NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2021
(Arising out of SLP (Criminal) No. 6767 of 2016)

JAYAN ..... APPELLANT

v.

STATE OF KERALA ..... RESPONDENT

WITH

CRIMINAL APPEAL NO. OF 2021
(Arising out of SLP (Criminal) No. 6769 of 2016)

VIJAYAN AND ANR. .....APPELLANTS

v.

STATE OF KERALA .....RESPONDENT

J U D G M E N T

ABHAY S. OKA, J.

1. Leave granted.

2. The appellants in these appeals have been convicted for the offence punishable under Section 55(a) of Kerala Abkari Act (The Abkari Act). The appellant/petitioner in Special Leave Petition

No.6767/2016 is the accused No.1. The petitioners/appellants in Special Leave Petition No. 6769/2016 are the accused Nos.2 and 4.

3. The allegation of the prosecution in brief is that the accused (the accused Nos.1 to 4) without any licence transported total quantity of 6090 litres of spirit in 174 plastic cans. The allegation of the prosecution is that the accused No.1 was the owner of the truck by which the spirit was transported. The case is that the said truck bearing registration number KLB-7589 was fitted with fake number plates bearing registration number KLY-730. At the time of the commission of the offence, the truck was being driven by the accused No.2 and that the accused Nos.3 and 4 were accompanying the accused No.2 in the truck.

4. The case of the prosecution is that on 25th July 1999, around 12:30, the said truck was stopped at Mandapathin Kadavu check post for checking. When the truck was stopped and while it was being checked, the accused No.2 suddenly started the truck and drove ahead by damaging the barricade put on the road near the check post. One Shri Balachandran Nair, a peon working at the check post had climbed on the top of the truck for inspecting the goods inside the truck. As the accused No.2 started the truck and went ahead after damaging the

barricades, the said Shri Balachandran Nair jumped from the truck and saved himself. The sub-inspector of police at Kattakkada Police Station was alerted about the incident. The said sub-inspector Shri R. Prathapan Nair (PW12) along with the police party proceeded to search the truck. When they located the truck and stopped the same, the accused No.2 who was in the driver's seat in the truck and the accused Nos.3 and 4 who were present in the truck ran away. The police party, however, apprehended the accused No.2 who allegedly disclosed to them that spirit was loaded in the truck in plastic cans. He also disclosed to the police that the accused No.1 was the owner of the truck who was his brother-in-law. He disclosed that the accused No. 1 was a shop contractor. Even the accused No.4 was apprehended by the police. The police party inspected the truck and seized 6090 litres of spirit which was stored in 174 plastic cans having a capacity of 35 litres each. The police party also found two name plates in the truck bearing registration number KLB-7589. A seizure mahazar was drawn and the truck, the plastic cans and the spirit therein were seized by the police. Thereafter, PW12 returned to the police station and recorded the First Information Report.

5. According to the prosecution case, the accused No.1 was a toddy shop contractor and the other accused were his relatives. It is alleged

that the accused No.1 purchased a truck from PW3, Shri Rajendra Prasad and after removing the original number plates on the truck, he fitted number plates bearing registration number KLY-730. The truck was used by the accused No.1 for illegally transporting the spirit from Umasamudram in the State of Tamil Nadu. It is alleged that the samples of the spirit seized by the police were sent for chemical analysis. It is stated that out of 174 samples, sample Nos.1 to 158 and 167 contained a certain percentage of Ethyl Alcohol. Sample Nos. 159 to 166 and 168 to 174 contained spirit and a poisonous substance known as “organophosphorus compound” which is used for pest control.

6. The police could not trace the accused No.3 and therefore, a charge sheet was filed against the accused Nos.1, 2 and 4. The prosecution examined 13 witnesses. The learned Additional Sessions Judge convicted the accused Nos.1, 2 and 4 for the offence punishable under Section 55(a) of the Abkari Act. They were sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rupees one lakh each. In default of payment of fine, they were sentenced to undergo a simple imprisonment for a period of 6 months each. The Accused Nos.1, 2 and 4 preferred an appeal against the

order of conviction. The appeal has been dismissed by the learned Single Judge of the Kerala High Court by the impugned judgment.

SUBMISSIONS ON BEHALF OF ACCUSED NO.1

7. Shri R. Basant, the learned Senior Counsel appearing for the accused No.1 has taken us through the evidence of the witnesses. His basic submission is that the only evidence against the accused No.1 is of an alleged confession made by the accused No.2. He submitted that the prosecution has failed to establish that the accused No.1 was the owner of the offending truck. He pointed out that PW3 Shri Rajendra Prasad was examined by the prosecution who deposed that he sold the truck to the accused No.1. The learned Senior Counsel pointed out that apart from the fact that PW3 did not support the prosecution, even the record of the Regional Transport Office (RTO) regarding the name of the registered owner of the truck was not produced by the prosecution. He pointed that though the offending truck was having a number plate bearing number KLY-730, according to the prosecution case, a photocopy of R.C book of Tata HMC Goods vehicle of registration No. KLB-7589 was found in the truck as recorded in mahazar. He submitted that the said photocopy of R.C book allegedly showing the name of the

accused No.1 as the owner was not produced before the trial court. He submitted that no investigation was carried out for ascertaining the engine number and chassis number of the truck with a view to find out whether the correct registration number of the truck was KLY-730 or KLB-7589. He pointed out the notices issued by the investigation officer to Shri Sajan Mathai, Shri Chandran and PW3 Shri Rajendra Prasad and the response submitted by the said three persons. He pointed out that notices were issued for inquiring about the ownership of the truck. He submitted that the said Shri Sajan Mathai in his response claimed that he sold the said truck to one Shri Makkar Maideen on 4th September 1998. However, both Shri Sajan and Shri Makkar were not examined as witnesses. He pointed out that Shri Chandran who was served with a similar notice claimed that he purchased the truck from one Shri Ebrahim which was registered in the name of Shri Sajan Mathai. In the reply, the said Shri Chandran claimed that he sold a truck to PW3 Shri Rajendra Prasad. The learned Senior Counsel pointed out that Shri Ebrahim and Shri Chandran have not been examined and PW3 Rajendra Prasad did not support the prosecution. The learned Senior Counsel would urge that though the accused No.1 has been convicted on the footing that he was the owner of the truck, there is absolutely no evidence of his ownership adduced by the

prosecution. He would, therefore, submit that the appeal filed by the accused No.1 deserves to be allowed.

SUBMISSIONS ON BEHALF OF ACCUSED NOs. 2 AND 4

8. The learned counsel Shri M. Gireesh Kumar submitted that the entire prosecution case is false. He submitted that though the prosecution alleged that when the truck was stopped at the check post where one Shri Balachandran Nair climbed on the top of the truck for checking the goods, the said person was not examined. He invited our attention to the evidence of PW13 Shri Madhusudhanan Nair who was allegedly an independent witness. He purportedly identified the accused No.2 in the Court on 20th April 2011 when his evidence was recorded. He submitted that his evidence was recorded nearly 12 years after the incident. He submitted that Test Identification Parade (T.I Parade) was not conducted and therefore, the version of PW13 Shri Madhu that he identified the accused No.2 in the court nearly after lapse of 12 years cannot be believed. He urged that the same is the case with other official witnesses who identified the accused No.2 in the Court after a gap of 11 to 12 years. He submitted that the prosecution could not prove what was the correct registration number of the truck and even investigation was not carried out to ascertain the correct

registration number. He urged that the first part of the prosecution case that when the truck was halted at the check post, the accused No.2 started the truck and took it ahead after the damaging barricade has not been established as the government servant who had climbed over the truck was not even cited as a witness. He would, therefore, submit that the entire prosecution case is doubtful and, therefore, the conviction of the accused No.2 cannot be sustained. He submitted that there is no evidence adduced against the accused No.4. His submission is that the conviction of both the accused Nos.2 and 4 cannot be sustained.

SUBMISSIONS OF THE PROSECUTION

9. Shri Abraham C. Mathew, the learned counsel appearing for the respondent stated that identification of the accused No.2 by the prosecution witnesses in the Court cannot be disbelieved only on the ground that T.I Parade was not conducted. He submitted that PW13 is an independent witness whose version has not been shaken in the cross examination. He submitted that considering the quality of evidence of PW13 which is supported by the evidence of PW6 Shri A.S. Krishnan, the Courts below have rightly held that the accused No.2 was the driver of the offending truck. He submitted that the

quantity of liquor containing injurious substances found in the truck has not been disputed. He, therefore, submitted that the accused No.2 was clearly guilty of transporting liquor without permission which is a punishable offence under Section 55(a) of the Abkari Act.

10. The learned counsel appearing for respondent submitted that PW3 Shri Rajendra Prasad issued a reply to the notice served upon him by the investigation officer stating that he sold the said truck to the accused No.1 at the cost of Rupees 1,50,000/- in the year 1999. He submitted that though PW3 may not have supported the prosecution, his reply to the notice has been marked as an exhibit which proves that the ownership of the truck vested in the accused No.1 at the relevant time. The learned counsel submitted that there is no reason to interfere with the concurrent findings of the fact recorded by the Sessions Court and High Court especially considering the serious nature of the offence.

CONSIDERATION OF SUBMISSIONS MADE ON BEHALF OF THE ACCUSED NO.1

11. The prosecution has firstly relied upon the mahazar drawn by the police for recording the seizure of the truck, plastic cans, spirit stored in plastic cans and other articles. In the mahazar, it is recorded that the accused No.2 stated that the accused No.1 was the owner of the truck,

who was his brother-in-law. He disclosed that the accused No.1 was the owner of the spirit loaded in the truck. The mahazar has been drawn by a police officer. The statements of accused No.2 recorded therein are not admissible in evidence being the alleged confessional statements of the accused No. 2 made before the police officer. Therefore, for proving the offence alleged against the accused No. 1, the statements of the accused No.2 recorded in the mahazar will have to be kept out of consideration.

12. The second part of the evidence relied upon against the accused No.1 is the deposition of PW3 Shri Rajendra Prasad. He did not support the prosecution and did not accept that he was the owner of the truck and that he had sold the said truck to the accused No.1. The prosecution relied upon the notice dated 26th December 1999 served by the investigation officer on PW3 in which it was stated that the truck bearing registration number KLB-7589 was registered in the name of Shri Sajan Mathai who sold it to one Shri Chandran and PW3 Shri Rajendra Prasad purchased the same from Shri Chandran. By the said notice, the investigation officer called upon PW3 Shri Rajendra Prasad to respond on the ownership of the vehicle. PW3 by his reply dated 26th December 1999 informed the investigation officer that he had sold the said truck to the accused No.1 on the basis of a sale deed. He claimed

that the sale deed has been lost. PW3 Shri Rajendra Prasad denied the signature on the said reply. It is pertinent to note that Shri Sajan Mathai and Shri Chandran who were the alleged prior owners of the truck were not examined by the prosecution. Surprisingly, no investigation was made whether the correct registration number of the truck was KLY-730 or KLB-7589. It appears that the prosecution came to the conclusion that the correct registration number of the truck was KLB-7589 on the basis of a photocopy of R.C book allegedly found in the seized truck. However, as admitted by PW12 - the investigation officer, the said photocopy of the R.C book was not produced by the prosecution.

13. A very shocking aspect of the case is that the prosecution did not even produce the record of the RTO in respect of the registration of the truck. Though the chassis and engine number of the truck were recorded in the mahazar, no investigation was carried out to ascertain the correct registration number of the offending truck. Thus, the identity of the truck itself becomes doubtful. The most relevant evidence of the record of RTO showing the name of the registered owner was withheld by the prosecution. There is no documentary evidence placed on record to show that the accused No. 1 was the owner of the offending truck at the relevant time. There is no other evidence pressed into service by the prosecution against the accused No.1. Therefore, we are

of the considered view that it is a case of no evidence against the accused No.1. Thus, there was no justification for convicting the accused No. 1.

CONSIDERATION OF THE CASE AGAINST ACCUSED NOS. 2 AND 3

14. Now, coming to the case against the accused Nos.2 and 4, apart from official witnesses, the prosecution has relied upon the evidence PW13 Shri Madhu who was stated to be an independent witness. The witness claimed that he was standing by the side of the road when he saw a truck passing through containing coconut leaves. He claims that after the truck passed through, a white ambassador car followed the truck. After some time, policemen came there who enquired with him whether he had seen a truck containing coconut leaves passing through. The witness claimed that he followed the police and he saw the driver running out of the truck after stopping the truck. He stated that the driver was caught by the police. The witness purported to identify the accused Nos.2 and 4 who were present in the Court as the persons who ran away from the truck. In the cross examination, he accepted that he was not able to identify all the persons whom he had seen 11 years back. But he claimed that he could identify the accused

No.2 and he knew his name. He accepted that before the incident of 25th July 1999, he had not seen the accused and even any time thereafter, he had not seen the accused. He was examined before the Court on 20th April 2011. Thus, he deposed before the Court after 11 years and 9 months after the date of the incident. It is pertinent to note that admittedly T.I Parade was not held and the witness never knew accused before the incident.

15. It is well settled that T.I Parade is a part of investigation and it is not a substantive evidence. The question of holding T.I Parade arises when the accused is not known to the witness earlier. The identification by a witness of the accused in the Court who has for the first time seen the accused in the incident of offence is a weak piece of evidence especially when there is a large time gap between the date of the incident and the date of recording of his evidence. In such a case, T.I Parade may make the identification of the accused by the witness before the Court trustworthy. However, the absence of T.I Parade may not be *ipso facto* sufficient to discard the testimony of a witness who has identified the accused in the Court. In a given case, there may be otherwise sufficient corroboration to the testimony of the witness. In some cases, the Court may be impressed with testimony of the prosecution witnesses which is of a sterling quality. In such cases, the

testimony of such a witness can be believed. In the present case, PW13 accepted that he is not able to identify any persons whom he had seen 11 years back. However, he asserted that he can identify the accused Nos.2 and 4 though he had seen them for the first time more than 11 years back on the date of the incident. Therefore, in the facts of the case, the evidence of PW13 as regards the identification of the accused Nos.2 and 4 in the Court cannot be accepted.

16. PW5 who was working as ASI at the concerned police station identified the accused No.2. However, he has not stated that the accused No.2 who was arrested at the spot was driving the truck. PW6 Shri A. S Krishnan was working as a Sales Tax Inspector at the relevant time. He stated that the truck was stopped at 12:30p.m at the check post when the cleaner of the truck claimed that it contained dry coconut leaves. He claimed that a clerk Shri Balachandran climbed on the top of the truck for taking search. He claimed that as the driver started the truck, the said Shri Balachandran jumped from the truck. The said Shri Balachandran has not been examined as a witness though he is an employee of the department. The witness claimed that he reached the place where the truck was stopped. He stated that the driver of the truck was arrested who was standing there. He identified

the driver as the accused No.2. However, the witness has not claimed that he had seen the accused No.2 driving the truck.

17. PW7, who was head constable attached to the concerned police station claimed that the truck was stopped and the driver and two others ran away. He identified the accused No.2 as the person who was driving the truck. He also identified the accused No.4 as a person who ran away. However, the witness has not stated he had seen the accused No.2 driving the truck.

18. PW8 was a police constable working at the concerned police station. He claimed that after the truck was stopped, three persons in the truck ran away. One was caught who disclosed that he was the driver of the truck. He identified the accused No.2 in the Court. However, he has not seen accused No.2 driving the truck. PW10 Shri N. George was a police constable attached to the concerned police station who claimed that after the truck was stopped, three persons inside the truck ran away and one person who was stopped, claimed to be the driver of the truck. However, he has not stated that he had seen the accused No.2 driving the truck. He also identified the accused No. 4 as a person who ran away from the truck.

19. Now, we turn to the evidence of PW12 Mr. R. Prathapan Nair who was the investigation officer. He stated that on 25th July 1999, he received information while he was on duty in the police station that a truck bearing number KLY-730 went passed check post causing damage to barricades and it was transporting some illegal articles. He along with the police party went out to locate the truck which was found near Khadi Board at Kizhamachal and tried to stop it. He alleged that on seeing the police party, the driver of the truck stopped the same. According to him, the driver and two others stepped out from the truck and ran away. The police party could get hold of the driver of the truck who was arrested. He stated that in the mahazar, the presence of accused No.2 was noted. He identified the accused No.2 in the Court. In the cross examination, he stated that as a police vehicle was not available, a private vehicle was used and the driver of the said vehicle is not a witness. He accepted that though mahazar records that a copy of RC book was found in the truck, it is not produced in the Court. He admitted that though he enquired with RTO, the record of RTO is not produced in the Court. It is pertinent to note that in the examination chief, PW12 did not state that he had seen the accused No.2 driving the truck. Even in this case, the evidence of PW12 has been recorded more than 11 years after the date of the incident.

20. It is very difficult to believe that PW13 who was not knowing the accused Nos.2 and 4 prior to the incident could identify them in the Court after lapse of 11 years. That is also the case with all the official witnesses. The prosecution has chosen not to produce evidence regarding the correct registration number of the truck and the name of the registered owner thereof. Therefore, the entire prosecution case becomes doubtful.

21. In the circumstances, both the appeals must succeed and the same are allowed. The impugned judgment and orders are hereby set aside and the appellants are acquitted of the offences alleged against them. Their bail bonds stand cancelled. Fine, if paid, be refunded to the appellants.

……J
(AJAY RASTOGI)

……J
(ABHAY S. OKA)

New Delhi;
October 22, 2021.