

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CRI-2012-404-000364  
[2013] NZHC 198**

**ERRON WEI LUN SOON**  
Appellant

v

**NEW ZEALAND POLICE**  
Respondent

Hearing: 5 February 2013  
Counsel: V Letele for Appellant  
W N Fotherby for Respondent  
Judgment: 14 February 2013

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**JUDGMENT OF ASHER J**

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*This judgment was delivered by me on Thursday, 14 February 2013 at 1pm  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

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## **A fraud on Trade Me**

[1] This is an appeal arising out of an undoubted deception practised on an innocent victim who believed he was carrying out a legitimate Trade Me transaction. The victim paid for an item, and got nothing.

[2] In August 2010, an iPhone was offered on Trade Me with a reserve price of \$1. The offeror had a Trade Me membership registered under the name of "Icedoutrolla". The appellant, Erron Soon, did not contest before me the fact that this was his registration. He had provided his correct date of birth and Mt Wellington address. There were also mobile phone numbers provided.

[3] The victim, Gray Barnett, was interested in that iPhone. He posted a public question on the auction page created by "Icedoutrolla" for the iPhone, asking whether he could purchase it for \$500. When requested by "Icedoutrolla", he provided his email address. As a consequence, any user of Trade Me who happened upon the auction page could view Mr Barnett's email address, and observe his interest in purchasing the phone. "Icedoutrolla" then said it would let the auction run.

[4] Mr Barnett was then contacted by email by a person calling himself "Nathan A". Nathan A sent an email from an address at [atsang.nz1@gmail.com](mailto:atsang.nz1@gmail.com). He said that he had seen Mr Barnett's email on the "Icedoutrolla" auction page and asked Mr Barnett if he wanted to buy an iPhone for \$520. Mr Barnett said that he was interested. Nathan A then provided the bank account details. Unbeknownst to Mr Barnett, this was the bank account not of "Icedoutrolla" but of another Trade Me user, Jerome Fester. Mr Barnett paid the money to the account, believing it was the bank account of "Icedoutrolla" and that he was purchasing an iPhone.

[5] Mr Fester, who was entirely innocent of the scam, had advertised a white Nokia N97 mini phone for sale by auction on Trade Me. A person called Nathan A with the same email address as that of the Nathan A who had contacted Mr Barnett was a successful bidder for that Nokia phone. The sale price was \$520 together with \$10 postage.

[6] In due course Mr Fester received payment. The payment was from Mr Barnett. The particulars shown were “Mr G W Barnett payment Gray phone D”.

[7] While Mr Fester was waiting for the funds to clear, he received an email again from [atsang.nz1@gmail.com](mailto:atsang.nz1@gmail.com). It stated that a friend called “Johnny” would come around to collect the phone. Mr Fester provided his address.

[8] The next day a person who called himself “Johnny” arrived to pick up the phone on behalf of Nathan A. Mr Fester asked the person for a mobile number. The person mumbled the last three digits, arousing Mr Fester’s suspicions that the person was making the number up. There was an exchange between Johnny and Mr Fester that took some 10 to 15 minutes. Mr Fester had received the purchase price so he provided the phone. After the person left he remained suspicious, and tried the number he had been given. He found that it went to an unrelated third party.

[9] Importantly for the purposes of this appeal, Mr Fester on being approached by the Police some months later identified the appellant as the “Johnny” who had visited him and collected the phone. He did this from a photo board. The reliability of this identification evidence is central to the appeal.

[10] Meanwhile, Mr Barnett who had paid \$530 did not have the phone delivered to him. He pursued Nathan A through his email address and received various assurances. Ultimately he never received the phone or any refund. He had been deceived. The person “Johnny”, or whoever was behind him, had obtained a phone from Mr Fester and by a fraud had got Mr Barnett to pay for that phone.

### **The issue on appeal**

[11] The essence of the appeal as presented by Ms Letele was that the Police had not shown beyond reasonable doubt that Mr Soon was the fraudster. He had made no admission. There was nothing showing that the fraudulent “Nathan A” or the fraudulent “Johnny” was the person who created the “Icedoutrolla” auction page. The fraudster may have obtained Mr Barnett’s email independently of Mr Soon, by opening and examining the iPhone auction page, and using the information on it.

[12] In essence, Ms Letele submitted that the only hard evidence connecting Mr Soon to the fraud was Mr Fester's identification evidence. She had a number of criticisms of that identification evidence and the Judge's reliance on it.

### **The identification evidence**

[13] Judge McNaughton summarised the identification evidence as follows:<sup>1</sup>

Mr Fester described the person who arrived to collect the phone as shortish, a male Asian with spiky hair and glasses and of medium build. He said the spectacles were square in shape and looked like prescription glasses rather than tinted sunglasses. He said the person was in his early 20s and around 5ft 3in. He was smartly dressed wearing black trousers and a striped white shirt. There was no noticeable Asian accent and Mr Fester assumed that the person had grown up in New Zealand or had lived in this country for a long time. He said he spent 10-15 minutes with Johnny.

Constable Walsh conducted a formal photographic identification on 16 November 2010. Mr Fester picked out the defendant's photograph in the montage of eight. Mr Fester signed the record of identification and in answer to question one "Do you see anyone you recognise", the answer "I think so". Asked to identify by number the photo or photos he recognised he answered "Number 2". In answer to the question "From where do you recognise the person identified" he answered "Coming into my office to pick up the phone I sold on Trade Me" and in the section for additional comments the witness answered "I am pretty sure it was number 2 it has been a while."

Mr Fester confirmed that he had not seen the person either before or since. In cross examination Mr Fester acknowledged that the person he identified the photograph to was not wearing spectacles but said he didn't think that spectacles would have made much difference. The person had a distinctive look.

Constable Walsh was cross examined about the identification. It was suggested the witness had some difficulty in making the identification. Constable Walsh described Mr Fester as "fairly certain" and "fairly ...". Although Mr Fester had narrowed the identification down to two people, he was not having trouble, he looked at them carefully and made a decision.

[14] He reminded himself of the need for caution in relying on a visual identification and the possibility that an honest witness might be mistaken. He stated that Mr Fester impressed him as a careful and meticulous witness. His suspicions were aroused early on by a mumbling of the last three digits of the telephone number. He considered that Mr Fester would have been careful to note any identification details he could remember because of his suspicions.

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<sup>1</sup> *Police v Soon* DC Manukau CRI-2010-092-18275, 30 May 2012 at [14]–[17].

[15] The Judge took into account that Mr Fester was confident in his evidence as to the correctness of his identification, notwithstanding the absence of spectacles and the identification photograph. He was satisfied that Mr Fester had a good opportunity to identify the person who collected the phone, and good cause to remember his appearance and any identifying details. He was satisfied that the identification was correct.

**Was the identification evidence relied on by the Judge admissible?**

[16] Section 45(1) of the Evidence Act 2006 (“the Act”) provides:

**45 Admissibility of visual identification evidence**

- (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.

[17] Section 45(2) goes on to set out what happens if a formal procedure is not followed. However, I am satisfied that the formal procedure was followed, and indeed with one exception, there was no challenge to the procedure by the appellant.

[18] The challenge was to the reliability of the responses. The only criticism of the procedure was of its timing. It took place two months after the fraud, when Mr Fester identified the appellant from a photo montage.

[19] Mr Soon was not a nominated suspect until 8 November, over two months after the fraud. The usual identification procedure was carried out just eight days later. In terms of timing, the expression “as soon as practicable” in s 45(3)(a) of the Act means that the formal procedure must be carried out as soon as it is feasible to do so in the circumstances. The phrase requires a consideration of the practical issues and may involve an evaluation of available means and resources.<sup>2</sup> Ms Letele did not point to any evidence that showed the identification should reasonably have taken place at an earlier date. I consider that a formal procedure was followed in

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<sup>2</sup> *Malone v R* [2010] NZCA 59 at [19].

terms of the Act. The eight day delay after the identification of Mr Soon as a suspect was not excessive.

[20] Under s 45(1), the onus is on the defendant to prove on the balance of probabilities that the evidence is unreliable. In *R v Aleki*<sup>3</sup> the Court of Appeal noted that in determining whether an accused had proved identification evidence to be unreliable, the Court is to embark upon a broad inquiry, taking into account all the circumstances relating to the identification. Reference was made in that case to *R v Edmonds*<sup>4</sup> where the Court quoted from *R v Turnbull*,<sup>5</sup> observing that where there were difficulties in the quality of identification evidence, the evidence should not be put to the jury unless there is other evidence which goes to support the correctness of the identification. It was noted in *Harney v Police*<sup>6</sup> that a Judge is able to take into account not only the circumstances in which the identification was made, but also any other evidence in the case that supports or raises concerns about the accuracy of the identification.

[21] I do not consider that, on its face, the identification evidence was unreliable. Any hesitation and uncertainty can be ascribed to the concern of a meticulous witness wishing to make the right decision. In the end Mr Fester, after a slight initial hesitation, was entirely firm in his identification. Mr Fester felt certain about his identification despite the fact that the person in the photograph was not wearing glasses, whereas “Johnny” did have glasses. My assessment is reinforced by the observations of Judge McNaughton, who described Mr Fester as a “careful and meticulous witness”.<sup>7</sup>

[22] The particular factors that indicate the reliability of the evidence are:

- (a) The length of time Mr Fester spent with the fraudster;
- (b) The fact that his suspicions were legitimately aroused by what appeared to be a deliberate mumbling of the telephone number; and

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<sup>3</sup> *R v Aleki* [2010] NZCA 442 at [26].

<sup>4</sup> *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762.

<sup>5</sup> *R v Turnbull* [1977] QB 224 (CA).

<sup>6</sup> *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.

<sup>7</sup> *Police v Soon*, above n 1, at [21].

- (c) The fact that he remained suspicious throughout the discussion and thereafter, and indeed telephoned the number to check it. That number did not provide him with any reassurance so his suspicions were unallayed.

[23] Given these circumstances, it could be expected that Mr Fester would remember the face of the person who collected the phone. His initial hesitation, referred to in Judge McNaughton's decision, if anything supports the reliability of the evidence by showing the identification to have been carried out with thought and care.

[24] Thus, I conclude that the evidence would have been admissible even without corroboration. However, there was corroboration to which I will now turn, as I consider whether the Police proved the case beyond reasonable doubt.

#### **Was the case proven?**

[25] There was no doubt about the fraud on Mr Barnett, and there was no issue that the person who collected the phone was part of the fraud. So was it proven beyond reasonable doubt that that person was Mr Soon?

[26] It was Mr Fester's evidence that it was Mr Soon. I have already commented on the high degree of reliability of that evidence. On its own it is enough to reach the threshold of evidence on which a decision maker could reasonably convict.

[27] Further, I regard the evidence about the "Icedoutrolla" auction page as significant corroboration of the fact that Mr Soon was the person who perpetrated the fraud. I accept Ms Letele's submission that the fraudster was not necessarily the person to whom the "Icedoutrolla" username was registered, as other persons could have access to the auction page created by that username. However, the offer of the iPhone by "Icedoutrolla" and the request for Mr Barnett to provide his email address (and thus the chance for "Nathan A" to contact him directly) occurred just two days before the fraud was perpetrated. At that point, Mr Soon had Mr Barnett's email address. The fact that it was then used within a short period of time to perpetrate a

fraud by a person corresponding to the description of Mr Soon is highly suspicious. The correspondence in timing makes it more likely that he perpetrated the fraud. On its own that would not be enough to prove his guilt. However, when considered with the identification evidence, it is corroborative in the sense of making it more likely that it was Mr Soon who was “Johnny”.

[28] There is yet another type of corroboration. It is the actual description that Mr Fester gave of the person who came to collect the phone. He said that he had certain distinguishing features that were consistent with Mr Soon’s features. Mr Fester described the fact that “Johnny” had no noticeable Asian accent. Mr Soon was born in New Zealand. He described the person as in his early 20s and about five feet three inches tall. Mr Soon is 23 and 170 centimetres, or five feet, five and a half inches tall.

### **Conclusion**

[29] I conclude that it was not shown that Mr Fester’s evidence was unreliable. It was admissible and was in itself strong evidence of guilt. It was corroborated by the suspicious circumstance of Mr Soon having registered the “Icedoutrolla” username and receiving Mr Barnett’s email address which was used shortly thereafter, and by the actual description of physical features of the fraudster. These factors are a proper basis on which to conclude beyond reasonable doubt that Mr Soon perpetrated the fraud.

[30] I consider that the Judge was entitled to reach the conclusion that he did as to Mr Soon’s guilt. The appeal will be dismissed.

### **Result**

[31] Appeal dismissed.

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**Asher J**