**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA451/2015**
**[2016] NZCA 334**

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| BETWEEN | DEMISSIE TEFERA ASGEDOM<br>Appellant |
| AND | THE QUEEN<br>Respondent |

**CA533/2015**

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| BETWEEN | NEBIYOU TEFERA DEMISSIE<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 1 June 2016 |
| Court: | Randerson, Woodhouse and Wylie JJ |
| Counsel: | R E Lawn for Appellant Asgedom<br>J R F Anderson for Appellant Demissie<br>K S Grau for Respondent |
| Judgment: | 18 July 2016 at 9.30 am |

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**JUDGMENT OF THE COURT**

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**A The appellant Mr Demissie is granted an extension of time to appeal.**

**B The appeals against conviction by both appellants are dismissed.**

**C The appellant Mr Demissie's appeal against sentence is dismissed.**

**D To the extent the sentences imposed may not have been completed, this must now occur. The respondent may revert to this Court if any further directions on this are required.**

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**REASONS OF THE COURT**

(Given by Randerson J)

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## Introduction

[1] After a judge-alone trial before Judge David Harvey the appellants were convicted on a number of dishonesty offences relating to a scheme to scalp tickets for the Rugby World Cup (RWC) tournament which commenced on 9 September 2011.[1]

[2] There were some 30 counts in the indictment brought jointly in each case against the appellants who are brothers. Where the relevant tickets were recovered, the appellants were charged with obtaining a document with the intention of obtaining a pecuniary advantage, contrary to s 228 of the Crimes Act 1961. In those cases where the RWC tickets were not recovered (or in one case were intercepted before they reached their destination) the appellants were charged with attempting to commit an offence under s 228.

[3] The appellant Mr Demissie was found guilty of seven counts under s 228 and nine counts of attempting to commit an offence under that section. Mr Asgedom was found guilty of seven counts under s 228 and eight counts of attempting to commit an offence under that section. They were found not guilty of the remaining charges or, in some cases, were discharged during the trial.

[4] The appellants were sentenced on 6 August 2015 to 12 months home detention and 200 hours of community work.[2]

[5] Both appellants appeal against conviction. Mr Demissie also appeals against his sentence.

[6] Mr Demissie filed two separate notices of appeal, both out of time. The respondent did not oppose an extension of time to appeal and we order an extension of time accordingly.

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1 *R v Demissie* [2015] NZDC 8912.
2 *R v Demissie* [2015] NZDC 19250.

**Background facts**

[7] The Crown case was that the appellants were involved in a scheme in which unlawfully obtained credit card details were used by overseas persons to purchase the RWC tickets online through Ticketek, a ticketing agency. The appellants' role was to collect the RWC tickets and hold them until the overseas persons arrived in New Zealand. This was said to be a very large scale operation with the intention of selling the tickets for profit.

[8] The police had become aware of a number of suspicious RWC ticket purchases at the beginning of September 2011 in the period immediately preceding the beginning of the tournament. A joint investigation was commenced between the New Zealand Police, Immigration and Customs Services.

[9] Two men, a Mr Seed and a Mr Boku, arrived at Auckland airport from South Africa on 3 September 2011. Both had RWC tickets with them purchased via fraudulent credit card transactions. Mr Boku said he was intending to visit Mr Demissie. Both Mr Seed and Mr Boku were denied entry to New Zealand.

[10] As part of the continuing investigation, search warrants were obtained for the appellants' homes in Auckland and were executed on 9 September 2011. Nine hundred and thirty one RWC tickets were found under Mr Demissie's house with a face value of over $500,000. A significant sum in cash was also located. Nine RWC tickets were located at Mr Asgedom's home. In addition, Customs intercepted a package containing 114 RWC tickets bound for Mr Asgedom's address with a face value of over $50,000. Cellphones associated with the appellants were also seized.

[11] The RWC tickets had been obtained by online purchases through the Ticketek website using credit cards. The Crown alleged that the credit card details for these purchases had been acquired dishonestly and that the tickets were probably purchased by a Mr Amera and other persons located overseas.

[12] Initially, RWC tickets were purchased in the names of the appellants but, as purchases increased, other names provided by the appellants were used. Both appellants were involved in uplifting RWC tickets from ticket outlets in

New Zealand and arranging for other people, whose names had also been used in connection with the purchases, to collect the RWC tickets. The Crown alleged the appellants were preparing to sell the tickets as the commencement date of the tournament approached.

**The grounds of appeal**

[13] Mr Lawn advanced numerous grounds in support of Mr Asgedom's conviction appeal. Mr Anderson for Mr Demissie adopted these submissions but did not advance any separate submissions on his conviction appeal. Mr Lawn's submissions were excessive in length, running to some 71 pages. After discussion with the Court, the following principal issues were identified:

(a) Whether evidence obtained under the search warrants was admissible.

(b) Whether an Excel spreadsheet produced by the Crown was admissible.

(c) Whether Judge Harvey's verdict was unreasonable.[3]

[14] Mr Lawn also raised issues relating to the form of the indictment; the refusal of an application for a stay of proceedings; the ordering of a judge-alone trial; and the refusal of applications under s 347 of the Crimes Act for a discharge. We will deal with the principal issues and then more briefly with these remaining issues.

**The search warrants**

[15] In a ruling given on 16 June 2014 Judge Kiernan upheld the validity of the search warrant.[4] There was no appeal from that decision or, indeed, from any of the other pre-trial decisions. We accept Ms Grau's submission that, if there were any defect in the warrants, then the issue post-conviction is whether this led to any miscarriage of justice through the admission of evidence obtained in consequence of the execution of the warrants.

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[3] The appeal is to be considered under s 385 of the Crimes Act 1961 since the informations were filed against the appellants prior to 1 July 2013.

[4] *R v Asgedom* DC Auckland CRI-2011-004-17257, 16 June 2014.

[16] Mr Lawn challenged the issue of the warrants on a wide range of grounds. The main points were:

(a) The application for the warrants was stated in terms that were too general.

(b) The material contained in the application amounted to mere suspicion and was not sufficient to meet the threshold for reasonable grounds to believe that evidence of the commission of an offence was at the premises to be searched.[5]

(c) The application did not give adequate particulars of the offence for which the warrants were sought.

(d) The application did not specify the individual tickets sought by reference to date, seat number or sale number.

(e) The search warrants did not authorise the search of the cellphones found at the appellants' addresses.

(f) The evidence located ought not to have been admitted in terms of the balancing test in s 30 of the Evidence Act 2006.

*The content of the application for the warrants*

[17] The application for the search warrants was sworn by Detective Gillian Holland on 8 September 2011, the day before the RWC was to commence. She was a detective assigned to the Financial Crime Unit of the Auckland police. Her duties involved the investigation of corporate fraud.

[18] In the application, the detective outlined the police concerns which had arisen on 2 September 2011 when they became aware of a number of suspicious RWC ticket purchases that appeared to have been obtained via fraudulent credit card transactions. The detective made it clear she was relying on information supplied by

[5] In terms of s 198 of the Summary Proceedings Act 1957.

Ticketek as well as information received from Immigration New Zealand and the New Zealand Customs Service. The information indicated that 1,771 tickets worth in excess of $900,000 had been purchased via fraudulent means. The information received from Ticketek was that between 50 to 100 different credit cards had been used. The majority of the tickets had been purchased by individuals based offshore.

[19] The detective then set out in considerable detail the links that had been established between persons offshore which indicated that the known purchases were likely to be linked to a small number of individuals using a large number of credit cards.

[20] Specific evidence was provided in respect of Mr Seed and Mr Boku who had attempted to enter New Zealand on 3 September 2011. Mr Seed had in his possession six RWC tickets and a substantial amount of cash. Inquiries with Ticketek made the following day revealed that a number of tickets had been purchased using a variety of different credit cards linked to the same address in Johannesburg, South Africa.

[21] In respect of Mr Boku, the police were advised that, upon his arrival at Auckland Airport on 3 September 2011, he had stated he was intending to visit Mr Demissie. He had provided a cellphone number for Mr Demissie and an address for Mr Asgedom. Mr Demissie's Facebook site listed a Mr Boku as a friend. Information received from Ticketek showed that Mr Boku was linked to a credit card purchase through the Chase Bank of America for 10 RWC tickets. Mr Boku's email address was linked to a purchaser using the implausible name "Mr George Washington" who purchased another 19 RWC tickets.

[22] The search warrant application established the appellants were paying the power accounts for the addresses intended to be searched.

[23] Inquiries in respect of Mr Demissie had established he was linked to three credit cards purchased through the Chase Bank of America which had been used to make suspicious purchases of RWC tickets. A further seven Chase Bank of America credit cards were linked to the name Tefera Nebiyou (a name said to be used by

Mr Demissie). In total, 301 RWC tickets had been purchased using these credit cards.

[24] Similar information was provided in respect of Mr Asgedom. Inquiries had revealed he had purchased 27 RWC tickets using five different credit cards. Persons with whom he had connections had purchased 116 RWC tickets using three different credit cards and another 72 RWC tickets using four different credit cards.

[25] The information provided was shown in graphic form in a chart attached to the application for the search warrants. This demonstrated in a compelling way the links between the appellants, their addresses and the other individuals to whom they were linked. The chart also set out the credit cards used and the dates of the transactions.

[26] The application concluded with a statement by the detective that she believed in light of the information supplied that the appellants had committed the offence of participating in an organised criminal group, an offence under the Crimes Act punishable by a term of imprisonment. The warrants sought related to the two specified addresses associated with the appellants. They authorised searches for any documentation relating to the purchase of RWC tickets, computers, electronic diaries, personal digital devices, cellphones, banking documentation including credit card information, identity documents and documents pertaining to people smuggling.

*Search warrants – principles*

[27] The general principles applicable to search warrants under s 198 of the Summary Proceedings Act are well-established. They have been summarised by this Court in *R v Williams*.[6] The applicant must provide evidence that would afford the issuing officer with reasonable grounds to believe there will be at the stated location an item or items that will be evidence of the commission of an offence. The warrant must be as specific as the circumstances allow. The application must describe the offence and the specific incidents to which the search relates. Having reasonable grounds to believe is a higher standard than reasonable grounds to suspect. The

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6 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [209]–[222].

belief required is that there be an objective and credible basis for thinking that a search will turn up items named in the warrant. All the available facts relevant to the issuing of the warrant should be disclosed.

[28] Relevantly to the present case, the person applying for the warrant need not have personal knowledge of the facts set out but in such circumstances the source of the information must be clearly stated so the issuing officer may assess its reliability and cogency. The applicant must state a personal belief in the truth of the facts as stated in the application or it must be obvious to someone reading the application that the applicant personally believes the facts to be true.

*Judge Kiernan's decision*

[29] The Judge carefully traversed the material in the application for the search warrants. She also had before her evidence from Detective Holland and the officer in charge of the case, Detective Sergeant Traviss. The Judge correctly stated that the starting point when issues arise concerning the validity of the search warrant is to recognise that the exercise of the statutory powers should be designed to achieve a balance between rights of privacy and law enforcement. She identified the right to be secure against unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990 and the relevant principles in terms of s 198 of the Summary Proceedings Act.

[30] Having considered the arguments raised on behalf of the appellants, the Judge determined that none of the grounds of complaint were established. The Judge concluded that the text messages and other data found on the appellants' cellphones during the searches of the premises were prima facie material authorised by the warrant. Issues of relevance and admissibility at trial were an issue for future argument.

*Search warrants – discussion*

[31] We are satisfied that, with the possible exception of the cellphone data that we discuss below, the defects alleged in the application for the search warrants are not sustainable. The application was as specific as the circumstances allowed. The

application made it clear that the warrants were sought as part of an ongoing investigation involving a number of agencies. The sources of the information provided were clearly identified and particularised and could be regarded as reliable. The offence alleged to have been committed (participation in a criminal group under s 98A of the Crimes Act) was clearly identified. It was not necessary for proof of the commission of that offence to be provided.[7] It was apparent that the criminal group involved the appellants and both named and unnamed parties residing overseas.

[32] We reject the submission that the application ought to have identified specific RWC tickets. It was only necessary for the applicant to demonstrate there was an objective and credible basis to suppose that a search would turn up evidence of the items named in the warrant.

[33] We also accept that the use in the search warrant application of the term "suspicious" with regard to the alleged fraudulent use of credit cards did not invalidate the warrants. The material provided was more than sufficient to establish an objective and credible basis for the officer's belief that a search would likely turn up the items named in the warrants.

[34] Mr Lawn submitted that the search warrants were defective because they did not authorise a search of the cellphones seized. He relied on the decision of the Supreme Court of Canada in *R v Vu*.[8] This decision and related authorities were discussed by our Supreme Court in *Dotcom v Attorney-General* when considering the validity of search warrants issued under the provisions of the Mutual Assistance in Criminal Matters Act 1992.[9] The majority of the Supreme Court concluded that a mutual assistance warrant issued under that legislation must give specific authorisation for a computer to be searched in order to identify and seize the data that it is believed is evidence of commission of an offence.[10] The Supreme Court added there must be sufficient sworn grounds in the application for such a warrant to justify a search of any computer seized. In reaching that conclusion, the Supreme

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7 *Warner v R* [2011] NZCA 258 at [21].
8 *R v Vu* 2013 SCC 60, [2013] 3 SCR 657.
9 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745; compare *R v Cox* (2004) 21 CRNZ 1 (CA) at [49].
10 At [192].

Court said the cases illustrated that searches of computers, including smart phones, raised special privacy concerns because of the nature and extent of the information they hold.[11] The potential for invasion of privacy in that context was high, particularly with regard to searches of computers located in private homes.[12]

[35] Of course, in 2011, the authorities just discussed did not exist. If they had, then the police may have been alerted to the possibility that the seizure of data from the appellants' cellphones was not specifically authorised by the warrants. However, even if that data was improperly obtained for the purposes of s 30 of the Evidence Act, we are satisfied that the exclusion of that evidence would not have been proportionate to the impropriety in terms of s 30(2)(b) of the Evidence Act.

[36] Addressing the factors in s 30(3), we accept that any breach of the appellants' privacy was important and a significant intrusion. However, all the other factors identified under that subsection favoured the admission of the evidence: in 2011, the police could not have been aware of the more recent trend of the authorities we have discussed; there is no evidence that the police acted deliberately, recklessly or in bad faith; as we discuss in more detail later, the nature and quality of the evidence was high; the offences involved were serious;[13] there were no other investigatory techniques not involving any breach of the appellants' rights that were known to be available but were not used; there are no alternative remedies to exclusion of the evidence which could adequately provide redress to the appellants; and there was considerable urgency in obtaining the improperly obtained evidence given that the RWC was due to commence the following day.

[37] We conclude that, if there were any impropriety, the evidence of the data from the cellphones was properly admitted. No issue of impropriety arises in respect of other items located at the appellants' addresses including the large number of RWC tickets and substantial sums of cash.

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11 At [191].

12 We note that s 110(h) of the Search and Surveillance Act 2012 now provides that every search power (as defined) authorises the use of any reasonable measure to access a computer system or other data storage device located at the place searched.

13 See the recent judgment of this Court in *Underwood v R* [2016] NZCA 312.

**The admissibility of the Excel spreadsheet**

*Background*

[38] At trial, the Crown produced an Excel spreadsheet containing details of the purchases of all the RWC tickets alleged to have been acquired fraudulently by an unknown person or persons residing overseas. The spreadsheet contained a great deal of detailed information such as the number for each of the credit cards, the names used by the person or persons using the cards, the tickets purchased and their value.

[39] The spreadsheet also recorded that all of the transactions for the purchase of tickets had been confirmed to be fraudulent. As we explain below, this process essentially involved the credit card companies or their issuing banks confirming with the legitimate owners of the credit cards that the transactions had not been authorised. The evidence established there were over 400 transactions that had been reported as fraudulent relating to cards issued by more than 40 different issuers around the world. All of the legitimate cardholders resided overseas.

[40] Prior to trial, the Crown had filed and served a memorandum dated 11 July 2014 giving notice that it did not intend to call any individual cardholder and it would seek to have the spreadsheet produced by Detective Sergeant Traviss as evidence of the truth of the matters contained in it. The Crown further advised that it intended at trial to rely on the evidence obtained and presented by witnesses from Westpac and American Express as hearsay evidence in the form of business records under ss 16 and 19 of the Evidence Act. The notice stated that the Crown would rely on s 19(1)(c) of the Evidence Act as a ground for admission of the evidence: that is, undue expense and delay would be caused by requiring individual cardholders to be witnesses since the evidence to be adduced at trial would not be legitimately contestable.

[41] We are satisfied that the notice complied with s 22 of the Evidence Act and that the appellants were well aware, long before trial, of the Crown's intention to rely on the hearsay exception for the admission of business records.

[42] The Crown also relied on s 133 of the Evidence Act in terms of which a party may, with the permission of the Judge, give evidence of the contents of a voluminous compilation of documents by means of a summary or chart. Section 133(1) requires notice of an intention to rely on this provision to be given to all other parties in "sufficient time" before the hearing. Again, we are satisfied that notice was given of the intention to use the spreadsheet well before the hearing.

[43] Mr Lawn raised numerous pre-trial objections on Mr Asgedom's behalf to the introduction of this material. His principal argument was that the data contained in the spreadsheet was essentially derived from data generated by computers controlled and operated by credit cardholders and banks situated overseas. In turn, Ticketek had combined this information with data generated from its own computer systems which had then been incorporated into the spreadsheet. His submission was that there was no effective way of checking on the reliability of the data. As well, counsel maintained that, in the absence of evidence from the cardholders themselves, no reliance could be placed upon the conclusion that the overseas credit card transactions were fraudulent.

[44] Counsel coupled these arguments with a complaint that there had been inadequate disclosure of the computer records from which the data in the spreadsheet was compiled.

*Judge Harvey's rulings*

[45] Judge Harvey dealt with these issues initially in a ruling given on 28 January 2015.[14] The issue was then revisited in the context of a stay application the reasons for which were given on 22 May 2015.[15] The Judge also considered the evidence relevant to the computer data in extensive detail in his reasons for verdict after trial.[16] On each of these three occasions, the Judge was satisfied that the material contained in the spreadsheet was admissible as a business record.

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14 *R v Demissie* [2015] NZDC 1117.
15 *R v Demissie* [2015] NZDC 6199.
16 Above n 1.

[46] It is convenient to discuss this topic first by reference to Judge Harvey's reasons for judgment given on 22 May 2015 in which the Judge dismissed Mr Asgedom's application for a stay of proceedings. The stay application was based on two grounds: undue delay in terms of s 25 of the New Zealand Bill of Rights Act 1990 and prejudice through non-disclosure. We will deal with the first ground later in this judgment but now address the disclosure issue.

[47] Judge Harvey's judgment of 22 May 2015 records Mr Lawn's submission that there had been a failure to disclose:

(a) Actual computer code records of each and every credit card transaction identifying the particular credit card used, the purported user of the credit card, the actual computer codes and electronic transactions on the RWC website in respect of every transaction charged.

(b) Original computer code ISP data records detailing information created at the time the transactions occurred on the RWC website.

[48] The Judge also recorded Mr Lawn's submission that Ticketek, the credit card companies and issuing banks had failed to comply with contractual requirements and identification requirements such as those set out in the Financial Transactions Reporting Act 2006 and other legislation aimed at deterring money laundering.

[49] Judge Harvey rejected all these arguments. In respect of the complaint about non-disclosure of the underlying data, the Judge said:

> [53] Mr Lawn's argument is based upon the assumption that there is a discreet "document" that contains all of this information and that can be printed out in much the same way that the content would be contained on a paper document. This assumption fails to appreciate that the web page with which a perspective purchaser is confronted when purchasing a ticket through Ticketek is merely "a front end" that enables data to be entered into a number of fields, the information then from being transmitted to credit card agencies and retained in a data base. Mr Lawn's suggestion that there is such a discreet document therefore demonstrates something of a misunderstanding about the gathering of data on what could generically be described as Ecommerce websites. There is a suggestion by Mr Lawn that there are electronic logs in existence to track each of the transactions and

> maintain the information that he seeks in discreet form but I gather that the information that is to be produced has been derived from these records into a form that can be easily comprehended and which will be explained in evidence during the course of the trial. This information is available to counsel.

[50] As to the arguments that the transaction had not complied with regulatory or contractual requirements, the Judge identified the key issue as being whether the appellants had obtained the RWC tickets dishonestly and without claim of right. Whether there had been compliance with regulatory or contractual requirements on the part of the banks or credit card companies was not relevant to that issue.

[51] In any event, the Judge was satisfied there was no obligation on the part of the prosecution to disclose all material the defence suggested should be disclosed. While ss 12–14 of the Criminal Disclosure Act 2008 made it clear that the disclosure process was ongoing, this did not extend to the disclosure of information not supplied to or in the possession or control of the prosecution.[17] In this respect, we were informed by counsel for the Crown in a memorandum provided at our request after the hearing that the computer records generated by Ticketek were not provided to counsel and were not provided to the police. This confirmed evidence given at trial by the managing director of Ticketek New Zealand, Mr Bainbridge.

[52] Judge Harvey found that while it might well be that Westpac, Ticketek, American Express or some of the other organisations involved in the case had data that could have been provided, it was clearly not in the possession or control of the prosecutor. The Judge also pointed out the appellants could have applied for non-party disclosure in terms of ss 24–29 of the Criminal Disclosure Act but had not done so.

[53] Judge Harvey accepted the Crown's submission that the material contained in the spreadsheet was admissible under the business records exception. He noted the Crown's submission that the starting point for the business records was the electronically stored information as well as information derived from that information. It was the latter that had been incorporated into the spreadsheet the Crown relied upon.

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[17] Criminal Disclosure Act 2008, s 15.

[54] The Judge rejected Mr Lawn's submission that the burden was on the prosecution to prove the reliability of the computer systems used to produce the data incorporated into the spreadsheet. The Judge referred to this Court's decision in *R v Miller*, which upheld the admissibility of information derived from a computer in a relatively modest freight-forwarding business.[18] This Court accepted that the computer would fall within the first part of the dictum in *Zappia v Webb* to this effect:[19]

> It is well established that the Courts will take judicial notice of the use, nature, and purpose of many mechanical or scientific instruments in common use, such as watches, thermometers, barometers, speedometers and the like. These instruments are of a class which by the general experience are known to be trustworthy, even if not infallible, so that there is a presumption of fact, in the absence of evidence to the contrary, that readings taken from such instruments are correct, and hence it is not necessary to show that at the relevant time the instrument had been tested and found to be working correctly.

[55] Judge Harvey also relied on Master Kennedy-Grant's observation in *Marac Financial Services Ltd v Stewart* that the use of computers for the recording of transactions on accounts was sufficiently well-established for there to be a presumption of fact that computers were accurate.[20] The Judge also noted the presumption in s 137(1) of the Evidence Act:

> **137 Evidence produced by machine, device, or technical process**
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> (1) If a party offers evidence that was produced wholly or partly by a machine, device, or technical process (for example, scanning) and the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed that on a particular occasion the machine, device, or technical process did what that party asserts it to have done, in the absence of evidence to the contrary.
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> …

[56] Judge Harvey accepted it was necessary to establish how a machine, device or technical process ordinarily operated[21] and concluded:[22]

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18 *R v Miller* (1988) 3 CRNZ 609.

19 At 614, quoting *Zappia v Webb* [1974] WAR 15 at 17.

20 *Marac Financial Services Ltd v Stewart* [1993] 1 NZLR 86.

21 Citing Heath J's judgment in *Scott v Otago Regional Council* HC Dunedin CRI 2008-412-17, 3 November 2008.

22 Above n 1, at [83].

> Thus as long as the Crown is able to prove generally how computerised transactions ordinarily work via the Ticketek website utilizing a credit card the presumption of reliability will arise and the onus then falls upon the defence to bring evidence to establish the contrary – that is that on the occasion presumption of reliability can be rebutted and usually this would have to be done by means of expert evidence.

[57] There was no appeal from Judge Harvey's determination that the spreadsheet evidence was admissible or his conclusion there was no basis for a stay of proceedings for lack of disclosure or on any other ground.

*The evidence at trial relevant to the admissibility of the spreadsheet*

[58] At trial, the Crown called Mr Bainbridge, Mr Cattermole (the fraud operations manager at the Westpac Bank) and Mr Cameron (the investigations manager based in Australia for American Express). In his reasons for verdict, Judge Harvey described the contents of the spreadsheet in these terms:[23]

> [82] The main parts of Detective Traviss' evidence related to the Excel spreadsheet. He prepared this document. It was created with data that had been sourced from Ticketek, the credit card companies and from the police investigations. It was tendered pursuant to s 133 of the Evidence Act 2006 in that it summarised and collated a large volume of documentary evidence into a manageable form which, utilising the filtering utilities present in Excel, made it possible to isolate sections of data for examination. It was possible, for example, to observe the relationships between credit card numbers and the transactions to which they were employed.
>
> [83] The spreadsheet contained all of the relevant data under a tab that was labelled Combined Data. It was possible to filter information under the Combined Data tab to display information in the name of those in whose names tickets were purchased. This information was duplicated in individual tabs under the names of those in whose names tickets were purchased. Each tab related to a name which also appears in the indictment. The spreadsheet made isolating details of the various transactions easy and an understanding of those transactions clear. …

[59] Judge Harvey went on to confirm that the business records of the various banks, credit card companies and Ticketek were brought together in the spreadsheet which conveniently linked the various transactions, details thereof, and the number of tickets purchased with the various named persons in the indictment.[24] The

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[23] Above n 1.
[24] At [93].

material also linked these details with the particular counts in the indictment and demonstrated the relationships between the data gathered.

[60] Noting that the actual credit cardholders had not been called to confirm they did not authorise the purchase transactions for the RWC tickets, the Judge said the absence of authorisation had come via the fraud reporting systems established by the credit card companies and the banks. Those organisations kept records of disputed transactions and it was on the basis of those business records that the Crown said the transactions referred to in the spreadsheet involved dishonesty or fraud in relation to the acquisition of the tickets. To prove that, it was necessary for the Crown to adduce evidence of the way in which the various systems operated.

[61] The Judge then considered at length the evidence adduced as to how the relevant business records were created, noting that many of them derived from automatic processes associated with computer programmes. All of the relevant purchases were made online from overseas through a website operated by Ticketek. The Judge found that, behind the web pages a user sees on the computer screen, Ticketek kept all of the booking information and the various records relating to customers and users. These recorded and preserved details of the transactions and the resulting database could be accessed for the collection of information. The database, amongst many other things, had details of tickets and the ticket numbers assigned to particular purchasers.

[62] When a purchaser wishes to conclude an online purchase, the credit card information supplied must be validated. The usual information provided is a credit card number, the type of card, expiry date, the name of the credit card owner and in some cases an additional identifier known as a CSV. This information is transmitted to a central agency called DPS. The information is then transmitted via the DPS portal to the credit card company which automatically checks the details against its records, advises whether the information provided was correct and whether the transaction may proceed. This information is then transmitted back to DPS which in turn communicates approval of the transaction to Ticketek and the user is advised that the transaction has been approved. This validation process is accomplished by computer in a matter of seconds.

[63] Judge Harvey then discussed the evidence given at trial as to the fraud detection processes operated by Ticketek, credit card companies and issuing banks. Data analytics and patterns relating to user conduct are used to raise red flags or to identify credit card usage of concern such as large volumes of tickets being purchased by a particular user. According to Mr Cattermole's evidence, all these processes were employed in respect of the transactions at issue.

[64] The Judge found on the evidence that the use of credit cards by people other than the lawful users would come to light only if there had been a complaint by the lawful users. This could arise once the users received their credit card statements and noted unauthorised transactions. Alternatively, where the credit fraud detection process identified suspicious or flagged transactions, a query could be made to the lawful owners of the credit cards. Where it was established that fraud had occurred, steps would be taken to reverse the transaction usually by a charge-back procedure the Judge described.

[65] Judge Harvey found that the information provided by way of business records was all information derived from computer processes and operations. He could presume that the records produced by the computer processes were reliable once he was satisfied of the ordinary operation of the computers and the information they made available. He then made the findings which we summarise:

(a) All of the credit card companies together with Ticketek had complex fraud detection processes in place.

(b) Mr Cameron had outlined the way in which American Express dealt with allegations of fraud and gave evidence that all of the American Express transactions involved had been investigated and found to be fraudulent. As well, Mr Cameron had given evidence that three credit cards sent to Mr Demissie by Mr Amera by email on 31 August 2011 were false.

(c) It was not known how the individual or individuals purchasing the tickets had obtained the particulars of the credit cards used.

(d) Nor was the correct identity of the person or persons involved in purchasing the tickets known for certain, although it could be inferred this was Mr Amera who was the prime point of contact, if not the purchaser, of the tickets. This could be concluded from the content of text messages passing between Mr Demissie and the person named in his contact list on his mobile phone as Mr Amera.

(e) The individual legitimate credit cardholders were all contacted by the credit card companies or the issuing banks who confirmed the transactions for the ticket purchases were not authorised by them.

(f) The credit card companies reversed the transactions and, in a number of cases, charge-backs were made to Ticketek's bank account.

(g) In turn Ticketek itself managed to cancel a number of the tickets issued.

*Excel spreadsheet – discussion*

[66] Mr Lawn's argument presented on this point ranged widely but essentially covered the same points that were canvassed and rejected in the District Court.

[67] As a general rule it is too late to raise disclosure issues on appeal after conviction. But we accept that issue may be relevant in this case to the reliability of the data in the spreadsheet. We agree with the conclusions reached by Judge Harvey on the disclosure issue for the reasons he gave. If Mr Asgedom wished to obtain the underlying data held by Ticketek, the credit card companies and the banks, then he ought to have utilised the procedures available under the Criminal Disclosure Act to obtain disclosure from third parties. He did not take that step. We also note that some limited items of evidence held by the prosecution were disclosed to defence counsel, namely:

(a) The statements from the 11 American Express cards said to have been fraudulently used.

(b) A small number of charge-back documents from cardholders who asserted their cards had been fraudulently used.

(c) Fraud reports about which Mr Cattermole gave evidence at trial.

[68] There is no evidence (expert or otherwise) to support Mr Lawn's assertions the appellants were prejudiced by non-disclosure of material such as ISP addresses or the precise times when transactions occurred or emails were sent.

[69] In order to be admissible at trial, the Excel spreadsheet had to meet two requirements. First, a judge had to permit it to be produced as a voluminous document under s 133 of the Evidence Act. Second, the information it contained had to be admissible as a business record under ss 16 and 19.

[70] We are satisfied the spreadsheet was properly admitted under s 133 given the evidence before the court involving large volumes of computer data evidencing the numerous ticket-purchasing transactions. The presentation of this information in the form of a spreadsheet capable of being accessed in court online was a convenient, practical and sensible manner of dealing with highly detailed information of this type.[25]

[71] We also accept the Crown's submission that the material collated in the Excel spreadsheet was admissible as a business record in terms of s 19 of the Evidence Act. The term "business record" is broadly defined in s 16(1) of the Evidence Act:

> **business record** means a document—
>
> (a) that is made—
>
> (i) to comply with a duty; or
>
> (ii) in the course of a business, and as a record or part of a record of that business; and
>
> (b) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied

[25] Evidence Act 2006, s 137(2).

[72] A "document" includes:[26]

…

(b) information electronically recorded or stored, and information derived from that information.

[73] Here the spreadsheet was not itself a business record but the material contained in it was admissible under the business records exception:

(a) The information collated in the spreadsheet was either information electronically recorded or stored by Ticketek, the credit card companies or the banks or it was information derived from that information.

(b) The information collated derived from documents made in terms of s 16(1)(a)(i) to comply with a duty, namely the duty on the part of those organisations and their employees to obtain, store and monitor such information.

(c) Alternatively, the information collated derived from documents made in the course of a business and as a record, or part of a record, of that business in terms of s 16(1)(a)(ii).

(d) The information collated was supplied directly or indirectly by a person or persons who had or might reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information supplied.

[74] On this last element of the definition of the business record, the information collated in the spreadsheet was supplied to the police by Mr Bainbridge of Ticketek. Some of the information was supplied directly from material in Ticketek's own electronic records while other information was supplied from electronic records maintained by the credit companies and by the Westpac bank. The persons supplying this information were Mr Cattermole and Mr Cameron who had personal

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[26] Evidence Act 2006, s 4(1).

knowledge of the matters dealt with including how the data collection and computer systems of their organisations operated.

[75] Some of the information had been provided to the credit card companies by the legitimate owners of the cards, including their advice that the transactions at issue were not authorised by them. It does not matter that the data in the spreadsheet was not first hand in the sense that it came directly from the credit cardholders to Ticketek. The definition of business record allows for the admission of evidence supplied directly or indirectly by a person who may reasonably be supposed to have had personal knowledge of the matters dealt with in the information supplied. Here the cardholders obviously had personal knowledge that the relevant purchases were not authorised by them. They provided information to investigators employed by the credit card companies who recorded it and transmitted it to Ticketek. The computer records so created thus became business records for the purposes of the Evidence Act.

[76] The definition of "business record" in s 16(1) is closely based on the definition of the same term in s 2 of the Evidence Amendment Act (No 2) 1980. The courts have long taken a broad approach to the interpretation of the definition, Richardson J stating in *R v Hovell* that the s 2 definition "breathed comprehensiveness".[27]

[77] In terms of s 19 of the Evidence Act, a hearsay statement contained in a business record is admissible if any one of the three circumstances in s 19(1) applies.[28] Here, the Crown relied on s 19(1)(c) that undue expense or delay would be caused if the persons who supplied the information were required to be witnesses. Representatives of the organisations providing the information were called but others, including the legitimate owners of the credit cards, were not. Although there does not appear to have been any explicit finding on this issue in the District Court, we readily accept that calling substantial numbers of cardholders, all of whom resided overseas, would have caused undue expense or delay.

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27 *R v Hovell* [1986] 1 NZLR 500 (CA) at 504.

28 See *Keshvara v Blanchett* [2012] NZCA 553 at [28].

[78] No specific reliability standard is identified in s 19. Rather, the legislation presumes a basic level of reliability from the nature of the business records as defined.[29] The rationale is that if information supplied by someone having personal knowledge of the matter is recorded in order to comply with a duty or in the course of a business then the information is likely to be reliable. This conclusion is supported by the distinction drawn in hearsay notices under s 22(2)(d) and (e). The former provides that if s 18(1)(a) is relied upon (general admissibility of hearsay), the hearsay notice must state the circumstances relating to the statement that provide reasonable assurance that the statement is reliable. In contrast, if s 19 is relied upon, the notice need only state why the document is a "business record".

[79] Despite the absence of a reliability standard in s 19, the general principles established by ss 7 and 8 of the Evidence Act apply to business records admitted under s 19. They may be excluded on the grounds of irrelevance or because the probative value of the evidence is outweighed by the risk that the evidence will have an unduly prejudicial effect on the proceeding or needlessly prolong the proceeding.

[80] Section 137(1) of the Act is also potentially available to assist on reliability issues where data is produced from a device such as a computer.

[81] Whether a machine, device or technical process is "of a kind that ordinarily does what a party asserts it to have done" must itself be proved although there is the potential for this fact to be judicially noticed under s 128(1) of the Act.

[82] In the present case, the Judge referred to s 137 but there does not appear to have been any express evidence before the Court that the computers generating the information contained in the Excel spreadsheet would normally operate to produce reliable and accurate information. However, the Judge had evidence before him and made his detailed findings as to the way in which the computer systems operated.

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[29] Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.23]: "Section 19 and the associated definitions in s 16 were inserted by the Select Committee for the following reasons: [quoting from the Select Committee report] 'Business records as a class of documents are accepted as reliable. In addition, we consider that time and cost will be saved by retaining the existing exception to the hearsay rule contained in the Evidence Amendment Act (No 2) 1980'."

He was satisfied that the records produced by the computer records were reliable on the basis of the evidence presented to him as to their method of operation.

[83] We observe that the electronic recording of information in financial transactions is now so pervasive and commonplace that courts ought not to take an unduly restrictive view of the admissibility of computer records under the business records hearsay exception in the Evidence Act. Particularly in cases such as the present which show graphically the complex inter-relationship between the computer systems involved in electronic commercial transactions, it is inevitable that greater reliance will need to be placed on the production of computer records. In cases involving the computer records of established institutions such as those involved in the present case the courts may need to be more ready to accept such records are likely to be reliable, subject to proper explanation of how the systems work. This was provided in the present case. As Judge Harvey said, any attacks on the reliability of such computer systems are likely to require expert evidence. No such evidence was adduced by the appellants in this case.

[84] Finally, the business records exception would be unworkable in a case involving complex computer transactions such as the present if it were necessary, as Mr Lawn submitted, to identify individuals in the organisations involved who recorded the information produced. On the evidence, much of the purchase transaction material was produced automatically without human input. It was sufficient for those responsible to explain how the systems operated in order to produce the data. There was nothing to suggest the information produced was unreliable.

[85] Crucially in the present case, the Judge found that the legitimate credit cardholders were all contacted by representatives of the credit card companies or the issuing banks and confirmed that the transactions for the purchase of RWC tickets were not authorised by them. That information was then recorded in the relevant business records. This was a sound foundation for the Judge's conclusion that the tickets were dishonestly or fraudulently acquired online by a person or persons residing overseas. In the light of the Judge's findings and, in the absence of any

plausible evidence that the information contained in the Excel spreadsheet was unreliable, we find that the evidence was properly admitted at trial.

**Was Judge Harvey's verdict unreasonable?**

*Counsels' submissions*

[86] In his written submissions, Mr Lawn raised two issues in support of his argument that the verdicts were unreasonable. The first related to the admission of hearsay evidence in the form of text messages and emails relating to communications between the appellants, Mr Boku and Mr Amera. The second related to a challenge to the Judge's finding that the collection of RWC tickets continued almost up until the day on which the tournament opened. This point appears to be related to a submission that three mock-up credit cards were sent to Mr Demissie by Mr Amera by email shortly before the tournament was due to commence. Mr Lawn's submission was that there was no evidence that these credit cards were used by the appellants to uplift RWC tickets.

[87] In response, the Crown submitted that the emails and text messages were admissible under the co-conspirators rule and that the evidence against the appellants was overwhelming.

*The evidence adduced by the Crown at trial*

[88] In order to provide context to these arguments we first summarise the evidence adduced by the Crown at trial.

(a) The evidence we have already discussed about the arrival of Mr Seed and Mr Boku at the Auckland airport; Mr Seed being in possession of RWC tickets and Mr Boku advising he would be staying with Mr Asgedom.

(b) The seizure of a very large number of RWC tickets hidden under Mr Demissie's house.

(c) The interception by Customs of a courier package addressed to Mr Asgedom containing 114 RWC tickets obtained with fraudulent credit cards.

(d) Mr Demissie's receipt of email messages on his phone including one attaching the three mock-up American Express credit cards.

(e) Evidence from three members of the Ethiopian community in New Zealand who had been approached by the appellants to provide their names for the purpose of purchasing RWC tickets and then to collect the tickets.

(f) Fingerprint evidence showing some of the items found at Mr Asgedom's address, including RWC tickets, had been handled by him.

(g) The Excel spreadsheet evidence already discussed.

(h) Text messages, email messages and attachments found on the various cellphones in the appellants' possession. The common themes from the text messages were:

(i) The obtaining of names to send to Mr Ken Amera or Mr Boku in South Africa;

(ii) Details of names, dates of birth and addresses sent to Mr Amera so tickets could be ordered in those names;

(iii) Once the tickets had been purchased, arrangements for collecting tickets;

(iv) Places where tickets could be collected and the provision of unique identity numbers;

(v) Communications regarding urgency in collecting tickets, not attracting attention of distribution outlets, spreading the collection of tickets, taking the "names" along with them to collect the tickets and provide identification; and

(vi) As the dates of the commencement of the tournament got closer the need for further information required to uplift tickets including the provision of credit cards.

(i) Texts between Mr Amera and Mr Demissie showing a general intention to on-sell the tickets once obtained.

(j) Messages to Mr Asgedom to ensure he used trustworthy people.

(k) Yahoo instant messaging communications between Mr Amera and Mr Demissie regarding the purchase and collection of tickets, Mr Amera commenting he is not interested in purchasing cheap tickets because it was unprofitable and it was better to get more expensive tickets.

(l) Text messages from Mr Asgedom's phone which made it clear tickets were being offered for sale.

*The appellants' evidence at trial*

[89] We refer in some detail to DVD interviews conducted by the police with the appellants and the evidence they each gave at trial. We do so because the appellants ultimately admitted taking part in providing names for the purchase of tickets and their involvement in collection of the tickets. The main focus of the defence was on their position that they had no knowledge the tickets had been acquired dishonestly.

*Mr Asgedom*

[90] The Judge's overall conclusion about the police interview with Mr Asgedom was:[30]

> [154] My impression of the overall interview was that Mr. Asgedom initially totalling denied any involvement. He then gradually conceded the reality of the situation when confronted with hard evidence. His attitude during the interview and the various concessions that he made it clear that he was dishonest in his initial answers that he was evasive and equivocal throughout the interview.

[91] Amongst other things Mr Asgedom eventually admitted collecting tickets from Ticketek and the SkyCity Casino and giving these to his brother. He acknowledged he did not pay for 56 tickets he picked up and that they were to be sold.

[92] In his evidence at trial, Mr Asgedom confirmed that his brother, Mr Demissie, had asked him to collect RWC tickets. He did this using his ID and a unique code his brother had given to him. Later, his brother asked him to arrange for others to become involved in uplifting RWC tickets and he assisted his brother in that respect. No compensation was offered to his friends for performing this service. He had no reason to believe he was being asked to take part in any dishonest scheme. He explained that the notice advertising RWC tickets for sale found in his car was there because he was trying to sell tickets he had acquired for himself. As the Judge said, this ignored the fact that Mr Asgedom was in fact in possession of a much larger number of tickets.

[93] Mr Asgedom was cross-examined by the prosecutor particularly on the basis of the text messages found on his cellphone. The Judge found that Mr Asgedom was aware he was giving names for the purposes of obtaining tickets. He referred to a text message found on Mr Asgedom's phone with a list of eight names, unique codes and the numbers of tickets that had been purchased. In total, some 400 tickets were involved which, even at a conservative rating of $400 per ticket, would have been worth $160,000. The text messages referred to Mr Ken Yilehal who, the Judge was satisfied, was the alter ego for Ken Amera. It was this person who was the contact

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[30] Above n 1.

and who it appeared from the evidence was the person who purchased the RWC tickets from the Ticketek website.

[94] Judge Harvey drew attention to Mr Asgedom's admission in evidence that a statement he had made about the source of tickets was a lie. He had said in the DVD interview that the tickets had been given to him but, under cross-examination at trial, he admitted the tickets had come via his brother. The Judge also identified other respects in which he found Mr Asgedom's evidence to be evasive or unproved.

*Mr Demissie*

[95] Mr Demissie admitted in his DVD interview with the police that he knew Mr Boku and that Mr Boku had asked him to collect RWC tickets that Mr Boku had purchased. He was to hold them for Mr Boku. Mr Demissie also admitted that, through Mr Boku, he had been introduced to Ken Amera. He also accepted he had given these two men the names of persons that could be used for the purchase of tickets. Initially he said the names given were those of himself and his brother. Later, the names of other people were given. The Judge found Mr Demissie's approach at interview was evasive in this and a number of other respects. This included his answers to questions about the tickets hidden under the house. He concluded that when Mr Boku was turned away at the border, he (Mr Demissie) had panicked and decided to hide the tickets under the house.

[96] In the police interview, Mr Demissie acknowledged that he had sold some tickets to a person named Colleen. When asked about RWC tickets for the opening ceremony found in the car, he gave an explanation which the Judge plainly did not accept. The Judge concluded:[31]

> [187] My view is that this is a complete fabrication and is consistent with his attitude throughout the interview being one of evasiveness. Throughout the interview he gave last minute explanations or fabrications which were not consistent with earlier information and were generally vague, fuelling an impression of overall unreliability.

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31 Above n 1.

[97] In evidence at trial, Mr Demissie accepted being involved in the purchase and sale of RWC tickets. He had never met Mr Amera but decided to help Mr Boku because Mr Boku had been helpful to him in the past. Mr Boku had told him Mr Amera was a successful and wealthy person. Mr Demissie believed Mr Amera paid for the tickets. He was happy for his name and that of his brother to be used for ticket purchases. He did not know that the tickets had been purchased using stolen credit cards. Had he done so he would not have agreed to help.

[98] Mr Demissie explained that the tickets were going to be purchased in bulk. They would then be delivered to Mr Boku and Mr Amera's brother when they arrived in New Zealand who would then resell them. Mr Demissie's evidence was he was merely a custodian. He was sending names and details and Mr Amera would purchase the tickets online. He would then send the ticket details to Mr Demissie so they could be collected from Ticketek outlets. Mr Demissie confirmed he had gone to about four outlets in Auckland to purchase tickets. He acknowledged that 931 tickets came into New Zealand, approximately a third of which were collected in his name. When he collected the tickets he showed the unique ID number on his iPhone and presented his driver's licence. Later, Mr Amera had started requesting more names. He and his brother Mr Asgedom had provided those names, derived mainly from members of an Ethiopian soccer club.

[99] As to the tickets found under the house, Mr Demissie said he had been gathering tickets for the end of July and was worried they might get stolen if they were left in the house. He gave other explanations as to the money found at the time the search warrants were executed.

[100] Mr Demissie admitted he had instructed Mr Asgedom to give a false explanation when he was collecting RWC tickets. His explanation was that Ticketek or the distributors might become suspicious if there was a build-up in ticket sales. He admitted having telephone conversations with Mr Amera but maintained he had never questioned him about how he was paying for the tickets. It was only when credit cards were required by the ticket outlets that he realised credit cards were being used for ticket purchases.

*Judge Harvey's findings*

[101] Judge Harvey then considered in detail Mr Demissie's responses to the prosecutor's questions in cross-examination. He found it was quite clear that Mr Demissie was directing Mr Asgedom as to how he should carry out his side of the transactions. It was clear to the Judge from the evidence of the communications taken as a whole that Mr Demissie was in charge of the New Zealand arm of the operation and was working very closely with Mr Amera. It was also clear from the evidence that there were other "operatives" involved in the scheme who were going to sell tickets on Mr Demissie's behalf. The Judge then made his concluding observations about the evidence of the appellants:[32]

> [229] In summary I consider Mr Demissie to be a completely unreliable and dishonest witness. Whenever he was confronted with evidence that seems to implicate or incriminate him he became shrill and evasive. His answers were inconsistent. He would frequently blame others. He certainly tried to distance himself at one stage from his brother. His explanations, if they could be called such, flew in the face of clear evidence of involvement and participation. There were occasions when he gave evidence that he was on solid ground but on each occasion when confronted with evidence that incriminated him he would attempt to offer illogical and inconsistent explanations. He went so far, as I have observed, to suggest that he had not opened emails when clearly he had, that he did not know the names of some of his contacts on his phone when clearly he did because his communications with them were responsive and his knowledge and complicity in the scheme to purchase and sell tickets was abundantly clear yet he attempted to pose as an innocent proxy or dupe, having been initially "groomed" for his role. I reject this.

[102] The Judge added there were times when both appellants were obviously lying and restated his conclusion that the evidence of both appellants was "completely unsatisfactory".[33] The Judge properly directed himself that, to the extent he rejected the evidence of the appellants it was necessary to turn to the remaining evidence to determine whether the Crown had proved its case beyond reasonable doubt.

[103] Having found that the Crown had proved to the required standard that both appellants were involved in a scalping operation that involved the provision of names to facilitate the purchase of tickets and the collection of tickets from sales outlets, the Judge then turned to consider whether the Crown had established that the

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32 Above n 1.
33 At [232].

appellants had obtained the RWC tickets dishonestly and without claim of right. The Judge concluded:[34]

> [234] … The evidence that they have given relating to their level of understanding of the nature of the transactions in which they were engaged or the otherwise lawfulness of what it was they were doing is rejected. In my view any suggestion of a belief that they might have that what they were doing was legitimate is a retrospective fabrication. When all of the evidence is considered particularly of the contemporaneous communications that took place between each of the accused and between Mr Demissie and Mr Amera as well as others such as Mr Chernet, such evidence completely displaces any suggestion that there was an absence of knowledge or understanding of the nature of the operation in which they were involved or any legitimate entitlement albeit mistaken, to uplift and retain the tickets.
>
> [235] On the contrary, the evidence that I have goes to establish that the accused were well aware that they were involved in a multilayered scheme to fraudulently purchase Rugby World Cup tickets, obtain them from ticket outlets by an elaborate deceptive process and subsequently profit from the sale of tickets to Rugby World cup fans.

[104] The Judge rejected a suggestion that Mr Demissie was being groomed by Mr Boku and Mr Amera. That was contradicted, the Judge considered, by the evidence available from text messages, emails and Yahoo instant messaging between the appellants and between Mr Demissie, Mr Boku, Mr Amera and others. The Judge noted that, in addition to the purchase of a large number of tickets in their names, neither appellant paid for them in any way. There was subterfuge in collecting the tickets. This was a well thought-out design to deceive the Ticketek sales agencies so their suspicions would not be alerted by a single individual coming to a ticket office to collect a large number of tickets. This particular methodology had pervaded the entire scheme.

[105] Judge Harvey found the appellants were well aware the tickets were not going to be used by either of them to attend RWC games but were to be sold to other rugby fans as part of a scalping operation. He then concluded:[35]

> This all leads ineluctably to the conclusion that the entire process was a dishonest one and was dishonest on a number of levels:
>
> (a) as to the validity of the purchase transaction
>
> (i) as to payment

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34 Above n 1.
35 At [243].

(ii) as to purchaser

(iii) as to purpose of the operation which was designed to circumvent Rugby World Cup ticket levels

(iv) to use the tickets for the purposes of resale and make a profit

(b) as to the collection of tickets

(i) misrepresenting the purchaser

(ii) using details provided by Mr Amera of

a. a unique ID

b. at a later stage during the progress of the scheme credit card details

c. using the false credit cards sent in the names of the 3 proxies.

[106] The Judge noted that the appellants had admitted the tickets were going to be sold and rejected the suggestion they were unwitting dupes. The Judge set out his reasons for these conclusions in extensive detail.

[107] Finally, the Judge turned his attention specifically to the individual counts and made his findings in respect of each. In cases where not guilty verdicts were entered, the Judge was not satisfied the appellants had been shown to have had any active role in obtaining or attempting to obtain the tickets. In all other cases, the Judge was satisfied of the appellants' guilt beyond reasonable doubt.

*Unreasonable verdict – discussion*

[108] We first address Mr Lawn's submission concerning the evidence admitted under the co-conspirator's rule. If evidence of hearsay communications had been wrongly admitted under the co-conspirator's rule, this would more naturally be considered under the miscarriage of justice ground in s 385 of the Crimes Act. However, since it is raised by counsel under the heading of unreasonable verdict, we will consider it in this context.

[109] Mr Lawn's submission relates to the admissibility of hearsay evidence relating to the co-conspirators Mr Boku and Mr Amera by way of text messages, emails and otherwise. The law on this subject has long been established and was

recently reviewed by this Court in *Kayrouz v R*.[36] Before evidence of this nature may be admitted it is necessary for the Crown to establish three things. First, it must be shown that there was a conspiracy between the persons alleged to have been involved in a joint criminal enterprise. Second, it must be shown by reasonable evidence that the defendant in question was a member of the conspiracy.[37] The defendant's membership of the conspiracy cannot be proved by reference to what the co-conspirators have said about the defendant in his or her absence. Third, it must be established that the statements sought to be admitted under the rule are reasonably open to the interpretation that they have been made in furtherance of the conspiracy.

[110] The only communications the Crown adduced at trial involving Messrs Boku and Amera also involved Mr Demissie. We accept the Crown's submission that those communications to which Mr Demissie was a party were plainly admissible against him and that communications between Mr Demissie and Mr Asgedom were admissible against each other.

[111] We also accept the Crown's submission that there was reasonable evidence of a conspiracy between the appellants and Mr Boku and Mr Amera. In this respect, we have already referred to the evidence relied upon when the search warrant was sought. This was sufficient by itself to establish the likely existence of a conspiracy between the appellants and Mr Boku and Mr Amera. The existence of a joint enterprise and Mr Demissie's membership of it was also established by Mr Demissie's admission to the police during his DVD interview that Mr Boku was well-known to him and that he had agreed to assist him in the provision of names to be used for the purchase of tickets and in the collection of the tickets in New Zealand once purchased. Although Mr Demissie said he had not previously met Mr Amera, he admitted he had given names for ticket purchases to both Mr Boku and Mr Amera. As earlier noted, these included the names of both appellants as well as others. And, in his own police interview, Mr Asgedom made admissions as to his involvement in the collection of tickets and giving them to his brother.[38]

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36 *Kayrouz v R* [2014] NZCA 139 at [21]–[23] and [33]–[37].
37 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [28].
38 See [92] above.

[112] All of this provides ample evidence to establish the conspiracy between the four men and that both appellants were members of that conspiracy. Moreover, there can be no doubt on the findings made by the Judge that the challenged communications were in furtherance of the conspiracy the Crown alleged.

[113] Addressing the unreasonable verdict ground of appeal more generally, the test in jury cases is whether, having regard to all the evidence, the decision-maker could not reasonably have been satisfied to the required standard that the defendant was guilty.[39] Although the same statutory test applies in judge-alone trials, this Court has followed the approach of considering the judge's reasons in determining whether the verdicts were unreasonable.[40]

[114] Mr Lawn submitted the Judge had erred in finding that the appellants had been involved in collecting tickets almost up to the day the tournament commenced. Presumably the argument is that this could not have occurred because there was no evidence the mock-up credit cards sent to Mr Demissie shortly before the tournament commenced were used to uplift tickets. We accept the Crown's submission that the sending of the false credit cards was simply one piece of circumstantial evidence the prosecution relied on to demonstrate that the appellants knew they were dealing in tickets obtained fraudulently. There was a substantial and compelling body of evidence to support the Judge's finding on this point.

[115] It is unnecessary for us to rehearse the evidence the Judge relied upon to reach his verdicts. We have already outlined this at [88] above as well as the Judge's findings on guilty knowledge. Suffice to say that we agree with the submissions made by Ms Grau on behalf of the Crown that the evidence against the appellants was overwhelming. Plainly, an appeal based on the unreasonable verdict ground cannot succeed.

**Remaining matters**

[116] We now deal briefly with the remaining matters.

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39 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37.
40 *R v Slavich* [2009] NZCA 188 and *Balfour v R* [2013] NZCA 429.

*Refusal to discharge the appellants pre-trial*

[117] This ground of appeal is dismissed on the ground that, post-conviction, this Court has no jurisdiction to entertain an appeal against the refusal of a discharge.[41] Once a conviction has been entered an appellant must establish one or more of the grounds in s 385 of the Crimes Act.

*The ruling for a judge-alone trial*

[118] In terms of s 102 of the Criminal Procedure Act 2011 the court may order in certain cases that the defendant be tried before a judge without a jury. The procedural requirements under the section are:

> …
>
> (3) An application by the prosecutor under subsection (2) must be made before the trial within the time prescribed by rules of court.
>
> (4) The court must not make an order under subsection (2) unless the prosecutor and the defendant have been given an opportunity to be heard in relation to the application and, following such hearing, the court is satisfied—
>
> (a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial have been made, but the duration of the trial still seems likely to exceed 20 sitting days; and
>
> (b) that, in the circumstances of the case, the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.
>
> (5) For the purposes of subsection (4)(b) the court must consider the following matters:
>
> (a) the number and nature of the offences with which the defendant is charged:
>
> (b) the nature of the issues likely to be involved:
>
> (c) the volume of evidence likely to be presented:
>
> (d) the imposition on potential jurors of sitting for the likely duration of the trial:
>
> (e) any other matters the court considers relevant.

[41] Crimes Act 1961, s 347(3). See *R v Downing* CA311/99, 23 November 2011 at [17] and *Attorney-General v District Court at Auckland* [2007] 2 NZLR 692 (HC) at [28] per Courtney and Lang JJ.

…

[119] There is no dispute that the section applies to the crimes with which the appellants were charged in the present case.

[120] On 3 March 2015 Judge Harvey dealt with further pre-trial matters including the form of the indictment and whether there ought to be a judge-alone trial. It appears the Judge considered the latter issue under the provisions of the Crimes Act. Nothing turns on this because s 361D of the Crimes Act is in materially identical terms to s 102.

[121] The Judge directed a judge-alone trial taking into account the following matters:

(a) The likelihood the trial would occupy four weeks or longer.

(b) The scope of the evidence necessary for the Crown to prove its case in relation to some 1,700 transactions.

(c) Mr Lawn's advice that Mr Asgedom would be putting the Crown to proof in respect of each transaction.

(d) The sheer number of the transactions was likely to give rise to difficulties in a jury being able to properly perform its functions.

(e) Any question trail given to a jury would have to be voluminous.

(f) Mr Lawn's advice that he intended to argue wide-ranging issues including questions as to compliance with relevant regulatory obligations by the organisations involved.

(g) The scope of the evidence generally, including the banking evidence and text messages.

[122] Mr Lawn did not pursue this issue in his oral argument. He was wise not to do so since it is abundantly clear from the way the trial was conducted, the nature of the evidence, the form of the indictment and the multiplicity of transactions that this was an obvious case for trial by judge-alone in accordance with the statutory criteria.

*Refusal of an application for stay of proceedings*

[123] At various points during the pre-trial stages, Mr Asgedom applied through counsel for a stay of proceedings. All of these applications were dismissed. It is only necessary for us to deal with the last of the applications which, as noted above, was considered and dealt with by Judge Harvey in the reasons he gave on 22 May 2015. We have already dealt with one of the two grounds advanced in support of the stay application, namely the alleged non-disclosure of relevant material by the prosecution. It remains to deal with the second ground: alleged prejudice through delay.

[124] Mr Lawn's submission to the District Court was based on s 25 of the New Zealand Bill of Rights Act 1990, which safeguards the right to be tried without undue delay. The leading authority on this topic is the Supreme Court's decision in *Williams v R*.[42] In that case, there had been a delay of almost five years between arrest and determination of the prosecution.

[125] In the present case, charges were first laid on 9 September 2011. After a number of pre-trial applications had been dealt with, a trial date was set for 30 September 2013. This trial date was vacated because it became apparent there were further pre-trial matters to be dealt with. In November 2013 dates for the pre-trial applications were scheduled for May 2014 and a trial date was scheduled for 7 April 2015. A series of pre-trial matters were heard during 2014 and in the first quarter of 2015.

[126] In dismissing the application for a stay, Judge Harvey found the total delay of approximately three and a half years had largely been occasioned by numerous pre-trial applications filed on behalf of Mr Asgedom. He accepted however that part

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[42] *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750.

of the problem was the difficulty in allocating the matter for a long cause trial. In this respect, the Judge noted it was a notoriously difficult matter to set down a trial of four weeks or more that is suitable to all counsel involved and matches the availability of judicial resources. The Judge rejected the application for a stay, finding that the delay was not unjustifiable particularly when time, cause and circumstance were taken into account. The Judge's reasons were:

(a) The case had been characterised from an early stage prior to committal with various procedural applications that had been responsible in large part for the delays.

(b) The prosecution had used every endeavour to bring the matter to the court.

(c) The difficulties in allocating fixture time were explicable.

(d) There was no demonstrable prejudice to the appellants in their preparation for trial.

(e) Even if there were undue delay, the extreme step of a stay of proceedings could not be justified.

[127] Mr Lawn did not advance oral submissions on this topic. We are satisfied for the reasons given by the Judge that there was no justification in the present case for the grant of a stay of proceedings. We acknowledge the acceptance by the Judge that some of the delay was due to the lack of judicial resource in the District Court and the difficulties of allocating judicial time to long causes. However, the Judge found that much of the delay was caused by the numerous pre-trial applications brought by Mr Asgedom, some of which were brought on more than one occasion. Only a very modest degree of success was achieved despite counsel's efforts. The great bulk of the pre-trial applications were unsuccessful. Importantly, we see no evidence that the appellants were materially prejudiced in consequence of any delay or of any risk of a miscarriage of justice in consequence of delay.

*The form of the indictment*

[128] In his ruling of 3 March 2015 Judge Harvey dealt with concerns raised by Mr Asgedom about the form of the indictment. Originally, there were only two counts in the indictment but, on 28 January 2015, the Judge granted leave to the Crown to file an amended indictment. This expanded the indictment into a total of 25 counts divided into allegations of obtaining documents dishonestly under s 228 and attempting to do so. Each count related to the acquisition of a group of tickets in a particular person's name.

[129] The Judge recorded that he had earlier raised concerns about the difficulty with proceeding with only two counts relating to some 1,700 documents. He defined the issue in relation to the amended indictment to be whether, by grouping the charges together, the indictment was in proper form. He noted the starting point is that every count in an indictment should apply to a single transaction. However, he considered it was not unusual to group charges together where there was a common pattern of offending. Particularly if there was a continuing course of conduct, it would be artificial to consider the appellants' conduct on separate occasions where they could not be distinguished from each other in a meaningful way.

[130] While recognising that separate counts helped the fairness and conduct of a trial his view was that the Crown's approach in the amended indictment of grouping the various issues together was appropriate since they could be all conveniently and fairly handled in that form. The only other alternative, advanced by Mr Lawn, was to have an indictment with some 1,700 counts. The Judge considered this would be unwieldly in the extreme. We agree.

[131] Ultimately, the trial proceeded on the basis of the 30-count indictment. The issue post-conviction is whether the appellants are able to demonstrate that they were materially prejudiced by the form of the indictment. We are not persuaded there was any such prejudice. It was appropriate for the trial to proceed on the basis of the 30-count indictment grouping the charges in the way we have referred to. The real question was whether the evidence was such as to support the verdicts. We are satisfied it clearly was.

**Mr Demissie's sentence appeal**

[132] Mr Anderson advanced Mr Demissie's sentence appeal on the sole basis that the starting point taken by the Judge of two years and six months imprisonment was too high. It was accepted the discounts given were appropriate. Mr Anderson submitted that the end sentence should have been four to six months home detention rather than the period of 12 months determined by the Judge. He further submitted that if the period of home detention were reduced then the sentence of community work would not be appropriate.

[133] The circumstances of the offending have already been adequately described. The Judge found that neither of the appellants had devised the scheme but it was a scheme that would certainly not have been able to work had they not participated in it. It was clearly a targeted fraud on an international scale but the appellants had not been involved with the overall planning. While there was a financial motivation, the Judge said there was no evidence to suggest the appellants were going to participate in the overall profits of the operation. They were clearly aware of the fact that this was a dishonest operation but, in their favour, although the value of the tickets was quite substantial (over $700,000), nobody actually lost any money because the tickets had been cancelled, the credit card companies had not processed the transactions and, if there were any loss to have been suffered, it would have been to the RWC organisers and Ticketek. The offending had taken place over a short period and had not involved a high level of planning or organisation.

[134] The Judge observed that there were some difficulties with comparative dishonesty cases because, generally, there have been actual losses suffered by the victims and aggravating factors such as breaches of trust. After reference to authorities, and noting the Crown's submission that the starting point should have been between three and four years, the Judge adopted a starting point of two and a half years imprisonment.

[135] He accepted the appellants appeared to be of good character with no involvement in previous dishonest activity. In Mr Demissie's case, he had lost his taxi licence in consequence of the convictions. From the starting point of two and a

half years imprisonment the Judge allowed a deduction of six months reflecting these factors.

[136] Taking into account the general purposes of sentencing and the policy to impose the least restrictive outcome appropriate in the circumstances, the Judge sentenced each of the appellants to 12 months home detention and 200 hours of community work.[43] The Judge considered there was a community interest in a community-based sentence given the significance of the RWC as an event in the New Zealand sporting calendar of international significance.

[137] Counsel agreed there is no tariff for offending of this nature. That is because the circumstances and degree of culpability in dishonesty cases vary widely. We do not accept the submission that the Judge overemphasised the potential loss from the fraud. In our view, the more important factor here, touched on only briefly by the Judge towards the end of his sentencing remarks, was the nature and significance of the circumstances of the offending.

[138] The Rugby World Cup 2011 was a major international sporting event of a type that occurs only infrequently in New Zealand. As the Judge found, the RWC organisers had taken elaborate steps to put security arrangements in place to avoid scalping of the very kind involved in this case. While the appellants were not the prime movers, they were willing parties in the scheme which could not have proceeded without their participation. The number and value of the tickets involved was very large. Had it not been for the vigilance of the enforcement agencies involved in the period immediately leading up to the commencement of the tournament, there was a real risk that substantial losses would have occurred.

[139] As well, there was the potential for serious damage to the reputation of the RWC organisers and for New Zealand as a whole. On that footing, despite the mitigating factors identified by the Judge, there was a strong need for deterrence in the sentences imposed. Given that background, we consider the sentences imposed were lenient. Certainly, there is no prospect that they could be regarded as manifestly excessive.

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[43] Above n 2.

**Result**

[140] The appeals against conviction are both dismissed. Mr Demissie's appeal against sentence is also dismissed.

[141] We were told that the sentences may have been partly completed. To the extent that they have not been completed, this must now occur. The respondent may revert to the Court if any further directions on this are required.

Solicitors:
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