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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

FRIDAY, THE 25TH DAY OF JUNE 2021 / 4TH ASHADHA, 1943

BAIL APPL. NO. 4822 OF 2021

CRIME NO.21/2021 OF KAVARATTI POLICE STATION, UNION

TERRITORY OF LAKSHADWEEP

PETITIONER/ACCUSED:

AYSHA SULTHANA, AGED 26 YEARS
D/O.LATE KUNHIKOYA, CHETLAH ISLAND, UNION
TERRITORY OF LASHADWEEP, NOW RESIDING AT M213, M
BLOCK, DLF-NEW TOWN HEIGHTS, KAKKANAD P.O.,
ERNAKULAM - 682 021.

BY ADVS.
P.VIJAYA BHANU (SR.)
P.M.RAFIQ
M.REVIKRISHNAN
VIPIN NARAYAN
AJEESH K.SASI
DEEPAK RAJ
POOJA PANKAJ
SRUTHY N. BHAT
AKBAR.K.A

RESPONDENT/S:

- 1 UNION TERRITORY OF LAKSHADWEEP
REPRESENTED BY ITS STANDING COUNSEL, HIGH COURT OF
KERALA, ERNAKULAM - 682 031.

- 2 SUB INSPECTOR OF POLICE AND INVESTIGATING OFFICER
KAVARATTI POLICE STATION, KAVARATTI P.O., UNION
TERRITORY OF LAKSHADWEEP - 682 555.

BY ADVS.S.MANU, SR.CGSC
R.KRISHNA RAJ FOR THIRD PARTY
E.S.SONI
KUMARI SANGEETHA S.NAIR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
17.06.2021, THE COURT ON 25.06.2021 PASSED THE FOLLOWING:

ASHOK MENON, J.

BA No.4822 of 2021

Dated, this the 25th day of June, 2021

ORDER

Application filed for anticipatory bail under Section 438 Cr.P.C.

2. The applicant is a film director, actor and model. She is also in the forefront of protest activities. Being organised against the draft Rules and the revised SOP regarding the Covid-19 quarantine protocol to persons reaching the Union Territory Archipelago of Lakshadweep, issued by the new Administrator appointed for the Islands.

3. The applicant is the sole accused in Crime No. 21 of 2021 of Kavaratti Police Station, the Union territory of Lakshadweep. She is accused of sedition, an offence punishable under Section 124-A and for making imputations, assertions prejudicial to the National integration, an offence punishable under Section 153-B of the Indian Penal Code.

4. The prosecution case as made out from a written complaint lodged by Shri C.Abdul Khader, the State President of the B.J.P., Lakshadweep, to the District Collector of the island, is that the applicant, a film director hailing from Chethalath island had in a channel discussion conducted by a TV channel named Media One, in Malayalam on 07/06/2021 between 7 PM and 8 PM participating Sri Muhammad Faisal, the

MP from the island, Sri Komalam Koya of CPM and Sri Vishnu of the B.J.P., made serious allegations about the Central Government using 'Biological weapon' against the people of the island. The de facto complainant, pleads that proper action to be taken against the applicant. On the basis of this complaint, F.I.R at Annexure A was registered. It is alleged that during the discussion, the applicant had asked the other participant who had reminded her about the Central Government fostering the island with special care, by stating thus: "Is it because the Centre has fostered the Lakshadweep with special care that the place has turned from a zero Covid area to a situation where now over, hundred cases of Covid reported everyday. They have used 'bio weapon', and I can be

clear about that when I say that what has been used is a 'bio weapon' and that is why a place where there was zero Covid has been used for that. If there was an attempt to spread Covid into a place where there was no Covid at all, it is undoubtedly, bio weapon." By stating so, the applicant has accused the Central Government of using 'bio weapon' against its own citizens in Lakshadweep. By the aforesaid words, spoken by the applicant, she has attempted to bring into hatred or contempt, and has attempted to excite disaffection towards the Government established by law in India. The applicant has also, by making such imputations incited the people of Lakshadweep against the integrity of India and it is likely to cause disharmony or feelings of enmity, hatred or ill

will between the residents of the island and the citizens of the rest of the country, attracting the aforesaid penal provisions.

5. The Sub Inspector of Police, Kavaratti has issued Annexure B, a notice under Section 41 A Cr.P.C, to the applicant directing her to appear before the Police Headquarters at Kavaratti, Lakshadweep on 20/06/2021 for interrogation. The applicant apprehends imminent arrest and detention, and therefore, seeks pre-arrest bail.

6. The applicant states that she is innocent and the allegations of sedition and inciting disharmony among groups of people are totally false and unsustainable and that it is made with ulterior motive and vexatious intentions. The applicant as a native of the island is against the

implementation of the revised and relaxed SOP bringing about the change in Covid 19 protocol for those who reach the islands. It is stated that until January 2021, not a single case of Covid 19, was reported in the island, owing to the strict quarantine system that was in place. Consequent to the appointment of the new Administrator, he brought about several new amendments, modifications and relaxations, which included the change in the SOP, forgoing the mandatory quarantine for persons entering the islands. All this was done despite the protests and agitation of the Islanders. As a result of the relaxation, Lakshadweep is now witnessing an exponential rise in Covid 19 cases. The inadequacy of the health care system available in the island which is primitive,

and the geography of the islands are adding to the number of deaths every day. There was discussion organised by the TV channel in this context, and the applicant was also invited for the discussion. While explaining the situation, such a remark was made by the applicant. The intend of the applicant was only to criticize the apathetic approach in the reforms brought about by the new Administrator, posing a serious threat to the lives of the people of the island. The applicant had no intention to excite disaffection towards the Government of India. On understanding that her statement has resulted in controversies, she has immediately taken to the social media, wherein she has explained her stand, and also apologized about the hurt she may have caused to the sentiments of a few

persons. She has also given interviews to several news channels explaining her statement and apologizing for the use of the strong words used by her, and has made it clear that she had never intended to excite hatred towards the Central Government. It is submitted that the statement made by her does not attract the penal provisions of Sections 124-A/153-B of the I.P.C. The applicant also relies on the decisions of the Apex Court in *Kedar Nath Singh vs. State of Bihar*, [1962 SC 955] and *Vinod Dua vs. Union of India* [2021 SCC OnLine SC 414 :MANU/SC/0363/2021], in support of her plea and claims that she is entitled to pre-arrest bail. The applicant points out that she has no criminal antecedents and is willing to abide by any conditions that may be imposed by this Court. She

undertakes not to tamper with evidence, influence witnesses or flee from justice.

7. The Senior Central Government Standing Counsel for the Lakshadweep Administration appeared for the respondents and filed a statement based on the instructions, he received. It is stated that the application is not maintainable because there are no genuine or bona fide 'reason to believe' that the applicant may be arrested for a non-bailable offence. The applicant was issued a notice under Section 41A of the Cr.P.C and such notices are issued for interrogation by the concerned Police officers, in cases where the arrest of a person is not required under sub-section (1) of Section 41 Cr.P.C. In the statement, portions of the discussions made by the applicant

in the TV channel is extracted. The applicant has accused the Central Government of using bio weapon against the residents of Lakshadweep. Those baseless assertions have serious consequences against the Central Government established by law. Despite being cautioned by the TV anchor, she stood by what she has stated, and asserted that she is ready to face the consequences of her statement. In plain terms, the applicant has alleged that the Central Government has used the Covid-19 virus as a bio weapon against the people of Lakshadweep. She has also compared it with the rumors rife about China using Corona virus as a bio weapon against the citizens of other countries. Her suggestion was that the Government of India has acted in a similar way against the citizens of India in

Lakshadweep. Her statements have a tendency to create disorder or disturbance to the public peace and people resorting to violence. Her statement also prima facie amounts to an assertion prejudicial to national integration. The applicant is therefore liable to stand trial for the accusations made against her in the F.I.R. It is also submitted in the statement that the Writ petition filed before this Court challenging the SOP has been dismissed. The word 'bio weapon' has a pernicious tendency to create public disorder or disturbance of law and order in the Union territory of Lakshadweep. The precedents in *Kedar Nath's* case and *Vinod Dua's* case, do not assist the applicant's case.

8. A person named Pratheesh filed CrI.M.A No.1/2021,

seeking permission to get himself impleaded as an intervener.

The application was considered and dismissed for the reason that he is not the de facto complainant. However, the learned counsel Shri S Krishna Raj appearing for him, was heard. Learned Senior Counsel Shri P Vijayabhanu instructed by the P.M Rafiq, appeared for the applicant while Sri S.Manu, the Senior Central Government Standing Counsel appeared for the respondents. Records perused.

9. A portion of the transcript of the discussions that took place in the program, "First Debate" aired in the channel Media One is produced by the respondents. The learned CGSC submits that the transcript would clearly indicate that the applicant had alleged that Covid virus was brought into the

island by the Centre to be used as the bio weapon. Despite being cautioned by the TV anchor about using such strong words and the B.J.P spokesperson insisting on the withdrawal of the word "bio weapon", the applicant did not budge from her stand and repeated her version that introducing the virus into the island where there was zero Covid until January 2021, does amount to use of a bio weapon. The learned CGSC refers to the decision of the Apex Court in *Vinod Dua* (supra) to argue that it is not necessary that there must be a riotous situation following the words spoken by the accused. It is enough if the words spoken to have the tendency to create disorder or disturbance of public peace by resort to violence. The learned counsel also relies on the decision in *Dukhishyam*

Benupani, Assistant Director, Enforcement Directorate (FERA)

vs. Arun Kumar Bajoria [(1998) 1 SCC 52] to point out that it is

not the function of the Court to monitor investigation

processes so long as such investigation does not transgress

any provision of law. It is also argued that the applicant

seeking anticipatory bail under the provisions of Section 438

Cr.P.C must show that he has 'reason to believe' that he may

be arrested in a non-bailable offence, and that the expression

shows that applicant may be arrested must be founded on

reasonable grounds and that an order under Section 438 is a

device to secure the individual's liberty and it is neither a

passport to the commission of crimes nor a shield against any

and all kinds of accusations likely or unlikely. In support of

this argument, the learned CGSC relies on another decision,

Vaman Narain Ghiya v. State of Rajasthan [(2009) 2 SCC 281].

10. The learned Senior Counsel Shri P.Vijayabhanu submits that the freedom of speech is guaranteed by Article 19 of the Constitution of India, and that there can be no dispute that the right to freedom of speech and expression carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions.

11. S.124-A, as it has emerged after successive amendments, reads as follows :

"Whoever by words, either spoken or written, or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be

punished with transportation for life or any shorter term to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1. The expression "*disaffection*" includes disloyalty and all feelings of enmity.

Explanation 2. Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

Explanation 3. Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

The Apex Court in ***Kedar Nath's*** case (supra) while considering the constitutional validity of S.124-A IPC in the light of the freedom of speech guaranteed under Art.19 of the Constitution held thus:

“With reference to the constitutionality of S.124A or S.505 of the Indian Penal Code, as to how far they are consistent with the requirements of cl. (2) of Art.19 with particular reference to security of the State and public order, the section, it must be noted, penalises any spoken or written words or signs or visible representations, etc., which have the effect of bringing, or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression "the Government established by law" has to be distinguished from the persons for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted xxxxxxxxxxxx

In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term "revolution," have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feeling

which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.” (emphasis supplied)

12. The learned Senior Counsel referring to *Vinod Dua's* case (supra), submits that the criticism of the policies of the newly appointed Administrator of Lakshadweep was subject matter of considerable debate and principal question is whether the statements made by the applicant were merely in the nature of critical appraisal of the performance of the Government or were designed to create unrest among the

public. It is submitted that the act of the applicant in using the word 'bio weapon' was not with the intention to subvert the government established by law, or to create disaffection against it. Neither was there any tendency to create public disorder by use of actual violence, or incitement to violence. The learned counsel submits that the mere use of strong words like 'bio weapon' is not sufficient to attract an offence of sedition, as long as it is without intention to incite people to violence against the government established by law.

13. *Per contra*, the learned CGSC and Sri R Krishna Raj would argue that the actual violence need not be followed in consequence to seditious words. All that is required to be established is whether that the statement has a tendency to

cause disaffection towards the government, and actual violent reaction against the Government need not follow.

14. The statement made by the applicant in the discussion will have to be taken in its entirety and words cannot be taken in isolation to suggest motive. After having considered the submissions made on both sides, and also the transcript of the discussion, it would suffice to say that prima facie, the applicant did not have a malicious motive to subvert the Government established by law by merely using the strong word 'bio weapon' to express her vehemence in disapproval of the subject under discussion. Her intention is explicitly in criticism of the modification of the SOP, introduced by the Administrator, forgoing the mandatory provision of subjecting

the persons entering the island to quarantine. This allegedly led to exponential rise in the number of Covid 19 cases in the island. The decisive ingredient for establishing the offence of sedition under S.124-A IPC is the doing of certain acts which would bring the Government established by law in India into hatred or contempt etc. In this case, there is not even a suggestion that applicant did anything as such against the Government of India.

15. The other penal provision incorporated in the F.I.R against the applicant is an offence under S.153A I.P.C., which after the amendment reads thus:

"153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence,

language, etc., and doing acts prejudicial to maintenance of harmony.- (1) Whoever- (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, or (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or xxxx xxxx xxxx xxxx shall be punished with imprisonment which may extend to three years, or with fine, or with both."

The ingredient of S.153A is promoting feeling of enmity, hatred or ill will between different religious or racial or linguistic or regional groups and covers a case where a person by "words, either spoken or written, or by signs or by visible

representations" promotes or attempts to promote such feeling among two distinct groups. The Apex Court has in *Balwant Singh v. State of Punjab [(1995 (3) SCC 214]* held that *mens rea* is a necessary ingredient for the offence under S.153A. Considering the scope of Sections 153–A and 505 of the I.P.C., the Apex Court has in *Bilal Ahmed Kaloo v. State of A. P [1997 KHC 1044 : 1997 (7) SCC 431]*, held thus:

“15. The common feature in both sections being promotion of feeling of enmity, hatred or ill will "between different" religious or racial or language or regional groups or castes and communities it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections.”

16. In the instant case, the applicant has opposed the

newly introduced reforms by the Administrator and has sworn allegiance to the people of Lakshadweep in their protest to the reforms. There is no apparent indication in her statement, which amounts to imputations or assertions prejudicial to the national interest, nor does it propagate any class of persons against another group of persons. It is therefore doubtful whether the penal provisions of S.153-A would be attracted in this case.

17. This is an application for anticipatory bail and not a petition for quashing the proceedings under Section 482 Cr.P.C. Neither is this court finally deciding the prosecution case on its merits. While considering an application for bail, detailed discussion of the evidence and elaborate

documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have an impression that his case has been pre judged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required (See *Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others [1980 CriLJ 426]* and *Vaman Narain Ghiya (supra)*). Under the circumstances, I am not venturing into a prolix discussion regarding the merits of the accusations made against the applicant. *Prima facie*, the offences alleged by the prosecution are not attracted. The applicant has no criminal antecedents. She is not likely to flee from justice. The learned Senior Counsel has stated that the

applicant has expressed her regret about the use of the words 'bio weapon'. Custodial interrogation of the applicant and her incarceration in prison, particularly in these pandemic times may not be required. The prosecution has also not expressed any fear of her fleeing from justice or not co-operating with the investigation. Nor has the prosecution expressed its intention to subject the applicant to custodial interrogation. There is no evidence that can be tampered with or witnesses to be influenced or intimidated. Consequent to the granting of interim anticipatory bail, the applicant was directed to appear before the investigating officer for interrogation, and there is no report that she has not complied with that direction of this court.

Hence, the application is allowed and the interim anticipatory bail is made absolute. In the event of her arrest, the applicant shall be released on bail on execution of bond for ₹ 50,000/- (Rupees fifty thousand only) with two solvent sureties each for like amount to the satisfaction of the arresting officer and subject to the conditions under Section 438 (2) Cr.P.C.

Sd/-
ASHOK MENON
JUDGE