IN THE SUPREME COURT OF NEW ZEALAND

SC 85/2013
[2013] NZSC 119

BETWEEN	MARK HETERAKA Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: L L Heah for Applicant
S B Edwards for Respondent

Judgment: 13 November 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Heteraka, was tried in the District Court on one count of aggravated robbery and two counts of robbery, arising out of three separate incidents. He was convicted on one count of robbery but was acquitted on the remaining counts. There were two principal pieces of evidence against him on the count on which he was convicted – an identification by the victim of the robbery and his sister's possession soon after the robbery of the victim's cell phone (which was stolen in the robbery).

[2] Mr Heteraka seeks leave to appeal to this Court principally on the basis that the Court of Appeal misinterpreted s 45(2) of the Evidence Act 2006.[1] Mr Heteraka argues that the Court of Appeal erred in confining the words "the circumstances in which the identification was made" in s 45(2) to the circumstances of the

1 *Heteraka v R* [2013] NZCA 339.

identification process followed by police rather than including the circumstances in which the original identification occurred. He relies on the judgment of this Court in *Harney v Police*.[2] Mr Heteraka also argues that the formal procedures set out in s 45(3) could not be met by the process followed in this case.

[3] The Crown accepts that the Court of Appeal erred in respect of the meaning of "circumstances" in s 45(2), but says that nothing turns on that because, if the circumstances in which the original identification occurred are taken into account, the grounds for concluding that the evidence met the threshold test for admissibility would be even stronger.

[4] We are not satisfied that it is in the interests of justice for the Supreme Court to hear and determine this appeal. Although there are unsatisfactory aspects of the identification process followed by police in this case, no matter of general or public importance is raised, given that *Harney* has determined the interpretation to be given to "circumstances" in s 45(2). Nor do we consider that a substantial miscarriage of justice may have occurred given that (putting the identification to one side) there is compelling evidence of Mr Heteraka's involvement in the robbery, in particular, the evidence that his sister had the victim's stolen cell phone.

Solicitors:
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[2] *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [22].