IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 15th OF MAY, 2024

MISCELLANEOUS CRIMINAL CASE No. 47663 of 2023

BETWEEN:-

NEHA SINGH RATHORE

.....APPLICANT

(BY SHRI ARUBENDRA SINGH PARIHAR - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH THROUGH POLICE STATION KOTWALI BAIDHAN, DISTRICT SINGRAULI (MADHYA PRADESH)**

2. **JUNEB KHAN ALIAS (ASHU)**

.....RESPONDENTS

(STATE BY SHRI MOHAN SAUSARKAR - PUBLIC PROSECUTOR)

.....

This application coming on for admission this day, the court passed the following:

O R D E R

This application under Section 482 of Cr.P.C. has been filed seeking following relief(s):-

> "It is, therefore, for the facts and reasons as stated above, it is most respectfully prayed that

> this Hon'ble Court may graciously be pleased to quash the first information report No.0468/2023, Under Section 153-A of Indian Penal Code registered at Police Station - Chhatarpur, District - Chhatarpur, FIR Dated 09.07.2023 against the applicant and proceeding incidental to it, in the interest of justice for the glory of justice, for just decision of the case and to secure the ends of justice.
>
> AND/OR any other order or direction of an appropriate nature that this Hon'ble court may deem fit and proper in the circumstances of the case may kindly also be granted in favour of the Petitioner."

2. It is submitted by counsel for the applicant that an incident had taken place where one person in an inebriated condition peed on another person belonging to the reserved category. Applicant is a Folk singer and it is her moral duty to highlight such gruesome incidents and accordingly, she uploaded a message on her Twitter and Instagram account along with cartoon in which a person in semi-naked condition was seen peeing on another person who was sitting on the floor and one half Pant of yellowish brown (*khakhi*) colour was shown lying on the floor. It is submitted that since the applicant was being scolded as an Agent of other political parties, therefore she had mentioned that she is not afraid of any threat. It is submitted by counsel for the applicant that even if the entire allegations are accepted, still it is clear that no offence punishable under Section 153A of IPC is made out.

3. *Per contra,* application is vehemently opposed by counsel for the State. It is submitted that making a distasteful comment which may promote disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or

communities and which is prejudicial to the maintenance of harmony, would amount to an offence punishable under Section 153A of IPC. It is further submitted by counsel for the State that Supreme Court in the case of **Amish Devgan Vs. Union of India and Ors.** reported in **AIR Online 2020 SC 930** has interpreted the provisions of Section 153A of IPC and has refused to quash the proceedings. It is further submitted by counsel for the State that the incident had escalated the tension and the State had also invoked the provisions of National Security Act and the person who in an inebriated condition had peed on another person belonging to the reserved category was detained under the National Security Act and even the Writ Petition challenging the preventive detention under National Security Act was dismissed.

4. Considered the submissions made by counsel for the parties.

5. Section 153A of IPC reads as under:-

> "**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
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> (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 tranquillity, or

(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."

6. Applicant had uploaded a cartoon on her Twitter and Instagram account which has been filed along with this application as Annexure-A/2. From this cartoon, it is seen that the person who is peeing on another person is half naked and his half Pant which is yellowish brown in colour is lying on the floor and the person is wearing a black cap with white shirt and a belt.

7. Accordingly, counsel for the applicant was directed to clarify as to whether the person who had peed on the member of reserved category was wearing the same dress and was in the same condition or not?

8. It was fairly conceded by counsel for applicant that the cartoon which has been uploaded by the applicant was not in accordance with the actual incident and certain dress was included which the accused was not wearing at the time of incident.

9. The Supreme Court in the case of **Amish Devgan (supra)** has held as under:-

> "**54.** The present case, it is stated, does not relate to 'hate speech' causally connected with the harm of endangering security of the State, but with 'hate speech' in the context of clauses (a) and (b) to sub-section (1) of Section 153A, Section 295A and sub-section (2) to Section 505 of the Penal Code. In this context, it is necessary to draw a distinction between 'free speech' which includes the right to comment, favour or criticise government policies; and 'hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity (as explained above) and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference etc. Freedom to express and speak is the most important condition for political democracy. Law and policies are not democratic unless they have

been made and subjected to democratic process including questioning and criticism. Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. This justification is also premised on the conviction that freedom of speech serves an indispensable function in democratic governance without which the citizens cannot successfully carry out the task to convey and receive ideas. Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of the accusation would not be sufficient to constitute criminal offence of 'hate speech'. The Constitutional Bench decision of this Court in Kedar Nath Singh and the subsequent decisions have clearly and uniformly held that there is difference between 'government established by law' and 'persons for the time being engaged in carrying on administration' and that comment or criticism of the government action in howsoever strong words must be protected and cannot be a ground to take penal action unless the words written or spoken, etc. have pernicious tendency or intention of creating public disorder. Without exciting those feelings which generate inclination to cause public disorder by acts of violence, political views and criticism cannot be made subject matter of penal action. Reference to later decision in Arun Ghosh drawing distinction between serious and aggravated from of breaches of public order that

endanger public peace and minor breaches that do not affect public at large would be apposite. In consonance with the constitutional mandate of reasonable restriction and doctrine of proportionality in facts of each case it has to be ascertained whether the act meets the top of Clapham omnibus test and whether the act was 'likely' to lead to disturbance of the current life of the community so as to amount to disturbance of public order; or it may affect an individual or some individuals leaving the tranquillity of the society undisturbed. The latter and acts excluded on application of the top of Clapham omnibus test are not covered. Therefore, anti-democratic speech in general and political extremist speech in particular, which has no useful purpose, if and only when in the nature of incitement to violence that 'creates', or is 'likely to create' or 'promotes' or is 'likely to promote' public disorder, would not be protected.

55. Sometimes, difficulty may arise and the courts and authorities would have to exercise discernment and caution in deciding whether the 'content' is a political or policy comment, or creates or spreads hatred against the targeted group or community. This is of importance and significance as overlap is possible and principles have to be evolved to distinguish. We would refer to one example to illustrate the difference. Proponents of affirmative action and those opposing it, are perfectly and equally entitled to raise their concerns and even criticise the policies adopted even when sanctioned by a statute or meeting constitutional scrutiny, without any fear or concern that they would be prosecuted or penalised. However, penal action would be justified when the speech proceeds beyond and is of the nature which defames, stigmatises and insults the targeted group provoking violence or psychosocial hatred. The

'content' should reflect hate which tends to vilify, humiliate and incite hatred or violence against the target group based upon identity of the group beyond and besides the subject matter.

56. Our observations are not to say that persons of influence or even common people should fear the threat of reprisal and prosecution, if they discuss and speak about controversial and sensitive topics relating to religion, caste, creed, etc. Such debates and right to express one's views is a protected and cherished right in our democracy. Participants in such discussions can express divergent and sometimes extreme views, but should not be considered as 'hate speech' by itself, as subscribing to such a view would stifle all legitimate discussions and debates in public domain. Many a times, such discussions and debates help in understanding different view-points and bridge the gap. Question is primarily one of intent and purpose. Accordingly, 'good faith' and 'no legitimate purpose' exceptions would apply when applicable.

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64. In the context of Section 153A(b) we would hold that public tranquillity, given the nature of the consequence in the form of punishment of imprisonment of up to three years, must be read in a restricted sense synonymous with public order and safety and not normal law and order issues that do not endanger the public interest at large. It cannot be given the widest meaning so as to fall foul of the requirement of reasonableness which is a constitutional mandate. Clause (b) of Section 153A, therefore, has to be read accordingly to satisfy the constitutional mandate. We would interpret the words 'public tranquillity' in clause (b) would mean ordre publique a French term that means absence of insurrection, riot, turbulence or crimes of violence and would also include all

acts which will endanger the security of the State, but not acts which disturb only serenity, and are covered by the third and widest circle of law and order. Public order also includes acts of local significance embracing a variety of conduct destroying or menacing public order. Public Order in clause (2) to Article 19 nor the statutory provisions make any distinction between the majority and minority groups with reference to the population of the particular area though as we have noted above this may be of some relevance. When we accept the principle of local significance, as a sequitur we must also accept that majority and minority groups could have, in a given case, reference to a local area.

* * *

68. The word 'attempt', though used in Sections 153-A and 295-A of the Penal Code, has not been defined. However, there are judicial interpretations that an 'attempt to constitute a crime' is an act done or forming part of a series of acts which would constitute its actual commission but for an interruption. An attempt is short of actual causation of crime and more than mere preparation. In Aman Kumar v. State of Haryana, (2004) 4 SCC 379 it was held that an attempt is to be punishable because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. Further, in State v. Mohd. Yakub, (1980) 3 SCC 57 this Court observed:

> "13...What constitutes an attempt is mixed question of law and fact depending largely upon the circumstances of a particular case. "Attempt" defies a precise and exact definition. Broadly speaking all

> crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage he makes preparation to commit it. The third stage is reached when the culprit takes deliberate overt act or step to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence..."

On the scope of proximity, it was elucidated that the measure of proximity is not in relation to time and place but in relation to intention.

In the context of 'hate speech', including the offences related to promoting disharmony or feelings of enmity, hatred or ill-will, and insulting the religion or the religious beliefs, it would certainly require the actual utterance of words or something more than thought which would constitute the content. Without actual utterance etc. it would be mere thought, and thoughts without overt act is not punishable. In the case of 'publication', again a mere thought would not be actionable, albeit whether or not there is an attempt to 'publish' would depend on facts. The impugned act should be more than mere preparation and reasonably proximate to the consummation of the offence, which has been

> interrupted. The question of intent would be relevant. On the question of the harm's element, same test and principle, as applicable in the case of 'likely' would apply, except for the fact that for intervening reasons or grounds public disorder or violence may not have taken place."

10. Why the dress of persons believing particular ideology was added by the applicant on her own, is a question which is to be decided in the trial.

11. The addition of a particular dress was indicative of the fact that applicant wanted to communicate that the offence was committed by a person belonging to a particular ideology. Thus, it was a clear case of making an attempt to disrupt harmony and to provoke the feelings of enmity, hatred or ill-will.

12. So far as the contention of counsel for the applicant that the applicant had no intention to commit an offence under Section 153A of IPC is concerned, this Court is of considered opinion that it is a defence which has to be proved by the applicant in the trial.

13. It is well established principle of law that this Court can quash the proceedings only if uncontroverted allegations made in the FIR do not make out an offence.

14. Since the cartoon which was uploaded by the applicant on her Twitter and Instagram account was not in accordance with the incident which had taken place and certain additional things were added by the applicant on her own, this Court is of considered opinion that it cannot be said that the applicant had uploaded the cartoon by exercising her fundamental right of free speech and expression. Even otherwise, fundamental right of free speech and expression is not an absolute right

and is subject to reasonable restrictions. Although an artist must have the liberty to criticize through satire but adding a particular dress in the cartoon cannot be said to be a satire. The attempt of the applicant was to involve a group of particular ideology without any basis. Therefore, it would not come within the purview of Article 19(1)(a) of Constitution of India and even a satirical expression may be prohibited under Article 19(2) of Constitution of India.

15. The Supreme Court in the case of **Patricia Mukhim Vs. State of Meghalaya and Others** reported in **(2021) 15 SCC 35** has held as under:-

> "**8.** "*It is of utmost importance to keep all speech free in order for the truth to emerge and have a civil society*."—Thomas Jefferson. Freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution is a very valuable fundamental right. However, the right is not absolute. Reasonable restrictions can be placed on the right of free speech and expression in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. Speech crime is punishable under Section 153-A IPC. Promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony is punishable with imprisonment which may extend to three years or with fine or with both under Section 153-A. As we are called upon to decide whether a prima facie case is made out against the appellant for committing offences under Sections 153-A and 505(1)(*c*), it is relevant to reproduce the provisions which are as follows:

"**153-A.** ***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

(*c*) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any

religious, racial, language or regional group or caste or community and such activity, for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

* * *

505. ***Statements conducing to public mischief***.—(1) Whoever makes, publishes or circulates any statement, rumour or report—

* * *

(*c*) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both."

9. Only where the written or spoken words have the tendency of creating public disorder or disturbance of law and order or affecting public

tranquility, the law needs to step in to prevent such an activity. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove the existence of mens rea in order to succeed. [*Balwant Singh* v. *State of Punjab*, (1995) 3 SCC 214 : 1995 SCC (Cri) 432]

10. The gist of the offence under Section 153-A IPC is the intention to promote feelings of enmity or hatred between different classes of people. The intention has to be judged primarily by the language of the piece of writing and the circumstances in which it was written and published. The matter complained of within the ambit of Section 153-A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning [*Manzar Sayeed Khan* v. *State of Maharashtra*, (2007) 5 SCC 1 : (2007) 2 SCC (Cri) 417].

11. In *Bilal Ahmed Kaloo* v. *State of A.P.*, (1997) 7 SCC 431 : 1997 SCC (Cri) 1094, this Court analysed the ingredients of Sections 153-A and 505(2) IPC. It was held that Section 153-A covers a case where a person by "words, either spoken or written, or by signs or by visible representations", promotes or attempts to promote feeling of enmity, hatred or ill will. Under Section 505(2) promotion of such feeling should have been done by making a publication or circulating any statement or report containing rumour or alarming news. Mens rea was held to be a necessary ingredient for the offence under Sections 153-A and 505(2). The common factor of both the sections being promotion of feelings of enmity, hatred or ill will between different religious or racial or linguistics or religious

groups or castes or communities, it is necessary that at least two such groups or communities should be involved. It was further held in *Bilal Ahmed Kaloo* [*Bilal Ahmed Kaloo* v. *State of A.P.*, (1997) 7 SCC 431 : 1997 SCC (Cri) 1094] that merely inciting the feelings of one community or group without any reference to any other community or group cannot attract any of the two sections. The Court went on to highlight the distinction between the two offences, holding that publication of words or representation is sine qua non under Section 505. It is also relevant to refer to the judgment of this Court in *Ramesh* v. *Union of India* (1988) 1 SCC 668 : 1988 SCC (Cri) 266 in which it was held that words used in the alleged criminal speech should be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The standard of an ordinary reasonable man or as they say in English law "the man on the top of a Clapham omnibus" should be applied.

12. This Court in *Pravasi Bhalai Sangathan* v. *Union of India*, (2014) 11 SCC 477 : (2014) 3 SCC (Cri) 400 had referred to the Canadian Supreme Court decision in *Saskatchewan (Human Rights Commission)* v. *William Whatcott*, 2013 SCC OnLine Can SC 6 : (2013) 1 SCR 467. In that judgment, the Canadian Supreme Court set out what it considered to be a workable approach in interpreting "hatred" as is used in legislative provisions prohibiting hate speech. The first test was for the Courts to apply the hate speech prohibition objectively and in so doing, ask whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to

> hatred. The second test was to restrict interpretation of the legislative term “hatred” to those extreme manifestations of the emotion described by the words “detestation” and “vilification”. This would filter out and protect speech which might be repugnant and offensive, but does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or injury. The third test was for the Courts to focus their analysis on the effect of the expression at issue, namely, whether it is likely to expose the targeted person or group to hatred by others. Mere repugnancy of the ideas expressed is insufficient to constitute the crime attracting penalty."

16. Considering the totality of facts and circumstances of the case, this Court is of considered opinion that no case is made out warranting interference.

17. Application fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

S.M.