

IN THE HIGH COURT OF KERALA AT ERNAKULAM  
PRESENT

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

WEDNESDAY, THE 24TH DAY OF FEBRUARY 2021 / 5TH PHALGUNA, 1942

CRL.A.No.9 OF 2021

AGAINST THE ORDER/JUDGMENT IN CRMC 2355/2020  
DATED 24-12-2020 OF PRINCIPAL SESSIONS COURT, ERNAKULAM

CRIME NO.2036/2020 OF Ernakulam Central Police Station ,  
Ernakulam

APPELLANT/S:

- 1 PRATHEESH R. @ PRATHEESH VISWANATH  
AGED 39 YEARS,  
S/O.VISWANATHAN NAIR, MURINGOOR VALIYAKALAYIL  
(H), NALIKALIKKAD P.O., ARANMULA,  
PATHANAMTHITTA DISTRICT, PIN - 689 533.
- 2 C.C.RAJAGOPAL  
AGED 47 YEARS  
S/O.C.S.GOPINATHAN, CHERTHEDATH (H),  
VATTAKKATTU ROAD, KALOOR P.O.,  
COCHIN, PIN - 682 017.

BY ADV. SRI.C.S.MANU

RESPONDENT/S:

- 1 STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR, HON'BLE  
HIGH COURT, ERNAKULAM DISTRICT, PIN - 682 011.
- 2 SUB INSPECTOR OF POLICE  
ERNAKULAM CENTRAL POLICE STATION, ERNAKULAM  
DISTRICT, PIN - 683 104 (NOTICE TO WHOM MAY BE  
SERVED ON THE PUBLIC PROSECUTOR, HON'BLE HIGH  
COURT, ERNAKULAM DISTRICT, PIN - 682 011).

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3 BINDU AMMINI,  
AGED 42 YEARS  
W/O.HARIHARAN, NILAVEEYYIL, THOOVAKKADPARAMBIL,  
CHENGOTTUKAVU VILLAGE, KOYILANDI THALUK,  
KOZHIKODE, PIN - 673 304.

R3 BY ADV. SRI.U.JAYAKRISHNAN

OTHER PRESENT:

SRI.K.B. UDAYAKUMAR, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
24.02.2021, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**JUDGMENT**

The appellants are accused Nos.2 and 3 in Crime No.2036 of 2019 of Central Police Station, Ernakulam.

2. The prosecution case can be summarised as follows:

The victim is a guest lecturer in a Government law college. She is an activist. The appellants are supporters of RSS/BJP. The victim along with Mrs.Tripathi Desai and four others, who are activists in the organisation, namely, Bhumatha Brigade came to the office of the Commissioner of Police, Ernakulam City, for getting police protection for the purpose of proceeding to the Sabarimala Temple on 26.11.2019. The appellants and many Hindu organisations assembled there to protest against the visit of the activists

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to Sabarimala Temple. While so, at about 7.45 p.m., the first accused applied chilly spray on the face and body of the victim, in furtherance of the common intention of all the accused. The victim is a member of Scheduled Caste. The appellants do not belong to the said community.

3. The crime was originally registered for the offence punishable under Sections 324 read with Section 34 IPC. During the course of investigation, the offences under Sections 326B and 354 IPC and Sections 3(2)(v) and 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act') were added to the Section of offences.

4. The appellants filed application before the court below praying for the relief under Section 438 Cr.P.C. The court below dismissed the said application, against which

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this appeal has been filed.

5. Heard the learned counsel for the appellants, the learned counsel for the victim and the learned Public Prosecutor. Perused the case diary.

6. The audio-visual Compact Disc, which was handed over to the police by the victim herself, is appended to the case diary. The said Compact Disc was played in the chamber in the presence of the learned counsel for the appellants, the learned counsel for the victim and the learned Public Prosecutor.

7. The learned counsel for the appellants has argued that since the allegations against the appellants are *prima facie malafide*, the bar under Section 18 of the Act is not applicable in this case and consequently, the appellants are entitled to be granted the relief under Section 438 Cr.P.C.

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On the other hand, the learned counsel for the victim has argued that since there is express bar under Sections 18 and 18 A of the Act to entertain an application under Section 438 Cr.P.C., this Court has no jurisdiction in this case to grant the relief under Section 438 Cr.P.C. to the appellants, particularly when there are allegations against the appellants constituting the offences under the Act. The learned Public Prosecutor has also supported the argument of the learned counsel for the victim.

8. The first question to be considered is as to whether there is absolute bar against the grant of anticipatory bail in cases under the Act. In order to consider the above question, it will be profitable to go through the provisions of Sections 18 and 18A of the Act. Section 18 of the Act is extracted hereunder:-

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**“18. Section 438 of the Code not to apply to persons committing an offence under the Act.-**

Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.”

Section 18A of the Act is extracted hereunder:-

**“18-A. No enquiry or approval required.-(1)**

For the purposes of this Act,-

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person,

against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or

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the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.”

9. The Hon'ble Apex Court considered the object and purpose of Section 18 of the Act in detail and held in paragraph 83 in Subhash Kashinath Mahajan v. State of Maharashtra [2018 (2) KLT 33 (SC)] thus:-

“83. Our conclusions are as follows:

i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be



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*prima facie mala fide.* We approve the view taken and approach of the Gujarat High Court in Pankaj D Suthar (supra) and Dr.N.T. Desai (supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);

iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that

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the allegations are not frivolous or motivated.

v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

The above directions are prospective.”

10. Thereafter review petition was filed by the Union of India for reviewing the judgment in Subhash Kashinath (supra). The Three Judge Bench of the Apex Court in Union of India v. State of Maharashtra and Others [2019(5) KHC 57 (SC)] reviewed the judgment in Subhash Kashinath (supra) and held in paragraph 67 thus:-

“Resultantly, we are of the considered opinion that direction Nos.(iii) and (iv) issued by this Court deserve to be and are hereby recalled and consequently we hold that direction No. (v) also vanishes.”

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It appears from Union of India (supra) that the Apex Court did not recall conclusion No.(ii) made in Subhash Kashinath (supra).

11. Section 18 A (1) was inserted owing to the direction of the Hon'ble Apex Court in Subhash Kashinath (surpa), which made it necessary to conduct a preliminary enquiry to avoid false implication of an innocent and also to obtain the approval of the appointing authority concerning a public servant and the S.S.P in the case of arrest of the other accused persons. The Hon'ble Apex Court recalled the said direction as per the decision in Union of India (supra).

12. The Three Judge Bench of the Apex Court in Prithvi Raj Chauhan v. Union of India (UOI) and Others [2020 (2) KHC 423] held that the provisions which had

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been made in Section 18 A were rendered of academic use as they were enacted to take care of the mandate issued in Subhash Kashinath (supra), which no more prevails. The provisions were already there in Section 18 of the Act with respect to anticipatory bail.

13. The Apex Court in Prithvi Raj Chauhan (supra) further held that if the complaint does not make out a *prima facie* case for the applicability of the provisions of the Act, the bar created by Sections 18 and 18 A shall not apply.

15. As already mentioned above, Section 18 A was inserted owing to direction Nos.3 and 4 issued in Subhash Kashinath (supra). However, the Apex Court as per the decision in Union of India (supra) recalled direction Nos.3

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and 4 issued in Subhash Kashinath (supra). Since direction No.2 was not recalled, the said direction holds the field even now. Therefore, there is no absolute bar against grant of anticipatory bail in cases under the Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be *prima facie mala fide*.

16. In the concurring judgment in Prithvi Raj Chauhan (supra), His Lordship Justice S. Ravindra Bhat held in paragraph 32.(20) thus:-

“I would only add a caveat with the observation and emphasize that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests: i.e. that the power is not so used as to convert the jurisdiction into that under S.438 of the Criminal Procedure Code, but that it is used sparingly and such orders made

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in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law”.

17. This Court in Arul P. Sugathan and others v. State of Kerala and another [2021(1) KHC 126] followed the above decisions of the Hon'ble Apex Court and held in paragraph No.15 thus:-

“15. The above discussion would make it clear that there is no absolute bar against the grant of anticipatory bail in cases under the Act. However, the said jurisdiction shall be exercised sparingly and only in very exceptional cases by the High Court. Where the court finds that no *prima facie* case is made out or where on judicial

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scrutiny, the court finds that the complaint is *prima facie malafide*, the court will be justified in passing an order granting pre-arrest bail, if the Court is further satisfied that if the pre-arrest bail is not granted in the case, the result would inevitably be miscarriage of justice or abuse of process of law.”

18. It is clear from the above discussion that eventhough there is no absolute bar against the grant of anticipatory bail in cases under the Act, the said jurisdiction shall be exercised sparingly and only in very exceptional cases by the High Court. Where the High Court finds that no *prima facie* case is made out or where on judicial scrutiny, the court finds that the complaint is *prima facie malafide*, the High Court will be justified in passing an

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order granting pre-arrest bail if the Court is further satisfied that if the pre-arrest bail is not granted, the result would inevitably be miscarriage of justice or abuse of process of law.

19. The next question to be considered is as to whether the present case falls under any of the said categories of cases or not.

20. It is not disputed that the entry of women activists to Sabarimala Temple was a controversial issue during the relevant period. It is also not disputed that in the said issue, the Government of Kerala was on one side and the RSS/BJP and many Hindu organisations were on the other side. The RSS/BJP and many Hindu organisations made protest against the entry of activist women to Sabarimala Temple. However, the Government of Kerala supported the



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entry of activist women to Sabarimala Temple. It is admitted that the victim is an activist and not a devotee. The appellants are admittedly supporters of RSS/BJP. The argument of the learned counsel for the appellants that the allegations against the appellants are *malafide*, will be considered by this Court in the light of the above facts.

21. The gist of the allegation in the FIR is that on 26.11.2019 at about 7.30 a.m., the accused Nos. 1 to 5 approached the victim chanting 'Ayyappa hymn' and one of the accused persons applied chilly spray on the face and body of the victim.

22. The above FIR was registered on the basis of the statement given by the victim on the same day at about 9.45 am. As per the F.I. statement, the victim is an activist woman. She, along with Mrs.Tripathi Desai and four others,

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who are also activists, reached the office of the Commissioner of Police, Ernakulam City, for getting police protection for the purpose of proceeding to the Sabarimala Temple on 26.11.2019 at about 7.30 a.m. Since the police was not ready to provide protection, the victim proceeded near to her car for collecting the certified copy of the order of the Supreme Court. At that time, around five persons came near to her chanting 'Ayyappa hymn' and one among them applied some chemical spray on the face of the victim.

23. The victim was again questioned on the very same day at the hospital by the Investigating Officer. At that time, the victim stated that RSS people, when she attempted to take the order of the Supreme Court from the car, approached her chanting 'Ayyappa hymn' and touched

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her body in the presence of public and humiliated her by calling 'Urban Naxal'. The victim added that she could not state the Police about the said incident at the time when she had given the statement in the morning.

24. Eventhough the victim had stated in the F.I. statement that the appellants along with the first accused came near to the victim chanting 'Ayyappa hymn' and at that time, the first accused applied some chemical spray on the face and body of the victim, none of the witnesses so far questioned by the Investigating officer stated about the presence of the first accused with the appellants at any point of time. The audio-visual Compact Disc produced along with the case diary also does not support the allegation of the victim that the appellants came near to the victim along with the first accused. In the statement given

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by the victim under Section 164 Cr.P.C., she did not state that the appellants came near to the victim along with the first accused.

25. The Investigating officer is present in the Court. The Investigating Officer has submitted through the learned Public Prosecutor that no visual is available showing the presence of the first accused with the appellants at any point of time prior to or subsequent to the incident, even though the appellants and many Hindu organisations, who opposed the entry of activist women to Sabarimala Temple, assembled there to protest against the visit of the activist women to Sabarimala Temple.

26. The learned counsel for the victim has submitted that the incident was recorded in the video only by the accused and no other person and hence no visual is

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available showing the presence of the first accused with the other accused. The statement of the victim herself would show that so many media persons were present at the scene. The victim had stated before the learned Magistrate under Section 164 Cr.P.C. that the victim herself had reached the place in a car belonging to one of the media institutions. However, no visual is available showing the presence of the first accused with the appellants. The audio-visual Compact Disc, which was handed over to the police by the victim herself, had been played in the presence of the learned counsel for the appellants, the learned counsel for the victim and the learned Public Prosecutor, which would show that the first accused alone came near to the victim and applied some spray on her face and body. No other person was seen near to the first accused at that time. In her

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statement under Section 164 Cr.P.C., the victim did not state that the appellants came near to the victim along with the first accused. On the other hand, the victim clearly stated in her statement under Section 164 Cr.P.C. that the first accused alone came near to her and applied chemical spray on her face and body.

27. When the victim had given the second statement to the Investigating Officer, she had stated that the appellants and the other accused approached her chanting 'Ayyappa hymn' and touched her body in the presence of the Public. The appellants and the other accused had also humiliated her by calling her 'Urban Naxal'. The audio-visual Compact disc produced along with the case diary also does not support the allegation of the victim that the appellants touched her body or humiliated her by calling

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her 'Urban Naxal'. The victim had given statement under Section 164 Cr.P.C. before the learned Magistrate on 15.2.2020. In the said statement, the victim did not state that the appellants touched her body or humiliated her by calling her 'Urban Naxal'. So many witnesses were questioned by the Police. The police also recorded their statements. In the said statements also, none of the witnesses stated that the appellants had touched the body of the victim or humiliated the victim by calling her 'Urban Naxal'. It is true that all the witnesses stated about the involvement of the first accused.

28. It is clear from the statement of the victim recorded under Section 164 Cr.P.C. that the incident occurred in the presence of media persons. In view of the above, the submission of the learned Counsel for the victim

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that the accused persons alone videographed the incident and no media person had videographed the incident, cannot be correct. The victim had stated that the videograph showing the act of the first accused was uploaded and circulated by the other accused persons through social media. The victim also stated that the accused persons had recorded the videograph as already decided by them. It appears from the audio-visual Compact Disc produced along with the case diary that the appellants and many other people gathered near to the victim and talked to her immediately after the incident. However, the victim did not accuse the appellants at that time. None of the witnesses, whose statement was recorded by the police, also did not mention about the involvement of the appellants in the incident. From the statement of the victim



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recorded under Section 164 Cr.P.C., it appears that the second appellant was a candidate in the election to the Kerala Legislative Assembly. Even then, no person who witnessed the incident could identify the second appellant upto this date. The first appellant is a practising lawyer in Ernakulam. He is also one of the leaders of RSS/BJP. However, he is also not identified as one of the assailants in this case by any of the independent witnesses till date. The victim also could not identify the appellants till she had given statement under Section 164 Cr.P.C. before the court. The appellants were made as accused in this case only on 12.10.2020, which was nearly after eleven months from the date of incident.

29. Admittedly, the first appellant is a lawyer practising in Ernakulam and the second appellant was a

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BJP candidate in the last election for the Kerala Legislative Assembly in Ernakulam constituency. Both of them are supporters and leaders of RSS/BJP. Both the appellants are admittedly public figures. Even then, the appellants could not be identified by the victim for a long period.

30. The victim was admittedly an activist and not a devotee. The RSS/BJP and many Hindu organizations opposed the entry of activist women to Sabarimala Temple. In her statement under Section 164 Cr.P.C., the victim did not state that the appellants came near to the victim along with the first accused or touched her body or humiliated her by calling her 'Urban Naxal' as stated by her before the police. On the other hand, the victim clearly stated in her statement under Section 164 Cr.P.C. that the first accused

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alone came near to her and applied chemical spray on her face and body. Thus it appears that the victim did not raise any allegation against the appellants when she had given a detailed statement about the incident under Section 164 Cr.P.C. The victim is an educated lady. She is admittedly working as a guest lecturer in a Government Law College. Therefore, the said statement given by the victim under Section 164 Cr.P.C. assumes significance. Neither the audio-visual Compact Disc appended to the case diary nor the statement of witnesses recorded by the police supported the allegations raised by the victim against the appellants before the police. When viewed the above facts in the light of the admitted fact that the appellants are leaders/supporters of RSS/BJP, who opposed the entry of

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women activists to Sabarimala Temple, it appears that the allegations raised against the appellants by the victim before the police are prima facie tainted with *malafides*. Thus, on a judicial scrutiny of the materials, it appears that the allegations against the appellants are *prima facie malafide*.

31.Considering the facts and circumstances of the case, I am of the considered view that if pre-arrest bail is not granted to the appellants, the result would inevitably be abuse of process of law. In the said circumstances, the appellants are entitled to pre-arrest bail. For the said reason, the order impugned cannot be sustained.

In the result, this appeal stands allowed, setting aside the order impugned and the arresting officer is directed to release the appellants on bail in the event of

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their arrest in connection with Crime No.2036/2019 of Central Police Station, Ernakulam, on condition of each of the appellants executing a bond for Rs.50,000/- (Rupees Fifty Thousand Only) each with two solvent sureties each, each for the like sum to the satisfaction of the Investigating Officer, before whom the appellants shall surrender within fifteen working days, if not arrested in the meantime and subject to the following further conditions:

- (i) The appellants shall report before the Investigating Officer as and when required by the Investigating Officer for interrogation.
- (ii) The appellants shall not intimidate or influence the witnesses or in any way tamper with the investigation.
- (iii) The appellants shall co-operate with the

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investigation.

I make it clear that no observation in this judgement shall be construed as expression on merits as the observation, if any, made in this judgment was only for the purpose of disposing of this appeal.

**Sd/-B. SUDHEENDRA KUMAR,  
JUDGE.**

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P.S. to Judge