC 14
(c) D.K. Basu v. State of West Bengal; (1997) 1 SCC 416
(d) Suresh & Anr. V. State of Haryana; (2015) 2 SCC 227.

A of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by
B providing adequate compensation to the victims[9]. The result is that private parties are now able to assert "their claim for fair trail and, thus, an effective 'say' in criminal prosecution, not merely as a 'witness' but also as one impacted"[10].

34. That apart, it is in the larger interest of the society that actual
C perpetrator of the crime gets convicted and is suitably punished. Those persons who have committed the crime, if allowed to go unpunished, this also leads to weakening of the criminal justice system and the society starts losing faith therein. Therefore, the first part of the celebrated dictum "ten criminals may go unpunished but one innocent should not be convicted" has not to be taken routinely. No doubt, latter part of the
D aforesaid phrase, i.e., "innocent person should not be convicted" remains still valid. However, that does not mean that in the process "ten persons may go unpunished" and law becomes a mute spectator to this scenario, showing its helplessness. In order to ensure that criminal justice system is vibrant and effective, perpetrators of the crime should not go unpunished and all efforts are to be made to plug the loopholes
E which may give rise to the aforesaid situation.

35. The position which emerges is that in a criminal trial, on the one hand there are certain fundamental presumptions in favour of the accused, which are aimed at ensuring that innocent persons are not convicted. And, on the other hand, it has also been realised that if the
F criminal justice system has to be effective, crime should not go unpunished and victims of crimes are also well looked after. After all, the basic aim of any good legal system is to do justice, which is to ensure that injustice is also not meted out to any citizen. This calls for balancing the interests of accused as well as victims, which in turn depends on fair trial. For
G achieving this fair trial which is the solemn function of the Court, role of witnesses assumes great significance. This fair trial is possible only when the witnesses are truthful as 'they are the eyes and ears' of the Court.

[9] For detailed study on this aspect, see *'Victim Justice – A paradigm Shift in Criminal Justice System in India'* by *G.S. Bajpai* and *Shriya Gauba.*

H [10] Reference as in Footnote 9 above.

36. We are conscious of the fact that while judging as to whether a particular accused is guilty of an offence or not, emotions have no role to play. Whereas, victims, or family of victims, or witnesses, may become emotive in their testimonies, in a given case, as far as the Court is concerned, it has to evaluate the evidence which comes before it dispassionately and objectively. At the same time, it is also a fact that emotion pervades the law in certain respects. Criminal trials are not allusive to the fact that many a times crimes are committed in the 'heat of passion' or even categorised as 'hate crimes'. Emotions like anger, compassion, mercy, vengeance, hatred get entries in criminal trials. However, insofar as the Judge is concerned, most of these emotions may become relevant only at the stage of punishment or sentencing, once the guilt is established by credible evidence, evaluated objectively by the Court[11]. The aforesaid factors, then, become either mitigating/ extenuating circumstances or aggravating circumstances. We make it clear that these factors have not influenced us. We also expect that the trial court will not go by such considerations insofar as first stage is concerned, namely, evaluating the evidence to decide as to whether accused persons are guilty of the offence or not. That part is to be performed in a totally objective manner. Reason is simple. The manner in which the murder of Amit Jethwa is committed may be cruel or ruthless. However, in the first instance it has to be examined as to whether the accused persons are responsible for the said murder or they (or some of them) are innocent.

37. Keeping in mind the aforesaid jurisprudential philosophy of criminal law, let us examine the events and eloquent facts of this case, with a deeper sense. A cumulative and non-disjunctive stare at those facts would amply justify the conclusion of the High Court, and approaching the case in a right perspective. It would be more so, when examined in the background in which events took place right from the day of murder of the complainant's son. It has come on record that the victim was an activist who had been taking number of cases which are taken note of by the High Court in para 4.3 of the impugned judgment. It is also an admitted fact that the victim Amit Jethwa had filed a Public Interest Litigation (PIL) in the High Court against illegal mining within 5 kms. radius from the boundary of the Gir Sanctuary. In that petition, he had pleaded for protection of environment generally and the biodiversity

[11] Though in certain circumstances, these emotions may be relevant for establishing motive for the commission of crime.

A of Gir Forest, in particular. Mr. Solanki and his nephew were got impleaded in the said PIL whose names emerged during the pendency of that petition.

38. After the murder of the said activist, the case was registered with the Sola Police Station. But the investigation was lackadaisical. B The complainant was forced to approach the High Court to seek necessary directions for proper investigation. The High Court was compelled to intervene and it transferred the investigation to an independent investigating agency, i.e., CBI. It is only thereafter that investigation progressed and chargesheets were filed. It also needs to be borne in mind that soon after Mr. Solanki was released on bail, C application for cancellation of bail was filed by the complainant with the allegations that Mr. Solanki was extending threats to the complainant, his family members as well as witnesses. Even some witnesses complained to this effect. What is revealing that this application is supported by the CBI affirming the stand of the complainant to the ef- D fect that witnesses are threatened.

39. Trial is expedited on the directions of the Court and witnesses start turning hostile. It is difficult to say, at least, *prima facie,* that in the given scenario, the CBI, during investigation, would have compelled the witnesses to give statements against the accused persons. In any case, E that is also a matter to be finally tested at the time of trial. However, it is stated at the cost of repetition that requirement of a fair trial has to be fulfilled. When the trial takes place, as many as 105 witnesses turn hostile, out of 195 witnesses examined, is so eloquent that it does not need much effort to fathom into the reasons there for. However, when the aforesaid facts are considered cumulatively, it compels us to take a F view that in the interest of fair trial, at least crucial witnesses need to be examined again.

40. Having depicted our thought process which is generally in tune with the approach adopted by the High Court, we need to enter caveat on two aspects:

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(i) Whether it was a case where entire *de novo* trial is necessitated?

(ii) Whether the High Court is justified in passing strictures against the Presiding Officer of the trial court?

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41. Insofar as first aspect is concerned, it transpires that the CBI had stated before the High Court that *de novo* trial may not be necessary and the purpose would be served by recalling 46 witnesses, out of which 8 witnesses are cited as eye-witnesses. We feel that the examination of all the witnesses once again in *de novo* trial may not be appropriate in the circumstances of this case. On the order passed by this Court for conducting day to day trial, the trial court could record the deposition of 195 witnesses over a period of one year. Obviously, in the process of giving priority to this case by fixing it for evidence, practically on every working day, same would have happened at the cost of adjourning many other cases. Directing a trial court to spend this kind of time once again is a tall order and the same purpose which is sought to be achieved by the High Court could be served by re-examining only those witnesses which are absolutely necessary. After all, out of 195 witnesses, if 105 witnesses have been declared hostile, 90 other witnesses have been examined and cross-examined and their deposition is not required to be recorded again. Further, among them, there would be many officials/formal witnesses as well. Likewise, some of the witnesses though turned hostile, their testimony may not have much bearing. In this scenario, we had asked Mr. Nadkarni, learned ASG who appeared for CBI to discuss the matter with CBI and on objective and fair assessment, give the list of those witnesses afresh deposition whereof is absolutely essential. After undertaking the aforesaid exercise and on instructions from CBI, Mr. Nadkarni stated that apart from 8 eye-witnesses, 18 more witnesses need to be necessarily examined. Out of those, 15 persons are witnesses for circumstantial evidence and 3 are panch witnesses relating to various panchnamas. He was categorical that when all 8 eye-witnesses are examined afresh along with other 18 witnesses as aforesaid, it would subserve the purpose for which trial is reordered. Mr. Rohatgi, in response, had stated, without prejudice to this contention that no such retrial was necessary at all, direction should be confined to 8 eye-witnesses only if at all some witnesses need to be re-examined. Since we have rejected the contention of the learned counsel of the accused persons on the merits of the case, we are of the opinion that 26 witnesses, list whereof was furnished by Mr. Nadkarni in the Court with copies to the learned counsel for the accused persons, should be re-examined.

42. Coming to the second aspect of remarks against the Judge, no fault can be formed about the general observations of the High Court

about the role of the trial court judge who is not supposed to be a mute spectator when he finds that witnesses after witnesses are turning hostile. Following general comments are made by the High Court in this behalf:

> "86. Criticizing the sharp decline of ethical values in public life even in the developed countries much less developing one, like ours, where the ratio of decline is higher is not going to solve the problem. Time is ripe for the Courts to take some positive action. Sections 195 and 340 of the Cr. P.C. could hardly be termed as the effective measures to combat with the menace of the witnesses turning hostile. If the witnesses have been won over in one way or the other, they are bold enough to even face the prosecution under Section 340 of the Cr. P.C. However, the same ultimately does not serve any purpose because the guilty goes unpunished. In the recent times, the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a sharp judgment so as to achieve the yardstick of disposal. These days when crime is looming large and humanity is suffering and society is so much affected thereby, the duties and responsibilities of the Courts have become much more. Now the maxim let hundred guilty persons be acquitted, but not a single innocent be convicted' is, in practice, changing world over and the Courts have been compelled to accept that the 'society suffers by wrong convictions and it equally suffers by wrong acquittals'. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. The need of the hour is 'robust judging'. The trial Judge is the linchpin in every case, and he has also its eyes and ears. He is not merely a recorder of facts, but a purveyor of all evidence, oral and circumstantial. It is said that a good trial Judge needs to have a 'third ear' i.e. hear and comprehend what is not said. When a material eyewitness, one after the other start resiling from their statements made before the police, this must obviously excite suspicion in the mind of the trial Judge to probe further and question the witness (even if the prosecutor does not do so).
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> (emphasis supplied)"

43. At the same time, condemnation of the Presiding Officer and going to the extent of damning him, *albeit*, in an oblique manner, may not be justified in the facts of this case. No doubt, it was expected of the Presiding Judge to play more active and positive role. However, if error is committed on that front, it is also not appropriate to arrive at other extreme conclusions against that Presiding Officer in the absence of any cogent evidence against him. We were also informed that the said Presiding Officer is at the verge of retirement and is going to retire within a couple of months, after rendering long service of more than 30 years. This Court has time and again stated that the High Court should not lightly pass strictures against the judges in the subordinate judiciary {See – ***Awani Kumar Upadhyay*** v. ***High Court of Judicature of Allahabad and Others***[12] and ***Amar Pal Singh*** v. ***State of Uttar Pradesh and Another***[13]}.

44. At the time of hearing, we were informed that in routine transfers of judicial officers, the Presiding Officer who was dealing with this matter stands transferred to another city in the State of Gujarat. Therefore, it was agreed by learned counsel for the accused persons as well that, for this reason alone, he ceases to be the Presiding Officer of CBI, Court No. 4, Ahmedabad and, therefore, would not be dealing with this matter in any case. But, we feel that direction to take up the matter against him on administrative side does not seem to be appropriate.

45. Accordingly, we dispose of the appeals with modification of the direction of the High Court in respect of aforesaid two aspects. In the first instance, instead of entire *de novo* trial, only 26 witnesses would be examined afresh as per the list furnished by the CBI. Secondly, direction to look into the matter against the Presiding Judge on administrative side of the High Court is set aside.

46. With this, we advert to the application filed by the complainant for cancellation of bail. As mentioned above, application for cancellation of bail has been filed on the ground that Mr. Solanki had been threatening the witnesses; threats have been extended to the complainant and his family members as well for whose protection CBI had written to the DGP, Gujarat and it is also stated that apprehension of the complainant expressed earlier which can be discerned from the events that have taken place. Coupled with that, a very pertinent and

[12](2013) 12 SCC 392
[13](2012) 6 SCC 491

A significant factor is that even CBI has affirmed the aforesaid plea of the complainant with categorical assertion that the witnesses are threatened by Mr. Solanki. In this scenario, *prima facie* case for cancellation of bail has been made out. In this behalf, we may usefully refer to the following discussion in ***State of Bihar*** v. ***Rajballav Prasad Alias Rajballav Prasad Yadav Alias Rajballabh***[14]:

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"23. Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf. We would like to reproduce following discussion from the judgment in *Kanwar Singh Meena* v. *State of Rajasthan*

C (SCC pp. 186 & 189, paras 10 & 18)

"10. ... While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice

D or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no

E relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well-recognised principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of

F supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening

G the prosecution case and have adverse impact on the society. Needless to say that though the powers of this Court are much wider, this Court is equally guided by the above principles in the matter of grant or cancellation of bail.

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H [14](2017) 2 SCC 178

18. Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody."

24. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in *Panchanan Mishra* v. *Digambar Mishra,* while setting aside the order of the High Court granting bail in the following terms: (SCC pp. 147-48, para 13)

"*13.* We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

25. Such sentiments were expressed much earlier as well by the Court in *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar* in the following manner: (AIR p. 379, para 6)

"*6.* ... There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons,

A either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked."

47. In this hue, we need to examine as to whether purpose can be served by banning the entry of Mr. Solanki in the city of Gujarat. It was passionately argued by Mr. Rohatgi that during the period aforesaid witnesses are examined, Mr. Solanki can be barred from entering Gujarat. He even offered that Mr. Solanki would remain in Delhi during that period. In normal circumstances, we would have accepted this suggestion of Mr. Rohatgi. For examining this argument, we have to keep in mind the principle laid down by this Court in ***Masroor*** v. ***State of Uttar Pradesh and Another***[15], expressed in the following words:

"15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in *Shahzad Hasan Khan* v. *Ishtiaq Hasan Khan* are quite apposite: (SCC p. 691, para 6)

"6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel

[15](2009) 14 SCC 286

helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution."

We, thus, require to adopt a balancing approach which takes care of right of liberty of Mr. Solanki as an undertrial and at the same time the interest of the society in general, viz., the fair trial is also fulfilled.

48. Going by the exceptional circumstances in which retrial is ordered by the High Court, and is being maintained in principle, with only modification that instead of all witnesses, 26 witnesses would be re-examined, we are of the opinion that in order to ensure that there is a fair trial in literal sense of the term, at least till the time eight eye-witnesses are re-examined, Mr. Solanki should remain in confinement and he be released thereafter with certain conditions, pending remaining trial. We, therefore, dispose of Criminal Miscellaneous Petition No. 14006 of 2015 with the following directions:

a) Bail granted to Mr. Solanki by this Court vide order dated February 25, 2014 stands cancelled for the time being. He shall be taken into custody and shall remain in custody during the period eight eye-witnesses are re-examined.

b) The trial court shall summon 26 witnesses who are to be examined afresh. In the first instance, 8 eye-witnesses shall be summoned and examined on day to day basis. Once their depositions in the form of examination-in-chief and cross-examination are recorded, Mr. Solanki shall be released on bail again on the same terms and conditions on which he was granted bail earlier by this Court by order dated February 25, 2014. After Mr. Solanki comes out on bail, there shall be an additional condition, namely, till the recording and completion of the statements of other witnesses, he shall not enter the State of Gujarat. To put it clearly, after Mr. Solanki is released on bail, he shall immediately move out of the State of Gujarat and shall not enter the said State till the completion of remaining evidence, except on the days of hearing when he would be appearing in the court. It will be open to the trial court to add any further conditions, if the circumstances so warrant.

A c) The trial court shall also endeavour to record the remaining evidence as well as expeditiously as possible by conducting the trial on day to day basis.

49. Appeals and applications stand disposed of in the aforesaid terms.

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Devika Gujral Appeals disposed of.