
(1984) 09 GUJ CK 0005

In the Gujarat High Court

Case No : Criminal Revision Application No. 183 of 1983

Jasmat Parshottam Ganesh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-09-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 386
Customs Act, 1962 — Section 135(1)

Citation : (1995) 76 ELT 548 : (1985) 2 GLR 1121

Hon'ble Judges : B.S. Kapadia, J;A.S. Qureshi, J

Bench : Division Bench

Advocate : S.J. Joshi, B.C. Patel and K.J. Kakkad, for the Appellant; S.R. Divetia, Assistant Public Prosecutor, for the Respondent

Judgement

B.S. Kapadia, J.—The above-mentioned Revision Application have been filed by the original accused Nos. 6, 4, 1, 5 and 2 respectively against the order passed by the learned Additional Sessions Judge, Junagadh in Criminal Appeals Nos. 70/82, 73/82, 83/82 and 78/82 filed by them against the order of conviction and sentence passed by the learned Chief Judicial Magistrate, Junagadh in the Criminal Case No. 52 of 1981.

2. The learned Chief Judicial Magistrate by his order dated 19th June, 1982 in the aforesaid case had convicted the accused Nos. 1, 2, 4, 5 and 6 for offence punishable u/s 135(1)(b)(i) of the Customs Act and passed the order of seven years R.I. and a fine of Rs. 1,000/- and in default of the payment of fine, to undergo further R.I. for one year, against each of the accused. The learned Additional Sessions Judge after hearing the aforesaid appeals partly allowed the appeals confirming the order of conviction passed by the learned Chief Judicial Magistrate, Junagadh against the aforesaid accused and modified the order of sentence as under :

"For the reasons aforesaid each appellant/accused in sentenced to suffer R.I. for 42 months and to pay fine of Rs. 20,000/- and in default of fine to undergo

further R.I. for 20 months."

The learned Additional Sessions Judge has directed the Chief Judicial Magistrate to proceed against the absconding accused Nos. 3 and 7 accordingly.

3. The facts of the case in brief can be stated as follows :

4. The present petitioners were the members of the crew of the Vessel named "Al-Barkati" registered at Ajman U.A.E. 29381. The said vessel was travelling in the sea between Madhwad and Veraval heading towards Madhwad coast on 23-2-1981. The original complainant Shri S. C. Chhaya is the Assistant Collector of Customs at Porbandar. The Customs Officers frequently undertake the patrolling in the sea just to check and to detect smuggling offences and as much on the receipt of the information the Porbandar Customs Division undertook patrolling in the sea between Madhwad and Veraval in the Departmental launch named as Al-Faruqui on 22-2-1981.

5. During the course of the sea patrolling at about 4.00 p.m. on 23-2-1981 they notices one big vessel heading towards the coast of Madhwad. On suspicion, they directed the Departmental launch towards the above foreign vessel. The Customs Officers of Al-Faruqui gave signals to the above-mentioned unknown vessel to stop, but instead of honouring the signals and stopping, the vessel made an attempt to escape. Therefore, the Customs Officers gave warning signal by resorting to fire in the air. Still however, they did not stop the vessel. However, firing was done on the above-mentioned foreign vessel and by about 5.00 p.m. the Customs Officers reached alongside the abovenamed vessel and got it stopped. The said vessel was carried towards Veraval coast.

6. On inquiry and search it was found that Mr. Shrikti Al-Barkati was the owner of the said foreign vessel as disclosed by the tindals and crew members of the said vessel. The petitioners and absconding accused were found to be the crew members of the said vessel. The accused No. 1 who is the petitioner in the Criminal Revision Application No. 254/83 was the tindal, the leader of the team. The accused No. 2 Maksud, who is a Pakistani citizen was the Engine driver and the accused Nos. 3 to 7 were the members of the crew.

7. Thereafter the regular search was made in the presence of the Panchas from 11.00 p.m. on 23-2-1981 to 4.00 p.m. on 25-2-1981 and during the search, 121 packages containing wrist-watches, synthetic fabrics, radios and other goods as described in the panchnama dated 23-2-1981 to 25-2-1981 were found on the said vessel Al-Barkati. Some materials were also found from search of the persons of the petitioners. The goods which were thus detected were worth Rs. 53,22,358/-. The goods were of foreign origin. The Customs Officers asked for the documents such as bills of goods, document pertaining to customs duty, Import and Export Licence required under the Act, etc., but the petitioners could not furnish any document to justify that the goods which were carried by them were permissible goods. The petitioners were thus found carrying the above-mentioned goods illegally and without any authority.

8. Shri. B. I. Patel recorded the statements u/s 108 of the Customs Act. The statement of Jasmat, the accused No. 6 is at Exh. 134 starting from page 421 of the record of the case. The statement of Ayubali Bholim, the accused No. 4 is at Exh. 238 starting from page 443 of the record. The statement of Abbas Abdulla, the accused No. 1 is at Exh. 133 starting from page 407 of the record. The statement of Purshottam Laxman, the accused No. 5 is at Exh. 139 starting from page 451 of the record. The statement of Maksud, the accused No. 2 is at Exh. 135 starting from page 440 of the record. Thus, the petitioners are alleged to have committed offence punishable u/s 135(1)(b)(i) of the Customs Act. After obtaining the sanction to prosecute from the Collector of Customs and Central Excise, Ahmedabad, the complaint at Exh. 1 was filed on 10th December 1981. The charge is framed at Exh. 25 against the accused. The accused have pleaded not guilty. The prosecution has examined Shri Chhaya at Exh. 23, Shri Chaudhary at Exh. 61 Shri Saiyed at Exh. 120 and Shri B. I. Patel at Exh. 132. At the time of recording the further statement u/s 313 of the Criminal Procedure Code the accused Nos. 3 and 7 were absconding and hence the case against the accused Nos. 3 and 7 was separated and the case against the present petitioners was proceeded further. The present petitioners in their further statement have denied all the material facts alleged against them in the prosecution evidence. No defence was led by the petitioners. The learned Chief Judicial Magistrate after appreciating the evidence on the record held that the petitioners have committed the aforesaid offence and the learned Judge has sentenced each of them as stated just hereinbefore and the learned Addl. Sessions Judge has also passed the order, in the appeals filed by the accused, modifying the sentence as stated just hereinbefore.

9. Mr. S. J. Joshi, the learned Advocate appeared on behalf of Jasmat Purshottam Ganesh, original accused No. 6. He has submitted that the learned Sessions Judge has committed an error in relying on the statement of the other accused. He has further submitted that the learned Addl. Sessions Judge has also erred in not ascertaining as to whether the statement u/s 108 was voluntary. He has further submitted that the statement of accused No. 6 u/s 108 is not taken into consideration that he was only the passenger. He has also submitted that the learned Addl. Sessions Judge has erred in coming to the conclusion that the vessel Al-Barkati was within the territorial waters inasmuch as it is not based on any documentary evidence. Lastly, he has submitted that the sentence imposed on the accused No. 6 is very harsh.

10. The learned Advocate, Shri B. C. Patel appointed through the Legal Aid Committee, has appeared for the original accused No. 1 Abbas Abdulla, who is the petitioner in Criminal Revision Application No. 254/83. Shri Patel has submitted that the accused No. 1 was arrested on 25th February 1981 and he was not released on bail pending the trial and substantial sentence is over and he is undergoing the sentence in default of payment of fine and the accused No. 1 pleads for mercy. He has further submitted that the accused Nos. 1 and 2 had not engaged their lawyers in the trial court and they should have been given the

assistance through the legal Aid Committee which has not been done. He has submitted on this point that as the accused No. 1 served out the substantial sentence, it is not necessary to send the case for trial.

11. Shri B. C. Patel, the learned Advocate appointed through the Legal Aid Committee also appeared for the original accused No. 5 Parshottam Laxman and submits that the accused No. 5 was simply the passenger and he has been wrongly convicted. He has submitted that the accused No. 5 was in custody from 25th February 1981 to 16th March 1981 and after conviction on 19th June 1982 until now. He has therefore, submitted that the sentence should be reduced.

12. Mr. B. C. Patel, the learned Advocate has also appeared for Mr. B. B. Oza, the learned Advocate in the Criminal Revision Application No. 222/83 on behalf of Ayubali Bholim, the original accused No. 4. According to Mr. Patel, the accused No. 4 was a passenger and he has been wrongly convicted.

13. Mr. K. J. Kakkad, the learned Advocate has appeared for the original accused No. 2 Maksud, who is the petitioner in Criminal Revision Application No. 332/84. He submits that Maksud was merely the engine driver and that he had no knowledge about the smuggled goods and therefore, he has been wrongly convicted. He has also submitted that the Additional Sessions Judge has committed an error in modifying the sentence which has the effect of enhancement of sentence for which he has no power u/s 386 of the Criminal Procedure Code.

14. Shri S. R. Divetia, the learned Asstt. Public Prosecutor appears for the respondent State in all the Criminal Revision Applications and submits that the learned Addl. Sessions Judge has passed the order in modification of the order passed by the learned Chief Judicial Magistrate by partly allowing the appeals. He states that the learned Sessions Judge has so done under the provisions of Section 386 of the Criminal Procedure Code. Shri Divetia submits that when the substantial sentence of seven years" R.I. is reduced to 3-1/2 years R.I., the proportionate increase in the fine cannot be said to be enhancement of sentence. He further submits that there is clear, sufficient and cogent evidence on the record to show that all the petitioners were in know of the smuggled goods and they were in possession of the said smuggled goods and that they have been rightly convicted.

15. We think it would be necessary to consider the submission of Shri Kakkad on behalf of original accused No. 2 Maksud on the point that the appellate Court has modified the order of sentence passed by the Trial Court by enhancing the sentence. This point affects all the petitioners because it is a common order made for all the petitioners by the learned Addl. Session Judge and the Trial Court has also made common order for all the petitioners. The Trial Court has passed the order that each of the accused was sentenced to suffer R.I. for seven years and to pay a fine of Rs. 1,000/- and in default of payment of fine to undergo R.I. for one year. The appellate Court has modified the order as under :

".... Each appellant/accused is sentenced to suffer R.I. for 42 months and to pay fine of Rs. 20,000/- and in default of the payment of fine to undergo further R.I. for 20 months."

16. Shri Kakkad submit that this order for imposing fine of Rs. 20,000/- and in default of payment of fine to undergo R.I. for 20 months is in the nature of enhancement of sentence as the Trial Court has only imposed the fine of Rs. 1,000/- and in default of payment of fine to undergo R.I. for one year only. He further submits that u/s 386 of the Criminal Procedure Code the appellate Court has no power to enhance the sentence though it has power to alter the nature or extent of the sentence. While Mr. S. R. Divetia, the learned A.P.P. submits that when the substantial sentence is reduced and fine is imposed it cannot be said to be enhancement of sentence inasmuch as the fine is always a lighter sentence in comparison with sentence of imprisonment. He further submits that even taking the aggregate sentence of imprisonment including the sentence of imprisonment in default of payment of fine, it does not exceed the original sentence of imprisonment ordered by the Trial Court and hence, it is no enhancement and, therefore, the learned Addl. Sessions Judge has not committed any error in passing the order of sentence.

17. With a view to appreciate the arguments it would be profitable quote Section 386 of the Criminal Procedure Code :

"386. Powers of the appellate Court. - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears and in case of an appeal u/s 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) In an appeal from a conviction

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence, but not so as to enhance the same.

(c) in an appeal for enhancement of sentence

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding alter the nature or the extent, or nature and extent of the sentence, so as not to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused had an opportunity of showing cause against such enhancement.

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

18. From reading Section 386 sub-clause (iii) of clause (b), it is clear that the appellate court has power to alter the nature or extent or the nature and extent of the sentence, but not so as to enhance the same. u/s 53 of the Indian Penal Code different punishments are provided. The first punishment is death, the second is imprisonment for life, (third is omitted), fourth is imprisonment which is of two descriptions namely : (1) Rigorous and (2) Simple, fifth is forfeiture of property and sixth is fine. Thus looking to the order in which the punishment of "fine" is mentioned it is clear that it is in comparison with other punishments a lighter punishment. Section 70 of the Indian Penal Code provides that the fine or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender is liable to imprisonment for a longer period than six years, than it any time previous to the expiration of that period; and the death of the offender does not discharge from the liability and property which would, after his death, be legally liable for his debts. Section 421 of the Criminal Procedure Code provides for the modes in which the fine can be recovered, but in the proviso it is specifically enacted that if the sentence directs that in default of payment of fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine u/s 357. Careful consideration of the above-referred provisions is necessary to consider the effect of undergoing the sentence imposed in default of payment of fine. Therefore, except in special circumstances as provided in the proviso to Section 421 of the Criminal Procedure Code, when the offender has undergone the whole of such period in default of payment of fine, then the Court shall not issue the warrant of recovering the amount of fine. In that view of the matter, the aggregate of the substantive sentence of imprisonment and the sentence of imprisonment ordered to undergo in default of payment of fine should not exceed the original sentence ordered to be undergone by the Trial Court and if it exceeds then it would amount to enhancement of the sentence.

Here, in the present case the Trial Court has imposed the substantive sentence of seven years" R.I. while the appellate court has reduced the substantive sentence of R.I. to 42 months and imposed a fine of Rs. 20,000/- and in default of payment of fine further R.I. for 20 months. The aggregate of the imprisonment would come to 62 months. While the original order of imprisonment was for seven years i.e. 84 months. If this standard is accepted then there is no enhancement.

19. Shri S. R. Divetia, the learned A.P.P. has first drawn our attention to the judgment of the Bombay High Court in the case of Queen Empress v. Chagan Jagannath reported in ILR 23 Bom 439. In the said case the accused was convicted of criminal breach of trust and sentenced to nine months" rigorous imprisonment. The appellate court altered to one of six months" R.I. and a fine of Rs. 1,000/- or, in default of payment, three months" further R.I. It was contended in the High Court that the alteration of the sentence amounted to an enhancement of the sentence beyond the powers of the appellate Court u/s 423 of the Criminal Procedure Code. In the said case the Division Bench held that there was no enhancement of the sentence. It has been observed by the Division Bench as under :

".... We have, however, to deal with the case as involving a point of law, and looked at in that light we think that cannot yield to the contention. A sentence of the fine is always considered lighter than a sentence of imprisonment. A sentence, therefore, of a fine of Rs. 1,000/- would not be so severe as a sentence of three months" rigorous imprisonment, and the substitution of the former for the latter would not be an enhancement. The sentence of three months" rigorous imprisonment, in default of payment, does not make the whole sentence of imprisonment larger than it was before. In a case which came before the Madras High Court (which has not been reported, but the record of which has been sent to us - Criminal Revision Case No. 460 of 1888 decided on the 27th August 1888) where the original sentence of three months" rigorous imprisonment had been altered to one of two months" rigorous imprisonment and Rs. 30, fine in default one month"s rigorous imprisonment. Shepherd J. passed the following decision :- "I do not think that there is any enhancement of the sentence. If the accused is in a position to pay the fine, and does pay it, the nature of the sentence is altered, but the sentence is not enhanced. If he cannot and does not pay the fine, the sentence remains unaltered. The case of Queen Empress v. Ishri (1894) 17 All 1967 is not an authority to the contrary, for there the term of imprisonment plus the additional imprisonment in default of the payment of the fine exceeded the original term, and the altered sentence was on that account held to be an enhanced one."

20. There is also Full Bench judgment of the Madras High Court in the case of Bhaktavatsalu Naidu and Others v. Emperor reported in Indian Law Reports - Madras 103. In the said case also the aforesaid judge of the Division Bench of the High Court has considered and held that where the aggregate period of

imprisonment awarded on appeal is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellant Court is no enhancement of the sentence within the meaning of Section 423 of the Code of Criminal Procedure (now Section 386 of the Criminal Procedure Code). In the said case the appellate court reduced sentence of one month's imprisonment to five days but imposed in addition a fine with two weeks' imprisonment in defaults. It was held that the sentence of the Appellate Court was not illegal.

21. There is another judgment in the case of Mahadoo Vs. State of Hyderabad, wherein the original sentence was of 8 months' R.I. and fine of Rs. 200/- and in default 2 months' R.I. The appellate court reduced the substantive sentence by holding that the imprisonment already undergone i.e. five days was sufficient and raised the fine from Rs. 200/- to Rs. 300/-. Following the aforesaid judgment of the Bombay High Court it was held that it cannot be regarded as enhancement of the sentence. In the said case it is observed as under :

"A sentence of fine is always regarded as lighter than a sentence of imprisonment where the aggregate period of imprisonment that an accused has to undergo, including the period of imprisonment that he has to undergo for default of payment of fine, is less than the period of imprisonment, that he has been originally sentenced to undergo, it cannot be regarded as an enhancement of the sentence although the fine imposed has been increased"

Suffice it to say that there are also other judgments taking the same view following either the above-referred Bombay High Court's judgment or the Madras High Court's judgment. They are reported in AIR 1931 and Lahore 159 AIR 1937 Lahore page 195 AIR 1949 140 (Nagpur) and Narayan Singh Vs. The State, . It is not necessary to refer to them in detail.

22. Shri Kakkad, the learned advocate for the original accused No. 2, the petitioner in Revision Application No. 332/84 submits that this order imposing fine of Rs. 20,000/- and in default of payment of fine to undergo R.I. for 20 months is in the nature of enhancement of sentence as the Trial Court has only imposed fine of Rs. 1,000/- and in default of payment of fine to undergo R.I. for one year only. He further submits that u/s 386 of the Criminal Procedure Code the appellate Court has no power to enhance the sentence though it has power to alter the nature or extent or the nature and extent of the sentence.

23. In view of the aforesaid judgments and principle of aggregate sentence of imprisonment laid down therein, it cannot be said that in the present case when the sentence of R.I. for seven years is altered by sentence of R.I. for 42 months and fine of Rs. 20,000/- and in default of payment of fine to undergo R.I. for 20 months, is an enhancement of sentence. Hence, the submission of Shri Kakkad cannot be accepted.

24. Now it would be convenient to deal with another contention raised by Shri S. J. Joshi, the learned advocate for the original accused No. 6 that the learned Addl. Sessions Judge has erred in coming to the conclusion that the vessel Al-

Barkati was within the territorial waters inasmuch as it is not based on any documentary evidence.

25. It may be stated that the petitioners in these Revision Applications were charged for the commission of offence punishable u/s 135(1)(b)(i) of the Customs Act, 1962. It is an offence relating to any of the goods to which Section 123 applies and the market price whereof exceeds one lakh of rupees. Section 123 of the Act provides for the burden of proof in certain cases with regard to the goods which are seized under this Act in the reasonable belief that they are smuggled goods on the persons referred to therein that they are not smuggled goods. Smuggling is defined u/s 2(39) of the Act as under :-

"Smuggling" in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113."

The goods which are liable to confiscation u/s 111 of the Act inter alia refers to the goods imported by sea as specified therein. The word "import" has been defined in Section 2(23) of the Act as under :

"2(23) import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India."

"India" is also defined u/s 2(27) of the Act which includes the "territorial waters" of India. So, if any goods are brought within the territorial waters from outside India it would mean "import" to India. "Indian Customs Waters" means waters extending into the sea upto the limit of contiguous zone of India u/s 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, and includes bay, gulf, harbour, creek or tidal river. Section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 reads as under :

"5. Contiguous zone of India. - (1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of 24 nautical miles from the nearest point of the base line referred to in sub-section (2) of section 3....."

Thus, if any articles are brought from outside India within 24 nautical miles from the nearest point of the base line, it would be "import" in India.

26. As per the Standards of Weights and Measures Act, 1976, one mile is equal to 1,609.344 meters and one nautical miles (UK) is equal to 1,853.18 meters and therefore, 24 nautical miles are equal to 44.472 Kms. With this position of law, now we consider as to whether the foreign vessel Al-Barkati when it was stopped by the customs officers on 23rd February, 1981 at about 5.00 p.m. was within the territorial waters of 44.472 Kms. or not. It may be stated at the outset that both the courts below on appreciating the evidence have come to the conclusion that the vessel Al-Barkati occupied by the accused was within the territorial waters at the time when it was stopped at about 5.00 p.m. on 23rd

February, 1981 and, therefore, there is no question of law required to be considered at the time of considering these revision applications. However, with a view to see that there is no failure of justice and with a view to satisfy our conscience on the point, we have carefully perused the evidence on record. Mr. Shivprasad Chhaya, who has given his deposition at Exh. 23 has clearly stated in the cross-examination of the accused No. 1 Abbas that vessel Al-Barkati was caught by the Inspectors S/Shri Saiyed and Mehta and that at that time he was not there and, therefore, he could not say that the said vessel was at a distance of 60 to 70 Kms. from the coast. Further, this witness in the cross-examination of the learned advocate Shri S. D. Vora on behalf of the accused No. 4 has stated that he could not say definitely at what distance the said vessel was. He has voluntarily stated that he could not say about that fact because they are keeping Log Book regarding patrolling of the launch and they are determining the places as per the written report of the Patrolling Officer. Further, in the cross-examination on behalf of the accused No. 6 by learned advocate, Shri Lalwani, he has produced the true copy of the said Log Book which is at Exh. 60. On perusal of the extract of the said Log Book at Exh. 60 it is clear that with regard to the journey particulars in column-7 it is mentioned that PBR (Porbandar) to Veraval and in between Veraval and Madhwad its vicinity and to Verval Jetty. The purpose of the journey is also mentioned as sea-patrolling for working it a specific information given by the Addl. Collector of Customs, Ahmedabad. It is also mentioned in the remarks-column that at about 17.00 hours on 23-2-1981 intercepted one Arab vessel Al-Barkati opposite Madhwad carrying contraband goods from Dubai. Before interception of the vessel a hot chase was given for about one hour and also signals were given. 53 rounds from 303-rifles and 2-rounds from revolver were fired, but no injuries caused to any one. Then the Arab Dhaw was brought to Veraval Jetty at about 22.30 hrs. on 23-2-1981 for detailed examinations and for taking action under the Customs Act, 1962. Thus, it is clear from the true copy of the abstract of Log Book that the prosecution has not suppressed any material and whatever was called for has been produced. However, on perusal of the said abstract of the Log Book it cannot be said that at the time when the vessel Al-Barkati was caught by the Customs Officer at about 5.00 p.m. on 23-2-1981 it was beyond 44.472 Kms. from the coast. It is true that distances travelled during the journey (knotts) in column 11 is shown to be 207, but in absence of seeking any clarification on this point in the cross-examination of prosecution witnesses, it cannot be said that the evidence given by the other witnesses is not correct.

27. On this point there is further evidence of Shri Saukatali at Exh. 120. He has clearly stated in his deposition that on 23-2-1981 at about 4 o'clock he saw one vessel coming towards the coast which was at a distance of 7 Kms. from the coast. He also stated that when the said vessel was at a distance of 2 Kms. from their launch the said vessel changed the direction and accordingly their launch also changed the direction and chased it. He has also further deposed that at the time when it was coming towards the coast its speed was very slow and after

seeing the department's launch it increased its speed. He further deposed that they also increased the speed of the department's launch and when it was at a distance of about half a mile they gave signals to stop it and the sipoys also fired in air from the rifles. Thereafter for about 10 minutes, the said vessel tried to escape and hence firing was done in that direction, but it was so done that neither the vessel nor any person therein would have any damage or injury. Thereafter, the said vessel was stopped and when it was stopped it was at a distance of 7 Kms. from Madhwad coast. He has further deposed that at the time when the said vessel was seen for the first time it was coming towards the coast of Madhwad so that they could see the light house. It may be stated that the accused Nos. 1 and 2 have not cross-examined this witness. In the cross-examination on behalf of the accused Nos. 3 and 5 this witness has further stated that the said vessel was at a distance of 6 to 7 Kms. from Madhwad towards Veraval. He has further stated in the cross-examination of Shri Keshwani on behalf of the accused No. 7 (who is absconding from the stage of recording further statement) that the distance between Madhwad and Veraval is approximately 30 Kms. This witness has further stated in the cross-examination of Shri Lalwani, on behalf of the accused No. 6 that the speed of the departmental launch "Al-Faruqui" was seven miles, but he could not say what was the speed of vessel Al-Barkati. He also could not state upto what distance they chased it, but he has stated that they chased that vessel for an hour. He has further stated that after seizing that vessel when they were coming towards Veraval port the speed of their launch was 3 to 4 Kms. per hour. If the evidence of this witness is properly scrutinized it is clear that Al-Faruqui, the departmental launch, had a speed of 7 nautical miles per hour and when there was a chase for one hour it must have travelled at the most seven nautical miles. Even so the offending vessel "Al-Barkati" would not be more than 24 nautical miles from the shore in any event.

28. Naturally, the question would arise when the vessel Al-Barkati was seized at 5.00 p.m. had it come to Veraval at 10.30 p.m. Shri Saiyed has already given his reply in his deposition that while returning the speed of the departmental launch was 3/4 Kms. per hour. He has also denied the suggestion made to him in the cross-examination that while returning the speed of the departmental launch was 7 Kms. The answer given by the witness appears to be more probable because they had to return along with the vessel Al-Barkati which was tied with the departmental launch and when that is so the speed would be very slow. Under the circumstances, it would take more time for returning to Veraval port. Thus, carefully scrutinising the evidence of this witness and considering it along with the abstract of the Log Book it is clear that when they have travelled the distance as mentioned in column 11 of the abstract of the Log Book they must have spent more time for patrolling before they saw the vessel Al-Barkati at 4.00 p.m. on 23rd February 1981. It is pertinent to note that in the entire cross-examination not even a single question has been put to this witness about the abstract of the Log Book though it was already on the record of the case. Thus, the evidence

itself is sufficient, reliable and convincing to come to the conclusion that when the vessel Al-Barkati, occupied by the accused-petitioners was seized it was within the territorial waters as it was clearly within 24 nautical miles which is equal to 44.472 Kms.

29. In that view of the matter apart from the statement of Abbas, Accused 1 (Exh. 133) u/s 108 of the Customs Act where in he has stated that their vessel was at a distance of 10 Kms. from the coast and the statement of Purshottam, the original accused No. 5 (Exh. 139) wherein he has stated that the vessel was at a short distance from the coast when they saw the other launch, the above evidence is sufficient to confirm the finding on the point arrived at by both the courts below. In that view of the matter we do not find any merit in the contention by the appellant on this point.

30. Shri Joshi, the learned Advocate for the original accused No. 6 Purshottam has also submitted that the learned Judge has committed an error in considering the statement of other accused. It may be stated that the statement recorded u/s 108 of the Act is not the statement recorded by the Police Officer in the course of the investigation which would be hit by Section 162 of the Criminal Procedure Code nor is it the statement recorded by the Magistrate u/s 164 of the Criminal Procedure Code. The said statement, if it is of the voluntary nature can be said to be a statement of the co-accused which can be considered by the Court u/s 30 of the Indian Evidence Act. It may be stated that here in this case as stated earlier, there is sufficient evidence from the prosecution witnesses. However, the reliance on the statements has been placed with a view to lend assurance. It cannot be said that this is a case in which the decision is purely passed on the statement u/s 108 of the Customs Act, but it is used only for the purpose of lending assurance to the versions of the prosecution witnesses. In that view of the matter we do not find any substance in this point.

31. The next contention raised by Shri Joshi, the learned Advocate for the original accused No. 6 is about the voluntary nature of the statement. The statement of Jasmat, the original accused No. 1 starts from page 421 of the record of the case (Exh. 134) and it ends on page 431, wherein he has already given the name of his native place and also the family background, about his education and how he went to Dubai and under what circumstances he wanted to come back, what work he has done on the vessel and also with regard to the things which were found from his possession. In that view of the matter is it difficult to accept the contention that his statement u/s 108 of the Customs Act, has not been recorded. On the point of recording the statement of the petitioners in the present case Shri B. I. Patel, the Customs Superintendent has given his evidence at Exh. 132 and he has clearly proved recording of the said statements. He has proved the statements recorded by him at Exh. 133 to Exh. 139. It is important to note that there is no cross-examination on behalf of the accused Nos. 1 and 2 but on behalf of the original accused Nos. 6 and 7 the learned Advocate Shri Keshwani had cross-examined this witness. Not a single question

is put to the witness that the statement of the accused was not recorded and/or the same was recorded under any threat, promise or coercion or inducement or that the statement was not of voluntary nature. In absence of any cross-examination on the point, the mere assertion in the further statement that his statement was not recorded cannot be accepted as true. As per the version of Shri Patel (Exh. 132) all the accused whose statements have been recorded u/s 108 of the Act had given their statements voluntarily. It is true that such statement should be free and voluntary and it should not be preceded by any threat or inducement. This principle is well laid down, but it cannot be said that Shri Patel had not borne in mind the said principle. It is important to note that here in this case there is not even the assertion made by any of the petitioners that they or any of them was threatened or any inducement was offered to them or to any one of them. Hence, it cannot be held that the statements were not voluntarily made and/or that they were not recorded as per the statements given by them. In that view of the matter, we do not find any substance in the submission that the statements recorded u/s 108 were not the voluntary statements made by the accused-petitioners.

32. It is also submitted by Shri Joshi on behalf of the accused No. 6 that he was merely a passenger and his statement u/s 108 of the Act has not been considered. It may be stated that the accused No. 6 has stated in the statement u/s 108 of the Act that he did miscellaneous labour work for 22 months when he stayed in Dubai, and he made several efforts to come to India, but he was not successful in obtaining the out-pass and, therefore, he could not come. Further, he has stated that he received a letter from his brother Naran wherein he had stated that he was suffering from cancer and asked him to come to India. Thereafter also he made many efforts, according to him. He has further stated that in the meantime, he came to know that one vessel named "Al-Barkati" was to come to India and he met the accused No. 1 Abbas, tindal of the vessel in the evening on 11th February, 1981 and he promised that he would take him to India. However, in the earlier part of the said statement he has stated that he was present at the time when the foreign goods were loaded in vessel Al-Barkati and he had helped in loading the said goods. Further, he has stated that on 23-2-1981 when they were in vessel Al-Barkati they saw the launch of the Customs Department, but they thought it to be Pakistani launch and, therefore, they were going ahead, but on coming nearer they had doubt it was the customs launch and therefore, they changed the side of the vessel and also increased the speed and tried to escape, but within a short time there was firing started from the said launch and therefore, the Khalasies and Nakhudas on account of firing went in the cellar of the vessel. Further, in the statement he has stated that he had come for the first time in the vessel containing smuggled goods and that he has come on his own willingness because he was not in a position to return to his country in any other manner. He has also admitted he knew that it would be an offence to go to the country in this manner, but he had taken the risk to meet his family members and that he has not done any smuggling. Reading the entire

statement as a whole, it is clear that practically he has given the entire biography of his life in short regarding his family, education, native place, etc. He does not seem to be innocent passenger as he claimed to be because he has actively participated in loading the smuggled goods in vessel Al-Barkati and has also acted as Khalasi in the said vessel and when the firing was done in the air he also tried to escape. Under these circumstances, it cannot be said that this accused Jasmat Purshottam Ganesh was not in conscious possession of the smuggled goods in the vessel Al-Barkati. Thus, we do not find any substance in the contentions raised by Shri Joshi on behalf of the accused No. 6.

33. On behalf of the accused No. 1 Shri S. C. Patel, the learned Advocate has submitted that in the Trial Court he was not represented by any lawyer and therefore, he was not given a fair opportunity to defend his case. It may be stated that the learned Chief Judicial Magistrate in his judgment para-11 has stated that the accused Nos. 1 and 2 have not engaged any advocate. Ordinarily, the accused should get the legal aid, but in view of the prevalent Rules there is no provision for legal aid for economic or anti-national offences and hence, no legal aid was given to them. It may be stated that the accused No. 1 has already put the questions in cross-examination to the complainant Shri Chhaya as well as to Shri Chaudhary. He has chosen not put any question in cross-examination to the other witnesses. However, in the further statement this accused has already denied what he has stated in the statement u/s 108 of the Customs Act. It may be stated that in the appellate Court he was represented by a lawyer, but not grievance whatsoever was made in the appellate Court with regard to any injustice being done on account of his not being represent by any lawyer in the Trial Court. In this court he is represented by Shri B. C. Patel, the learned Advocate and he is fully heard in the matter. It is important to note that he was tried along with the other accused represented by other Advocates and the defence of the accused was common. Mr. Patel has relied on the case reported in Pravinkumar Lalchand Shah Vs. State of Gujarat and Another, in the case of Pravinkumar Lalchand Shah v. State and Another. It may be stated that the said case is in respect of supplying copies of the enlarged photographs taken out by the handwriting concern with the case with regard to economic offences and, therefore, the said judgment is of no help to this accused. He has also relied on the judgment in the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, wherein it is observed in para-7 of the said judgment after referring to the Article 39-A of the Constitution of India, as under :

"This article also emphasises that free legal service is an unalienable element of reasonable, fair and just procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or

incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer....."

It is clear from the above observation that it should be the duty of the State provide lawyer to an accused person if the circumstances of the case and the needs of justice so required. Now, as stated earlier the circumstances of the case are that the vessel Al-Barkati is seized by the Customs Department and the accused were in possession of goods worth more than Rs. 53 lakhs in the said vessel and they also tried to escape inspite of signals given by the officers of the customs department, that after seizing the said vessel the search was made and their statements u/s 108 of the Act were also recorded which are voluntary in nature and the statement of the accused No. 1 is in the nature of confession, it is clear that practically the accused No. 1 has confessed the economic offence under the Customs Act voluntarily. The circumstances of this case do not require that the accused No. 1 should be provided with free legal aid. As stated above, free legal aid service by engaging a lawyer at the State's cost to be provided for reasonable, fair and just trial. When the accused No. 1 has already confessed the offence u/s 108 of the Customs Act and that he himself has already put the questions in the cross-examination to the prosecution witnesses as stated above, it cannot be said that he has been denied the fair, reasonable and just opportunity to defend his case merely because he was not provided with the services of a lawyer at the costs of the State. In that view of the matter we do not find any merit in the contention raised by Shri B. C. Patel, the learned Advocate for the accused No. 1

34. Relying on the statement of the accused No. 1 Abbas, Shri B. C. Patel, the learned Advocate submits that the accused No. 1 was not in conscious possession of the articles in the vessel, because as per his statement one Mohiuddin was in charge of the articles and he was given instructions with regard to the delivery of the said goods. According to him the entire liability of the said articles was on Mohiuddin. According to him, he has also not made any inquiry with regard to the contents of the said article. However, it may be stated in the same statement the accused No. 1 has stated that at the time of loading and arranging the said articles he made inquiries and he felt that it contained cloth, watches, radios, etc. He has also spoken that there were other six persons with him namely, Ayub (accused No. 4), Ismail Bhandari (accused No. 7), Jasmat Patel (accused No. 6), Purshottam Laxman (accused No. 5), Maksud (accused No. 2), and Mohiuddin (accused No. 3). Thereafter he has given the details about the voyage. He has further stated in the said statement u/s 108 of the Act that at about 4 o'clock when they were proceeding towards the coast at slow speed and when they were at a distance of about 2 kms. they saw one launch and it was also moving with slow speed. They had a doubt that it was a departmental launch and therefore, they changed the direction in the northern side and increased the speed of the vessel. The persons sitting in the launch gave signals

by firing in air and shouting. Ultimately, they seized the vessel and the accused No. 1 had introduced himself as Tindal. According to him, in all there were seven persons. He had also stated that in the vessel there were smuggled articles of foreign make namely, cloth, radios, watches etc. He stated that at about 5 o'clock they could see the coast clearly and at that time they were at about 10 kms from the coast. He had stated that the Customs Officers demanded the documents and/or permits from him, but he had no such permit or document. Considering the entire statement of the accused No. 1 it is clear that it cannot be stated that he was not aware of the contents of the articles which were seized from the vessel Al-Barkati and the further conduct of escaping also discloses his guilty mind. Thus, the argument that the accused No. 1 was not conscious of the contents of articles cannot be accepted.

35. Similarly, for accused No. 5 Purshottam Laxman, Shri B. C. Patel, the learned Advocate has submitted that he was only a passenger and was not involved in smuggling and therefore, he has not committed any offence. In the further statement the accused No. 5 has stated that he was merely a passenger. Further, he has admitted in the statement that his statement was recorded but according to him it was not recorded as dictated by him. It may be stated that no such question is put to Shri B. I. Patel, Supdt. of Customs in the cross-examination that statement of the accused No. 5 Purshottam Laxman was not recorded as per his dictation. Under the circumstances, his reply in the further statement cannot be accepted as correct. In his statement he has also stated that from internal talks he came to know that the said vessel was to be taken to Bombay and when they were at a short distance they saw another launch, and, therefore, they changed direction of the vessel and also increased the speed and they also made an attempt to run away, but in a very short time there was firing from the said launch and therefore, the Khalasies and Nakhudas went into the cellar of the vessel. It is further stated that thereafter the officers of the Customs Department came to their vessel and they made a search of the articles and they also started the procedure for seizing the same and this continued for two days. When the search was going on all the Khalasies were constantly present there. In all there were 121 articles which were attached by the customs officers. The vessel Al-Barkati was also attached. According to him, he did not know where these goods were to be delivered and to whom they belonged. He was only a Khalasi and he was to act as per the direction of the Nakhuda. In the beginning of his statement he has also stated that they all loaded the said articles from the truck to the cellar of the said vessel. Therefore, it is clear that he was not merely an innocent passenger, but he has actively participated in loading the said articles in the vessels. Under the circumstances the argument that he was merely a passenger and that he was not conscious about the contents of the articles cannot be accepted.

36. Mr. Kakkad, the learned Advocate on behalf of the accused No. 1 Maksud, who is a Pakistani citizen, has also submitted that he was merely the Engine Driver and he was not in conscious possession of the articles. It may be stated

that in his statement u/s 108 of the Customs Act which is at Exh. 135 he has also stated that they tried to escape. Further, it is a matter of inference to be drawn about the knowledge when he was engine driver of the vessel and when he drove the vessel from Dubai to Veraval it can safely be inferred particularly taking into consideration the conduct of escaping that he knew that the vessel contained smuggled goods of foreign make. In that view of the matter we do not find any merit in the argument of Mr. Kakkad on behalf of this accused No. 2

37. Mr. B. C. Patel, the learned Advocate has appeared on behalf of Mr. B. B. Oza, the learned Advocate for the original accused No. 4 Ayubali Bholim. His case is also that accused No. 4 was merely a passenger. However, in the statement u/s 108 of the Act which is at Exh. 138 he has clearly stated that he has helped in arranging the smuggled goods in the vessel. In that view of the matter the arrangement is part and parcel of loading. Under the circumstances, he cannot be said to be innocent passenger who was ignorant about the contents of the 121 articles in the vessel Al-Barkati.

38. The last argument advanced on behalf of all the accused was that in view of the peculiar conditions the sentence should be reduced.

39. Shri B. C. Patel, the learned Advocate further submits that the accused Nos. 1 and 5 are unable to engage an advocate which clearly discloses their financial conditions. The accused No. 2 also could not engage an advocate in the Trial Court and that in the lower appellate Court the learned Advocate, Shri K. D. Dave's assistance was provided to him and that circumstance also shows his financial condition and in that view of the matter it is submitted that the fine of Rs. 20,000/- which is imposed by the learned Addl. Sessions Judge, Junagadh, should be reduced. It is further submitted the except the accused No. 6 all others are in jail and practically the accused No. 1 has undergone the substantial sentence of imprisonment and he is now undergoing the sentence of imprisonment ordered to undergo in default of payment of fine. It may be stated that originally each of the accused were ordered to undergo R.I. for seven years and a fine of Rs. 1,000/- and in default of payment of fine to undergo R.I. for one year. The learned Addl. Sessions Judge has altered the sentence and the appeals were partly allowed by passing the order that each of the appellant/accused to suffer R.I. for 42 months and to pay a fine of Rs. 20,000/- and in default of payment of fine to undergo further R.I. for 20 months. It is true that in imposing fine it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. Here in this case there is no doubt with regard to the magnitude of the offence inasmuch as it is economic offence which affects the economy of the entire country. The goods that were seized from the vessel Al-Barkati were worth more than Rs. 53 lakhs and the total fine on all the accused would come to Rs. 1 lakh. Looking to the magnitude of the offence the total fine imposed cannot be said to be excessive. With regard to the paying capacity, it may be stated that they may not be able to pay and, therefore, they have to undergo the sentence of R.I.

which is 20 months and as stated earlier in this judgment the aggregate period of imprisonment that each accused will have to undergo would be 62 months which is much less than the original sentence of imprisonment of seven years ordered by the Trial Court.

40. In normal circumstances and in view of the modern criminology the Court would not have imposed severe sentences against the accused particularly when the offences are committed under pressure or provocation or due to unbalanced omission or as a result of adverse environment and circumstances. In such circumstances the criminals deserve a sympathetic treatment, but it would not be appropriate to adopt the same approach in dealing with the offence committed under the Customs Act particularly which affects the economy of the country. In the case of the Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others, , the Supreme court has observed as under in para-33 of the judgment.

"..... Illegal importation of gold has assumed the proportions of a major problem faced by the country and the manifold, clever and ingenious devices adopted in carrying out these illegal operations tend to show that the organisation which is responsible for them is inspired merely by cupidity because it conducts its operations solely for the purposes of making profit, and so, it would be open to the Customs Authorities to take the view that the best way to check the spread of these illegal operations is to impose deterrent fines whenever these offences are discovered and proved....."

41. The above observation clearly applies to the present case though it is not a question of importing gold. It is in respect of importing of foreign cloth, watches, radios, etc. In that view of the matter as this is the offence committed by the accused-petitioners which affects the economy of this country, it is not at all desirable to accede to the request of the petitioners in these revision applications for reducing the sentence.

42. For the abovestated reasons all the revision applications fail and they are dismissed. Rule discharged. The accused No. 6 Jasmat Parshottam Ganesh, who is the petitioner in the Criminal Revision Application No. 183/83 to surrender within a week from today.