IN THE SUPREME COURT OF NEW ZEALAND

SC 90/2016
[2016] NZSC 138

BETWEEN	DEMISSIE TEFERA ASGEDOM Applicant
AND	THE QUEEN Respondent

SC 91/2016

BETWEEN	NEBIYOU TEFERA DEMISSIE Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Arnold and Ellen France JJ
Counsel:	R E Lawn for Applicants K S Grau for Respondent
Judgment:	25 October 2016

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The applicants, who are brothers, faced a 30 count indictment charging seven counts of obtaining documents (tickets) with intent to obtain a pecuniary advantage and 23 counts of attempting that offence arising out of a scheme to scalp tickets for the Rugby World Cup (RWC) held in New Zealand in 2011.[1] The scheme involved the purchase of RWC tickets overseas by way of fraudulent credit card transactions and the collection of the tickets in New Zealand with a view to on-sale. The counts alleged that both of the applicants were involved in the offending with others, in

[1] Crimes Act 1961, s 228.

particular a Mr Amera and a Mr Boku, who were both based in South Africa. At a judge alone trial before Judge David Harvey, Mr Asgedom was convicted on 14 counts and Mr Demissie on 16.[2] They were sentenced to 12 months home detention and 200 hours of community work.[3] Both appealed against their convictions; Mr Demissie also appealed against his sentence. The Court of Appeal dismissed their appeals.[4] They now seek leave to appeal to this Court, Mr Asgedom against conviction and Mr Demissie against both conviction and sentence.

[2] Before the Court of Appeal numerous grounds of appeal against conviction were raised. Before this Court, the applicants' submissions purport to address three grounds, but range more extensively than the three grounds identified and are not easy to follow. As we understand it, the applicant seeks to raise issues about the form of the indictment, the Crown's use of an Excel spreadsheet which contained details of the RWC ticket purchases alleged to be fraudulent, the fact that the defence did not receive certain disclosure and the fact that the indictment was amended partway through the trial to remove the name of a Mr Seed and add that of Mr Amera.

[3] By way of background, on the day the 2011 RWC commenced, the police searched the homes of Mr Asgedom and Mr Demissie under warrant. At Mr Asgedom's home they found nine RWC tickets with a face value of over $9,000 and a sign advertising cheap tickets to the RWC opening ceremony. In addition, a package addressed to Mr Asgedom's home was intercepted. It contained 114 RWC tickets having a face value of over $50,000. At Mr Demissie's address the police found 931 RWC tickets with a face value of over $500,000. These were found underneath the house. The police also found a significant amount of cash.

[4] The RWC tickets had been purchased online through the Ticketek website using credit cards, the details of which the Crown alleged had been acquired dishonestly.

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2 *R v Demissie* [2015] NZDC 8912 [*Demissie* (DC)].
3 *R v Demissie* [2015] NZDC 19250.
4 *Asgedom v R* [2016] NZCA 334 (Randerson, Woodhouse and Wylie JJ) [*Asgedom* (CA)].

[5] The Crown case was that the tickets were probably purchased by people based outside New Zealand. They were purchased initially in the names of the applicants and later in the names of other people. The applicants collected some of the tickets themselves but also arranged for other people in whose names tickets had been purchased to collect tickets from New Zealand Ticketek outlets. The Crown alleged that the applicants were collecting and holding the tickets, knowing they had been purchased fraudulently, for the overseas purchasers and that they intended to on-sell the tickets as part of the scalping operation.

[6] At the trial, the Crown produced an Excel spreadsheet which contained details of the purchases of the RWC tickets alleged to have been made fraudulently by overseas operatives. The spreadsheet referred to matters such as the number of each of the relevant credit cards, the names used by those using the cards, the tickets purchased and their value. The spreadsheet recorded all the ticket purchase transactions which had been confirmed to be fraudulent. This confirmation involved the relevant credit card company or bank contacting the owners of the credit cards to find out whether the relevant transactions had been authorised. Some 400 transactions were found to be fraudulent in connection with cards issued by numerous issuers around the world and held by customers who resided overseas.

[7] The Crown indicated prior to trial that it did not intend to call the individual cardholders but would seek to have the spreadsheet produced as a summary of a voluminous compilation of documents under s 133 of the Evidence Act 2006. It said that the matters recorded in it were business records in terms of ss 16 and 19 of the Act and accordingly were admissible under those provisions for the truth of their contents. The spreadsheet was ruled to be admissible, both prior to[5] and during[6] the trial, a decision upheld by the Court of Appeal.[7]

Analysis

[8] Originally, the indictment contained two charges relating to some 1,700 transactions. Judge Harvey had concerns about this and ultimately the Crown laid an

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5 *R v Demissie* [2015] NZDC 1117.
6 *R v Demissie* [2015] NZDC 6199.
7 *Asgedom* (CA), above n 4, at [38]–[85].

amended indictment containing 30 counts which brought the individual transactions together into groups based on the various names in which the tickets were purchased. Judge Harvey considered that this grouping enabled matters to be addressed fairly and conveniently. The only other alternative suggested was to have an indictment with 1,700 counts, which both Judge Harvey and the Court of Appeal considered would be "unwieldy in the extreme".[8]

[9] For the applicants, Mr Lawn argues, by reference to this Court's decision in *Qiu v R*,[9] that the indictment should have contained 1,700 individual counts. This is on the basis that each transaction was identifiable and should have been charged separately. The failure to charge the offences in this way prejudiced the defence because where the individual dates and other details of each transaction were not identified, the applicants could not apply for third party disclosure from Ticketek, Westpac, American Express, Visa and the credit card transactions verification agency DPS concerning the date and time of the alleged transaction and the related ISP numbers.

[10] We consider that the form of the indictment was appropriate. We note that this was not a jury trial but a trial before a Judge alone, so that some of the potential difficulties referred to by this Court in *Mason v R* do not arise.[10] Moreover, like Judge Harvey and the Court of Appeal, we do not accept that the applicants were in some way prejudiced by the form of the amended indictment. In particular, the spreadsheet provided full details of the transactions alleged and if the applicants wished to obtain the underlying data held by Ticketek or others, they ought to have sought non-party disclosure under the procedures set out in the Criminal Disclosure Act 2008.

[11] While we accept that the operation of the business records provisions of the Evidence Act and of s 133 may in some circumstances raise issues of general or public importance, we are satisfied that no such issues arise in the present case. Nor do we see any risk of a substantial miscarriage of justice in the particular circumstances of the case.

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8 *Asgedom* (CA), above n 4, at [130].
9 *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1.
10 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296.

[12] In relation to the amendment to the indictment to replace the reference to Mr Seed with a reference to Mr Amera, Mr Lawn appears to be advancing two propositions. The first is that there was a breach of the co-conspirators' rule, leading to inadmissible evidence being led. The second is that because of the late substitution, the applicants were unable to exercise their right to apply for non-party disclosure.

[13] The Court of Appeal addressed the first point.[11] The Crown case was that there was a conspiracy between Messrs Asgedom and Demissie, which involved Messrs Amera and Boku. Judge Harvey found that Mr Asgedom and Mr Demissie were well aware that they were engaged in an unlawful and dishonest scheme.[12] The communications between them were admissible against each other given that there was evidence of a conspiracy between them. Judge Harvey also found that Messrs Amera and Boku were involved in the illegal scheme.[13] The only communications adduced at trial involving Messrs Amera and Boku also involved Mr Demissie. They were accordingly admissible against Mr Demissie. They were also admissible against Mr Asgedom even though he was not involved in some of the communications.

[14] As to the second point, it appears to be a new point, but raises in a different context the argument about non-disclosure of the technical data which underlay the spreadsheet. Although references to Mr Seed in the indictment were replaced by references to Mr Amera, the material in the spreadsheet did not change as a result and the details underpinning the spreadsheet remained the same. As we have said, the applicants did not seek non-party discovery. It is too late now to rectify that.

[15] As to Mr Demissie's sentence appeal, this Court rarely entertains sentence appeals. In any event, we agree with the Court of Appeal's conclusion that there is no basis on which the sentence could be described as manifestly excessive – if anything, it was lenient.[14]

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11 *Asgedom* (CA), above n 4, at [108]–[112].
12 See *Demissie* (DC), above n 2, at [234]–[235], [239] and [250].
13 At [237], [242]–[243] and [248]–[253].
14 *Asgedom* (CA), above n 4, at [139].

[16] In the result, we do not consider that it is necessary in the interests of justice that we hear and determine these appeals. They raise no point of general or public importance, nor is there any appearance of a substantial miscarriage of justice. The applications for leave to appeal are accordingly dismissed.

Solicitors:
Kumeu-Huapai Law Centre, Auckland for Applicants
Crown Law Office, Wellington for Respondent