IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2175 OF 2017

1 Victor Chigozie Ezurike
2 Caleb Mezie Ogbuagu .... Applicants

Vs.

The State of Maharashtra .... Respondent

Mr. Tushar Lavhate for the Applicants.
Ms. Veera Shinde, APP for the State.

Mr. Deepak Lagad, PI, Cyber Cell, Pune City present

***Coram : Smt. Sadhana S. Jadhav*, J.**
Date : 18th January, 2018

P.C.:

1 Heard the learned counsel for the applicants and the learned APP.

2 This is an application under Section 439 Code of Criminal Procedure. The applicants herein are arrested on 6th November 2016 in Crime No. 389 of 2016, for the offences punishable under Sections 419, 420, 468, 471, 201 read with 34 Indian Penal Code, Sections 66 (C), 66(D) of Information Technology Act and Sections 5, 14 and

14(a) of the Foreigners Act, 1946. Pursuant to the report lodged by one Hema Bhalchandra Kanetkar at Chatushrungi Police Station on 5th September, 2016.

3 It is the case of the prosecution that one Hema Kanetkar lodged a report at the police station alleging therein that she has a face-book account in her name. One day she has received a friend's request from a person namely Harley Benson. He had informed her that he is working as an Engineer in Genesis Oil & Gas Consultant Limited, London. As she has accepted his friend's request, they used to chat regularly. One day, he had proposed to marry her. In fact, the first informant is 64 years old. In 2016, Harley Benson had informed her that he had come to Delhi and his bag has been confiscated by the Customs department. He had further informed her that he had to leave for London immediately. One day she had received a call allegedly from the Customs office from cellphone no. 9654354719 and she was informed that one person called Harley Benson has left a bag and that she should get it released after paying the customs duty. She had spoken to Harley Benson and he had enquired about the said bag left for her and it carried money, gold and diamonds. Harley Benson had given her the account numbers, on which she should deposit the amount to get the bag released. She had then deposited Rs.94,60,000/- in various accounts. On 24th July, 2016, the person purportedly calling from customs department had

informed her that the entire procedure is over, they would deliver the bag at her doors step. She waited for the carrier, however, she did not receive anything and therefore she had realised that she had been cheated and therefore she was constrained to lodge a report at the police station.

4 The supplementary statement of the complainant was recorded, in which she had informed the police that there is one female involved as the call that she made were initially by a female, who told her that she would transfer her call to her boss. It appears from the papers of investigation that the police had kept track of cellphone numbers mentioned by the complainant. The police had taken the help of cyber crime cell and had been able to track the present applicants from Delhi. The applicants are Nigerian citizens.

5 Learned counsel for the applicants submits that applicant no.1 had been to India for business and applicant no. 2 had visited India as a student. While in custody, the applicants had disclosed that their female associate has not been traced out till today. Learned counsel for the applicants submits that in fact the prosecution is relying upon the secondary evidence as even according to the prosecution, all the calls were made on cellphone. The prosecution while filing the charge-sheet has not followed proper procedure and the said internet data is not supported by the

certificate issued under Section 65(B) of Indian Evidence Act. As against this, the learned APP has submitted that in the house search, the investigating agency had found three laptops, more than14 sim-cards and Airtel dongles. M.E.I.D. number was taken from their respective handsets. There were more than 7 pen-drives. Hard discs are seized and all the other material seized from the house of the applicants has been sent for forensic tests and reports are awaited.

6 It appears from the papers of investigation that the number A447937469255 was used for free forwarding site calls and messages through 9654354719. The said numbers are tracked by the investigating officer to be registered and used from U.K. The documents are seized by the investigating agency.

7 Learned counsel for the applicants submits that the service providers are in foreign countries and that it is incumbent upon the prosecution to obtain certificates after verifying records from the service providers and in the absence of following the mandatory provisions under the Information Technology Act and the Indian Evidence Act, further incarceration of the applicants would be futile. Learned counsel for the applicants has placed implicit reliance on the judgment of Hon'ble Apex Court in the case of Anwar P.V. Vs. P.K. Basheer and Others (Civil Appeal No.4226 of 2012) and has submitted that the Hon'ble Apex Court has held that Section 45A of

the Evidence Act is a mandatory provision. That the compliance of Section 65B of the Indian Evidence Act is also mandatory. According to the learned counsel, the investigating agency ought to have followed the mandatory provisions. In paragraph 13 of the said judgment, the Hon'ble Apex Court has held that “any documentary evidence by way of electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B of the Indian Evidence Act. The purpose of these provisions is to sanctify secondary evidence in electronic form generated by a computer. Notwithstanding anything contained in the Evidence Act, any information contained in an electronic record, which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a documents only if the conditions mentioned under Sub-section (2) are satisfied, without further proof or production of the original”.

8 According to the learned counsel for the applicants, it is, in these circumstances that further incarceration of the applicants would not serve the ends of justice. It is submitted that the applicants are not being produced on the scheduled dates and hence, the trial is protracted and the applicants are in custody for more than 1 year. Learned APP has drawn attention of this court to the papers collected in the course of hearing and has submitted that this is an

economic offence. The applicants have cheated the complainant for an amount of more than Rs.94.00 Lacs. They are foreign nationals and that in the eventuality that they are enlarged on bail, they would not be available for trial. Taking into consideration the papers of investigation, the submissions advanced across the bar and the gravity of the offence, this Court is of the opinion that the applicants do not deserve to be enlarged on bail. Hence, the application being sans-merits, stands rejected.

9 The observations made hereinabove are prima facie in nature and are restricted to the application under Section 439 Code of Criminal Procedure and the trial Court shall not be influenced by the same.

(*Smt. Sadhana S. Jadhav*, J)