

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 637 of 1993

with

CRIMINAL MISC.APPLICATION No 2545 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ASSTT.COLLECTOR OF CUSTOMS, KANDLA

Versus

MR VANG AH BOO & 2

Appearance:

1. Criminal Appeal No. 637 of 1993
2. Criminal Misc.ApplicationNo 2545 of 1993

Mr. H.M Mehta, Sr.Central Govt. Spl. PP
with Mr. N.D Nanavati & Mr. B.B Nayak,
Addl. Standing

Counsels for the Appellants.

Mr. Kiran Jani, Advocate for the Respondents.

Mr. P.S Chapaneri, APP for the Respondent-State.

CORAM : MR.JUSTICE K.J.VAIDYA

Date of decision: 16/12/94

ORAL JUDGEMENT

These two appeals, first-one an appeal for the enhancement of sentence by the Assistant Collector of Customs (Prevention), Kandla (Original Complainant), preferred before this Court, and second-one by the Sumahadi Bin Maoris (the original accused No. 3) before the Sessions Court-Kachchh, at Bhuj (subsequently transferred to this Court), are directed against the common judgment and order dated 3-12-1992 rendered in C.C. No. 2836/91 passed by the learned Chief Judicial Magistrate - Kachchh, at Bhuj, wherein three respondents, namely; Wong Ah Boo, Asmi Firmanto, Sumhadi Bin Maoris who came to be tried for the alleged offences punishable under Section 135 (1) (a), 135 (1)(b), 135 (1)(i) of the Customs Act, 1962, under Section 5 (1) of the Import and Export (Control) Act, 1947 and under Section 120 (B) read with Section 34 of the Indian Penal Code, on their pleading guilty to the charge were convicted for the same and sentenced to undergo sentence of various rigorous imprisonments and fine; as stated in detail in paragraph hereinafter.

2. To briefly narrate few relevant facts of the case as far as they are necessary to determine the question involved regarding the quantum for the enhancement of the sentence, it may be stated that on the basis of the secret information received that a Singapore registered merchant vessel viz., "M.V Pacific Gembira" carrying wooden-logs to Kandla (India) had on board a very large quantity of silver and other contraband goods which will be off-loaded by it before reaching the destination, the officers of the Directorate of Revenue Intelligence, Bombay requested the Coast-Guard ship viz., "Vijaya" to intercept the said vessel viz., "M.V Pacific Gembira". Acting on this tip-off, on 19-5-1991, the Coast-guard ship viz., "Vijaya" intercepted the said vessel in the mid-sea between Okha and Porbandar and was taken to Kandla Port on 20-5-1991 for necessary search and investigation. The DIR authorities thereafter rummaged the said vessel and ultimately as per the information received, they were able to recover on the end of 9th day, the Silver of foreign make weighing 9528.216 grams valued at Rs. 6,67,71,012/- (rupees six crores sixtyseven lacs seventy one thousand twelve) as well as 30 VCRs of foreign make worth Rs. 4,50,000/- (rupees four lacs fifty thousand only) from the Water Tank No. 2 for which the accused had neither any pass nor any permit nor any explanation to offer, and accordingly, the same

came to be seized under the Panchnama. In all, the contraband muddamal goods totalling more than Rs. 6,72,21,012/- (rupees six crores seventy two lacs twenty one thousand and twelve) were recovered. Incidentally, it may also be stated that at the relevant time Zanaidez B. Gomez, Wong Ah Boo, Asmy Firmanto, Sumhadi Bin Maoris were the persons employed in the vessel in question working in the capacity of the Master, Chief Engineer, Bosum and Chief-Cook respectively. During the course of further inquiry, statements of all the four accused persons came to be recorded under Section 108 of the Customs Act on 29-5-1991, wherein all of them admitted the role played by each one of them in respect of the contraband goods in question. Now despite the fact that the muddamal goods were contraband goods all the four accused persons acting in concert smuggled the same into Indian Territorial waters. On the basis of these allegations after obtaining necessary sanction, the Assistant Collector of Customs, Kandla filed a complaint on 3-12-1991 against all the four accused persons before the learned Chief Judicial Magistrate, Kachchh at Bhuj for the alleged offences punishable under Section 135 (1)(a), 135 (1)(b), 135 (1)(i) of the Customs Act, 1962, under Section 5 (1) of the Import & Export (Control) Act, 1947 and under Section 120-B read with Section 34 of the Indian Penal Code. Thereafter, the charge Exh. 43 was framed wherein except Zanaidev B. Gomez, master of the vessel in question, (trial separated) the rest of the three accused persons pleaded guilty and prayed for mercy in the matter of sentence. The learned Magistrate accordingly accepting the said 'plea of guilty' in the presence of the learned advocates for the accused passed the order of conviction and sentence as stated in detail in the chart tabulated below :-

Name of Accused persons	Sentence Imposed under u/ss.135 (1)(i), of the Customs Act.	Offence U/s.5(A) of the Act.	Offence U/s.120B of the Act.	Further i.d of sentence total fine of Rupees
Wong Ah Boo	RI for 2 years	R.I for 2 years & Rs.2000/-	R.I for one year & fine of Rs.1000	R.I for Rs.5000/- and fine

Asmy Firmanto -do -do- -do- -do-

Sumhadi Bin R.I for	R.I for	R.I for	R.I for one
Moaris	5 years	5 years	1 years & for Rupees
	& fine	& fine of	fine of 10,000/-.
	Rs.5000	Rs. 3000/-	Rs. 2000

3. That the complainant feeling that the impugned order of sentences passed against the respondent-accused was comparatively unduly lenient has challenged the same before this Court by preferring the present appeal for enhancement of sentence. Similarly, out of three accused persons, Sumhadi Bin Maoris feeling aggrieved by the impugned order of sentence of five years and fine of Rs. 10,000/- in all, as quite harsh and excessive went in appeal before the Sessions Court - Kachchh, at Bhuj, which came to be numbered there as Criminal Appeal No. 14 of 1993. When the appeal for the enhancement of sentence preferred by the original complainant was called out last week, at the joint request of the learned advocates appearing for the respective parties, the appeal of Sumhadi Bin Maoris pending before the Sessions Court - Kachchh, at Bhuj was ordered to be transferred to this Court to be heard together alongwith the appeal No. 637 of 1993.

4. Mr. H.M Mehta, the learned senior Special PP appearing for the Appellant while vehemently challenging the impugned order of sentence submitted that taking into consideration firstly, the extreme gravity and seriousness of the alleged offence, and secondly, the law having failed to deter if not to totally eradicate ever increasing offences of smuggling on the coastal lines of Western India, atleast to some extent, the sentence awarded on face of it being comparatively quite lenient and manifestly unjust, the same is required to be enhanced. Mr. Mehta submitted that unless and until the learned Magistrate trying such serious cases cares to appreciate the extreme gravity and seriousness of offences and its ultimate fall-out on the Society and accordingly resolves himself to come down heavily upon such anti-national elements more particularly when the accused involved are the foreigners and found to have been involved in smuggling contraband goods worth more than rupees six crores fifty lacs, it is indeed not at all possible to control the ever-escalating crime ratio of smuggling and for that purpose any espionage activities and trafficking in Narcotic drugs and arms on

quite vulnerable, sensitive coastal line of our country ! Mr. Mehta further submitted that the learned Magistrate has clearly overlooked the proviso to Section 135 of the Customs Act, wherein there is a clear mandate that in cases wherein value of the contraband goods exceeds Rs. 1 lac (rupees one lac), the Court had no discretion left with it but to impose the minimum sentence of three years, unless of course, there were some special and adequate reasons for awarding less than the same. In support of this contention, Mr. Mehta has relied upon the decision of this Court rendered in case of State v/s. Thakorelal Keshavlal Rana, reported in 1991 (1) GLR p-71. Mr. Mehta further submitted that none of the grounds; such as (i) that the accused has voluntarily pleaded guilty, (ii) has a large family to maintain and that he was the only bread-winner; (iii) that the offence alleged against him was the first offence; and for that he was seriously repenting; (iv) that he will not repeat the same or similar offence in future; and (v) that it was under sheer unfortunate compulsion of life that he has become the victim of the conspiracy of circumstances to be involved in the commission of the crime alleged against him, on the basis of which comparatively lenient view was taken by the trial Court can be said to be special and adequate reasons to impose sentence less than the minimum prescribed. According to Mr. Mehta, no doubt the learned Magistrate has imposed substantive sentence of imprisonment for some years and some amount of fine, but at the same time, taking into consideration the extreme gravity and seriousness of the offences highlighted above, the same can not be said to be commensurate with the alleged offences against the accused persons, and accordingly, merely because the accused pleaded guilty that by itself was hardly a ground for the learned Magistrate to unnecessarily feel obliged and to impose a sentence less than the minimum prescribed under the Act so far as the respondent No. 1 and 2 are concerned, and sentence of only five years and some fine so far as the respondent No. 3 was concerned. On the basis of these submissions, Mr. Mehta finally urged that sentences against all the accused persons be suitably enhanced so as to deter the accused persons and serve as an object lesson to the other like-minded persons from committing such offences in future.

5. As against the above, Mr. Kiran Jani, the learned advocate appearing for the respondents equally vehemently submitted that despite all the three accused persons making clean breast of everything and frankly pleading guilty, the learned Magistrate has indeed quite unduly and surprisingly came down upon all of them

heavily by imposing rigorous imprisonment of as many as two years, two years and five years respectively along with substantial amount of fine in thousands ! Mr. Jani further submitted that accused persons were at the most merely the carriers, not only that but they were young, only bread-winners in the family and offences alleged against them were first, and in that view of the matter the same constituting quite a special and adequate reasons, the learned Magistrate ought to have taken still lighter view of the matter by imposing the sentence less than the actual awarded. Mr. Jani further submitted that in this sort of smuggling cases, the kingpin always remain out of reaches of the law enjoying in five star hotels and petty henchmen like his clients acting under some unfortunates compulsions of life, just become victim of the circumstances are booked and ultimately have to face the roughs, toughs and rigorous of prosecution, trial and ultimate conviction and sentence, which is just like "big fishes remain at large and small fries are caught in "!! Mr. Jani further submitted that in departmental proceedings, not only the huge haul of contraband goods came to be confiscated but each one of the accused persons have been heavily fined. Mr. Jani further submitted that while imposing the sentence, the same should be tampered with mercy and particularly when the accused were foreigners and have readily pleaded guilty without wasting public time of the trial Court and the Custom Department. In the alternative, Mr. Jani finally submitted that in case this Court was not inclined to accept any of his above submissions and intended to enhance the sentences, atleast to the minimum sentence of imprisonment for three years or more, then having regard to the fact that after the impugned order of conviction and sentence came to be passed, Wong Ah Boo and Sumhadi Bin Maoris having already undergone additional imprisonment of 18 months and in all for as many as 42 months, while Asmi Firmanto has undergone the additional imprisonment of 40 months and 15 days, this additional period of sentence may be treated as enhancement of sentence and all the three accused be accordingly released forthwith as having undergone the period of enhanced sentences.

6. Now having heard the learned counsels for the respective parties quite at length, it may be stated at the very outset that the submissions made by the learned Special senior PP Mr. Mehta have a considerable force and hence the same deserves to be accepted. It is indeed no doubt true that all the three respondents have pleaded guilty and on the basis of the same only, the impugned order of conviction and sentence came to be passed. It

is equally further true that awarding of sentence is essentially a matter of trial Court's discretion and the same should not ordinarily be interfered with, unless it is found to be grossly inadequate and manifestly unjust. But then to this general principle, there is one exception viz., that when the statute itself prescribes the minimum sentence, the trial Court has no option, discretion left to it but to impose minimum sentence prescribed, unless of course, the Legislature has also vested some further discretion to award less than the minimum on the ground of special and adequate reasons to be given in writing. In fact there is no such legal mandate and indeed there cannot be any one that whenever the accused pleads guilty, irrespective of the facts and circumstances of that particular case, the trial Court not only is bound to accept the same straightaway but after accepting the same, as a matter of necessary corollary thereof, was further bound to award sentence lesser than the minimum prescribed under the Act, in the name of so-called "mercy" !! In a given case like the present one or for that purpose in any other cases, whenever the learned Magistrate is befaced with the 'plea of guilty' ,he has to sound alert to this judicial conscience and discretion by adverting Firstly, to the fact whether the crime alleged is an organised one and/or of the professional category, or some such other ordinary offence which had taken place in the heat of moment or due to some negligence or inadvertance; Secondly, by referring to the relevant provisions for the penalty prescribed under the Act and to find out therefrom whether the Statute has prescribed any minimum sentence. In this regard, the further care that is required to be taken is that, the concerned statute book he refers to is the latest and not the absolute one ! Thirdly, to imagine and appreciate the gravity and seriousness of the offence alleged and its resultant impact on the Society and the nation as a whole. Fourthly, the unabated continuity and alarmingly increasing frequency of the alleged offences in the particular area; Fifthly, why indeed instead of alleged offences if not eradicated totally or arrested partly even, the same persisted being committed in that particular area and what indeed could be the possible reasons for the same ! Sixthly, what indeed should be the attitude or to put it positively the response of the Court in order to effectively control and eliminate as far as possible, the intensity and frequency of the alleged offences; Seventhly, what indeed could be the real intention of the accused behind pleading guilty; Eighthly, could it be the possibility of some scheming attempt on the part of the accused to lure away the learned Magistrate reeling under the acute unnerving

pressure of backlog of cases exploiting his weakness or greed for the quick disposal and thereby succumbing him to easy course of throwing away the cases with the lighter sentences to the liking of accused-persons ? Ninthly, could it be the fact that whenever the accused finds himself in a tight corner and accordingly difficult to come out from the clutches of the law, that is to say, roughs, toughs and rigours of the impending prolonged trial, conviction and sentence, he was bound to cleverly prefer low-profile before the learned Magistrate and in that methodical process dramatically taming himself down pleads guilty to get away with the lighter possible sentence and walk out of the Court with a mischievous wink in one eye and the smile in his cheek !! Tenthly, that in such type of smuggling cases under the Customs Act these days the complaints are filed at quite a belated stage, and therefore, by the time the charge is framed, the accused as an under-trial prisoner languishes in jail for quite a long period. In a given case, even for more than two to three years ! Under the circumstances, by the time the charge is framed, the accused many a times is tempted to plead guilty hopefully expecting that even if the Court was to impose some sentence of imprisonment, the period undergone as an under trial prisoner would be readily given as set-off and as a result he would accordingly be immediately out of jail without further trial. Eleventhly, many a times (but for the experience in hundreds of such cases, this Court would have possibility restrained itself from observing) the learned Magistrate sometimes inadvertently, may be sometimes in the blind craze for cheap disposals and sometimes even deliberately, despite reported decisions of the High Court and Supreme Court, accepts the "plea of guilty" on mere asking, letting off the accused with the lighter sentence perhaps not realizing the serious consequences of such unbecoming act on his service career that may follow. Twelvethly, the object underlying the particular act for example in the instant case, the national economy, (and for that purpose in other Acts security and the law order situation as the case may be) and awarding of what amount of sentence can take proper care of the same in minimizing if not eliminating the recurring of such offences in the areas !! Thirteenthly, further still where the statute prescribes minimum sentence, the fact that accused were young, poor, lone bread-winners, repenting or that it was their first offence, was indeed of no consequence in case of extreme grave nature like the present one. Forteenthly, whether at the time of pleading guilty, the learned Public Prosecutor and the complainant were present so as not to take them by surprise by imposing

sentence lesser than the minimum prescribed. Fifteenthly, over and above the statutory minimum sentence prescribed under the Act, having regard to the facts and circumstances of the case where the offence alleged is of extreme grave and serious nature and accordingly, if the Court was prima facie even inclined to impose the maximum possible sentence, order to arrest crime wave despite the accused pleading guilty, whether the Court has disclosed its mind likewise before doing so. Sixteenthly, in order to have no room whatsoever for any remote possible allegation of plea-bargaining, in cases wherein the statute has prescribed the minimum sentence or where though no minimum sentence is prescribed, yet the Court having regard to the facts and circumstances of the case like the present one was inclined to impose maximum possible sentence of imprisonment and fine on accused pleading guilty, he should be asked to do so by filing clear-cut written purshis to the said effect. Seventeenthly, after carefully screening and examining the aforesaid factors, if the learned Magistrate was prima facie of the view to accept the plea of guilty and as a result of the same was further inclined to give a lighter sentence, then to carefully visualize as to what indeed could be the possible fall-outs of the lighter sentence viz., on (i) the legislative policy, the object underlying that particular Act, and thereby ultimately upon the respect and honour of that Law ! (ii) the morale of the law enforcing agency (in the instant case, the Customs Officers); (iii) his own image as a Magistrate, and (iv) the overall credibility i.e. the faith of people in the Administration of Justice !! It may once again be re-emphasized that merely because the accused pleads guilty that by itself does not warrant or mean that the learned Magistrate should accept the same at its face value. The reasons is, if the plea of guilty is blindly and mechanically accepted, then in gross cases like the present one, serious miscarriage of justice was likely to take place. The Court trying the criminal cases should be wise enough with the worldly wisdom to know that all accused appearing before it are not always that fair, fine and simple, truthful and honest gentleman as they outwardly appear to be, and therefore, the submissions made before it by way of pleading guilty should not be accepted at its face value without carefully screening, scrutinizing and testing the same in the light of the common sense, borne out of the worldly experience. In fact it is hardly required to be stated that "Law minus commonsense and the overall judicial pragmatism is nothing less than cynicism, perversity and accordingly, can never deliver substantial justice more so when it is

mechanically followed, shutting ones eyes to some obvious hard facts and nacked truths of life !! To apply law without commonsense and the ordinary prudence is something like blind man plodding across the road trying to cross the same to find its way with the help of the stick (Law) !! Thus, whenever accused pleads or pretends to plead guilty, if the learned Magistrate fails to operate on any of the aforesaid judicial frequencies and waive lengths, he was likely to wander away from the path of justice and trapped by some scheming accused, managing to run away with the lighter sentence, resulting into serious miscarriage of justice thereby.

In this view of the matter, it would indeed be quite advisable and, accordingly, desirable in the first instance, for the learned Magistrate to remember the aforesaid check-list by heart and keep the same in the forefront of his mental eyes at the time of deciding the "plea of guilty" (that is - whether the same should be accepted or not and if accepted what would be the proper sentence to be imposed) and in the second instance, if for want of experience or because of slippery habit of memory and forgetfulness, the aforesaid check-list goes out of sight and thereby out of mind of the learned Magistrate, then to meet with such a challenging eventuality, the catalogue of said checklist has firstly got to be put down in black and white and thereafter placed/insterted under the glass of desk in the Court room where he presides as a Judge in order not to miss the same to wander away.

7. Accordingly, bearing in mind the aforesaid checklist in the present case also while entertaining the plea of guilty and thereafter accepting the same and passing the impugned order of sentence, having regard to the facts and circumstances of the case, the learned Magistrate ought not to have been oblivious to the following glaring facts constituting the extreme gravity and seriousness of the offence and some of the pertinent observations of the Supreme Court and the High Court made in the said regard such as (i) the accused were foreigners; (ii) the muddamal contraband goods confiscated were silver, VCRs, etc., of foreign make worth more than Rupees six and half crores seized from the foreign vessel where accused on their own statements under Section 108 of the Customs Act were involved, which but for the secret tip-off would not have been caught at all; (iii) that the experience of last several years to the effect that the nefarious anti-social smuggling and espionage activities quite clandestinely were alarmingly on increase, had become rampant and unabatedly going on,

on large scale in the vast coastal areas, more particularly in Kachchh & Saurashtra areas which are highly sensitive zones being at a whispering distance from hostile Pakistan, seriously damaging the national economy and creating problems for the security and independence of the country (which many a time is indeed simply impossible to detect) needing little more introspection both - on the part of the top-most D.R.I officers and the Court as to why it was so happening, and whether in said regard, either the revenue intelligence was slack and not upto the mark and/or the liberal and unconcerned attitude of the Court in the matter of conviction and sentence was in any way responsible for the same ???!!! (iv) that social and economic offences stand on graver footing in respect of punishment. "The new horizons in penal treatment with hopeful hues of correction and rehabilitation are statutorily embodied in India in some special enactments but crimes professionally committed by deceptively respectable members of the community by inflicting 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, adulterator and others of their like have been busy in their underworld because the legal hardware has not been able to halt the invisible economy aggressor inside. The ineffectiveness of prosecutions in arresting the wave of white-collar crime must disturb the Judge's conscience. While courts agree that penal treatment should be tailored to the individually the extreme category of professional economic offenders, incarceration is peculiarly potent. When all is said and done, the offences for which the appellant has been convicted are typical of respectable racketeers who tempted by the heavy payoff the peril of the law and hope that they could smuggle on a large scale and even if struck by the Court they could get away with a light blow." (Balkrishna Chhaganlal Soni v. State of West Bengal, AIR 1974 S.C 120); {para 18 & 19 at page Nos. 124 & 125 respectively}; (v) that "it must be realized that economic offence like smuggling shake and wreak the entire national economy. Sympathy for those who are virtually the enemies of the people is difficult to comprehend. It is unnecessary to fall on the shoulders of such an offender and join with him in the sobbing. When Parliament (which represents the will of the people)

views these offences with gravity and alarm one cannot be excused for projecting one's own philosophy to the contrary and in virtually nullifying the will of the Parliament by refusing to faithfully enforce the law. Misplaced sympathy in such matters shakes the faith of people in the judicial system and tarnishes its image. Merely because big smugglers hide behind the skirt of these small operators or linkmen and the big guns escape, these offenders cannot be treated with ultra and uncalled for sympathy. The big operators cannot operate if the small operators do not extend their willing hand. The chain has to be broken and a sentence which would deter the particular offender, as also those who are like-minded, must be imposed (State of Gujarat vs. Manharlal Ambalal Soni, 17 GLR 427).

8. Thus, taking into consideration the facts and circumstances of the case, there is indeed no doubt that the learned Magistrate has failed to operate on the above listed judicial frequencies and thereby clearly overlooked extreme gravity and seriousness of the alleged offence and the proviso to Section 135 of the Customs Act providing for minimum sentence of three years, etc. In this view of the above catalogue of glaring circumstances of which a judicial notice could be and accordingly ought to have been taken but is unfortunately not taken while imposing the sentence. Thus, having regard to the fact that the contraband goods seized from the possession of the respondents exceeded one lac of rupees, the learned Magistrate was under statutory obligation to impose the sentence not less than three years as the reasons given by him, by no stretch of imagination, can be said to be special and adequate in back-ground of the extreme gravity and seriousness of the offence. For the alleged offence under Section 135 of the Customs Act, where the substantive sentence in cases where the smuggled goods are more than Rs. one lakh, is upto seven years R.I and some fine, the prime question is - Can there be any better and grosser case of imposing the extreme sentence of seven years R.I. and heaviest fine than the present one ??? When the Legislature in its wisdom has made provisions for imposing the sentence of as many as seven years, it must have in its mind certain extreme cases, and there indeed cannot be any doubt that the offence of smuggling on coastal lines of India like the present one is one of such extreme case ! The punishment like a sword, is a holy weapon in the hands of the Deity of Justice. The same is not merely meant for mere show, for whipping and/or brandising in the air ! The same is also not scare-crow to scare away birds and animals damaging the standing crop in the field ! Rather in the

appropriate cases, Swords are required to be used and used and likewise the extreme sentence of R.I alongwith heavy fine is also required to be imposed and must be imposed making the accused of the national economy feel what indeed is the power in the sentencing process of the Court and that the sword of sentence is not wooden-one !! It is perhaps here that the accused having quite intelligently realized on the one hand that their being one of the grossest case where the maximum punishment of seven years can not be ruled out and therefore to save themselves from unsavoury situation of maximum sentence and on the other hand that sometimes the unrealistic courts dozing like a Watchman on the gate could be given a slip by persuading to take lighter view that they were tempted to plead guilty in order to get away with the lighter sentence and accordingly, it was here perhaps that the learned Magistrate has walked in to the trap thinking that sentence of two years rigorous imprisonment and some fine would meet the ends of justice forgetting altogether that on the coastal lines and on boarder areas of India with Pakistan such offences regularly go on with the help of the fifth columnist of the country and soft sentencing is nothing but taming, encouraging and providing shelter to offenders of such offences to play with the country's life. Mind well, if in our country the law and order situation if it has started gradually deteriorating as alleged, and further still if the law also has started losing its respect, it is neither only because of any inadequacy or inefficiency of law nor further more because of only inefficiency, and in a given case corruption in the law enforcing agencies but it is perhaps more because at times, the over charitable, unconcerned relaxed attitude and approach of the Courts in seeing on the one hand the case of the accused in isolation with all mercy for him and on the other hand forgetting altogether the concern for overall social, national interest involved of the people, the real sufferer at the hands of such accused persons and the alleged offences going on challengingly practically unopposed by awarding lighter punishments !! In this connection, the following observations by the Supreme Court (though it pertains to the acquittal, the same can as well be usefully read in the matter of exercising judicial discretion while imposing sentence) in the case of State of Gujarat v. Mohanlal Jitmalji Porwal, reported in AIR 1987 SC p-1321 the same reads as under :-

5. xx xx xx xx xx

"Ends of justice are not satisfied only when the
accused in a criminal case is acquitted. The

community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The Community or the State is not a persona non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the community in the system of administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

Accordingly, it could be seen that "ends of justice" in the present case cannot be said to be satisfied merely because some sentence of RI and fine were imposed on the accused. The nation as a whole clamours for getting rid of such gross offences and accordingly to achieve the said goal - the aspirations of the people, the Court must resolve to come down quite heavily upon the accused by relentlessly imposing the maximum possible sentence till the time deterrent effect is felt and the crime wave starts receding.

9. While deciding this appeal for enhancement of the sentence, this Court is indeed quite conscious of three paramount principles governing the sentencing process. Firstly, the sentence is essentially a matter of trial Court discretion and unless the same is grossly inadequate and manifestly unjust, the Appellate Court should not lightly interfere with the same. Secondly, the sentence should always be commensurate with the gravity of the offences, and thirdly, the underlying twin object of the penology namely that on the one hand order of sentence should be deterrent enough to deter the accused from attempting same or similar offences in future and also on the other hand to serve as an object lesson to the person having similar modus operandi to commit the crime alleged. Now bearing in mind these

three principles, it indeed can not be said that the sentence awarded can be said to be in commensurate with the extreme gravity and seriousness of the offence. In fact, in the light of the circumstances highlighted above, the gravity and seriousness of the offence is manifestly extreme to such an extent that sentence imposed by the Trial Court in the opinion of this Court undoubtedly is unduly lenient and manifestly unjust ! Not only that but in case the impugned order of sentence is not disturbed and enhanced, similar minded accused persons would be quite tempted to take calculated risk of committing similar offences in territorial waters of the country with clear understanding that in case offence is detected and they are arrested, they would immediately plead guilty in the Court and get away with lighter possible sentence. The judicial notice can as well be taken of the fact that smuggling which is a nefarious activity, for the anti-national and anti-socials, it is highly alluring international profitable business. Accordingly, certain class of persons are quite prepared to undertake any hazards, financial and physical as well of undergoing any period of imprisonment and fine, in case they are detected. The kingpins involved in such offences like a businessman take a calculated risk upon themselves and engage persons in smuggling activities who more often then not are careerists, professionals, working under some guise of employment on the ship. These persons engaged in smuggling activities are in the first instance hopefully promised to get rich awards on successful operation of smuggling the contra-band goods, in the second instance, they are further fully assured that in case during the course of smuggling transaction if they are arrested, the enough care would be taken to be defended by an advocate and in the third instance, in case they were ultimately sent to jail, their family will also be taken proper financial care during their period of incarceration. When such is the tempting crime insurance guaranteed from the underground kingpins, in these days of extreme unemployment and starvation, with dreams to live luxuriously by taking some risk people gets just prepared to undergo any risk which is duly covered by their employer. This indeed is one of the hardest fact of life which cannot be permitted to be hood-winked at to lose sight of !! May be, or it may not be so in each and every case of smuggling, still however, not to take judicial notice of such possible back-ground, the common sense stoke of the situation would be too simpleton an approach for the court worth capable of doing any justice to the nation. By way of abundant caution even, the aforesaid broad back-ground is required to be kept before the mental eyes of the Court to err on

the safer side of the national interest. When such is the glaring position, are we to take that merely because Kingpins are away, person actually involved in heinous activities of smuggling should be let off lightly under one pretext/excuse or the other in the name of so-called "mercy" and "judicial discretion" ? Nodoubt, the Courts of Law while doing justice is of course bound to know Law, but when it comes to the real application and interpretation of law to the facts, the judicial vision should be clear enough with two eyes namely, one of the sound common sense and second of judicial conscience and concern for the common man and the overall national interest. If these two eyes are or even any one of the two are shut-down, no law which is primarily enacted for the protection and welfare of the people at large can ever bring about the desired result - justice worth the name to the community for which it is enacted. While considering the plea of mercy by accused, the Courts are bound to know and understand that mercy does not mean mercy to the accused alone, even the Society, community as a whole which is sufferer at the hands of these accused persons have also just claims on the Court for claiming "Justice". Thus, whenever the question of preference in the matter of "mercy" to the accused or the community arises, depending upon the facts and circumstances of that case, the scale of justice should tilt in favour of the community.

10. In this view of the matter, taking into consideration the extreme gravity and seriousness of the offence and that too at the hands of foreigners in the most sensitive zone of coastal area of Kutch and Saurashtra, this Court sitting as a Trial-Court certainly would not have hesitated for even a breath more in imposing maximum sentence of seven years and some heavier fine. The reason is the disease of smuggling has been going on such a large scale and has become so chronic and rampant and desperate that it requires to be desperately treated, keeping in mind the adage that 'the disease desperately grown should be treated desperately before it kills a person affected with the said disease to save them from. If indeed you want to cry-halt to the crime, the Court is indeed one of the most powerful agency which can certainly help back in arresting the escalating crime ratio, bringing it down if not totally eradicating the same, by imposing the maximum possible punishment even in cases where the accused pleads guilty. In fact it is the duty of the Court first of all to uphold the respect, dignity and honor of law, secondly of boosting morale of the Law enforcing agency and thirdly to keep in tact the faith of people in the Administration of Justice, and

accordingly, in an appropriate case like the present one the Court has got to rise to the occasion by inflicting the maximum sentence, if it does not want to unnecessarily expose itself to the allegation that one of the reasons for deteriorating of law and order situation in the country is perhaps the over-leniency and charitable view of the Court in dealing with the offenders. Accordingly, this Court at this stage can as well certainly enhance and impose the maximum sentence of seven years and further fine and would have without any hesitation positively done the same but it refrains from doing so for certain valid reasons ! This Court is of the view that firstly when statutes prescribe the minimum sentence, and the Court has no alternative but to impose the minimum and secondly, when the statute prescribes the maximum punishment and accordingly having regard to the extreme case of gravity and seriousness of the offences, the Court intends to impose the maximum sentence, than in such type of cases if the accused pleads guilty, it is the foremost duty of the Court in the first instance, to point out to the accused that look - here even if you plead guilty, the Court is not going to take a lenient view of the matter by imposing sentence less than the statutory minimum, and in the second instance, in case of extreme offence, where it is inclined to impose maximum sentence, the Court must disclose its mind as to for what maximum period - years of RI and fine it intends to impose. The consequences of accused pleading guilty must be told point blank in advance before accepting the same, as it would be simply unjust and unfair to take accused by surprise by imposing statutory minimum or maximum sentence as provided under the Act on their pleading guilty to the charge. To do so would be springing surprise and shock to the accused hitting him below the belt. It is not at all difficult to imagine that when the accused pleads guilty, he is tempted to plead so taking that by pleading guilty, the Court would be merciful and he would be left off with a lighter sentence. Such impression of the accused right or wrong cannot be permitted to be stabbed at his back by surprising him by imposing either the statutory minimum or the maximum sentence. In the instant case, had there been case of learned advocate Mr. Jani that accused has been trapped because of the plea-bargaining, than the matter could have been remanded, but that is not the case here. Mr. Jani had submitted that this is not a case of plea bargaining and the accused had voluntarily pleaded guilty. Under the circumstances, though this Court is very much inclined to impose the maximum sentence of seven years, it is under heavy constraints of justness and fairness to the accused by holding itself back in

imposing the sentence of seven years as after recording the plea of guilty, much waters have flown and it is too late in a delay of inform them that this Court is going to impose on them the maximum imprisonment of seven years and accordingly, whether they wanted to plead guilty. It is for these reasons that though the accused are foreigners and are involved in a serious case of smuggling, this Court is holding back itself in not imposing the maximum possible sentence of seven years imprisonment just to take them by surprise. Once again, to do so would be simply hitting them below the belt which is quite unjust, unfair and unjudicial for any Court to do. In this view of the matter, by this time, since all the three accused persons have already undergone more than minimum sentence of three years (42 months of imprisonment) in all and further since the learned Sr. PP in principle quite satisfied with the additional period of about 18 months more undergone to be treated as enhancement of sentence so far as original accused No. 2 and 3 are concerned. Nothing further is required to be done in their case. So far as accused Sumadhi Bin Maoris is concerned, the trial Court has given quite convincing reasons in awarding sentence of five years he being the principle offender and Mr. Jani has failed to persuade this Court to reduce the same.

11. Nodoubt, ordinarily, the justice should be tampered with mercy and while awarding sentence also as far as possible, the attending circumstances of the accused should be separately taken into consideration but in a gross case like the present one, wherein foreigners are involved in anti-national activities and found to be involved in the rising tide of smuggling activities of worth more than six crores of rupees, it is always wiser and, therefore, advisable in overall interest of the country not to be unduly overtaken by one-sided sympathy which can prove to be misplaced sympathy and curse to the Society.

12. In the result, this appeal for enhancement of the sentence is partly allowed. Accordingly, the impugned order sentencing Mr. Wang Ah Boo and Mr. Asmy Firmanto Bosun respondent Nos. 1 & 2 respectively is modified and accordingly sentence is enhanced from 2 years RI to that of period already undergone till today for each of the offences which are ordered to be run concurrently. So far as the amount of fine is concerned, respondent Nos. 1 and 2 are directed to pay further fine of Rs. 5000/- (rupees five thousand only) each, in default, to undergo further RI for six months.

So far as appeal for enhancement against Mr. Sumadhi Bin Moaris is concerned, the same stands dismissed. His appeal against the impugned order of conviction and sentence the same being Transferred Criminal Appeal No. 1145 of 1994 is also dismissed.

Prakash*