(2001) 03 GUJ CK 0068

In the Gujarat High Court

Case No : Criminal Revision Application No. 71 of 2000

Linder Frank Wolfgang APPELLANT

Vs

Yogesh D. Shah Supdt of Customs RESPONDENT

Date of Decision : 21-03-2001

Acts Referred:

Citation : (2001) 21 GLH 127 : (2002) 1 GLR 395

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : H.R. Prajapati, in Criminal Revision application No. 71 of 2000, for the Appellant; Asim J. Pandya, for Respondent No. 1, A.J. Desai, APP for Respondent No. 2 in Criminal Revision Application No. 71 of 2000, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Mehta, J.—Linder Frank Wolfgang, petitioner-original accused has filed this Revision Application under Secs. 397, 401 read with Sec. 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as `the Code'') has challenged the judgment and order dated 18th January, 2000, passed by the learned Additional City & Sessions Judge, Court No.12, Ahmedabad in Criminal Appeal No.42 of 1999. The learned Sessions Judge was pleased to dismiss the appeal No.42 of 1999 and confirmed the judgment and order dated 31st March, 1999, passed by the learned Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No.18 of 1997 and confirmed the sentence imposed under Sec. 248(2) of the Code read with Sec. 135 of the Customs Act, 1962 (hereinafter referred to as `the Act'') imposing five years simple imprisonment and Rs.5,000/- fine and in default of this, three months more simple imprisonment.

1.1 Originally, Shri Yogesh Lakhani, learned advocate was appearing on behalf of the petitioner. However, he has expressed his desire to retire from this case and he was allowed to retire in view of the desire of the accused himself. However, in view of the legal question raised in this behalf I have requested Mr.H.R.

Prajapati, learned advocate to appear on behalf of accused as amicus curiae and he has agreed to appear on behalf of accused. In view of the same, I have heard Shri Prajapati, learned advocate on behalf of accused, Shri Asim Pandya, learned advocate on behalf of respondent No.1 and Shri A.J.Desai, learned APP on behalf of State.

2. The facts giving rise to this application are as under:

2.1 Shri Yogesh D. Shah - opponent No.1 was serving as Superintendent of Customs in the year 1996 at Air Intelligence Unit, Sardar Patel International Air Port, Ahmedabad. On 18.12.1996, the opponent No.1 was present on his duty. On that day, by Flight No. IC 886 of Indian Airlines on Federal Republic of Germany Passport No.L0190670 present petitioner-original accused Mr. Linder Frank Wolfgang had arrived at Ahmedabad Airport. After his arrival he was passing through the green channel with his luggage with two bags. He has not declared that he was carrying prohibited articles. During the closing of the channel, the conduct of the above passenger was suspicious, so he was asked to stop just near to the gate and his physical search was done. At that time, from the sandals which were worn by him on his legs, it was so weighty, so it was checked and on skinning mussy at baggage hall at that time some black patches were seen and some doubtful metal was seen. Thereafter the panchas were called and in their presence the sandals were opened and from his sandals 88 gold biscuits were of 10.264 kgs weight detected (this were costing in Indian Rupees worth Rs.51,32,000/-). Thereafter, the officers of the Custom Intelligence thought that above gold biscuits were brought by accused for the purpose of `smuggling'' and so it was required to be seized under the Customs Act. Thereafter it was seized by the Customs Officers in the presence of panchas. Thereafter the Officers of the Custom Department had arrested the present petitioner-accused under the provisions of Sec. 135 of the Act and he was produced before the learned Magistrate on 9.12.96. The accused was sent to the custody. From the record, it appears that the accused had filed a bail application before the learned Magistrate but the same was rejected by the learned Magistrate.

2.2 Being aggrieved and dissatisfied with the said order, the accused has challenged the same before the Sessions Court. The Sessions Court has also rejected the said application. The accused has filed Misc. Criminal Application before this Court and this Court also dismissed the bail application.

2.3 Being aggrieved and dissatisfied with the aforesaid order of this Court, the accused has filed application before the Hon''ble Supreme Court of India which was also rejected.

2.4 Shri Yogesh Shah, opponent No.1 herein has filed a criminal complaint before the trial Court on 11.2.1997 against the present accused and charge was framed under Sec. 135 of the Act at Exh.60 for the said allegation and then before the learned trial Judge for evidence.

The Prosecution examined following witnesses:

(1) P.W.No.1 Yogesh Shah, Superintendent of Customs, Air Intelligence Unit at Exh.14 Page 131.

(2) P.W.No.2 Thakorbhai Manilal Patel at Exh.50 Page 357. (panch witness)

(3) P.W.No.3 Yakubhabdullah Dolti, Customs Suptd. at Exh.101 Page 719.

(4) P.W.No.4 Hasotia, Inspector Intelligence Dept. at Exh.109 Page 749.

2.4(A) As regards documentary evidence is concerned, the Prosecution has produced following documentary evidence.

(1) Exh.27 Statement of accused recorded u/s 108 of the Act at Page No.285.

(2) Exh.19 Disembarcation card.

(3) Exh.20 Airtickets.

(4) Exh.21 Air tickets.

(5) Exh.22 Air-tickets.

(6) Exh.23 Boarding Pass.

(7) Exh.24 Travelling Programme Paper.

(8) Exh.25 Passport.

(9) Exh.26 Summons of custom department.

(10) Exh.27 statement of accused recorded u/s 108 of the Act at Page No.285.

(11) Exh.30 Letter dated 20th June, 1997, addressed by Commissioner of Customs Preventive, Ahmedabad to the General Manager, India Government Mint, Fort, Bombay at Page No.301.

(12) Exh.31 Mint Report at Page No.305.

(13) Exh.32 Mint Report dtd.13.2.97 at Page No.309.

(14) Exh.33 Sanction Letter dated 7.2.97 passed by the Commissioner of Customs (Preventive) at Page No.313.

(15) Exh.51 Panchnama Dated 18.12.96 at Page No.415.

(16) Exh.60 Charge framed before the Court.

(17) Exh.61 statement of accused at Page No.521.

(18) Exh.102 xerox copy of entry at Page No.727.

(19) Exh.103 xerox copy of inventory of goods seized at Page No.735.

(20) Exh.104 xerox copy of inventory of goods seized at Page No.737.

(21) Exh.105 xerox copy of Muddamal Register at Page No.741.

(22) Exh.110 xerox copy of Muddamal Register at Page No.793.

2.4(B) After discussing the aforesaid oral as well as documentary evidence in detail, the learned trial Judge by his judgment and order dated 31st March, 1999, convicted the accused u/s 135 of the Customs Act read with Sec. 248(2) of the Code and imposed five years imprisonment and Rs.5000/- fine and in default of this three months more simple imprisonment.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned Magistrate, accused has filed appeal before the City Sessions Court at Ahmedabad being Criminal Appeal No.42 of 1999. The learned Sessions Judge by his judgment and order dated 18.1.2000 pleased to confirm the judgment and order of the learned trial Judge and also confirmed the sentence of five years imposed on the appellant-accused.

2.6 Being aggrieved and dissatisfied with the aforesaid order of the learned Sessions Judge, the accused has filed this application before this Court.

3. Before I discuss the various contentions raised by the learned advocate for the petitioner, let me set out the statutory provisions of the Act in this behalf.

Sec. 2(3) provides definition of baggage includes unaccompanied baggage but does not include motor vehicles.

Sec. 2(10) provides for "customs airport" means any airport appointed under clause(a) of Sec. 7 to be a customs airport.

Sec. 2(11) provides definition of "customs area" means any area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.

Sec. 2(14) provides for "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid.

Sec. 2(15) provides for "duty" means a duty of customs leviable under this Act. Sec. 2(23) provides for "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

Sec. 2(25) provides for "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

Sec. 2(33) provides for "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

Sec. 2(39) provides for "smuggling", in relation to any goods means any act or omission which will render such goods liable to confiscation under Sec. 111 or Sec. 113.

Chapter XIII of the Customs Act provides for Searches, Seizure and Arrest:

Sec. 100 provides Power to search suspected persons entering or leaving India, etc.

Sec. 101 provides Power to search suspected persons in certain other cases.

Sec. 102 provides Persons to be searched may require to be taken before Gazetted Officer of Customs or Magistrate:-

"(1) When any officer of customs is about to search any person under the provisions of Sec. 100 or Sec. 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or the Magistrate. (2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the Magistrate. (3) The gazetted officer of customs or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. (4) Before making a search under the provisions of Sec. 100 or Sec. 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses. (5) No female shall be searched by anyone excepting a female.

Sec. 104 provides Power to arrest.

Sec. 105 provides Power to search premises.

Sec. 106 provides Power to stop and search conveyances.

Sec. 107 provides Power to examine persons.

Sec.108 provides Power to summon persons to give evidence and produce documents.

"(1) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods. (2) A summons to produce documents or other things may be fore the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. (3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required. (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sec. 193 and Sec. 228 of the Indian Penal Code, 1860."

Sec. 110 provides Seizure of goods, documents and things.

Chapter 14 provides for Confiscation of Goods and Conveyances and Imposition of Penalties.

Sec. 111 provides Confiscation of improperly imported goods, etc:- The following goods brought from a place outside India shall be liable to confiscation.

Sec. 111(d) reads as under:

"any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

Sec. 112 provides Penalty for improper importation of goods etc.

Sec. 123 provides Burden of proof in certain cases.

Chapter 16 provides for Offences and Prosecutions

Sec. 132 provides False declaration, false documents etc.

Sec. 135 provides Evasion of duty or prohibitions.

"Sec. 135 Evasion of duty or prohibitions:-

(1) Without prejudice to any action that may be taken under this Act, if any person -

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Sec. 111, he shall be punishable -

(i) in the case of an offence relating to any of the goods to which Sec. 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to [seven years], and with fine:

(ii) in any other case, with imprisonment for a term which may extend to [three years], or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section

(1) of Sec. 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for less than [one year].

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than [one year], namely:-

(i) the fact that the accused has been convicted for the first time for an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence.

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.

Sec. 138(A) of the Act provides for Presumption of culpable mental state.

"Sec. 138-A Presumption of culpable mental state:(1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation:- In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

Section 138(B) provides for Relevancy of statements under certain circumstances.

4. Shri Prajapati, learned advocate for the petitioner has contended (i) that the prosecution has failed to prove that accused has illegally imported gold and therefore the accused has not committed any offence in this behalf. (ii) He has further contended that in any view of the matter the authority has relied upon the statement made by accused under Sec.108 of the Act and they have not been able to lead any independent evidence for proving the offence under Sec. 135 of the Act. So, solely on the basis of the statement made by the accused under Sec. 108 of the Act punishment cannot be awarded to the accused in this

behalf. He has further contended that in any view of the matter the benefit of doubt may be given to the accused. (iii) He has further contended that the accused is in jail since December, 1996, and four years have been passed and only five years imprisonment have been imposed so this Court may reduce the imprisonment which was imposed by the trial court and which has been confirmed by the appellate Court that when accused had already undergone the imprisonment for more than four years, this Court may acquit the accused and reduce the imprisonment for the remaining period as the accused is a German accused.

4.1 Shri Prajapati has submitted that as per Sec. 102 of the Act it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect (i.e. accused herein), (on the basis of prior information), to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Sec. 102. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad in violation of Sec. 102 of the Act. In support of the same, he has relied upon judgment of the Hon''ble Supreme Court in the case of State of Punjab Vs. Baldev Singh,

5. As against this, Shri Asim Pandya, learned advocate for the Customs Department has submitted that the prosecution has clearly established beyond reasonable doubt that accused had imported the gold from outside India. He was trying to smuggle the gold inside India without paying custom duty and in fact he has not declared that he was carrying such a large amount of gold. He has hidden the same and only because of the customs officer suspected he was stopped and ultimately large amount of gold biscuits were recovered from the accused and the same was seized by panchas. He has also relied upon the report of the Mint Department at Exh.31 and 32 to show that the goods which have been recovered from the accused was "gold" biscuits. The prosecution has examined about four witnesses before the trial court and also produced necessary documentary evidence and also recorded the statement of the accused under Sec. 108 of the Act. The trial court as well as appellate court have rightly convicted the accused. He has further submitted that importing such large amount of gold worth more than Rs.51/- lacs is a very serious economic offence. Prior to his present incident sometime back he has also tried to smuggle gold. At that time a minor punishment was awarded to the accused. Over and above, he has further submitted that the accused might have imported gold illegally earlier for which the authority might have not noticed and therefore this Court should take very serious view as the offence is the serious economic offence which

affect national economy. He has further submitted that the trial court has imposed five years imprisonment is comparative less as the section provides seven years imprisonment and therefore this Court should not show sympathy while awarding punishment.

5.1 Shri Pandya has submitted that as regards contention of Mr. Prajapati, learned advocate for the petitioner that Sec. 102 of the Act is applied to the present accused, however, he has submitted that earlier on similar principle given by the Hon''ble Supreme Court the present accused filed an application for discharge before the trial court and the appellate court. The learned Sessions Judge by his order dated 10th August, 1998, pleased to reject the said application in Criminal Revision Appln.No.112/98. Being aggrieved and dissatisfied with the said order, the petitioner-accused preferred a Special Criminal Appln.No.764 of 1998 before this Court and this Court (Coram: A.K. Trivedi, J.) by judgment and order dated 22.9.98 pleased to reject the said application. He has not further assailed this judgment before the higher forum so the judgment has become final between the accused and respondents and, therefore this contention based on Sec. 102 of the Act is not available to the present accused, at this stage.

5.2 He has also relied upon Sec. 108 of the Act. He has submitted that if the statement is recorded under Sec. 108 of the Act then the conviction of the accused can be based on the statement for which he has relied upon some of the judgments of the Hon''ble Supreme Court.

5.3 Shri A.J.Desai, learned APP has also tried to support the case of the prosecution in this behalf.

FIRST CONTENTION REGARDING SMUGGLING OF GOODS:

6. In this case it is almost admitted fact that accused has tried to smuggle the gold while traveling from outside India and he was caught red handed while importing such large amount of gold in the presence of panchas by a duly authorised custom officers at the airport. The prosecution has also proved their case by examining P.W.No.1 Shri Yogesh Shah, P.W.No.2 Shri Thakorbhai Manilal Patel as panch witness, P.W.No.3 Shri Yakubabdullah Dolti and also Shri Hasotia inspector of customs. The statement of accused recorded under Sec. 108 of the Act has also been recorded at Exh.27 in which he has clearly admitted that he was carrying gold at the relevant time. The authorities have also produced Exh.30 forwarding letter and also the report of Mint at Exh.31 and 32 which have been produced on the record of the case, to prove that the goods which petitioner-accused was carrying was a gold article and therefore he was liable to be prosecuted in this behalf.

7. In my view, in view of the totality of the circumstances namely oral evidence led by the prosecution, the statement of accused recorded under Sec. 108 of the Act, there is no substance in the contention of the learned advocate for the petitioner-accused that petitioner was not carrying gold. He has knowing try to

smuggle the gold inside the India with an intention to evade payment of custom duty. He has concealed the gold in this behalf. So offence under Sec. 135 read with Sec. 138-A has been committed by the accused.

7.1 As regards submissions made under Sec. 102 of the Act passed in the judgment of the Hon''ble Supreme Court in the case of State of Punjab Vs. Baldev Singh, ., the petitioner-accused will not be able to take advantage of the same because on this very ground earlier he has filed a discharge application and there is already judgment passed by this Court (Coram: A.K.Trivedi, J.) wherein Special Criminal Application No.764 of 1998 decided on 22.9.98 is also rejected by this Court. The petitioner-accused has not filed further appeal challenging the order and to that extent that judgment has become final between the parties.

7.2 As regards statement recorded under Sec. 108 of the Act, the learned counsel for the revenue submitted that object of the act empowering Customs officers to record the evidence under Sec. 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise/custom so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act so as to take proceedings for further action of confiscation of the contraband or imposition of the penalty under the Act. The officer exercising the powers under the Act is an authority within the meaning of Sec. 24 of the Evidence Act. He further submitted that the collection of evidence under Sec. 108 and other relevant provisions relating to search and seizure are only for the purpose of taking further steps for confiscation of contraband and imposition of penalty. The self-same evidence is admissible in evidence on the complaint laid by the Customs Officer for prosecution under Sec. 135 or other relevant statutes.

8. As regards the statement recorded under Sec. 108 of the Act, the learned counsel for the revenue Mr. Pandya has relied upon the judgment of the Hon''ble Apex Court in the case of K.I. Pavunny Vs. Asstt. Collr. (H.Q.), C. Ex. Collectorate, Cochin reported in 1997(90) E.L.T. 241(S.C.). In para 19 the Hon''ble Apex Court has observed as under:

"Next question for consideration is: whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own hand-writing giving wealth of details running into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is: whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before the Magistrate though no complaint was filed and was released on bail. He did not complain to the Magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weightage to the same. It is true that the Magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant''s knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bed-room through which he or family members could always watch anyone frequenting the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying aware the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they would immediately catch hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by threat, duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one."

8.1 He has also relied upon the judgment of the Hon''ble Apex Court in the case of Bhana Khalpa Bhai Patel Vs. Assistant Collector of Customs, Bulsar reported in 1997 (96) E.L.T. 211 (S.C.)., particularly para 6 and 7 on Page 213 are also reiterate similar principle. He has also relied upon the judgment of the Division Bench of this Court in the case of Bipinbhai A. Patel Vs. State of Gujarat reported in 1998(101) E.L.T. 254(Guj.)., particularly para 10 were also similar principle reiterated.

8.2 As regards contention of learned advocate for the petitioner-accused that some leniency should be given to the petitioner-accused. Mr. Asim Pandya, learned counsel for the revenue has stated that the petitioner has tried to smuggle such large quantity of gold which is very serious economic offence and in view of provisions of the Customs Act, particularly Sec. 135 and Sec. 138 of the Act and object of preventing smuggling is to be seen and for that purpose he has relied upon the following judgments.

8.3 He has relied upon the Hon''ble Supreme Court judgment in the case of State of Maharashtra Vs. Natwarlal Damodardas Soni, , wherein in para 23 the Hon''ble Supreme Court has shown the object of the Customs Act and also interpreted

Sec. 135 of the Customs Act which read as follows:

"It may be remembered that smuggling, particularly of gold, into India affects the public economy and financial stability of the country. The provisions of Section 135(1) and like statutes which are designed to suppress smuggling have to be construed in accordance with the Mischief Rule first enunciated in Heydon''s case."

8.4 He has also relied upon the judgment of the Hon''ble Supreme Court in the case of Devchand Kalyan Tandel Vs. State of Gujarat reported in 1997(89) E.L.T. 433 (S.C.). In para 10 the Hon''ble Supreme Court has observed as under:

"So far as the third submission of Mr. K. Madhava Reddy is concerned it is no doubt true that sufficient time has elapsed between the date of occurrence and the date of judgment and further the accused persons have served their sentences for a major part but yet we do not think that in such economic offences the courts should take any lenient view in the matter. Smuggling has become a threat to the effective fulfillment of the objectives of foreign trade control. The extent of the leakage of revenue that takes place through the process of tax evasion cannot be estimated. It has got serious deleterious effect on legitimate trade. Taxation Enquiry Commission had suggested that stringent measures both legal and administrative should be adopted to minimise the scope of the evil. For the purpose of achieving the desired objective Parliament came forward with insertion of Section 138A into the statute book. Question of taking a lenient view of the matter, therefore, does not arise. In view of large scale smuggling activities in the border area and large scale evasion of duty the country has faced severe economic imbalance. Notwithstanding stringent legislation having been made it has not been possible to eradicate the evil. Any leniency therefore in economic offences will send a wrong signal. In this view of the matter, we are unable to accept the last contention of Mr. K. Madhava Reddy, the learned Senior Counsel for the appellants."

8.5 He has also relied upon the judgment of the Hon''ble Supreme Court in the case of K.I. Pavunny Vs. Asstt. Collector (HQ), Central Excise, Collectorate, Cochin reported in 1997(90) E.L.T. 241(S.C.) where the Hon''ble Supreme Court after considering the judgment of the Hon''ble Apex Court in the case of Naresh J. Sukhawani Vs. Union of India, and also in the case of Surjeet Singh Chhabra Vs. Union of India - 1997 (89) E.L.T. 646. In para 26 the Hon''ble Supreme Court has held as under:

"As noted, the object of the Act is to prevent large scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted u/s 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded u/s 108, the recovery panchnama (mediator''s report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve."

MY CONCLUSION :-

9. In my view, the purpose of Customs Act particularly Sec. 135 of the Act is to prevent smuggling set out in Sec. 111(2)(c) and other provisions of the Act and there are enough guidelines for the exercise of discretion u/s 135 read with Sec. 137 of the Act. The Legislative history and the background of the statute and its scheme and policy as disclosed by various provisions furnish enough guidelines. The requisite guilty knowledge or mens rea of Sec. 135(1) can be established by circumstantial evidence. In my view, Sec. 135(1)(a) of the Act requires it to be shown that the accused must have in any way knowingly concerned or attempted evasion of any duty chargeable. Clause (b) of that section requires it to be shown that the accused was concerned in carrying, removing, etc., the goods which he knows or has reason to believe are liable to confiscation and the offence must be shown to be relating to goods to which Sec. 123 of the Customs Act applies. Sec. 138-A provides for presumption of culpable mental state. In my view, the Prosecution has established beyond reasonable doubt the ingredients of Sec. 135(1)(a) and 135(1)(b) of the Act in this behalf.

9.1 In my view, the crimes professionally committed by the present accused is to be considered very seriously. The act of the accused inflicted severe trauma on the health and wealth of the nation and the numbers of this neo-criminal tribe are rapidly escalating form a deterrent exemption to humane softness in sentencing. The penal strategy must be informed by social circumstances, individual factors and the character of the crime. India has been facing an economic crisis and gold smuggling has had a disastrous impact on the State''s efforts to stabilize the country''s economy. Smugglers, hoarders, adulterators and others of their like have been busy in their under-world because the legal hardware has not been able to held the invisible economic aggressor inside. In my view, there cannot be any dispute that for such offences under the Customs Act which affect the economy of the nation deterrent punishment has to be meted out. In my view, smuggling offences deserve to be dealt with due degree of seriousness and gravity having regard to their detrimental effect on the economy of the nation as also the morale of the society. If a lenient view is taken of such offences it would be difficult to maintain ethical standards and it would be difficult to maintain respect of the people for the judicial administration. The Parliament has exhibited its anxiety in regard to these matters by amending the Customs Act from time to time by enhancing the maximum sentence which could be imposed for such offences. In these circumstances, it is but right to view these offences with gravity and to impose a sentence without being carried away by considerations of misplaced sympathy or charity at the cost of the society and at the cost of the detrimental effect on the social structure and the national economy. These are offences where the deterrent theory of punishment has its justification and the sentence imposed must be made sufficiently deterrent. In my view, persons like present accused who is a foreign national, who is travelling on a fake passport and committing smuggling of gold of more than Rs.51/- lacs, the consequential punishment for the violation of such laws must be equally deterrent. The offences against Export and Import restrictions and customs are of the species of "economic" crimes which must be curbed effectively.

9.2 The counsel for Revenue further submitted that accused had tried to import such large quantity of gold without any permission under the provisions of the Customs Act thereby the accused had tried to evade large amount of customs duty on the import of such gold. He has also tried to violate the provisions of the Customs Act in this behalf. The tax evasion results in increase of tax burden on the honest tax payer and therefore every attempt to prevent tax evasion is laudable being in public interest. In my view, therefore also when the accused has tried to evade large amount of payment of customs duty, a strict view of punishment has to be taken so that there will be a deterrent effect on the aspects of the tax evasion also.

10. In view of the aforesaid facts and circumstances of the case, I do not propose to reduce the sentence of the accused from five years. In view of the same, I confirm the judgment and order of the learned Metropolitan Magistrate dated 31st March, 1999, in Criminal Case No.18 of 1997 and the same was confirmed in Criminal Appeal No.42 of 1999 passed by the learned Additional City Sessions Judge, Court No.12, Ahmedabad, in this behalf. Revision application is dismissed. Rule is discharged.

11. Before I part with the judgment, I am beholden to Mr.H.R.Prajapati, learned advocate who has appeared for the petitioner as amicus curiae. I am also grateful to Mr. Asim Pandya, learned counsel for the Union of India and Shri A.J.Desai, learned APP for the State for rendering very able assistance in disposing of this matter. Office is directed to send the copy of this judgment to the petitioner-accused in this behalf, who is in Sabarmati Jail.