IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 6330 of 2015

With

SPECIAL CRIMINAL APPLICATION NO. 6339 of 2015

With

SPECIAL CRIMINAL APPLICATION NO. 6263 of 2015

With

SPECIAL CRIMINAL APPLICATION NO. 6264 of 2015

With

SPECIAL CRIMINAL APPLICATION NO. 6265 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==

HARDIK BHARATBHAI PATEL THRO. HIS FATER BHARATBHAI NARSIBHAI PATEL....Applicant(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

==

Appearance:

MR BM MANGUKIYA, ADVOCATE for the Applicant(s) No. 1

MS BELA A PRAJAPATI, ADVOCATE for the Applicant(s) No. 1

MR MITESH AMIN, PUBLIC PROSECUTOR for the Respondent(s) No. 1

==

CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 01/12/2015

CAV COMMON JUDGMENT

1 Since the relief prayed for, in all the captioned writ applications, is to quash the selfsame F.I.R. lodged with the D.C.B. Police Station, Ahmedabad city, being C.R. No.I-90 of 2015, those were heard analogously and are being disposed of by this common judgment and order.

2 The applicants herein – original accused persons, have prayed for the following reliefs:

> *"21(A) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction and to quash and set aside the FIR lodged with D.C.B. Police Station, Ahmedabad City, recorded as C.R.No.I-90/2015, qua the present petitioner;*
>
> *(B) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction and issued necessary direction, protecting fundamental rights of the petitioner including not to lodge frivolous FIRs against the petitioner on the basis of the same materials in any other Police Station of the State of Gujarat for the offence punishable under sections 121, 121A, 124A, 153A, 153B and 120B of Indian Penal Code, 1860, and if any such FIRs are recorded, restrain the respondents, their agents and servants from arresting the petitioner for the offences punishable under sections 121, 121A, 124A, 153A, 153B and 120B of Indian Penal Code, 1860, based on the same material facts disclosed in the body of the aforestated FIR.*
>
> *(C) Pending admission and final disposal of the present petition, be pleased to stay further investigation of the FIR being C.R. No.I-90/15 lodged with D.C.B. Police Station, Ahmedabad City – Annexure-B, qua the present petitioner;*
>
> *(D) Pending admission and final disposal of the present petition, be pleased to direct the respondents, their agents and servants not to arrest the petitioners in connection with any FIR logged in any part of the State of Gujarat for the offences punishable under sections pending admission*

and final disposal of the present petition, be pleased to stay on the materials and facts of bundle which have been disclosed, wholly or partly, in the FIR recorded as C.R. No.I-90/15 with D.C.B. Police Station, Ahmedabad City.

(E) Be pleased to pass such other and further orders as may be deemed fit and proper."

3 The case of the prosecution may be summarized as under:

3.1 The first informant is the Deputy Police Commissioner, Zone - 3, Surat city. It is the case of the first informant that past about four months, there is a strong and violent agitation going on in the State of Gujarat as regards the reservation for the members of the Patidar Patel Community. The applicant accused of the Special Criminal Application No.6330 of 2015 is the Convener of a committee known as the Patidar Anamat Andolan Samiti. The applicant accused, in his capacity as the Convener of the organization, declared bandhs, convened public meetings and various other programmes as a part of the agitation. According to the organization, the Patidar Patel Community is being neglected by the State Government in respect of education and employment. In the last few months, the State of Gujarat, more particularly, the cities like, Ahmedabad, Surat, Mehsana and Rajkot witnessed worst of the riots, in which, extensive damage was caused by the members of the organization as well as the people of the Patidar community and others to the public property by torching the police stations, public buses, etc. Few innocent people also lost their lives.

HC-NIC Page 3 of 68 Created On Wed Dec 02 17:14:25 IST 2015

4 For better understanding of the accusations, I may quote few relevant paragraphs containing the allegations in the F.I.R. as under:

> *"1. Article 16(4) of the Constitution of India, 1950 states as thus: "Nothing in Article 16 or in clause 2) of Article 29 of the Constitution of India shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes f citizens for the Scheduled Castes and the Scheduled Tribes."*
>
> *Further Article 46 of the Constitution states that;*
>
> *"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particularly, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."*
>
> *However, the maximum limit of the percentage of the reservation has been directed by Hon'ble Supreme Court in the Indira Sawhney vs Union of India & Others. In the said judgement it has been directed that "Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50%."*
>
> *2. Reservation for Other Backward Class Cases was introduced in the year 1981, by the Government of Gujarat, headed by then Chief Minister Shri Madhav Solanki, then called Socially and Economically Backward Castes (SEBC), based on recommendations of the Bakshi Commission. It resulted in anti-reservation agitation across the state which spilled over in riots resulting in more than one hundred deaths. In Gujarat, 27% of seats are reserved for OBC, 7.5% for Scheduled Castes and 15% for Scheduled Tribes for a total of 49.5% of all seas. The SEBC (later the OBC) list initially contained 81 communities. State has formed OBC commission in 1994 under article 340 of the constitution, and at present Gujarat has 146 castes included under OBC quota. Based on survey and recommendation by the commission the state government can include any community in the list. Patel or Patidar caste, formally recognised as a separate identity in the 1931 census of India and having previously been classified as Kanbi, is not included in the list of OBCs. None of the commissions, constituted for survey and recommendation for including of communities in OBC list, ever recommended Patidar caste to be included in the said list.*

3. Despite being aware of the fact that including of Patidar/Patel caste in the list of OBCs is not legal and sociologically impossible, a group of persons, led by one Shri Hardik Patel, conspired to instigate members of the Patidar/Patel Community to agitate for the same. As will be established by facts stated hereinafter, this conspiracy was pre-planned and executed for the purpose of bringing into hatred and contempt, and to excite disaffection towards the Government of Gujarat. These persons had deliberately and knowingly by words, spoken and written, attempted to undermine public order and lawful authority of the State. Facts stated hereinafter will ex-facie show that the words spoken by these accused persons have the pernicious tendency and intention of creating public disorder and disturbance of law and order. Therefore, the acts committed by these accused persons amount to offence under sections 124A IPC, which reads as thus:

> ***124A. Sedition***
>
> *Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings, or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added or with fine.*
>
> ***Explanation 1. -****The expression "disaffection" includes disloyalty and all feelings of enmity.*
>
> ***Explanation 2. -****Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> ***Explanation 3. -****Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

Further, the accused persons have conspired and acted in pursuance to the said conspiracy to instigate a deliberate and organised attack upon the Government forces. Such acts of these persons also amount to offences punishable under sections 121 and 121A IPC, since the object of the accused persons was, by force and violence, to overcome the servants of the Government and thereby to force Government of Gujarat to take illegal decisions. Section 121 and 121A IPC are reproduced herein-below for ready reference:

121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India

Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine.

121A. Conspiracy to commit offences punishable by Section 121

Whoever within or without b [India] conspires to any of the offence punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, h [and shall also be liable to fine.

Explanation.-*To constitute a conspiracy under this section, it is not necessary that any act or illegal or omission shall take place in pursuance thereof.*

In continuation to the aforesaid, it is further stated that in the garb of promoting interest of Patidar community, the accused persons started inciting Patidar community members against members of those community who already have reservation and are included in the list of Other Backward Castes. Through words spoken and written, described hereinafter, accused persons had acted with intention to cause disorder and incite people to violence and creating disharmony in the society. On the basis of evidence cited hereinafter, accused persons have also committed offence under section 153A and 153B of IPC which reads as thus:

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

(1) Whoever-
(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or

(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

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

153B. Imputations, assertions prejudicial to national integration

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,-

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons by reason of their being members of any religious, racial, language or regional group or caste or community be denied, or deprived of their rights as citizens of India, or

(c) makes or publishes and assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Acts of commission and omission by Hardik Patel and other accused persons, which amounts to various offences under abovementioned sections, are enumerated hereinafter.

4. Hardik Patel and other accused persons formed an organisation, namely Patidar Anamat Andolan Samiti, purportedly to seek Other Backward Class status for Patidar community to get reservation in Government jobs and education. Despite being aware of the legal and social aspects of such demand, several agitations/public gatherings and demonstrations were planned and executed at various places across Gujarat. It would be worthwhile stating here that some of the said agitations/public gatherings and demonstrations (reference of the main events which has been made date-wise hereinunder in a tabular form) were held without taking necessary permission from the concerned authorities.

Date of Agitation/ public gathering/ demonstration	***Place***	***Whether the Agitation/ public gathering/demonstration turned violent and resulted in any disturbance to law and order***
'6/7/2015	*Mehsana*	*Yes. Agitators entered into scuffle with police*
'22/7/2015	*Mansa*	*No*
'23/7/2015	*Visnagar*	*Yes, agitators torched vehicles and vandalised the office of BJP MLA, Shri Rishikesh Patel*
'28/7/2015	*Vijapur & Mehsana*	*Yes. Prohibitory orders violated. 152 persons booked.*
'30/7/2015	*Lunavada*	*Yes. Offence registered against organisers*
'1/8/2015	*Devbhoomi Dwarka*	*No*
'3/8/2015	*Gandhinagar, Navsari, Jam Jodhpur (Jamnagar),*	*No*

	Himmatnagar, Bagasara (Amreli)	
'5/8/2015	*Rajkot*	*Yes. Statements against leaders of other communities.*
'10/8/2015	*Amreli*	*Yes. Burnt effigy of community leaders*
'12/8/2015	*Junagadh*	*No*
'17/8/2015	*Petlad*	*No*
'17/8/2015	*Surat*	*Yes. Scuffle with police at the collector office and also burnt effigies and indulged in vandalism*
'21/8/2015	*Surendranagar, Bharuch, Ankleshwar and Vadodara*	*Yes. Scuffle with police at the collector office and incited the mob at the sabha venue against police.*

More than 300 odd rallies, agitations or demonstrations were conducted by the groups across the state. Over and above holding the aforesaid agitations/public gatherings/demonstrations, the aforesaid accused persons used social media to spread the protest quickly across the State and such agitations/public gatherings/demonstrations were organised and executed by the Patidar Anamat Andolan Samiti. The demonstration in Surat on 17th August, 2015 drew estimated 3 lac people. The diamond and textile markets of the city remained-closed. Several schools and colleges were also closed.

5. Deleterious effect of these agitations started showing in the society, where the castes, which are already part of OBC list, started demonstrating against the demand of Patidar community to be included in the list. Thousands of Other Backward Class communities' members held a rally on 23rd August in Ahmedabad to counter the agitation of the Patel community. Rallies were held by OBCs at various other places in Gujarat to oppose the demand of Patidars to be included in OBC list. Press cuttings pertaining to these rallies are available and will be produced. Similarly, those communities which do not get benefit of reservation, such as Brahmins, Baniya, etc., started agitating and organising rallies against reservation system details of which are also available. Division in various communities of the society was an expected fallout of the agitation led by Shri Hardik Patel and other accused persons. Divisive statements made by state against other communities and caste groups added fuel to fire. These accused persons conspired and planned to instigate the schism and violence between various communities.

6. Government of Gujarat made all the attempts to widely publicise

the correct facts vis-a-vis the fallacies being spread by the accused persons various advertisements and public statements were issued by the Government of Gujarat to dissuade the members of Patidar community from being misled. These advertisements and public statements are available. In fat the Government of Gujarat went out of its way to persuade Hardik Patel and other accused persons negated all such efforts of Government of Gujarat by either not participating in the negotiation process initiated by the Government or by making statements like "some parties say you do not know about Supreme Court guidelines (50 per cent cap on reservation), this cannot happen. If Supreme Court can open at 3.30 in the morning for a terrorist, then why not for the youth, the future of this nation?"

8. As can be inferred from the preceding paragraphs, all efforts of the State Government for the purpose of initiating a process of dialogue with Hardik Patel and in view of speeches made by Hardik Patel leading to the 25th August, 2015 rally at Ahmedabad, a decision was taken to monitor the activities of Hardik Patel and his group for the purpose of ascertaining the real motive behind these agitations. Accordingly on the grounds of maintaining law and public order, surveillance was done and phone numbers of some members of the group viz. Patidar Anamat Andolan Samiti (PAAS) were kept under technical surveillance after getting requisite approval from the office of the Additional Chief Secretary (Home).Based on the data collected from such technical surveillance, an inference was easily drawn regarding a nefarious design and pre-planned conspiracy on the part of Hardik Patel and other members of the PAAS. The conversations made by some members of the core committee of PAAS and the agitators clearly show that they had been instigated and abetted by the members of PAAS. The calls were made by the PAAS members to the agitators clearly show that they had been instigated and abetted by the members of PAAS. The calls were made by the PAAS members to the agitators instigating them and asking them to attack and burn public property and police and also asking them to wage war to overthrow the duly elected Government of Gujarat.

10. Initially it was planned and announced that after the completion of the sabha, a rally will be taken out to the Collector Office, Ahmedabad City to handover the memorandum to Collector & District Magistrate, Ahmedabad City. With an intention to prevent any untoward incident during the rally procession, Ahmedabad Collector & District Magistrate had voluntarily offered to come up personally to the G.M.D.C. ground to accept the memorandum for inclusion of Patidar community in OBC list. However, Hardik Patel refused the same, and insisted that Hon'ble Chief Minister of Gujarat herself came to be ground to accept the memorandum. An announcement to the same effect was made publicly by Hardik Patel. Thereafter, Hardik Patel and other members of PAAS led a rally procession to the Collector Office, wherein all throughout the route they were

addressing and inciting the agitators on the road. After submitting the memorandum to the Collector, Ahmedabad, Hardik Patel and other members of PAAS came back to GMDC ground and sat on indefinite fast. Their demand was that Hon'ble Chief Minister in person should come to the ground and accept the said memorandum. Hardik Patel again and again announced and requested more and more agitators to join him in indefinite fast at GMDC ground. In this connection, it is stated that the permission for sabha and rally procession was only till 6 pm on 25th August, 2015. However, Hardik Patel and other members of PAAS continued to sit on stage and were joined by about 1000 other agitators. The police officers and personnel deployed on GMDC ground informed these agitators that since there is no permission to sit on fast and the permitted time for the rally has lapsed, they should vacate the premises. Also, request was made to suspend the fast in view of the already fragile law & order situation in Ahmedabad City and other areas. It will be appropriate to mention that due to incitement made during the rally and sabha, confrontation on caste lines happened at Juna Wadaj area, where Police had to resort to lathi-charge to disperse the mob. Similar reports of confrontation and violence between Patidars and other communities were coming from different parts of the city. Despite continuous request of police officers to vacate the ground. Hardik Patel and other accused persons continued the fast, and instead started threatening the police officers and personnel of dire consequences. Derogatory comments on caste of the police officers and personnel were being made by the agitators present in the ground by reading the name plates on the uniform. Hardik Patel also incited the agitators present in the GMDC ground by announcing that the police want to arrest him and remove him forcibly from the ground. These statements, as also the other comments by Hardik Patel and other accused persons, made the crowd violent. Agitators started throwing chairs at police, resulting into injuries to police personnel, including Police Constable Ajay M Solanki of Dhari Police Station which resulted in a fracture of his left arm. This forced police to resort to lathi-charge. To disperse the mob the police officers were constrained to detain Hardik Patel and other members of PAAS under section 68 of Gujarat Police Act. This detention was done to ensure the safety of these persons, as in the ensuing melee, the mob resorted to stone pelting and damaging pubic property.

12. The spate of violence and destruction done by the agitators across the state showed a clear and well planned conspiracy.

a. Railway lines across the state were targeted by the mob wherein offences were registered at Sabarmati Railway Police Station, Viramgam Railway Police Station and Kapadvanj Town Police Station relating to uprooting of railway lines. The brief facs of the three offences are as given below:

i. Kapadvanj Town Police Station I CR No 38/2015 where

railway lines of 26 meters were removed and signal was damaged by unlawful assembly of 25 persons

ii. Sabarmati Railway Police Station I CR No 25/2015 where railway crossings, gateman cabin, and other critical railway property was damaged by a mob of 5,000 persons

iii. Viramgam Railway Police Station I CR No 09/2015 where in Kadi Railway Station critical railway infrastructure was damaged by an illegal mob of 700-800 person

b. The residence and offices of the elected representatives, MLA's, MP's and government offices located across the state were targeted by the mob. A total of 14 offences were registered across the state wherein residence and offices of Ministers and MLAs and MPs were attacked. The government rest house at Kadi, forest department vehicle at Idar, official vehicle of the Ld. Addl. Sessions Judge, Patan was attacked and set ablaze by the mob. Brief information of some of the offences are enumerated herein below:

i. Mehsana B Division PS I CR No 166/2015 where office of Minister of State for Home, Gujarat was set ablaze

ii. Patan City B Division, I CR No 104/2015 where official vehicle of Ld. Additional Sessions Judge, Patan was set ablaze.

iii. Unjha PS I CR No 155/2015 where Sales Tax Office and Taluka Panchayat office at Unjha were set on fire, alongwith stone pelting over police personnel.

c. Based on the misrepresented news regarding Hardik Patel's arrest, the agitators across the state targeted Police officers and personnel. Widespread damage was made to police stations, chowkis and police vehicles and policemen were attacked across the state. 55 offences were registered in the state of which 24 offences were reported in Ahmedabad, 14 in Mehsana, 6 offences in Rajkot, 4 in Sabarkantha, 3 each in Patan and Banaskantha, and one in Kheda.

i. Bapunagar PS I CR No 172/15 where a mob attacked the Diamond Police Chowki and set it ablaze.

ii. Ramol PS I CR No 175/15 were an unruly crowd laid siege on the Vastral Police Chowki, seized weapons from the police party and opened fire on them.

iii. Kadi PS I CR No 157/15 where a mob targeted the Gandhi Chowk Police Chowki and the police line and tried to set it ablaze.

iv. Gad PS I CR No 58/15 where a mob attacked the police station with swords and petrol bombs and torched the police vehicles and tried to take away the weapon of the police personnel.

d. The agitated mob also targeted public and private properties across the state, Public modes of transport like AMTS, GSRTC and BRTS buses across Gujarat were targeted. 32 offences were registered in this

THE HIGH COURT OF GUJARAT WEB COPY

connection wherein 9 offences were in Ahmedabad, 7 in Mehsana, 6 in Patan, 5 in Sabarkantha and 4 offences in Rajkot and one in Valsad.

i. Sola PS I CR No 191/15 where the mob damaged AMTS, BRTS and GSRTC buses and fire brigade vehicles.
ii. Ghatlodia PS I CR No 127/15 where the mob attacked the police chowki, burnt BRTS and AMTS buses.
iii. Gandhigram PS I CR No 209/15 where an irate mob torched the BRTS bus stop.

e. The incitement done by accused persons had caused schism in the society on caste lines, which resulted in caste clashes at various places. Offences were registered at various place, including at Vadaj Police Station of Ahmedabad City vide I CR No 15/2015 where clashes between Patidar community and other OBC community took place.

The entire detailed report showing the offences registered across the state as part of this spate of violence is available.

15. The spate of violent acts that ensued in Ahmedabad city since 25th August, 2015 clearly reveal a pattern and design getting its corroboration from the earlier speeches made by Hardik Patel and also from the transcripts of the conversations of the other accused persons mentioned hereinbefore. Further acts and omissions on the part of Hardik Patel and other accused persons belonging to PAAS prima facie establish that the entire agitation of seeking reservation for the Patidar Community was never the intended purpose of the PAAS. In fact, acts and omission on the part of accused person clearly establishes a sinister design to bring into hatred and contempt in order to excite disaffection towards the duly elected government and its functionaries. Covert calls to attack government in false and bad light by intentionally spreading misinformation with distorted facts are all parts of this conspiracy. The conspiracy hatched by Hardik Patel and the other accused persons to destabilise a duly elected democratic Government under the garb of Reservation Agitation for the Patidar Community, a community otherwise seen and perceived as a peace-loving and law-abiding community. Hardik Patel and other accused persons, intentionally incited the sentiments of the community members and also developed a feeling of hatred, contempt and disaffection amongst the members of the Patidar Community towards the Government and also other communities, thereby creating situations prejudicial to national integration. The accused persons under the leadership of Hardik Bharatbhai Patel attempted to wage war against the government and also conspired to overawe the lawfully elected government of Gujarat, by means of criminal force and also by show of criminal force. They committed various acts of omissions and commissions punishable u/s 121, 121A, 124A, 153A, 153B read with read with 120(B) of the Indian Penal Code and hence I file this complaint against Hardik Bharatbhai

Patel, Dinesh Bhagavanbah Bambhaniya, Chirag Bharatbhai Patel, Ketan Lalitbhai Patel, Alpesh Ganshyambhai Katharia, Amreshkumar D. Patel and others as will be disclosed in the course of investigation."

5 Keeping in mind the above, it is the case of the prosecution that the applicants herein have committed the offences of sedition punishable under Section 124A of the IPC, waging of war punishable under Section 121 of the IPC, hatching conspiracy to commit offence punishable under Section 121A of the IPC, and promoting enmity between different groups on grounds of religion, etc. punishable under Section 153A of the IPC.

- **SUBMISSION ON BEHALF OF THE APPLICANTS:**

6 Mr. B.M. Mangukiya, the learned counsel appearing for the applicants vehemently submitted that the First Information Report lodged against his clients is nothing, but an act of mala fide on the part of the State Government. Mr. Mangukiya submitted that never before in his professional career, he has seen the F.I.R. of the present nature. He submitted that a part of it is in vernacular and the the substantially in English. He submitted that a person, who lodges the F.I.R., cannot be also the person who takes down the F.I.R. and registers the same in accordance with law.

7 Mr. Mangukiya submitted that in the case in hand, the F.I.R. has been lodged by the Deputy Police Commissioner, Zone-3 in his own

name, and the same is also shown to have been registered by him.

8 Mr. Mangukiya submitted that the allegations levelled in the F.I.R. are more in the nature of an opinion expressed by the Deputy Police Commissioner.

9 Mr. Mangukiya submitted that even if the entire case of the prosecution is accepted as true, including the statements alleged to have been made by the applicants herein, would not constitute an offence of sedition punishable under Section 124A of the IPC. He submitted that none of the ingredients to constitute the offence punishable under Section 124A are spelt out on the plain reading of the F.I.R. He submitted that in a democratic country, like India, any citizen can raise his voice against any Government, if the Government is not found to be acting in the interest of a particular community. He submitted that the agitation for the reservation could not be said to be, in any manner, unlawful.

10 Mr. Mangukiya, the learned counsel appearing for the applicants submitted that there is not a whisper of an allegation that the applicants herein, by their prejudicial activities, promoted enmity between different groups on grounds of religion, etc. He submitted that this aspect has been taken care of by this Court in the judgment and order dated 27.10.2015 delivered in the case of **Hardik Bharatbhai Patel vs. State of**

Gujarat (Criminal Miscellaneous Application No.19858 of 2015).

11 He submitted that the Investigating Officer has gone to the extent of accusing the applicants of having committed the offence punishable under Section 121 of the IPC i.e. waging of war against the Government. He submitted that the expression “waging war” means and can only mean waging war in the manner usual in war.

12 Mr. Mangukiya submitted that mere violent activities, like torching public transport buses, police stations, etc. by itself, would not amount to waging war against the Government. Mr. Mangukiya submitted that the expression “waging war” should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of “waging war” against the Government. Mr. Mangukiya submitted that the offence of waging war was inserted in the Indian Penal Code when the Nation was fighting for an independence against the Britishers. According to Mr. Mangukiya, the expression “waging war” occurring in Section 121 of the IPC should be viewed with the eyes of the people of free India. He submitted that after independence, these have changed drastically. The people of this country are governed by the Constitution which provides for freedom of speech and expression, as embodied under Article 19(1)(g) of the Constitution.

13 Mr. Mangukiya submitted that before a person is accused of having committed an offence of waging war, the intention or purpose behind the defiance or raising the Government should also be looked into. He submitted that the agitation is for reservation. The object and purpose of the agitation is not to strike at the sovereign authorities of the Rulers or the Government.

14 In such circumstances referred to above, Mr. Mangukiya submitted that there being merit in all the writ applications, the same be allowed and the F.I.R. be quashed.

15 In support of his submissions, Mr. Mangukiya placed reliance on a decision of the Supreme Court in the case of **Nazir Khan and others vs. State of Delhi [2003 Cri. L. J. 5021(1)]**.

- **SUBMISSIONS ON BEHALF OF THE STATE OF GUJARAT:**

16 Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State vehemently opposed these applications and submitted that no case worth the name could be said to have been made out for quashing of the First Information Report. He submitted that the plain reading of the First Information Report discloses more than a *prima facie* case against the applicants. He submitted that the First Information Report discloses commission of cognizable offences. Mr. Amin submitted that so far as

HC-NIC Page 17 of 68 Created On Wed Dec 02 17:14:25 IST 2015

the offence of sedition punishable under Section 124A of the IPC is concerned, this Court has explained in details as to how the offence is committed so far as the agitation is concerned in the case of **Hardik Patel (supra)**. Mr. Amin placed reliance on the observations made by this Court in the judgment and order dated 27.10.2015 referred to above. Mr. Amin submitted that organizing or joining an insurrection against the Government of Gujarat is also a form of war. He submitted that unlawful assemblies, riots, insurrections, rebellions, levying of war are the offences which run into each other and not capable of being marked off by perfectly definite boundaries. He submitted that all of them have in common one feature, namely, that normal tranquility of a civilized society is disturbed either by actual force or at least by the show and threat of it.

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

17 Mr. Amin submitted that Section 121 of the IPC not only talks about waging of war, but also an attempt to wage war or abetting the waging of such war. In the same manner, Mr. Amin drew a fine classification of Section 121A into two parts. According to Mr. Amin, the first part speaks about conspiracy to commit any of the offences punishable under Section 121 and the second part speaks of conspiracy to overawe, by means of criminal force or the show of criminal force. Mr. Amin submitted that the words “conspires to overawe, by means of criminal force or the show of criminal force” clearly embrace not merely

a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Government by the organization of a serious riot or a large and tumultuous unlawful assembly. He submitted that the word "overawe" clearly imports more than the creation of an apprehension or alarm or even perhaps fears.

18 Mr. Amin submitted that the investigation is still in progress. He submitted that it is at a very delicate stage. He submitted that the material is being collected and whatever material has been collected so far would go to show that more than a *prima facie* case is made out against the applicants. He submitted that in such circumstances, the Court may not quash the F.I.R. at this stage.

19 In such circumstances referred to above, Mr. Amin prays that there being no merit in any of the writ applications, they may be rejected.

THE HIGH COURT
OF GUJARAT
WEB COPY

20 Mr. Amin, in support of his submissions, placed reliance on a decision of the Patna High Court in the case of **Jubba Mallah and ors vs. Emperor [AIR 1944 Patna 58]**.

- **ANALYSIS:**

21 Having heard the learned counsel appearing for the parties and

having gone through the materials on record, the only question that falls for my consideration is whether the F.I.R. should be quashed.

22 So far as the offence of sedition is concerned, I have dealt with the same at length in my judgment and order dated 27.10.2015 in the case of **Hardik Patel (supra).** I may quote the relevant observations as under:

> *"6 Let me first look into the principal accusation against the applicant as regards the offence of sedition punishable under Section 124A of the Indian Penal Code. Section 124-A reads as under:*
>
> ***124A. Sedition.** Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, [102] [***] the Government established by law in [103] [India], [***] shall be punished with [104] [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*
>
> ***Explanation 1.**The expression disaffection includes disloyalty and all feelings of enmity.*
>
> ***Explanation 2.**Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> ***Explanation 3.**Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> *7 Section 124-A deals with 'Sedition,' Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the country. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. "Sedition has been described as disloyalty in*

*action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder. [**See:Nazir Khan and others v. State of Delhi, 2003 Cri. L.J. 5021(1)].***

*8 It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. The demand for reservation for the members of the Patidar Patel community by itself is not an offence. It is open to the members of the Patidar Patel community to seek reservation, if available in law or the State Government, by way of a policy decision, deems fit to provide. It is also open to demand for reservation by peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of the society and the Government. What is not permissible in order to attain such object is any act which have the effect of bringing or which attempt to bring into hatredness or contempt or excites or attempts to excite disaffection towards the Government established by law. As observed by the Supreme Court in **Kedar Nath Singh (supra)** that the Government established by law is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. The continued existence of the Government established by law is an essential condition of the stability of the State. That is why sedition, as the offence in Section 124A, has been characterized, comes to Chapter VI relating to offences against the State. The question which arises for consideration is whether the statement made or the words spoken or the advice given by the applicant to one Shri Desai in the presence of many of people and media can be said to be seditious, that is to say of such a nature that the same would be punishable under Section 124A of the Indian Penal Code. The determination of this question depends on the true scope and ambit of Section 124-A which defines the well-known offence of sedition with which many in this country were only too familiar during the days of British rule. The offence of sedition is the resultant of the balancing of two contending forces : namely, freedom and security. Freedom and security in their pure form are antagonistic poles : one pole represents the interest of the individual in being afforded the maximum right of self-assertion free from Governmental and other interference while the other represents the interest of the politically organized society in its self-preservation. It is impossible to extend to either of them absolute protection for as observed by Mr. Justice Frankfurter, "absolute rules would inevitably lead to absolute exceptions and such exceptions would eventually corrode the rules". It is now a generally accepted postulate that freedom of speech and expression which includes within its fold freedom of propagation of ideas lies at the foundation of all democratic organizations,*

for without free political discussion, no public education so essential for the proper functioning of the processes of popular Government is possible. It is the matrix, the indispensable condition, of nearly every other form of freedom and because it has the capacity of unfolding the truth, it is indispensable to the democratic process. Now freedom of such amplitude might involve risks of abuse but as pointed out by ***Patanjali Shastri, J., in Romesh Thapper v. State of Madras****, AIR 1950 SC 124 "the framers of the Constitution may well have reflected, with Madison who was 'the leading spirit in the preparation of the first Amendment of the Federal Constitution' that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits";" (quoted in Near v. Minnesotta, (1930) 283 US 697. While conceding the imperative necessity of freedom of speech and expression in its full width and amplitude, it is necessary at the same time to remember that the first and most fundamental duty of every Government is the preservation of order, since order is a condition precedent to all civilization and the advance of human happiness. The security of the State and organized Government are the very foundation of freedom of speech and expression which maintains the opportunity for free political discussion to the end that Government may be responsive to the will of the people and it is, therefore, essential that the end should not be lost sight of in an over-emphasis of the means. The protection of freedom of speech and expression should not be carried to an extent where it may be permitted to disturb law and order or create public disorder with a view to subverting Government established by law. It is, therefore, necessary to strike a proper balance between the competing claims of freedom of speech and expression on the one hand and public order and security of the State on the other. This balance has been found by the Legislature in the enactment of Section 124-A which defines the offence of sedition for our country.* ***[See: Manubhai Tribhovandas Patel and others v. State of Gujarat [1972 Cri. L. J. 373]***

9 The interpretation of Section 124-A has over the years gone through various vicissitudes and changes. The first case where it came up for consideration was the famous Bangobasi Case; ***Queen-Empress v. Jogendra Chunder*** *(1892) ILR 19 Cal 35. The Section as it was in force at that time was the unamended Section which did not contain the words "brings or attempts to bring into hatred or contempt" and had only one composite explanation instead of the present three. The words of the Sec. which, therefore, fall for construction were : "Whoever............ excites or attempts to excite feelings of disaffection to the Government established by law." Sir Comer Petheram. C.J. in his charge to the jury gave a very wide interpretation to the word "disaffection". He interpreted it to mean "contrary to affection" and observed that it would be sufficient for the purposes of the Section that the words used are calculated to excite feelings of ill-will against the Government, Strachey, J. gave a further expansion to this meaning in* ***Queen Empress v. Bal Gangadhar Tilak,*** *(1898) ILR 22*

Bom 112, when he said : "I agree with Sir Comer Petheram in the Bangobasi case that disaffection means simply the absence of affection" which he explained by saying : "It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Govt. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government". He proceeded to observe, interpreting the Section : "The offence consist in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small... even if he ("that is the accused") neither excited nor intended to excite any rebellion or outbreak of forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section". This charge to the jury was expressly approved by the Judicial Committee of the Privy Council while dismissing the application preferred by Bal Gangadhar Tilak for special leave to appeal against his conviction by the Bombay High Court. This interpretation gave a very wide sweep to Section 124-A and made it a formidable Section. It was obviously an interpretation calculated to reserve power in the British Government to prosecute their political opponents and stifle opposition to the British rule. It reflected the anxiety of the British to retain their strangle-hold on this country and continue their exploitation by crushing all forms of opposition by making it penal even to excite feelings of ill-will against the Government, as if by punishing words or deeds calculated to produce ill-will, they could command goodwill from a subject people. ***[See: Manubhai Tribhovandas Patel (supra)]***.

10 This broad and sweeping interpretation of Section 124-A held the field until 1942, when in the leading case of Niharendu Dutt Majumdar v. Emperor, AIR 1942 F.C. 22. Sir Maurice Gwyer. C.J., an eminent British Judge who presided over the Federal Court of India in its early years, reviewed the position and attempted to restrict the scope of the Section by interpreting it according to the "external standard" applied by Judges in England. He recognised the great change that had taken place in the concept of Government since the days of enactment of the Section and since its interpretation in Bal Gangadhar Tilak's case (1898) ILR 22 Bom 112. He quoted with approval the following passage from the speech of Lord Summer in Bowman v. Secular Society Ltd., (1917) AC 406 : "The words as well as the acts which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before" and pointed out that "many judicial decisions in particular cases which were no doubt correct at the time when they were given may well be inapplicable to the circumstances of to-day." He felt that in the changed circumstances of the country "bad feeling" or "ill-will" towards the

Government could not be regarded as the basis of sedition. He pointed out that the language of Section 124-A must be interpreted in the light of the broad principles underlying the concept of sedition as formulated in English law and referring to the classic statement of these general principles in Mr. Justice Fitzgerald's charge to the jury in Rex v. Sullivam (1868) 11 Cox. C.C. 54. he concluded by saving that the offence of sedition "is the answer of the State to those who, for the purpose of attacking or subverting it, seek........................ to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency : and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed and no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. "The Federal Court thus emphasized the need for dynamic interpretation of the section appropriate to the modern concept of Government and accepted a narrower interpretation than the one given in the earlier cases by laving down that unless the acts or words have a tendency to create public disorder, they cannot be considered seditious, as sedition is essentially an offence against public order. ***[See: Manubhai Tribhovandas Patel (supra)].***

11 But this progressive and enlightened view taken by the Federal Court was overruled by the Judicial Committee of the Privy Council in ***King Emperor v. Sadashiv Narayan. 74****. Ind App 89 : (AIR 1947 PC 82). The Judicial Committee held that incitement to disorder is not an essential element of the offence of sedition but it is enough to excite or attempt to excite feelings of disaffection, that is, ill-will against the Government. They quoted with approval the relevant passage from Mr. Justice Strachey's charge to the jury in Bal Gangadhar Tilak's case, (1898) ILR 22 Bom 112 a passage from which we have also quoted earlier, and observed that they would adopt the language of Mr. Justice Strachey "as exactly expressing their view in the present case."****[See: Manubhai Tribhovandas Patel (supra)].***

12 The result was that when our Constitution was enacted there were two conflicting interpretations of Section 124-A before the Indian Courts. One was the conservative interpretation placed by the Privy Council which gave wide power to the Government to curb free speech and expression even if it was calculated merely to produce bad feelings or feelings of ill-will against the Government without any disturbance of public order : the other was the liberal interpretation accepted by the Federal Court which limited the

right of the Government to interfere with free speech and expression and permitted its free and unrestricted exercise so long as it did not incite public disorder or have the intention or tendency to do so. The Supreme Court was called upon to consider in ***Kedar Nath v. State of Bihar,*** *AIR 1962 SC 955, which of these rival interpretations must be accepted as the correct interpretation, for on the determination of this question depended the validity of Sec. 124-A. If the interpretation placed by the Privy Council were the correct interpretation. Section 124-A would be clearly ultra vires as offending Article 19(1)(a) since on such interpretation it would be outside the permissible limits of legislative restrictions which may be imposed on the fundamental right of free speech and expression under Article 19(2). It would not be possible to say on such interpretation that the Section has been enacted "in the interest of public order" : the restrictions, imposed by the section would go far beyond what is required "in the interest of public order." The interpretation approved by the Federal Court would on the other hand, make the section valid, for on that interpretation there would be direct nexus between the restrictions imposed by the Section and interest of public order and the Section would be saved by Article 19(2). The Supreme Court, after an exhaustive review of the case law on the subject accepted the interpretation placed by the Federal Court and held Section 124A to be valid. Sinha C.J. speaking on behalf of the Supreme Court gave the following reasons for preferring the interpretation accepted by the Federal Court :*

".........If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder of reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of clause (2) of Article 19. Sections 124-A and 505 are clearly violative of Article 19(1)(a) of the Constitution. But then we have to see how far the saving clauses, namely. Clause (2) of Article 19 protects the sections aforesaid. Now as already pointed out, in terms of the amended Clause (2), quoted above, the expression 'in the interest of.........public order' are words of great amplitude and are much more comprehensive than the expression 'for the maintenance of as observed by this Court in the case of Virendra v. State of Punjab, 1958 SCR 308 at p. 317 : (AIR 1957 SC 896 at p. 899). Any law which is enacted in the interest of public order may be saved from the vice of Constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create dis-affection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with Clause (2). It is well-settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean

in favour of the former construction. The provisions of the sections read as a whole, along with the explanations make it reasonably clear that the sections aim at rendering penal only such activities as would be intended or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of, the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress vide (1) Bengal Immunity Co. Ltd. v. State of Bihar. 1955-2 SCR 603 : AIR 1953 SC 661 and (2) R.M.D. Chamarbaugwala v. Union of India, 1957 SCR 930 : AIR 1957 SC 628. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence."

It must therefore, be now taken as well-settled that words, deeds or writings constitute sedition punishable under Section 124-A only if they incite violence or disturb law and order or create public disorder or have the intention or tendency to do so. It is in the light of this interpretation of Sec. 124-A that I have to determine whether the advice or the words uttered constitute seditious matter punishable under Section 124-A.

13 Although I have quoted a passage from the judgment in the case of ***Kedar Nath Singh (supra)****, as referred to above, I deem it necessary to quote the entire paragraphs 24, 25 and 26 as under:*
24. In this case, we are directly concerned with the question how far the offence as defined in S. 124A of the Indian Penal Code is consistent with the fundamental right guaranteed by Art. 19 (1) (a) of the Constitution, which is in these terms :

> *"19. (1) All citizens shall have the right-*
>
> *(a) to freedom of speech and expression.........."*

This guaranteed right is subject to the right of the legislature to impose reasonable restrictions, the ambit of which is indicated by cl. (2) which, in its amended form reads as follows :

> "*(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*"

It his not been questioned before us that the fundamental right guaranteed by Art. 19(1)(a) of the freedom of speech and expression is not an absolute right. It is common ground that the right is subject to such reasonable restrictions as would come within the purview of cl. (2), which comprises (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc. With reference to the constitutionality of S. 124A or S. 505 of the Indian Penal Code, as to how far they are consistent with the requirements of cl. (2) of Art. 19 with particular reference to security of the State and public order, the section, it must be noted, penalises any spoken or written words or signs or visible representations, etc., which have the effect of bringing, or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression "the Government established by law" has to be distinguished from the persons for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in S. 124A has been characterised, comes, under Chapter VI relating to offences against the State. Hence any acts within the meaning if S. 124 A which have the effect of subverting the Government of bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the felling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term "revolution," have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feeling which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the

condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence..

25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of 'sedition'. What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand fully to protect and guarantee the freedom of speech and expression, which is the sine qua non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The Court has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1) (a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order. We have, therefore, to determine how far the Ss. 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of 1942 FCR 38 : (AIR 1942 FC 22), that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State, in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced S. 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in cl. (2) of Art. 19 of the Constitution. If on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent

background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in cl. (2) aforesaid.

26. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of Ss. 124A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept, the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of cl. (2) of Art. 19, Ss. 124A and 505 are clearly violative of Art. 19(1) (a) of the Constitution. But then we have to see how far the saving clause, namely, cl. 2. of Art. 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended cl. (2), quoted above, the expression "in the interest of. . . . . public order" are words of great amplitude and are much more comprehensive an the expression "for the maintenance of",, as observed by this Court in the case of Virendra v. State of Punjab, 1958 SCR 308 at p. 317 : ((S) AIR 1957 SC 896 at p. 899). Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Art. 19 (l) (a) read with cl. (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law an order that the law steps in to prevent such activities in the interest of public order, so construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting

an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation its purpose and the mischief it seeks to suppress vide (1) Bengal Immunity Co. Ltd. v State of Bihar, 1955-2 SCR 603 : ((S) AIR 1955 SC 661) and (2) R. M. D. Chamarbaugwala v. Union of India, 1957 SCR 930 : ((S) AIR 1957 SC 628). Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.

14 I should be mindful of the fact that the case in hand is one wherein the accused is praying for quashing of the F.I.R. at a stage when the investigation is in progress. I should look into the allegations levelled in the F.I.R., as they are without adding or subtracting anything from it. I am of the view that a speech or a statement, in which the speaker exhorts the persons, who are listening to him, to resort to violence, prima facie, could be said to be intended to excite disaffection towards the established Government and amounts to an offence under Section 124A of the Indian Penal Code. To put it in other words, to advise a person to persuade to violence as a means of attaining a particular goal or seeking revenge is not less objectionable then advising that person to commit violence himself for that purpose. In either case, the advice is to pursue a course of action, it is calculated to disturb the tranquility of the State. It is a recommendation to oppose the established Government by force."

"16 WHAT MEANING SHOULD BE ATTACHED TO THE EXPRESSION THE GOVERNMENT ESTABLISHED BY LAW:

*16.1 The Supreme Court in **Kedar Nath Singh (supra)** observed that the expression the Government established by law should be distinguished from the persons for the time being engaged in carrying on the administration.*

16.1 This expression means Government rule and its representatives as such, - the existing political system as distinguished from any particular set of administrators. The established authority which governs the country and administrators its public affairs includes the representatives to whom the task of government is ens trusted. It denotes the person or persons authorized by law to administer Executive Government in any part of India...the feelings, which it is the object of section 124A to prohibit, may be excited towards the Government in a variety of ways, & it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in India, must depend

upon the nature of the criticism, the position of the service in the administration and all the other circumstances of the case. It would be a question of fact to be determined in each case with reference to its circumstances. In this sense the Government includes not only the Government of India but also Local Government. Government does not mean the person or persons in charge of administration for the time being. It means the person or persons collectively, in succession, who are authorized to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and are not representatives of that abstract conception which is called Government. There is a clear distinction between the Government and the individual officers employed under the Government. Words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter can only infringe the law of libel. There may be instances of criticism of subordinate officials that would not offend the rule to bring into hatred or contempt or excite disaffection towards Government and it is also easy to image instances that would. No general rule can be laid down. No substantial distinction can be drawn between the Government established by law in India and the Executive Government.

[See:

1 Sundar lal (1919) 42 All 233 (FB); Kshiteeshchandra Ray Chaudhuri (1932) 59 Cal 1197.

2 See Bal G Tilak AIR 1916 Bom 9: 18 Cri LJ 567, 605; Dhrendra Nath Sen (1938) 2 Cal 672.

3 Besant (1916) 39 Mad 1085 (SB); Kshiteeshchandra Ray Chaudhuri (1932) 59 Cal 1197.

4 Per Batty J, In Bhaskar Balvant Bhopatkar (1906) 8 Bom LR 421, 438: 4 Cri LJ 1: 30 Bom 421.

5 Raj Pal (1922) 3 Lah 405 (SB)

6 Sat Parkash AIR 1941 Lah 165: 42 Cri LJ 682 .

7 See Anadabazar Patrika (1932) 60 Cal 408 (SB); Kshiteeshchandra Ray Chaudhuri (1932) 59 Cal 1197.

17 The Government established by law acts through human agency and admittedly, the police service or force is itself a principal agency for the administration and maintenance of the law and order in the State. When a person makes a statement or gives an advice to resort to violence by killing 4 to 5 police officers, he could be said to have criticized the police force or the service en bloc. In such circumstances, whether one could be

said to have excited disaffection against the Government or not would be a pure question of fact and such question can be determined only after the entire picture is clear i.e. after the investigation is over and the chargesheet is filed.

18 In the aforesaid context, I may usefully refer to and rely upon the decision of the Bombay High Court. A Division Bench of the Bombay High Court in the case of ***Bal Gangadhar Tilak v. Emperor [AIR 1916 Bombay 9]*** *held as under:*

First, the, it was said that there could be no excitement or disaffection in these speeches, inasmuch as the the speaker openly and sincerely professed his loyalty to His Majesty the King-Emperor and the British Parliament. To that I have only to say that, as I read S. 124-A, it is clear that to a charge of exciting disaffection towards the Government established by law in British India a profession, however sincere, of loyalty to His Majesty and the British Parliament is no answer whatever.

Secondly, it was contended that the speeches could not in law offend against S. 124 A, because, the speakers attack was made not on the Government nomination but on the Civil Service only. That, I think, is not quite so in fact. But assuming it to be so, it affords no answer to the charge. For the government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace. Therefore where, as here, you criticise the Civil Service en bloc, the question whether you excite disaffection against the Government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the Civil Service, is also to infuse hatred or contempt of the established Government whose accredited against the Civil Service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government. It is, I think, a mere question of fact.

Passing now to the speeches themselves must be read as a whole. A fair construction must be put upon them, straining nothing either for the Crown or for the applicant, and paying more attention to the whole general effect than to any isolated words or passages. The question is whether upon such fair construction these speeches offend under S. 124-A or not. Now, first, as as to the general aim of the speaker it is, I think, reasonably clear that in contending for what he describes as swarajya his object is to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people or peoples of India. I am of opinion that the advocacy of such an object is not per se a infringement of the law, nor has the learned Advocate General contended otherwise.

It would be a question of fact to be determined in each case with reference to its circumstances. But as a mater of law it cannot be said that the condemnation of a particular service under the Government by law established in British India can never be sufficient to excite any of the feelings prohibited by S. 124-A. Towards such Government. I now come to the question as to whether the publication of the matter contained in these speeches is punishable under S. 124-A. It is quite clear that the speaker must not bring or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards, His Majesty or the Government established by law in British India; and it is also clear that even in the case of comments falling under Expln.2 or 3 of the section, this essential condition must be observed. In the present case Mr. Jinnah has laid great emphasis on the fact that throughout the speeches, the speaker has expressed his loyalty to His Majesty. But this cannot avail him. He is not charged with exciting disaffection towards His Majesty. The Crown case is that he has attempted to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India; and it is no answer to this charge to say that he has expressed his loyalty to His Majesty."

23 In view of the above, I have no hesitation in coming to the conclusion that more than a *prima facie* case is made out so far as the offence of sedition punishable under Section 124A of the IPC is concerned.

24 I have also dealt with at length the issue whether any case of promoting enmity between different groups on grounds of religion, etc, could be said to have been made out. I have discussed this issue at length in my above referred judgment. I may quote the relevant observations as under:

"25 Let me look into the applicability of Sections 153A and 505(2) of the Indian Penal Code is concerned.

26 Section 153-A was amended by the Criminal and Election Laws (Amendment) Act 1969 - Act No. XXXV of 1969. It consists of three clauses of which clauses (a) and (b) alone are material now. By the same

amending Act sub-section (2) was added to Section 505 of the Indian Penal Code. Clauses (a) and (b) of Section 153-A and Section 505 (2) are extracted below :

> "***153-A.*** *Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.-*
> *(1) Whoever-*
> *(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or*
> *(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or*
> ....
> *shall be punished with imprisonment which may extend to three years, or with fine, or with both."*
>
> "***505(2)*** *Statements creating or promoting enmity, hatred or ill-will between classes.- Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both."*

The common ingredient in both the offences is promoting feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes or communities. Section 153-A covers a case where a person by "words, either spoken or written, or by signs or by visible representations" promotes or attempts to promote such feeling. Under Section 505(2), promotion of such feelings should have been done by making and publishing or circulating any statement or report containing rumour or alarming news. ***[See: Bilal Ahmed Kaloo v. State of Andhra Pradesh (1997 Cri. L. J. 4091]***

27 The Supreme Court has held in ***Balwant Singh v. State of Punjab,*** *(1995) 3 SCC 214 : (1995 AIR SCW 2803) that mens rea is a necessary ingredient for the offence under Section 153-A. Mens rea is an equally necessary postulate for the offence under Section 505(2) also as could be discerned from the words "with intent to create or promote or*

which is likely to create or promote" as used in that sub-section. ***[See: Bilal Ahmed Kaloo (supra)]***

28 The main distinction between the two offences is that while publication of the words or representation is not necessary under the former, such publication is sine qua non under Section 505. The words "whoever makes, publishes or circulates" used in the setting of Section 505(2) cannot be interpreted disjunctively but only as supplementary to each other. If it is construed disjunctively, any one who makes a statement falling within the meaning of Section 505 would, without publication or circulation, be liable to conviction. But the same is the effect with Section 153-A also and then that Section would have been bad for redundancy. The intention of the legislature in providing two different sections on the same subject would have been to cover two different fields of similar colour. The fact that both sections were included as a package in the same amending enactment lends further support to the said construction. ***[See: Bilal Ahmed Kaloo (supra)]***

29 The common feature in both the sections being promotion of feeling of enmity, hatred or ill-will "between different" religious or racial or language or regional groups or castes and communities it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections. ***[See: Bilal Ahmed Kaloo (supra)]***

30 In view of the above and having regard to the case of the prosecution, I am of the view that although it could be said that the members of the Patidar Patel community have been provoked, but such provocation has nothing to do with any other religion, race or linguistic or regional group or community. The police force of the State cannot be brought within the purview of the term community."

THE HIGH COURT OF GUJARAT WEB COPY

25 Thus, so far as Sections 153A and 153B are concerned, I am of the view that the same is not attracted in the case in hand. To that extent, the F.I.R. deserves to be quashed.

26 I shall now deal with the most serious part of the allegation i.e. waging of war punishable under Section 121 of the IPC, and conspiracy to commit an offence punishable under Section 121, which is an offence

punishable under Section 121A of the IPC.

27 **WAGING WAR (SECTION 121 OF THE IPC)**:

> ***"121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India***
>
> *Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine.*
>
> ***Illustration***
>
> *A joins an insurrection against Government of India. A has committed the offence defined in this section."*

28 The Supreme Court in the case of **Nazir Khan (supra)** has explained in details the expression "waging war". I may quote the observations made by the Supreme Court in paras 27, 28, 29 and 30 as under:

> *"27. It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus, where the pledge of a Society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the Society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of society and the present Government; that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy; that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the Society planned to achieve its object by force and violence.*
>
> *1. About the expression 'Whoever' the law Commissioners say : (2nd Report : Section 13) "The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the*

country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, and c., or temporary, as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question.

2. Regarding 'Wage war' according to the Law Commissioners, these words "seems naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of his sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm. There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature.

28. The expression "waging war" means and can only mean waging war in the manner usual in war. In other words, in order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining the possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders.

29. The word "wages" has the same meaning as "levying" used in the English statute. In Lord George Gorden's case (1784) 21 St Tr 485, 644, Lord Mansfield said :

> *"There are two kinds of levying war :- one against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors :- the other, which is said to be levied against the majesty of the king, or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the king; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government; and by force or arms, to restrain the king from reigning according to law."*

30. An assembly armed and arrayed in a warlike manner for any treasonable purpose is bellum levatum, though not bellum percussum.

Lifting and marching are sufficient overt acts without coming to a battle or action.

"No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political objects, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power. Where the object of a mob is not mere resistance to a District Magistrate but the total subversion of the British power and the establishment of the Khilafat Government, a person forming part of it and taking part in its actions is guilty of waging war. When a multitude rises and assembles to attain by force and violence any object of a general public nature, it amounts to levying war against the Government. It is not the number of the force, but the purpose and intention, that constitute the offence and distinguish it from riot or any other rising for a private purpose. The law knows no distinction between principal and accessory, and all who take part in the treasonable act incur the same guilt. In rebellion cases it frequently happens that few are let into the real design, yet all that join in it are guilty of the rebellion. A deliberate and organized attack upon the Government forces would amount to a waging war if the object of the insurgents was by armed force and violence to overcome the servants of the Government and thereby to prevent the general collection of the capitation tax." (See Aung Hia's case (1931) 9 Rangoon page 404). AIR 1931 Rangoon 235 : 33 Cri LJ 205) (SB)

"There is a diversity between levying of war and committing of a great riot, a rout, or an unlawful assembly. For example, as if three, or four, or more, do rise to burn, or put down an inclosure in Dale, which the lord of the manor of Dale hath made there in the particular place; this or the like is a riot, a rout or an unlawful assembly, and no treason. But if they had risen of purpose to alter religion established within the realm, or laws, or to go from town to town generally, and to cast down inclosures, this is a levying of war (though there be great number of the conspirators) within the purview of this statute, because the pretence is public and general, and not private and particular." (See Cokes' Inst. Ch. 1, 9)

29 The concept of war embodied in Section 121 IPC is not to be understood in the international law sense of inter country war involving military operations by and between two or more hostile countries. Section 121 IPC is not meant to punish prisoners of war of a belligerent

nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the pre-independence days, the Illustration to Section 121 itself makes it clear that 'war' contemplated by Section 121 is not conventional warfare between the two nations. The organizing or joining an insurrection against the Government of India is also a form of war. "Insurrection" as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities. "Rebellion, revolution and civil war' are progressive stages in the development of civil unrest, the most rudimentary form of which is insurrection. Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

30 The offence of waging war was inserted in the Indian Penal Code to accord with the concept of levying war in the English Statutes of treason, the first of which dates back to 1351 A.D. I should, therefore, understand the expression "wages war" occurring in Section 121 IPC broadly in the same sense in which it was understood in England while

dealing with the corresponding expression in the Treason Statute. However, the Court should view the expression with the eyes of the people of free India and must also modulate and restrict the scope of observations too broadly made in the vintage decisions so as to be in keeping with the democratic spirit and the contemporary conditions associated with the working of our democracy.

31 The most important is the intention or purpose behind the defiance or rising against the Government. The intention and purpose of the war-like operations directed against the Governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contra-distinction to a private and a particular purpose; it is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force, arms and by defiance of Government troops or armed personnel deployed to maintain the public tranquility. The number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or fire arms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated

with war such as the offenders forming themselves in the battle-line and arraying in a war like manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

32 Even if the conspired purpose and objective falls short of installing some other authority or entity in the place of an established Government, it does detract from the offence of waging war. There is no warrant for such a truncated interpretation.

33 Section 121 of the I.P. Code embraces every description of war whether by insurrection or invasion. The true criterion is the purpose or intention with which the violent acts are alleged to have been committed. The object of such violent acts must be to attain by force and violence, an object of a general public nature thereby striking directly against the Government's authority.

34 The concept of war embodied in Section 121 of the Indian Penal Code has been the subject matter of various decisions.

The observations of LORD HOLT, C. J. in a case reported in HOLT'S REPORTS (1688-1700) at 681-682 reads as under:-

"Holt L. C.J. in Sir John Friend's case says, 'if persons do assemble

themselves and act with force in opposition to some law which they think inconvenient, and hope thereby to get it repealed, this is a levying war and treason". "I tell you the joint opinion of us all, that, if this multitude assembled with intent, by acts or force and violence, to compel the legislature to repeal a law, it is high treason". The question always is, whether the intent is, by force and violence, to attain an object of a general and public nature, by any instruments; or by dint of their numbers".

35 The speech of LORD MANSFIELD, CJ addressed to the Jury in LORD GEORGE GORDON'S CASE (1781) is often quoted to unfold the meaning of the expression 'levying war against the King'. To quote the words of Mansfield, C.J.:

"There are two kinds of levying war: one against the person of the King: to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors : the other, which is said to be levied against the majesty of the King or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government ; and by force of arms, to restrain the King from reigning, according to law".

"No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political objects, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power".

36 In 1820 LORD PRESIDENT HOPE in his summing up speech to the jury in **REX VS. ANDREW HARDIE,1820 1 STNS 610** explained the distinction between levying a war and committing a riot in the following words:

> "*Gentlemen, it may be useful to say a few words on the distinction between levying war against the King and committing a riot. The distinction seems to consist in this, although they may often run very nearly into each other. Where the rising or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, and not resisting or calling in question the King's authority or prerogative then the tumult, however numerous or outrageous the mob may be, is held only to be a riot. For example, suppose a mob to rise, and even by force of arms to break into a particular prison and rescue certain persons therein confined, or to oblige the Magistrates to set them at liberty or to lower the price of provisions in a certain market, or to tear down certain enclosures, which they conceive to encroach on the town's commons. All such acts, though severely punishable, and though they may be resisted by force, do not amount to treason. Nothing is pointed against either the person or authority of the King*".

> "*But, gentlemen, wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar views and interests of the persons concerned in it, but common to the whole community, and striking directly the King's authority or that of Parliament, then it assumes the character of treason. For example, if mobs were to rise in different parts of the country to throw open all enclosures and to resist the execution of the law regarding enclosures wheresoever attempted, to pull down all prisons or Courts of justice, to resist all revenue officers in the collecting of all or any of the taxes; in short, all risings to accomplish a general purpose, or to hinder a general measure, which by law can only be authorized or prohibited by authority of the King or Parliament, amount to levying of war against the King and have always been tried and punished as treason. It is, therefore, not the numbers concerned, nor the force employed by the people rising in arms, but the object which they have in view that determines the character of the crime, and will make it either riot or treason, according as that object is of a public and general, or private and local nature*".

37 Then in 1839, TINDAL, C. J. while summing up the Jury in the trial of John Frost in the year 1839 [All ER Reprint 1835-1842 P. 106 at P. 117] stated that it was: "essential to the making out of the charge of high treason by levying war, there must be an insurrection, there must be force accompanying that insurrection; and it must be for the accomplishment of an object of a general nature".

[See: Syed Mohammed Abrahim vs. State of Karnataka (*2014 Law Suit (KAR) 2920)]***

38 The Apex Court in the case of **STATE (NCT OF DELHI) VS. NAVJOT SANDHU ALIAS AFSAN GURU, 2005(11) SCC 600** has explained in details as to what amounts to waging war or abetting or attempting to waging war, punishable under Section 121 of the IPC and has held as under:

> *258. In interpreting the expression 'waging war', the Indian cases of pre-independence days, though few they are, by and large cited with approval the 18th and 19th century English authorities. The term 'wages war' was considered to be a substitute for 'levying war' in the English Statute of High Treason of 1351 i.e Statute 25, Edward III, c.2. In the famous book of Sir James F. Stephen "A History of the Criminal Law of England" (1883 publication), it was noted that the principal heads of treason as ascertained by that Statute were: (1) 'imagining' the King's death" (2) levying war and (3) adhering to the King's enemies.*
>
> *264. Whether this exposition of law on the subject of levying war continues to be relevant in the present day and in the context of great sociopolitical developments that have taken place is a moot point.*
>
> *272. Sections 121 and 121-A occur in the chapter "Offences against the State". The public peace is disturbed and the normal channels of the Government are disrupted by such offences which are aimed at subverting the authority of the Government or paralyzing the constitutional machinery. The expression "war" preceded by the verb "wages" admits of many shades of meaning and defies a definition with exactitude.*
>
> *274. The conspiracy to commit offences punishable under Section 121 attracts punishment under Section 121A and the maximum sentence could be imprisonment for life. The other limb of Section 121A is the conspiracy to overawe by means of criminal force or the show of criminal force, the Central Government or any State Government. The explanation to Section 121-A clarifies that it is not necessary that any act or illegal omission should take place pursuant to the conspiracy, in order to constitute the said offence.*
>
> *275. War, terrorism and violent acts to overawe the established*

Government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war imbedded in Section 121 is not to be understood in international law sense of inter-country war involving military operations by and between two or more hostile countries. Section 121 is not meant to punish prisoners of war of a belligerent nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the preindependence days, the Illustration to Section 121 itself makes it clear that 'war' contemplated by Section 121 is not conventional warfare between two nations. Organizing or joining an insurrection against the Government of India is also a form of war. 'Insurrection' as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities. "Rebellion, revolution and civil war are progressive stages in the development of civil unrest the most rudimentary form of which is 'insurrection' vide Pan American World Air Inc. Vs. Actna Cas & Sur Co. [505, F.R. 2d, 989 at P. 1017]. An act of insurgency is different from belligerency. It needs to be clarified that insurrection is only illustrative of the expression 'war' and it is seen from the old English authorities referred tothat it would cover situations analogous to insurrection if they tend to undermine the authority of the Ruler or Government.

276. Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.

277. To this list has to be added "terrorist acts" which are so conspicuous now-a-days. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. Terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.

282. The intention and purpose of the warlike operations directed against the governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of government troops or armed personnel deployed to maintain public tranquility.
283. However, a settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming

themselves in battle line and arraying in a warlike manner. Even a stealthy operation to overwhelm the armed, or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

284. The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties, etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of a general public nature or has a political hue, the offensive violent acts targeted against the armed forces and public officials should not be branded as acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long long past. An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war.

285. An aspect on which a clarification is called for is in regard to the observation made in the old decisions that "neither the number engaged, nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. These are not irrelevant factors. They will certainly help the court in forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the firepower or the devastating potential of the arms and explosives that may be carried by a group of persons-may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war.

286. In order to give rise to the offence of waging war, the avowed purpose and design of the offence need not be to substitute another authority for the Government of India. Even if the conspired purpose and objective falls short of installing some other authority or entity in the place of an established Government, it does not detract from the offence of waging war. There is no warrant for such truncated interpretation. The chances of success of such an operation need not be assessed to judge the nature of criminality.

39 The Supreme Court in the case of **Jamiludin Nasir vs. State of West Bengal [2014 (7) SCC 443]** considered the decision of ***Navjot Sandhu Alias Afsan Guru (supra)*** and culled out the following general principles to be applied:

"a) The most important is the intention and purpose behind the defiance or raging against the government.

b) Though the modus operandi of preparing for the offensive act against the government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, the arm and or equipments are immaterial.

c) Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms.

d) There need not be the pomp or pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a war-like manner.

e) The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless near and violent acts resulting in destruction of public property, etc.

f) The moment it is found that the object sought to be attained is of a great public nature or has a political hue the offensive violent act targeted against the armed force and public officials should not be branded as acts of 'waging war'.

g) The expression 'waging war' should not be stretched too far to hold that all acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of 'waging war' against the government.

h) A balanced and realistic approach is called in construing the expression 'waging war' irrespective of how it was viewed in the long long past.

i) An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of 'waging war'.

j) Neither the number engaged nor the force employed nor the species of weapon with which they may be armed is really material to prove the offence of waging war.

k) The single most important factor should be to think that in a case that is being considered of waging or attempting to wage war against the Government of India, what is the target of attack chosen by the conspirators and the immediate objective sought to be achieved thereby.

l) The planned operations if executed what is the extent of disaster spelt out to the whole nation. Whether a war like situation lingering for days or weeks would have prevailed and such offensive acts of unimaginable description and devastation would have posed a challenge to the government and the democratic institutions for the protection of which the government of the day stands.

m) Was it mere desperate act of a small group of persons who were sure to meet with death is to ignore the obvious realities and to stultify the wider connotation of the expression of war chosen by the drafters of IPC.

n) The undoubted objective and the determination of the offenders was it to impinge on the sovereign authority of the nation and its government."

40 The Supreme Court in the case of **Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid vs. State of Maharastra [AIR 2012 SC 3565]** analyzed the concept of "waging war" against the Government of India. I may quote the observations of the Supreme Court as under:

"540. The offences concerning "waging war" are in Chapter VI of the Penal Code under the heading "of offences against the State". Section 121 uses the phrase 'Government of India' and it provides as follows:-

> *"121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India. - Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine."*

541. Section 121A makes a conspiracy to commit offences punishable by Section 121 per se an offence punishable with imprisonment for life or for a period that may extend to ten (10) years. The explanation to the Section makes it clear that the offence is complete even without any act or illegal

omission occurring in pursuance of the conspiracy. This Section uses the expression 'the Central Government or any State Government'. The Section reads as under:-

> *"121A. Conspiracy to commit offences punishable by Section 121. - Whoever within or without India conspires to commit any of the offences punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation.- To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof."*

542. Section 122 similarly makes collection of arms with intention of "waging war" per se an offence, regardless of whether or not the arms were put to actual use. This Section again uses the expression "Government of India" and it reads as under:-

> *"122. Collecting arms, etc., with intention of waging war against the Government of India. - Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine."*

543. Section 123 deals with 'Concealing with intent to facilitate design to wage war against the Government of India'. Section 125 deals with 'Waging war against any Asiatic Power in alliance with the Government of India', and Section 126 deals with 'Committing depredation on territories of Power at peace with the Government of India'.

544. Here it may also be noted that Section 39 CrPC read with Section 176 of the Penal Code makes it an offence for any person who is aware of the commission of, or of the intention of any person to commit, an offence under Sections 121 to 126, both inclusive (that is, offences against the State specified in Chapter VI of the Code), to omit giving any notice or furnishing any information to any public servant. Moreover, Section 123 of the Penal Code makes it an offence to conceal, whether by act or omission, the existence of a design to "wage war" against the Government of India, when intending by such concealment to facilitate, or knowing it to be likely that such concealing will facilitate, the waging of such war.

545.The question that arises for consideration, therefore, is what is the

true import of the expression "Government of India"? In its narrower sense, Government of India is only the executive limb of the State. It comprises a group of people, the administrative bureaucracy that controls the executive functions and powers of the State at a given time. Different governments, in continuous succession, serve the State and provide the means through which the executive power of the State is employed. The expression "Government of India" is surely not used in this narrow and restricted sense in Section 121. In our considered view, the expression "Government of India" is used in Section 121 to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people. The use of the phrase "Government of India" to signify the notion of sovereignty is consistent with the principles of Public International Law, wherein sovereignty of a territorial unit is deemed to vest in the people of the territory and exercised by a representative government.

546.It is important to note here that earlier the word used in Section 121 (as well as all the other Sections referred to above) was "Queen". After the formation of the republic under the Constitution it was substituted by the expression "Government of India" by the Adaptation of Laws Order of 1950. In a republic, sovereignty vests in the people of the country and the lawfully elected government is simply the representative and a manifestation of the sovereign, that is, the people. Thus, the expression "Government of India", as appearing in Section 121, must be held to mean the State or interchangeably the people of the country as the repository of the sovereignty of India which is manifested and expressed through the elected Government.

547. An illuminating discussion on the issue of "Waging war against the Government of India" is to be found in this Court's decision in Navjot Sandhu (AIR 2005 SC 3820). In paragraph 272 of the judgment P. Venkatarama Reddi, J., speaking for the Court, referred to the report of the Indian Law Commission that examined the draft Penal Code in 1847 and quoted the following passage from the report:

> *"We conceive the term 'wages war against the Government' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous."*

548.To us, the expression, "in like manner and by like means as a foreign enemy" (highlighted by us in the above quotation), is very significant to understand the nature of the violent acts that would amount to waging war. In "waging war", the intent of the foreign enemy is not only to disturb public peace or law and order or to kill many people. A foreign enemy

strikes at the sovereignty of the State, and his conspiracy and actions are motivated by that animus.

549. In Navjot Sandhu (AIR 2005 SC 3820), the issue of "waging war" against the Government of India has also been considered in relation to terrorist acts and in that regard the Court observed and held as follows:

> *"275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them??*
>
> *276. It has been aptly said by Sir J.F. Stephen:*
> *"Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it."*
>
> *277. To this list has to be added "terrorist acts" which are so conspicuous now-a-days. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.*
>
> *278. It is seen that the first limb of Section 3(1) of POTA-*
>
> > *"with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever".*

and the acts of waging war have overlapping features. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by Section 121-A."

550.This answers Mr. Ramachandran's submissions to the effect that if an offence comes within the definition of "terrorist act" under Section 15 of the Unlawful Activities (Prevention) Act, it would automatically fall out of Section 121 of the Penal Code, as also his rather extreme submission that the incorporation of Chapter IV of the Unlawful Activities (Prevention) Act, 1967, should be viewed as deemed repeal of Section 121 of the Penal Code. As explained in Navjot Sandhu, a "terrorist act" and an act of "waging war against the Government of India" may have some overlapping features, but a terrorist act may not always be an act of waging war against the Government of India, and vice versa . The provisions of Chapter IV of the Unlawful Activities (Prevention) Act and those of Chapter VI of the Penal Code, including Section 121, basically cover different areas."

41 **CONSPIRACY TO COMMIT OFFENCES PUNISHABLE UNDER SECTION 121 (SECTION 121A OF THE IPC)**:

"Whoever within or without India conspires to any of the offence punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

***Explanation.-** To constitute a conspiracy under this section, it is not necessary that any act or illegal or omission shall take place in pursuance thereof."*

THE HIGH COURT OF GUJARAT WEB COPY

- **INGREDIENTS OF THE SECTION:**

42 Section 121-A deals with two kinds of conspiracies:

(i) Conspiring within or outside India to Commit any of the offences punishable by Section 121 I.P.C.;

(ii) Conspiring to overawe the Government by means of Criminal force or the show of criminal force.

Hence the essential ingredients of the offence under this section would

be:

(i) waging war against the Govt. of India; or

(ii) attempting to wage war against the Govt. of India; or

(iii) abetting the waging war against the Govt. of India.

(iv) Conspire to overawe by means of criminal force or the show of criminal force.

43 A conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. This section draws a distinction between the Government of India and State Government. Any conspiracy to change the form of the Government of India or any State Government, even though it may amount to an offence under another section of the Code, would not be an offence under this section, unless it is a conspiracy to overawe such Government by means of criminal force or show of criminal force, as was illustrated in the matter of Jhabwala v Emperor, (1933) 55 ILR (All) 1040.

The word 'overawe' clearly imports more than the creation of apprehension or alarm or even perhaps fears. The phrase "conspiracy to overawe" has been used in this provision of the IPC. Overawe in lay man's terms means to subdue, frighten or intimidate. The words 'conspires to overawe by means of criminal force or the show criminal force, the Government of India, or any State Government' in this section clearly embrace not merely a conspiracy to raise a general insurrection,

but also a conspiracy to overawe the Government of India or any State Government by the organization of a serious riot or a large and tumultuous unlawful assembly as was seen in the case of Ramanand v. Emperor, (1950) 30 ILR (Pat) 152.

44 It appears to connote the creation of a situation in which the members of the Central or the State Government feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public (Ramanand vs. Emperor, (1950) 30 ILR (Pat) 152).

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

45 The explanation to Section 121-A states that to constitute a conspiracy under this Section, it is not necessary that any act or illegal omission shall take place in pursuance thereof. The words in the section clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Government of India or any State Government by the organization of a serious riot or a large and tumultuous unlawful assembly.

46 At this stage, I may also look into the decision of the Patna High Court in the case of **Jubba Mallah (supra)** relied upon by Mr. Amin, the learned Public Prosecutor appearing for the State. A Division Bench, speaking through Shearer, J., observed as under:

> *"4... I think the rule of law may be laid down in a few words in this manner: to constitute high treason by levying war, there must be an insurrection, there must be force accompanying that insurrection; and it must be for the accomplishment of an object of a general nature. But if all these circumstances are found to concur in any individual case that is brought under investigation, that is quite sufficient to constitute a levying of war.*
>
> *5. Earlier, in his summing up, Tindal C.J. had quoted certain passages which occur in Sir Michael Foster's Discourse on High Treason, and, on one of thee passages, Mr. Sinha has laid considerable stress. The passage in question runs thus:*
>
> > *Insurrection in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labour, or to open all prisons-all risings in order to effect these innovations of a public and general concern by an armed force are, in construction of law, high treason within the clause of levying war; for though they are not levelled at the person of the King, they are against his royal Majesty, and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force.*
>
> *6. It is quite clear that, in making these observations, Sir Michael Foster had in mind certain of the early trials treason, and, in particular, the case of Burton, which occurred in 1597. The report of that case shows that certain persons were these charged "with conspiring to assemble themselves and moving others to rise and pull down inclosures." In the previous reign an Act had been passed making it a felony for "twelve or more persons to assemble with intent to pull down inclosures, pales and the like with force," and it was, in consequence, contended that, what Burton and the other prisoners had conspired to do, might amount to a felony, but could not amount to treason, as if it was treason, there would have been no need for Parliament to have enacted such a statute. The contention was negatived on the ground that the prisoners had, conspired to pull down inclosures in general, and not certain inclosures in particular. This decision was followed in two subsequent trials for treason, namely in R. v. Peter Messenger (1668) 6 Tr. 879, in which certain persons were indicted for high treason in levying war against the King "on the pretence*

of pulling down bawdy-houses," and the case R. v. Dammaree (1710) Tr. 521, in which certain persons were indicted for high treason in levying war against the Queen "under the pretence of pulling down the meeting houses of the Dissenters." The ratio decidendi in all these cases will sufficiently appear from this passage in the summing up of Sir Thomas Parker C.J. in the latest of them, namely the case in R. v. Dammaree (1710) 15 Tr. 521. That learned Judge said this:

In the case of inclosures, where the people of a town have had part of their common inclosed, though they have come with a great force to throw down that inclosure, yet that is not levying of war, but if any will go to pull down all inclosures and make it a general thing to reform that which they think a nuisance, that necessarily makes a war between all the lords and the tenants. A bawdy-house is a nuisance and may be punished as such, and if it be a particular prejudice to any one if he himself should go in an unlawful manner to redress that prejudice, it may be only a riot, but if he will set up to pull them all down in general, he has taken the Queen's right out of her hand, he has made it a general thing, and when they are once up, they may call every man's house a bawdy-house, and this is a general thing, it affects the whole nation." What was really decided in these cases was that in certain circumstances attacks by riotous mobs on private property might amount to levying war against the King. There is nothing in the decisions which in any way goes to support the contention which was put forward by the learned advocate for the appellant that, inasmuch as this mob contented itself with taking possession of one police station and did not manifest any intention of going on to take possession of any other police station, the offence which was committed, was necessarily the offence of rioting, and could not possibly be the more serious offence of waging war against the King. Mr. Sinha, in the course of his argument, referred to an observation made by Oldfield and Krishnan JJ., in In re Umayyathantagath Puthan Veetil Kunhi Kadir A.I.R. 1922 Mad. 126, that it is sometimes a matter of difficulty to say whether there has been a levying or waging of war against the King, or merely a riot of a serious kind. This very point was, I find, dealt with at considerable length in the trial of Andrew Hardie, which took place in Scotland in (1820) 1 Tr. (N.S.) 610 at page 623. In his summing up in that case, the Lord President is there reported as having said:

Gentlemen, it may be useful to say a few words on the distinction between levying war against the King and committing a riot. The distinction seems to consist in this, although they may often run very nearly into each other. Where the rising or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, and not to resisting or calling in question the King's authority or prerogative then the tumult, however numerous or outrageous the mob may be, is held only to be a riot. For example, suppose a mob to rise, and even by force of arms to break into a particular prison and rescue certain persons therein confined, or to oblige

the Magistrates to set them at liberty or to lower the price of provisions in a certain market, or to teardown certain inclosures, which they conceive to encroach on the town's commons. All such acts, though severely punishable, and though they may be resisted by force, do not amount to treason. Nothing is pointed against either the person or authority of the King. For this reason, after the most mature consideration, the outrageous proceedings of the mob of Edinburgh, in the affair of Porteous, were held not to amount to treason, and the few persons who were tried, were tried only as for riot, because, although there was in that case an interference with the royal prerogative of mercy, yet as it was only directed against the exercise of it in that individual case, and did not, in any degree, go to impeach or resist His Majesty's general exercise of it in other cases, it was determined to proceed, against those accused only as for riot, and not as for treason.

But, gentlemen, wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar views and interests of the persons concerned in it, but common to the whole community, and striking directly the King's authority or that of Parliament, then it assumes the character of treason. For example, if mobs were to rise in different parts of the country to throw open all inclosures and to resist the execution of the law regarding inclosures wheresoever attempted, to pull down all prisons or Courts of justice, to resist all revenue officers in the collecting of all or any of the taxes, in short, all risings to accomplish a general purpose, or to hinder a general measure, which by law can only be authorised or prohibited by authority of the King or Parliament, amount to levying of war against the King and have always been tried and punished as treason. It is, therefore, not the numbers concerned, nor the force employed by the people rising in arms, but the object which they have in vie that determines the character of the crime, and will make it either riot or treason, according as that object is of a public and general, or private and local nature.

7. As the career and tragic end of Captain John Porteous are probably not known to many outside the country to which he belonged and as some knowledge of them may serve further to elucidate the observations of the Lord President, I may say that he was the Captain of the City Guard at Edinburgh and, as such was instructed to attend at a public execution which took place in that town in 1786, and prevent any disturbance. After the prisoner had been hanged, Captain Porteous, apprehending an attempt to cut down and remove the dead body, opened fire on the crowd, killing a number of persons and wounding many others. This he did without obtaining any order from any of the Magistrates who were present, and, indeed, apparently without consulting them. He was subsequently tried for murder and was convicted and sentenced to death. A memorial on his behalf was submitted to King George II, and, as King Gorge II was then out of the kingdom, having gone to Hanover, Queen Caroline respited the

execution for a period of six weeks. This enraged a great many people in and around Edinburgh and a conspiracy was formed to raid the prison in which Captain Porteous was confined and to take him out and hang him. The prison was, in fact, stormed, and Captain Porteous was taken from it to the Grassmarket where he had opened fire on the crowd, and was there hanged. Mr. Sinha has criticised an observation of the learned Special Judge that it is a matter of common knowledge that the object of the recent disturbances and risings throughout the country was to paralyse the administration and to compel the Government to submit to the demands of the Indian National Congress.

8. The learned Special Judge, it is complained, has assumed that there was an insurrection and an insurrection for the accomplishment of an object of a general nature. There is a certain amount of force in this criticism, although, in fairness to the learned Special Judge, it must be observed that no such argument, as has been addressed to us with so much ability, was apparently addressed to him. Mr. Sinha, no doubt, went too far when he said that an attack, made on one police station, could not amount to waging war against the King, but he was correct in saying that, prima facie, the persons, who made such an attack, were guilty or rioting, and that, if the Crown charged them instead with waging war against the King, it was incumbent on the Crown to show that there was an insurrection and not a riot, and that the insurrection was for the accomplishment of an object of a general nature. Mr. Sinha was, also, correct in saying that there was no obligation on Jubba Mallah and his associates to show that their object was, and that it was for the Crown to establish that by evidence. As pointed by the Lord President in (1820) 1 Tr. (N.S.) 610 it is the latter point which is the crux of the matter. Does the evidence on the record show conclusively what the object of this mob or of its leader was?

9. There is nothing in the evidence to suggest, and no reason whatever to suppose, that Mr. Waller or the assistant Sub-Inspector and the constables under him had done anything to arouse animosity against them in Minapur and its neighbourhood. On the contrary, it is to be observed that, although Mr. Waller fired into the mob with a gun and also with a revolver, the mob allowed him to get away from the police station. It was not until they had destroyed the records and furniture of the police station that it occurred to any of them to seek out the Sub-Inspector and the constables, who had escaped, and maltreat them. Once of the chaukidars said that, when the mob appeared at the police station, its leaders called on them to remove and throw away their uniforms. A dafadar, Rajeshwar Singh, said that one Sahdeo Ojha, who had been in the mob, subsequently went round some villages in the locality, warning the dafadars and chaukidars not to go back to the police station or to communicate with or in any way assist the regular police. According to this dafadar, Sahdeo Ojha told him that he and other congress men had set up a thana of their

HC-NIC Page 58 of 68 Created On Wed Dec 02 17:14:25 IST 2015

own and would pay any chaukidars or dafadars who joined them. Another dafadar, Musafir Singh, said that this Sahdeo Ojha and some other congress men had actually set up a thana in a school building at Lautan, which remained there until a military force arrived in the locality. Among the slogans uttered by the mob were, it was said, e "Ungrez raj nash ho" and "Congress raj Kaem ho." That the congress party is a political party with a very large number of adherents and that, at or about the time when this police station at Minapur was attacked, other police stations and public buildings over a wide area elsewhere were also attacked by persons who professed to be members of the congress party and to be acting on its behalf, are facts so notorious that judicial notice may, I think, properly be taken of them.

10. A Full Bench of the Allahabad High Court has already taken judicial notice of this vide Saling Ram v. Emperor MANU/UP/0018/1942 : AIR 1943 All 26 and the Courts in England have taken judicial notice of similar facts as, for instance, that particular areas have been attacked by hostile aircraft. "Insurrection" is defined in the Oxford Dictionary as the "action of rising in arms or open resistance against established authority or Governmental restraint."

11. As was pointed in (1820) 1 Tr. (N.S.) 610 and has been pointed out in many other cases before and since, the numbers concerned and manner in which they were equipped or armed are not material, and it is, therefore, unnecessary for me to discuss the evidence that this mob or a portion of it was drawn up in military or semi-military formation. Even if the evidence is untrue-and it may perhaps be untrue, that is a matter of no importance whatever. The size of this mob was such that the men in it must have come from many different villages and the object of its leaders, as shown by the evidence, was to substitute for the authority of His Majesty the King-Emperor in the area round Minapur the authority of the congress party or of those persons who were or professed themselves to be members of the congress party and acting on its behalf in this area. Quite clearly, there was an insurrection with an object of a general nature, and any person, who voluntarily joined in that insurrection, as Jubba Mallah undoubtedly did, must be deemed, in law, to have waged war against the King."

47 Before I proceed to apply the general principles explained by the Supreme Court in the case of **Jamiludin Nasir (Supra),** I deem it necessary to recapitulate the allegations. To put it briefly, those are as under:

(1) The demand or claim to include the Patidar / Patel Community in the list of the OBCs is thoroughly misconceived and not tenable in law. Although the members of the Patidar Community are aware of the position of law, yet they hatched a criminal conspiracy for the purpose of bringing into hatredness and contempt, and to excite disaffection towards the Government of Gujarat. The persons concerned deliberately and knowingly, by words spoken and written, attempted to undermine the public order and lawful authority of the State.

(2) The accused persons conspired and acted in pursuance to the said conspiracy to instigate a deliberate and organized attack upon the Government forces.

सत्यमेव जयते

(3) The accused persons entered into a scuffle with the police.

THE HIGH COURT

(4) The accused persons torched the vehicles and office of one BJP MLA, namely, Shri Rishikesh Patel.

OF GUJARAT
WEB COPY

(5) The accused persons burnt effigies. The members of the Patidar Community burnt effigies of the community leaders.

(6) More than 300 odd rallies, agitation or demonstration were conducted by the groups across the State.

(7) Railway lines across the State were damaged.

(8) An unruly mob seized fire arms from the police party and opened fire on them.

(9) The police vehicles and police stations were torched.

(10) The unruly mob damaged AMTS, BRTS and GSRTC buses, including the Fire Brigade vehicles.

48 Keeping the above in mind, there is no element of doubt that more than a *prima facie* case can be said to have been made out of rioting at a large scale. However, the question before me is whether the same constitutes an offence of waging war against the Government. The offence of waging war against the Government and committing a mamoth riot may often run into each other, but at the same time, there is a fine distinction between them. Where the rising or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, and not resisting or calling in question the Government authority or prerogative, then the tumult, however, numerous or outrageous the mob may be, is only a riot. But wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar interests of the persons concerned in it, but common to the whole community, and striking directly the Government authority, then it assumes the

THE HIGH COURT OF GUJARAT WEB COPY

character of treason.

49 According to the English statute and the explanation by the English Judges in the vintage decisions, there are two kinds of levying war : one against the person of the King : to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors : the other, which is said to be levied against the majesty of the King, or, in other words, against him by his regal capacity; as when a multitude rise and assembly to attain by force and violence any object of a general public nature; that is levying war against the majesty of the King; and most reasonably so held, because tends to dissolve all the bonds of society, to destroy property, and to overturn the Government; and by force or arms, to restrain the King from reigning, according to law.

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

50 If I apply the principles of law explained in the English decisions, then probably, a *prima facie* case of waging war against the Government to achieve a particular purpose, i.e. reservation, could be said to have been made out. However, as explained by the Supreme Court in the case of **Jamiludin Nasir (Supra),** the expression "waging war" should not be stretched too far to hold that all acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of "waging war" against the Government. An approach

of the Court should be balanced and realistic. What was viewed in the long long past should not be applied mechanically.

51 The intention and purpose behind the agitation is to include the Patidar / Patel Community in the list of the OBCs. As observed by the Supreme Court in **Navjot Sandhu (Supra)** that the moment it is found that the object sought to be attained is of a general public nature or has a political colour, the offensive violent act targeted against the armed force and public officials should not be branded as acts of waging war. In the long long past, an organized movement attended with violence and attacks against the public officials and armed forces even while agitating for the repeal of an unpopular law or for preventing the burdensome taxes were viewed as acts of treason in the form of levying war.

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

52 In my view, an organized movement attended with violence while agitating for the inclusion of the Patidar / Patel Community in the list of the OBCs should not be viewed as an act of treason in the form of levying war.

53 There is no direct challenge to the authority or the sovereignty of the Government. Tomorrow, supposing, if the Government deems fit to

include the Patidar / Patel Community in the list of OBC, then probably, the agitation would come to an end. This is where lies the fine distinction between rioting for a particular purpose and high treason.

54 I may in my own way draw the difference between a riot, and an insurrection.

(a) A riot is a disturbance. An insurrection is a revolt or rebellion against the government.

(b) A riot is a noisy, violent public disorder caused by a group or crowd of persons, as by a crowd protesting against another group, a government policy, etc., in the streets.

(c) An insurrection is an act or instance of rising in revolt, rebellion, or resistance against the civil authority or an established government.

(d) An insurrection is more organized resistance, while a riot is chaos.

(e) A riot is a chaotic, spur of the moment occasion, where people who are angry over whatever reason suddenly turn violent. An insurrection is a revolt against an institution or a government, with a purpose, and usually better planning.

(f) Riots are short in duration, and usually localized.

(g) Insurrections are long term civil disobedience, and are generally spread out among the populace.

55 A person taking part in an organized attack on the constituted authority, and that attack having for its object the subversion of the Government and the establishment of nature in its place would be guilty of the offence of waging war. To put it in other words, when an object of the activities is to overthrow the Government and efforts in that

direction to complete the activity may constitute an offence of waging war. Such is not the position so far as the case in hand is concerned.

56 I am of the view that even if I accept the entire case of the prosecution as it is, the basic ingredients to constitute the offence of "waging war" punishable under section 121 of the IPC are lacking. It would be to much to say that the violent acts resulting in destruction of public property, etc, would fall within the expression "waging war".

57 The State of Gujarat in the past had witnessed worst of the riots. In the year 1974, there was the *Nav Nirman* agitation across the State, probably, much more grave and serious in intensity. Many people had lost their lives. To the best of my knowledge, the Gujarat Legislative Assembly was dissolved and the President rule was imposed for a period of almost six months. Thereafter, fresh Election was declared. Even in such circumstances, the prosecutions if any were not for "waging war". In the year 1985, the State of Gujarat again witnessed worst of the riots, popularly known as, the "*Anamat Andolan*". An extensive damage was caused to the public property, etc. Many people lost their lives.

58 In the year 1992, again, the State witnessed very bad communal riots due to demolition of the '*Babri Masjid*'.

59 Even at that point of time, the prosecutions were not for waging

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

war punishable under Section 121 of the IPC.

60 Judged by the standard laid down by the Supreme Court in **Navjot Sandhu (supra)** and **Jamiludin Nasir (supra),** it is difficult to hold that there has been a conspiracy to wage war against the Government of Gujarat, or that there are the necessary elements in this case, to constitute the offence of waging war against the Government of Gujarat. However, a *prima facie,* case of conspiracy to overawe by means of criminal force, or the show of criminal force the Government is made out. I am saying so because Section 121A of the IPC deals with two kinds of conspiracies:-

One conspiring within or without India to commit any of the offences punishable by Section 121 IPC and the other conspiring to overawe by means of criminal force, or the show of criminal force the Government.

THE HIGH COURT OF GUJARAT WEB COPY

61 I am not impressed by the vociferous submission of Mr. Amin that the persons who attacked police stations are guilty of waging war against the Government. *Prima facie,* the persons who attacked the police stations, damaged public property are guilty of mammoth rioting, and if the Government authority charges them instead of waging war against the Government, it is incumbent upon the Government to show that there is insurrection and not a riot and the insurrection is that the accomplishment of an object of a general nature. The prosecution, in my

opinion, has not been able to make out a *prima facie* case of insurrection. When I am talking about insurrection, I mean, a violent uprising against an authority or Government. This is what is lacking in the present case, though more than a *prima facie* case could be said to have been made out of a mammoth rioting. The riot is an unlawful assembly in a particular State of activity, which activity is accomplished by the use of force or violence.

62 If I am asked by any one to name two things, which has destroyed this country or rather, has not allowed the country, to progress in the right direction, then the same is, (i) Reservation and (ii) Corruption. It is very shameful for any citizen of this country to ask for reservation after 65 years of independence. When our Constitution was framed, it was understood that the reservation would remain for a period of 10 years, but unfortunately, it has continued even after 65 years of independence. The biggest threats, today, for the country is corruption. The countrymen should rise and fight against corruption at all levels, rather than shedding blood and indulging in violence for the reservation. The reservation has only played the role of an amoeboid monster sowing seeds of discord amongst the people. The importance of merit, in any society, cannot be understated. The merit stands for a positive goal and when looked at instrumentally, stands for "rewarding those actions that are considered good". Then, this instrumental nature of merit that

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

should be given importance – emphasizing on and rewarding merit is a means towards achieving what is regarded as good in the society. The parody of the situation is that India must be the only country wherein some of the citizens crave to be called backward.

63 In view of the above, all these applications are partly allowed. The First Information Report is ordered to be quashed so far as the offences punishable Sections 121, 153A and 153B are concerned. The investigation may proceed further in accordance with law so far as the offence punishable under Sections 124A and 121A is concerned.

(J.B.PARDIWALA, J.)

FURTHER ORDER

After the judgment is pronounced, Mr. Mangukiya, the learned counsel appearing for the petitioner of the Special Criminal Application No.6339 of 2015 made a request that the interim order passed by this Court earlier may be continued for a period of two weeks.

In the facts and circumstances of the case, the interim relief earlier granted in the Special Criminal Application No.6339 of 2015 shall continue for a period of 15 days.

(J.B.PARDIWALA, J.)

chandresh

THE HIGH COURT OF GUJARAT WEB COPY