

(2008) 01 GUJ CK 0053

In the Gujarat High Court

Case No : Criminal Appeal No's. 2319, 2430, 2432 and 2629 of 2005 and 131, 132 and 137 of 2006

Mamad Bhakhar Rayma and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-01-2008

Acts Referred:

Arms Act, 1959 — Section 19, 25(1), 25(1AA), 29, 39
Criminal Procedure Code, 1973 (CrPC) — Section 10(2), 132, 162, 164, 300
Customs Act, 1962 — Section 107, 108, 124, 135, 137
Evidence Act, 1872 — Section 17, 24, 25
Explosive Substances Act, 1908 — Section 4, 5, 6
Foreign Exchange Regulation Act, 1973 — Section 59
Foreigners Act, 1946 — Section 13(2), 14, 34
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 36, 42, 53, 67
Passports (Entry into India) Rules, 1950 — Rule 3, 6, 9
Penal Code, 1860 (IPC) — Section 120, 120B, 121, 122, 123
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15, 15(1)

Citation : (2008) 01 GUJ CK 0053

Hon'ble Judges : R.M. Doshit, J;C.K. Buch, J

Bench : Division Bench

Advocate : K.B. Anandjiwala, for the Appellant; R.C. Kodekar, Ld. APP, for the Respondent

Judgement

C.K. Buch, J.—Criminal Appeal Nos. 2319 of 2005, 2430 of 2005 and 2432 of 2005 preferred by the appellants-orig. accused Nos. 2 to 7 (hereinafter referred to as "the accused Nos. 2 to 7") arise out of the judgment and order of conviction and sentence dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch, in Sessions Case Nos. 56 of 2002, 42 of 2003 and 44 of 2003, whereby the learned trial Judge has convicted the accused Nos. 2 to 7 for the offences punishable under Sections 122 and 123 of the Indian Penal Code; under Sections 25(1)(b), 25(1AA) of the Arms Act; under Rules 3 and 6 of the Indian Passport (Entry into India) Rules, 1950 and also under

Sections 13(2) and 14 of the Foreigners Act, 1946 read with Section 34 of the Indian Penal Code; and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 500/-, in default of payment of fine further rigorous imprisonment for three months for the offences punishable under the provisions of the Indian Penal Code. The accused Nos. 2 to 7 are also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 250/-, in default of payment of fine further rigorous imprisonment for two months under the offences punishable under the provisions of the Arms Act. The accused Nos. 2 to 7 are also sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 100/-, in default of payment of fine further simple imprisonment for one month for each offence punishable under the provisions of Foreigners Act and Indian Passport (Entry into India) Rules, 1950.

2. Criminal Appeal No. 2629 of 2005, preferred by the appellant-orig. accused No. 9-Mohammad alias Salim alias Sameer alias Firoz alias Hussain alias Mohammad Ismail Yusuf Sida Sindhi, who is the accused in Sessions Case No. 29 of 2004, has been received through the Jail Authority. This Appeal arises out of the judgment and order of conviction and sentence dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch, in Sessions Case No. 29 of 2004, whereby the learned trial Judge has convicted the accused No. 9 for the offences punishable under Sections 122 and 123 of the Indian Penal Code; under Sections 25(1)(b), 25(1AA) of the Arms Act; under Rules 3 and 6 of the Indian Passport (Entry into India) Rules, 1950 and also under Sections 13(2), 14 read with Section 34 of the Foreigners Act, 1946; and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 500/-, in default of payment of fine further rigorous imprisonment for three months for the offences punishable under the provisions of the Indian Penal Code. The accused No. 9 is also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 250/-, in default of payment of fine further rigorous imprisonment for two months under the offences punishable under the provisions of the Arms Act. The accused No. 9 is also sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 100/-, in default of payment of fine further simple imprisonment for one month for each offence punishable under the provisions of Foreigners Act and Indian Passport (Entry into India) Rules, 1950.

3. Criminal Appeal No. 131 of 2006 is preferred by the State against the judgment and order of acquittal recorded qua the orig. accused Nos. 1 to 8 of Sessions Case No. 56 of 2002, 42 of 2003 and 44 of 2003.

4. Criminal Appeal No. 132 of 2006 is preferred by the State against the judgment and order of acquittal recorded qua the orig. accused Nos. 2 to 7 of Sessions Case No. 56 of 2002, 42 of 2003 and 44 of 2003 as well as the accused of Sessions Case No. 29 of 2004 for their acquittal from the charge of offence punishable under Sections 121, 124(A) and 120(B) of the Indian Penal Code.

5. Criminal Appeal No. 137 of 2006 is preferred by the State against the judgment and order of acquittal recorded qua the orig. accused Nos. 2 to 7 as

the acquittal of all these accused persons has been recorded separately in the operative portion dividing different Sessions Cases to meet with the procedural requirement being shown as accused persons simultaneously in different Sessions Cases for the similar offences.

6. The accused of Sessions Case No. 56 of 2002, 42 of 2003 and 44 of 2003 have been tried with the accused of Sessions Case No. 29 of 2004. As per the charge Ex.1 total eight persons have been shown as accused of these Sessions Cases. Out of total eight accused persons, orig. accused No. 1-Noormamad Isha Sanghar and orig. accused No. 8-Sidik Mubarak Notiyar have been acquitted from the charge of offences levelled against them. The accused Nos. 2 to 7 and 9 of these Sessions Cases have challenged the legality and validity of the judgment and order of conviction and sentence. As per the earlier orders, all these appeals have been heard together.

7. As total four Sessions Cases were tried together and were disposed of by way of common judgment and order dated 28th October 2005, four Appeals have been preferred by the appellants-accused Nos. 2 to 7 and 9 challenging the judgment and order of conviction and sentence and three Appeals have been preferred by the appellant-State challenging the judgment and order of acquittal.

8. We have heard Shri Anandjiwala, learned advocate appearing for the accused Nos. 2 to 7 and Shri R.C. Kodekar, learned Additional Public Prosecutor, appearing on behalf of the respondent-State. The learned advocates have taken us through the relevant oral as well as documentary evidence led during the course of trial. It is submitted by Shri Anandjiwala that the finding recorded by the learned trial Judge is based on incorrect and erroneous appreciation of evidence. The learned trial Judge has grossly erred in considering certain inadmissible evidence. The say of Shri Anandjiwala, in nutshell, is that:

i. The charge framed by the learned trial Judge is vague and this has resulted into serious prejudice to the accused persons while placing their defence.

ii. The statements of the accused Nos. 2 to 7 and 9 allegedly recorded u/s 108 of the Customs Act, 1962 (hereinafter referred to as "the Act") have been wrongly read and considered as evidence against the accused, including the admissions made by the respective accused in their so-called statements recorded by different Superintendents of Custom Department, though the accused were never subjected to inquiry under the Act. When they have not been charged with any offence punishable under the provisions of the Act, these statements of the accused could not have been read in evidence considering the scheme of Section 108 read with Section 138(B) of the Act keeping in mind the relevant Sections 124 and 137 of the said Act.

iii. The learned trial Judge has again erred in appreciating the evidentiary value of the so-called statements recorded u/s 108 of the Act in absence of any other cogent, convincing and corroborative piece of evidence; especially when except two, the rest of the statements allegedly recorded u/s 108 of the Act do not bear

any signature of the maker of the statements and these statements were retracted statements. On the count of probative value also, these statements recorded u/s 108 of the Act by various Superintendents of Custom Department examined by the prosecution, could not have been looked into as clinching piece of evidence.

iv. The panchnama of boat at Ex.49 and the story placed by the prosecution as to the purchase of Oil Engine which was required to be fixed on a boat as well as the evidence about seizure of Tempo bearing registration No. GJ-12-V-7000, led by the prosecution do not carry the case of the prosecution any further in absence of other legal and admissible evidence which can be said to be cogent and convincing.

v. The conviction recorded under the Arms Act is not sustainable in the eye of law as there is no valid sanction to prosecute the accused persons because the District Magistrate is the only authority who could have accorded such sanction required u/s 39 of the Arms Act. In the present case, the sanction to prosecute is neither proved nor has been accorded by the District Magistrate. The order of sanction is by Additional District Magistrate. There is no legal evidence to show that the Additional District Magistrate was authorized under the law to accord such sanction. So on this count only, the judgment and order of conviction and sentence recorded by the learned trial Judge may be quashed and set aside.

vi. The evidence led by the prosecution shows that of the accused persons two have been prosecuted and tried for the offences punishable under the provisions of the Arms Act for the alleged recovery of unauthorised weapon, namely Pistol, by the Police during the search carried out. In that prosecution, the statements of two accused persons i.e. accused No. 3-Tamachi Khengarji Jadiya and accused No. 2-Jakariya Haji Noor Mamed, recorded on 16th June, 1999 by PW-21 Pritam Nechardas, Superintendent of Custom Department, were placed and relied upon. In the same way, these two statements were also relied upon by the prosecution in the another Sessions Case No. 85 of 1999 and these accused persons were also tried for similar offences. There is reference of two different offences registered by Narayan Sarovar Police Station being C.R. No. I-17 of 1999 and C.R. No. II-17 of 1999. The prosecution, therefore, under the Arms Act as well as the other offences under the provisions of the Indian Penal Code would be barred so far as C.R. No. I-17 of 1999 is concerned. The accused cannot be subjected to more than one prosecution on same facts and on similar allegations. The accused Nos. 2 to 7 were subjected to prosecution on similar facts in Sessions Case No. 85 of 1999 and the learned trial Judge after conclusion of the trial has decided to acquit the orig. accused Nos. 2 to 7. The accused of Sessions Case No. 29 of 2004 has been held guilty at the conclusion of the trial of Sessions Case No. 85 of 1999. Shri Anandjiwala has tendered a copy of the charge framed by the learned Additional Sessions Judge in Sessions Case No. 85 of 1999 as well as Sessions Case No. 1 of 2002. The accused are asked to face prosecution on account of the so-called activities which were undertaken by them along with the

other absconding accused persons for the attempt which was allegedly made in the month of February, 1999. As the charge of Sessions Case No. 85 of 1999 and Sessions Case No. 1 of 2002 speaks about something which might have occurred even prior to 31st May, 1999, the present accused persons could not have been prosecuted and tried as per the scheme of Section 300 of the Code of Criminal Procedure, 1973. Thus, the accused may be acquitted observing that the trial against the accused was bad on the principle of double jeopardy.

9. Shri R.C. Kodekar, learned Additional Public Prosecutor, has submitted that the Government by publishing a notification has empowered all the Additional District Magistrates to accord sanction u/s 39 of the Arms Act. Of course, the copy of the said notification was not produced before the Court, but this fact situation was considered earlier in the case of State Vs. Bhimsha Chanbasappa Kore, He has drawn the attention of this Court to the relevant part of paragraph No. 4 of the said decision, which is reproduced as under:

4. xxx xxx xxx

...The authority enumerated in Section 29 of the Arms Act, is Magistrate of the District in the mofussil and a Commissioner of Police in the Presidency Towns, and there is no dispute that the Magistrate of the District means the District Magistrate, as understood under the Criminal Procedure Code. Once that the conclusion is reached, it is easy to see that any person who is appointed as Additional District Magistrate by the State Government can exercise all or any of the powers of the District Magistrate, under Sub-section (2) of Section 10 of the Criminal Procedure Code and he would automatically have the power of a District Magistrate, under the code or under any other law. It is quite clear that the Additional District Magistrate would, therefore, have the same power as the District Magistrate u/s 29 of the Arms Act. In our opinion, therefore, the learned Judicial Magistrate was in error in considering that the Additional District Magistrate had not the jurisdiction or authority to give sanction for prosecution of the respondent for breach of offence u/s 19(f) of the Arms Act.

10. In the cited decision, the Bombay High Court has accepted the say that the State Government is authorized to empower the Additional District Magistrate to accord sanction under the Arms Act. In absence of statutory bar, the prosecution cannot be held to be invalid on the ground of want of sanction. It is, further submitted by Shri R.C. Kodekar that the learned trial Judge was right in accepting the evidence collected by the Investigating Officer which is in the form of statements recorded by the authorised/ competent officers u/s 108 of the Act. The admission made by the maker of the statement is materially different than a confession of the accused recorded u/s 164 of the Code of Criminal Procedure, 1973. The person interrogated or brought for interrogation before the Superintendent of Custom Department or any other superior officer so empowered may not be the accused. So during the inquiry if the statement is made and if anything incriminating is found against the maker of the statement, the same can be used against the very person as evidence. After referring to

Sections 107 and 108 of the Act, it is submitted by Shri R.C. Kodekar that it is not necessary that such a statement can be used as a piece of evidence in a prosecution under the Act or the other allied laws, say like Gold Control Act, FERA, etc. The accused were facing charge under the Foreigners" Act and, therefore, the statements could have been read. In support of this submission, he has tried to place reliance on the decision of the Apex Court in the case of K.I. Pavunny v. Assistant Collector (HQ.), Central Excise Collectorate, Cochin reported in 1997 SCC (Cri.) 444 and also in the case of Chandrakant Chimanlal Desai Vs. State of Gujarat, According to Shri R.C. Kodekar, the observations made by this Court in the case of Hemant Bhanushanker Vyas v. K.V. Patel, Inspector of Customs and Ors. reported in 1992 (1) GLR 346, would help the prosecution. However, in response to the query raised by the Court, he has fairly accepted that he could not lay his hand on any direct decision propounding the ratio that the statement recorded u/s 108 of the Act can be read in any other criminal proceeding against the maker of it irrespective of the fact whether he is asked to face the charge of any offence punishable under the provisions of the Act or any other allied laws. But according to him, the facts disclosed by the accused persons being relevant to the offence which was being investigated by the Police, these statements were handed over to the Investigating Officer of C.R. No. I-17 of 1999 (Narayan Sarovar Police Station). The prosecution was authorized to use these statements as relevant and reliable piece of evidence. These statements have been proved and received in evidence. It is not necessary that each statement must have been signed. The custom officer has no animosity with the accused persons. Except the orig. accused No. 9, all the accused were Indian nationals. The custom officer would not have known the details which are reflected in each of the statements made by the convicts. The smallest detail of the family of the respective accused in his respective statement clearly show that the statement must have been made by the very person i.e. maker of the statement, voluntarily. Though the said statements were recorded after a very long period, during meticulous interrogation a person can respond to the questions. Merely because most of the statements have been recorded on 04th October, 1999 and except two accused, none of the accused persons has signed the statements, the said statements ought not to have been ignored and the learned trial Judge has rightly appreciated the contents of the said statements. It is further submitted by Shri R.C. Kodekar that there are certain lapses in the investigation but they are insignificant and unless the Court finds that the infirmity in the investigation goes to the root of the case of the prosecution, they should be ignored. Most of the prosecution witnesses have turned hostile and some witnesses have not stood to the test of cross-examination. However, the finding of the learned trial Judge is mainly based on the statements recorded u/s 108 of the Act and the conviction can be based on such evidence. According to Shri R.C. Kodekar, of the total accused, two accused have made statements at two different times. One in the month of June, 1999 and another in the month of October, 1999. If the learned trial Judge has found that these two statements are consistent to each other, there was no reason for him to discard such evidence

and a statement made by the co-accused can be used against other accused barring confessional part. No muddamal was produced in the present case and certain original documents were brought before the Court from the record of Sessions Case No. 85 of 1999 and certified copies have been rightly admitted in evidence and considered by the learned trial Judge.

11. According to Shri R.C. Kodekar, this is not a case of double jeopardy at all. The prosecution against the accused was in connection with the wrong committed by them in the month of February, 1999. During that period, the attempt of infiltration by Pakistan Nationals and the absconding co-accused was made. During that period only, two weapons were brought illegally inside India. The accused No. 9 i.e. accused of Sessions Case No. 29 of 2004, was responsible for the said offence. So they have been asked to face the charge of the offence committed earlier by them. Sessions Case in which they have been acquitted was altogether a different wrong which was committed in the month of June, 1999 and at that time, they had succeeded in importing dangerous weapons and explosive substances in India with the help of intruders and infiltrators. So the argument of double jeopardy would not help the accused. It is further submitted that there is no merit in the appeals filed by the convicts, and therefore, the same are required to be quashed and set aside.

12. Shri Anandjiwala has canvassed various points before us. On plain reading of the oral evidence led by the prosecution, it is clear that none of the prosecution witnesses can be said to have led any clinching evidence which can be said to be sufficient to link the accused with any of the crimes in question, except qua the orig. accused No. 9 so far as the offence punishable under the provisions of the Foreigners Act, 1946 and Indian Passport (Entry into India) Rules, 1950, are concerned. Indisputably, most of the witnesses have turned hostile except the Police witnesses and Superintendent of Custom Department examined by the prosecution. The panchas or the witnesses, who have tendered certain documents including the registers, etc., who have not been declared hostile, do not help the prosecution in establishing the guilt. Their version before the Court is found helpful neither to the prosecution nor to the accused. On the contrary, the accused can forcibly argue that the evidence of these witnesses even do not establish the facts which the prosecution intends to rely upon. There is some force in the argument of Shri Anandjiwala that the accused were in prison. In the present case, the accused were taken into custody under Transfer Warrant. When an attempt was made by the accused No. 3-Tamachi Khengarji Jadiya to get bail pending trial stating that there is no evidence against the accused, the evidence in the form of statements u/s 108 of the Act was collected at the instance of the Investigating Agency. Shri Anandjiwala has made allegation against the learned Additional Public Prosecutor for using his influence in getting the statements recorded on a single day with the help of officers of the Custom Department. On all occasions, the statements have been retracted. As per the settled legal position, a retracted statement cannot be used against the co-accused. The retracted statement can be read in evidence provided the Court is satisfied about

the genuineness of the statement so recorded. While using a retracted statement as a piece of evidence, the Court should consider its legal effect. As a rule of prudence the Court should try to seek some corroborative piece of evidence. According to us, unless the statement made by the accused u/s 108 of the Act is found safe which is able to gather confidence of the Court, it should not be made a base to record conviction. According to us, unless a statement is found safe, able to gather confidence and there is ample evidence to show that the same has been recorded without fear or favour, and as per the free will of the maker, it cannot be made a base to link the accused with the crime. In the case of retracted statements, the Court should be doubly conscious. Ultimately, the admission made by a maker of the statement is also an act and that act has to be proved beyond reasonable doubt that a particular admission or confession was made before the competent officer and the same was voluntary and without pressure. The language used or the other details in the statement would not make such statement a reliable piece of evidence. Each such statement should stand to the test vis-a-vis the other facts and evidence available on record. On close scrutiny of each statement available on record, no statement inspire confidence; e.g. in one of the statements at Ex.100, the officer who has recorded the statement has mentioned before concluding the statement that the maker is not inclined to sign and he has refused to sign the same. How could this be possible? In other statements, such endorsements are found independently, after conclusion of the statement. Two persons have allegedly signed the statements, but ultimately they were under custody since long. They were asked to make statement of the events occurred in the month of February, 1999. The details of the statements including each minute incident which had allegedly occurred in the month of February, 1999 or prior thereto, found in the statements make the statements more doubtful. Furthermore, these statements are retracted. The crucial question which has cropped up before the Court is as to who gave basic clue to the Custom Officers that the accused are required to be interrogated with which details and for what purpose. When Shri R.C. Kodekar has accepted that the accused were not subjected to inquiry under the Act, each Superintendent of Custom Department must have such material with him which could have permitted him to ask certain questions to each of the accused. The accused were in prison. It is claimed by the prosecution that all the Superintendents of Custom Department who have recorded the statements of accused were asked to go to prison with a view to record their statement u/s 108 of the Act and all of them were successful in completing their job. It is in evidence that initially the statements recorded were given to their respective superiors. But according to us, the statements recorded on 04th October, 1999 do not inspire any confidence and these statements ought not to have been considered as reliable piece of evidence because:

- i. on the date of statements i.e. 04th October, 1999, none of the accused was required to be interrogated by the Superintendent of Custom Department;
- ii. there is no document on record to show as to why the services of number of

Superintendents of Custom Department were requisitioned from the entire area of District Kutch and other surrounding areas;

iii. there is no evidence to show that any of these Superintendents of Custom Department had obtained permission to enter into the Jail premises from the authorized Superintendent of Jail.

iv. there is no documentary evidence to show that a particular Superintendent of Custom Department had entered into the Jail premises at a particular time and had left the Jail premises after recording statement at a particular time.

v. It is not possible for this Court to believe that the statements might have been recorded in the respective barrack where the concerned accused was housed. We have reason to believe that the said statements must have been recorded in the office premises of either Superintendent of Jail or the other subordinate staff. Each statement runs into number of pages without any overwriting and erasures, and certain details are such that a pointed question must have been posed to the maker of the statement and such an exercise would consume more time. The statements of the accused could have been recorded much earlier and at the earliest available opportunity, especially when they were available at Special Prison at Bhuj.

vi. It is claimed by the prosecution that Shri V.S. Kadiya, Superintendent of Central Prison, Bhuj was present at the time when the statement of each accused was being recorded by different Superintendents of Custom Department. It appears physically impossible to us, unless recording of statements was being done simultaneously and this makes the said statements doubtful and it would be difficult for the Court to accept that these statements were free from any fear, threat or inducement.

vii. The statement of one of the accused namely Ismail Abada alias Aghada gives an impression that the thumb impressions were obtained on blank papers, otherwise there could not have been thumb impression at different angles and spaces on five different papers and some hand-written part on the last page overlaps the thumb impression of the maker of the statement. The language used is Hindi i.e. in the language of the person who recorded the statement and the same is not in the language of the maker. The maker of the statement at Ex.105 is resident of one of the villages of Taluka Abadasa of Dist. Bhuj-Kutch (Gujarat).

viii. Shri V.S. Kadiya, Superintendent of Central Prison, has neither been examined nor proved any document, giving permission to number of Superintendents of Custom Department to enter into the Jail premises and record the statements of persons who were otherwise in judicial custody.

ix. In the second statement of the accused No. 3- Tamachi Khengarji Jadiya, there is reference of his earlier statement dated 16th June, 1999. There is reference of some orders passed by the learned Judicial Magistrate First Class,

Nakhatrana. Similar reference is there in the statement of accused-Jakariya Haji Noor Mamed Jat. These statements are at Exs.101 and 100 respectively. Shri R.C. Kodekar has not pointed out any document asking permissions from Nakhatrana Court obtained either by Shri P.N. Jethwani, Superintendent of Custom Department or Shri K.B. Antani, Superintendent of Custom Department. At least these Superintendents of Custom Department could have produced a copy of the application made by both of them seeking permission from the Court of learned Judicial Magistrate First Class, Nakhatrana. The statement of accused-Jakariya Haji at Ex.100 is the statement referred to by us wherein it is mentioned in the conclusive part of the statement itself that he refused to sign the statement.

x. None of the Superintendents of Custom Department has led any cogent and convincing evidence as to what tempted them to go to a particular accused person, that too to interrogate him in reference to the events which had allegedly occurred in the month of February, 1999, though no specific question qua the offence punishable under the provisions of the Act was required to be put to any of these accused. The Additional Collector of Custom is not examined to bring on record as to why he ordered the Superintendents and Inspectors of Custom to go to the Jail and to record the statements of concerned accused.

xi. There is nothing on record to show as to how the said statements reached to the Investigating Officer/ Police if they were really recorded during an innocent inquiry or scrutiny of facts. No correspondence or documentary evidence of convincing nature has been found produced and proved. The statement u/s 108 of the Act of accused No. 4-Abdul Latif @ Fakiro Mohammad Sumra at Ex.86 shows that diary at Ex.153 was in his possession when his statement was recorded. The said diary was seized under a panchnama in connection with offence registered vide C.R. No. I-17 of 1999 with Narayan Sarovar Police Station and kept as muddamal article in that case. How could it be in possession of accused in Jail custody ?

13. For short, when the statements recorded u/s 108 of the Act do not inspire any confidence in the mind of the Court and when they were retracted statements without any corroborative piece of evidence of convincing nature, no conviction could have been based on such statements.

14. The crucial question raised by Shri Anandjiwala regarding admissibility of these statements in evidence also needs consideration. For the sake of convenience, we would like to reproduce the provisions of Sections 107, 108 and 138(B) of the Act as under:

Section 107 : Power to examine persons:- Any officer of customs empowered in this behalf by general or special order of the (Commissioner of Customs) may, during the course of any enquiry in connection with smuggling of any goods,-

(a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case.

Section 108 : Power to summon persons to give evidence and produce documents:

(1) Any gazetted officer of custom 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 for 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 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 document and other things as may be required.

Provided that the exemption u/s 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).

Section 138B : Relevancy of statements under certain circumstances:

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains:

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of Sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.

15. The provisions of Section 107 of the Act takes care of investigatory emergency. As observed by this Court in the case of Union of India v. Abdul

Kadar Abdul Gani reported in 1985 Cr.L.J. 324, the recording of statement u/s 108 of the Act arises only when an inquiry is initiated either for confiscation of goods or for imposing penalty. True it is that the Custom Officer can call upon a person suspected of having engaged in smuggling activities to make a statement or to furnish information both at the stage of inquiry u/s 124 of the Act. Full Bench of this Court while dealing with the case of Union of India (supra) has overruled the decision but the Full Bench has observed that as per Section 108 of the Act, it is the Gazetted Officer who is in contemplation when he is making an inquiry in connection with the smuggling of goods. Such a Gazetted Officer acting u/s 108 of the Act in connection with the inquiry about smuggling of goods would be empowered to his investigational powers for collecting evidence by examining persons. If a view is taken that he cannot act u/s 108 till notice u/s 124 of the Act is issued to the concerned accused, this observation in paragraph No. 5 of the cited decision in the case of Hemant Bhanushankar Vyas (supra), does not nullify the basic observation made by the Court in the case of Union of India (supra). In the present case, it is not the say of any of the Superintendents of Custom Department examined by the prosecution that they were inquiring into the matter in connection with the smuggling of goods. No document has been produced on record to show that the statements of the accused were recorded under any action contemplated under the Act. It is not the say of the witnesses examined from the Customs Department that the statements of the accused were recorded because they were suspected to have committed any offence under the Act either in the month of June, 1999 when the statements of two accused were recorded or thereafter on 04th October, 1999. Total 5 (five) Superintendents of Department of Customs recorded the statements of the persons who were in prison and they have been examined. So for the sake of argument, if it is accepted that the statements made by the accused before the respective Superintendent of Custom Department were not given under any compulsion and they were given voluntarily, even then their admissibility in evidence itself would come in the way of prosecution. Shri R.C. Kodekar has fairly accepted that he is not in a position to lay his hand to any decision of this Court as well as Apex Court or any other High Court to show that the statement recorded u/s 108 of the Act can be read in any proceeding, irrespective whether the person is facing prosecution u/s 135 of the Act or any other relevant statutes. The decision cited by Shri R.C. Kodekar in the case of Husen Bhenu Malad and Ors. v. State of Gujarat and Ors. reported in 2003(2) GLH 705, would not help the prosecution. In this cited decision, this Court was dealing with the appeal preferred by a convict of the offence punishable u/s 20(b)(ii) of the Narcotics, Drugs and Psychotropic Substances Act, 1985 and a case of smuggling of "Charas" was noticed by the officials of Border Security Force (BSF) and they had informed the Custom Department. The accused of the cited decision were facing prosecution in reference to Sections 36(A) and 42 read with Sections 67 and 53 of the Narcotics, Drugs and Psychotropic Substances Act and the Court was scrutinising as to whether the statements given by the accused u/s 67 of the Narcotics, Drugs and Psychotropic Substances Act and Section 108 of the Act

were voluntary or not. The admissibility of the statements recorded u/s 108 of the Act in evidence was never a question before the Bench.

16. According to us, the statements recorded by the Superintendents of Custom Department in the month of June, 1999; September, 1999 and on 04th October, 1999, could not have been accepted as relevant piece of evidence as the accused persons were not facing charge of the offence punishable under the provisions of the Act or any other relevant laws; and as these statements have not been recorded to initiate any inquiry or during inquiry or proceedings initiated after service of notice u/s 124 of the Act, the same could not have been used as the statements admissible in evidence. It would not be safe to accept the argument of Shri R.C. Kodekar in this respect, otherwise in any criminal case of any nature, the Police machinery can misuse the officers empowered to record statements having some statutory immunity like statements u/s 108 of the Act or Section 15 of the TADA Act or Section 59 of the FERA, etc. Each Investigating Officer would be tempted to make use of such short-cuts to bring home the charge without entering into detailed scientific and conclusive investigation.

17. In the same way, Shri R.C. Kodekar has placed reliance on the decision of this Court in the case of State of Gujarat Vs. Mohammed Atik and others, which would also not help the prosecution. This cited decision deals with the scheme of Section 15(1) of the TADA Act. On plain reading of Sub-section (1) of Section 15 of the TADA Act, it is clear that the confessional statement recorded in accordance with the requirement contained under the scheme becomes admissible inspite of ban contained in Section 25 of the Indian Evidence Act or Section 162 of the Code of Criminal Procedure, 1973. The scheme provides for the recording of confession by a person before the Police Officer not lower in rank than the Superintendent of Police. In the present case, the Superintendents of Custom Department were never asked or intended to record confession of any of the accused persons, otherwise the confession of the accused could have been recorded before the learned Judicial Magistrate First Class. The claim of the prosecution is that these are the statements voluntarily made by them during some proceedings undertaken by the Custom Department and, therefore, these statements are admissible in the prosecution instituted against them for the offences though do not fall in the category of prosecution under the Act or relevant law; and the facts stated by them which are in the nature of admissions should be read as a relevant piece of evidence, is another say of prosecution and on the strength of such admissions, the prosecution claims that the accused can be held guilty. According to Shri R.C. Kodekar, the learned trial Judge has rightly held that the admissions made by the accused persons are reliable piece of evidence and they are sufficient to bring home the charge levelled against them. On close reading of each statement, most of the facts stated by the maker of the statement are descriptive or there is narration of facts. However, certain admissions are in the nature which can be said to be incriminating against the accused in reference to the charge. If the learned trial Judge was of the view that certain admissions made by the accused can be treated as confession, it was the

duty of the learned trial Judge to record a convincing finding to the effect that the confessional part of the statement made by the accused persons in their respective statement, is not under any inducement, threat or promise. When the statement of the respective accused was being recorded by the concerned Superintendent of Custom Department, whether the accused had given the statement in any inquiry conducted by the Custom Department or he was interrogated as accused of C.R. No. I-17 of 1999 (Narayan Sarovar Police Station), are the questions which need answer. According to us, there are ample circumstances to show that these statements were recorded merely because they were named as accused in the aforesaid crime and the Custom Department had not contemplated any inquiry or investigation of offence punishable under the provisions of the Act or relevant laws. The word "admission" in criminal cases is almost the same as defined in Section 17 of the Indian Evidence Act. The admission of the accused is a statement by which he admits either his guilt in terms or substantially all the facts which constitute the offence. The word "confession" has appeared for the first time in Section 24 of the Evidence Act. The said Section comes under the heading "Admission". So it is clear that confessions are merely one species of admission. When the Court is of the view that certain part of statement allegedly made by the accused before the respective Superintendent of Custom, is in the form of confession, then before receiving such statements in evidence, the learned trial Judge ought to have considered whether Section 24 of the Evidence Act would come in the way or not. As discussed in the foregoing paragraphs by us, the said statements are not found genuine. They are not voluntary but retracted statements. The retractions are on record. It is not even the say of the learned Additional Public Prosecutor that the statements are not retracted statements. In such a situation, it appears that the statements have been recorded mechanically, otherwise the Jail Superintendent Shri V.S. Kadiya who has signed the statements along with the Superintendent of Custom Department endorsing that each statement has been recorded in his presence, would have stepped into the witness-box with relevant record. Non-examination of Shri V.S. Kadiya or the actual persons who took the dictation, makes all these statements more doubtful. It appears that the learned trial Judge while recording the finding in paragraph No. 75 of the judgment vis-a-vis evaluating in earlier paragraphs of the judgment, could have dealt with the said aspect in appropriate manner keeping all principles of appreciation of evidence in mind. The convict persons were also accused of Sessions Case No. 85 of 1999 and except the accused Nos. 1, 3, 4 and 5, the rest of the accused of the said case were acquitted. Each of them was sentenced to death and to pay a fine of Rs. 500/-. This Court while dealing with Criminal Confirmation Case Nos. 3 of 2004 and 4 of 2004, with Criminal Appeal Nos. 567 of 2004 and 643 of 2004, has upheld the conviction, but decided to convert the death penalty into imprisonment for life. Each of the accused has been asked to undergo rigorous imprisonment for seven years for the offence punishable u/s 4(b), 5 and 6 of the Explosive Substances Act, 1908. The decision of this Court has been placed by Shri Anandjiwala before us and the facts of this decision clearly reveal that the

Police Officers had learnt about offence on 01st June, 1999 and arrested some persons, made recovery of explosives and a formal complaint was filed on 14th June, 1999. So the convicts of the present case were subjected to trial for their alleged success in committing offence and the present prosecution, as argued by Shri R.C. Kodekar, is in reference to earlier similar attempt made in the month of February, 1999. According to Shri R.C. Kodekar, during those days as sea water was there in the Creek, the accused persons could not offload the dangerous material brought with a view to waging war against India. The said period was sensitive. The Kargil War was going on at the relevant point of time. According to us, with the help of Forensic Science Laboratory experts, the Police could have collected better convincing evidence or at least could have collected some corroborative piece of evidence which can establish that admissions made by the accused in their respective statements are genuine and voluntary. The Yellow Diary at Ex.153 could have been sent to hand-writing or finger-print expert. According to us, there is no convincing evidence on record to show that this diary was recovered genuinely from a particular person in presence of panchas and it bears the hand-writings of the accused from whom the same is recovered or any of the accused named in the chargesheet. In the same way, some reliable oral evidence could have been led about reliance on receipts produced with the list Ex.128 issued by Bhojani Travels at Pakistan. If a passenger had travelled on the strength of the tickets purchased from Bhojani Travels at Pakistan, then relevant record from the entry point Airport, including the passenger manifesto also could have been collected and produced in the present case, and the prosecution also would have shown as to how this evidence is relevant to the wrong allegedly committed in the month of February, 1999. These two documents were found relevant by the Court in respect of Sessions Case No. 85 of 1999. What was the nature of the other evidence available on record in that case is altogether a different question and it would not be proper for us to make any conjecture. According to us, these two crucial documents become irrelevant in absence of any other legal admissible evidence.

18. The point of double jeopardy advanced by Shri Anandjiwala has some force. No muddamal weapon has been produced in the present case, including the alleged recovery of two fire arms from the accused No. 3-Tamachi Khengarji Jadiya and accused No. 2-Jakariya Haji Noor Mamed, recovered under a panchnama drawn by the panchas. Shri R.C. Kodekar has fairly accepted that on this count those two accused persons have been prosecuted individually. When it is indirectly the say of the prosecution that both these accused again should be held responsible along with other accused persons as conspirators, it would seriously prejudice both these accused; and when none of the accused persons was found linked with the said crime registered, it would be risky for this Court to link the other accused persons with the crime registered against both these accused Nos. 3 and 4 under the Arms Act. The prosecution could have instituted the case against all conspirators responsible in brining those two weapons in India at the relevant point of time. In the same way, a competent Court has

acquitted the accused Nos. 1 to 8 in Sessions Case No. 85 of 1999. They could not have been prosecuted afresh on practically similar set of facts and allegations. It was open for the prosecution to plead specifically and to put cogent evidence on record that prior to 31st May, 1999 in the month of February, 1999, a similar attempt was made by this very accused persons. But the said attempt had failed. If the statements recorded u/s 108 of the Act dated 04th October, 1999 are ignored, there is no element of any new or fresh prosecution in the present case. Thus, though there is some force in the arguments of Shri Anandjiwala that the accused Nos. 1 to 8 could have been acquitted solely on this count, we do not think it necessary to record any positive conclusion accepting the say of Shri Anandjiwala in favour of accused Nos. 2 to 7.

19. Today learned advocate Ms.Nita Banker has appeared for orig. accused No. 9 (i.e. accused of Sessions Case No. 29 of 2004) and she has submitted that the appellant-orig. accused No. 9 may be given advantage along with the orig. accused Nos. 2 to 7. However, in response to the query raised by the Court, she has fairly accepted that she does not challenge the conviction recorded by the learned trial Judge qua the appellant of Criminal Appeal No. 2629 of 2005 for the offences punishable under the provisions of Indian Passport (Entry into India) Rules and also under the provisions of the Foreigners Act. However, she has submitted that the quantum of punishment imposed may be reduced to some extent because the appellant-orig. accused No. 9 has already undergone the major part of sentence imposed. Merely because the accused has undergone substantive part of the sentence, we are not inclined to reduce punishment imposed by the learned trial Judge qua the orig. accused No. 9. The serving of substantive period of punishment by itself is not a sufficient reason to reduce the substantive sentence. Unless the Court has reasons for reduction of sentence, the substantive punishment imposed by the learned trial Judge should not be either enhanced or reduced because ultimately this part of the order falls in the domain of the discretionary jurisdiction vested in the Court. The learned trial Judge has only to consider the minimum and the maximum period of punishment prescribed for the offence. We do not find any reason to reduce the punishment imposed upon the appellant-orig. accused No. 9. Indisputably, he was not in a position to show any permit or VISA to enter into India granted by the competent authority. So the appeal of the appellant-orig. accused No. 9 is required to be partly allowed. He is required to be acquitted along with the orig. accused Nos. 2 to 7 from the charge of offences punishable under Sections 122 and 123 of the Indian Penal Code as well as offence punishable under Sections 25(1)(b) and 25(1AA) of the Indian Arms Act.

20. We also do not find any merit in the appeals preferred by appellant-State against the judgment and order of acquittal recorded by the learned trial Judge. The view taken by the learned trial Judge appears to be legal and reasonable, and the same is based on sound logic. The learned trial Judge has also discussed relevant law applicable considering the facts placed by the prosecution during trial in the nature of evidence. So the acquittal appeals preferred by the

appellant-State are required to be dismissed.

21. In view of aforesaid observations, the following final order is passed:

1. Criminal Appeal Nos. 131 of 2006, 132 of 2006 and 137 of 2006 preferred by the appellant-State against the judgment and order of acquittal dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch, in Sessions Case Nos. 56 of 2002, 42 of 2003 and 44 of 2003 are dismissed.

2. Criminal Appeal Nos. 2319 of 2005, 2430 of 2005 and 2432 of 2005 preferred by the appellants-orig. accused against the judgment and order of conviction and sentence dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch, in Sessions Case Nos. 56 of 2002, 42 of 2003 and 44 of 2003 are hereby allowed.

3. Criminal Appeal No. 2629 of 2005 preferred by the appellant-orig. accused No. 9 is hereby partly allowed and partly dismissed. The appellant-orig. accused No. 9 is ordered to be acquitted from the charge of offences punishable u/s 122 and 123 of the Indian Penal Code as well as offence punishable under Sections 25(1) (b) and 25(1AA) of the Indian Arms Act. However, the appeal of the appellant-orig. accused No. 9 is dismissed so far as the offences punishable under Rules 3, 6 and 9 of the Indian Passport (Entry into India) Rules read with Section 34 of the Indian Penal Code and Section 13(2) read with Section 14 of the Foreigners Act read with Section 34 of the Indian Penal Code, are concerned; and the judgment and order of conviction and sentence dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch in Sessions Case No. 29 of 2004 is upheld so far as the offences punishable under Rules 3, 6 and 9 of the Indian Passport (Entry into India) Rules read with Section 34 of the Indian Penal Code and Section 13(2) read with Section 14 of the Foreigners Act read with Section 34 of the Indian Penal Code, are concerned.

4. The judgment and order of conviction and sentence dated 28th October, 2005 passed by the learned Additional Sessions Judge, Bhuj-Kutch, in Sessions Case Nos. 56 of 2002, 42 of 2003 and 44 of 2003 is hereby quashed and set aside and the appellants-orig. accused No. 2 to 7, namely Mamad Bhakhan Rayma, Jakariya Haji Noor Mamed, Tamachi Khengarji Jadiya, Abdul Latif @ Fakiro Mohammad Sumra, Abdul Wahab Talab Jat and Adhado @ Adha @ Ismail Rana Abdsa respectively, are ordered to be acquitted from all the charges levelled against them in respect of the offence in question.

5. The appellants-orig. accused Nos. 2 to 7 are ordered to be set at liberty forthwith, if they are not required for any other purpose by the Jail Authority.

6. The amount of fine, if any paid, be refunded to the appellants-orig. accused Nos. 2 to 7 after proper identification.