IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA722/2023
[2025] NZCA 9

BETWEEN	JESSE THOMPSON Appellant
AND	THE KING Respondent

Hearing: 7 November 2024

Court: Katz, Dunningham and Powell JJ

Counsel: I A Jayanandan for the Appellant
H G Clark for the Respondent

Judgment: 13 February 2025 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Powell J)

[1] Jesse Thompson has appealed his three convictions resulting from a riot that took place in Wellington on 2 March 2022, as police took action to clear protesters who had occupied the grounds of Parliament.

[2] Following a jury trial, Mr Thompson was found guilty of possession of an offensive weapon (the possession charge),[1] being a member of a riot (the rioting

[1] Crimes Act 1961, s 202A(4)(b). Maximum penalty: three years' imprisonment.

charge),[2] and assault with a weapon (the assault charge).[3] He was subsequently sentenced to six months' community detention, 100 hours of community work and nine months' supervision.[4]

[3] Mr Thompson's offending was summarised in the sentencing notes of Judge B Davidson as follows:

> [2] The charges stem from the riot on 2 March 2022 which ended the occupation of Parliament grounds and surrounding streets. Early that morning, the police began a major operation to regain control of the grounds and the streets. You had been at the protest since its beginning, camping in grounds at the nearby law school.
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> [3] By early morning of 2 March 2022, it must have been plainly obvious to you that the protest was coming to an end. During the course of the day, you were seen by police officers, and later on reviewed closed-circuit television footage, in possession of a hammer which you said at trial you had used earlier in the morning to clear your campsite. You were first seen with the hammer near the Parliamentary Library and sometime later near the gates to Parliament. It is clear that the jury must have rejected your defence that you had retained the hammer inadvertently and never intended that it would be used in a violent or threatening way.
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> [4] The charge of participating in a riot arose around the same time that you were seen with the hammer near the gates. You were seen to be in possession of the hammer. You also had a riot shield, and you were closely associated with others who were throwing various objects at the police. Again, the jury must have rejected your evidence that you were involved as a peacemaker.
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> [5] The final charge, that which is the most serious, that of assault with a weapon, occurred towards the end of the day's events. By around 5.30 pm, authorisation had been given to the police to fire sponge bullets at the crowd, believed to be the first time this has ever occurred in New Zealand for crowd control. You were seen to go to your car which was parked on Lambton Quay outside the law school. You then reversed at speed towards a line of officers, stopped a few metres short of the line, then pulled forward aggressively, fishtailing towards another line of officers. Again, the jury must have been clearly satisfied that this was a threat by you.

[4] Mr Thompson raises three matters on appeal, namely that Judge Davidson:

(a) failed to direct the jury to consider the issue of self-defence on the assault charge which led to a miscarriage of justice;

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2 Section 87. Maximum penalty: two years' imprisonment.
3 Section 202C(1)(b). Maximum penalty: five years' imprisonment.
4 *R v Thompson* [2023] NZDC 29595.

(b) misdirected the jury on the elements of the rioting charge; and

(c) failed to properly direct the jury on prejudice arising from the contextual evidence.

[5] This Court must allow a conviction appeal only if satisfied that a jury's verdict was unreasonable or a miscarriage of justice occurred.[5] Miscarriage of justice means any error, irregularity or occurrence, in relation to or affecting the trial that:[6]

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[6] The three issues raised by Mr Thompson are considered in turn.

Issue one — was a direction on self-defence required?

[7] There is no dispute that at trial Mr Thompson did not wish the jury to consider self-defence in relation to the assault charge. It is quite clear that Mr Thompson's defence on that charge was that he panicked as he attempted to drive his car along Lambton Quay, away from Parliament, and came under fire from police using sponge rounds to quell the riot. The defence position was summarised by Judge Davidson as follows:

> The defence say this was an instinctive, impulsive reaction to being shot at, certainly from behind, and perhaps also from towards the front. All he wanted to do was leave but when he tried, he reacted instinctively, driving back and forward to try and get away.

[8] Notwithstanding the position taken at trial, on appeal Ms Jayanandan, on behalf of Mr Thompson, relied on the Court's commentary in *R v Tavete*:[7]

> … A trial according to law requires an adequate direction by the Judge to the jury of all matters, whether of fact or of law, which, upon the evidence, are reasonably open to the jury to consider in reaching their verdict. In a trial for murder this includes matters of defence such as self-defence, provocation, manslaughter, or accident, notwithstanding that such matters are not raised or

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5 Criminal Procedure Act 2011, s 232(2).
6 Section 232(4).
7 *R v Tavete* [1988] 1 NZLR 428 (CA) at 431.

> are even expressly disavowed on behalf of the accused. The failure to press such a defence is usually for tactical reasons; it would weaken, perhaps destroy, the main defence relied on. This does not in our judgment exonerate the Judge from directing on such matters if there is a sufficient evidential foundation. A careful and dispassionate direction by the trial Judge will put the issue in a balanced perspective.

[9] Ms Jayanandan submitted that self-defence was available to Mr Thompson from the beginning of the trial and the trial Judge was alert to it. In Ms Jayanandan's submission, while Mr Thompson denied any intention to frighten the officers, if the jury were to determine he had some nominal intention to momentarily frighten police officers, they would have then needed to consider whether the level of force used was reasonable in the circumstances.

[10] Ms Jayanandan appeared to accept that if Mr Thompson had claimed to have threatened the police in self-defence, it would have damaged his credibility on his central defence that he panicked. However, given *R v Tavete*, and a sufficient evidential foundation for the jury to consider self-defence, it was Ms Jayanandan's submission that the trial Judge should have instructed the jury to consider self-defence and the failure to do so was a material error resulting in a miscarriage of justice.

Discussion — issue one

[11] We commence our analysis on the first issue by acknowledging the principle set out in *R v Tavete*, that a trial judge must direct on self-defence if there is a "credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence".[8]

[12] As Ms Clarke submitted on behalf of the Crown, before any direction is made a judge must consider all three limbs of self-defence.[9] Thus, when determining whether self-defence is reasonably available, the judge must consider not only the circumstances as a defendant perceives them to be, but how the defendant is said to be acting "in defence of himself, herself or another" and the reasonableness of the force used, including whether there were other options available to neutralise any threat.[10]

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8 At 430.
9 *R v Sila* [2009] NZCA 233 at [31].
10 Crimes Act, s 48(1).

In the event that there is no such "credible or plausible narrative" available, a trial judge is not required to put self-defence to the jury.

[13] In this case we are satisfied there was no credible or plausible narrative of self-defence available to Mr Thompson and the trial Judge was not required to direct on it.

[14] First, and consistent with the way the case was run, it is clear Mr Thompson's trial counsel did not seek that the jury be permitted to consider self-defence on the assault charge as such was manifestly inconsistent with the careful and considered defence advanced on all three of the charges.

[15] Mr Thompson's position with regard to the assault charge contrasted with the position he took on the possession charge. This was the subject of a lengthy legal discussion after the conclusion of the evidence and prior to finalising the question trail. Although there was no dispute that Mr Thompson had not used the weapon that was the subject of the possession charge (a hammer), trial counsel wanted it put to the jury that in the event Mr Thompson had used it intentionally, it would only have been used in self-defence. The question trail was accordingly amended to provide for this so as to require the jury to exclude self-defence.

[16] More broadly we accept Ms Clarke's submission that the evidence, and in particular the extensive video evidence produced at trial which we have had the opportunity to review in detail, otherwise does not support a self-defence narrative.

[17] As Ms Clarke acknowledged, Mr Thompson's evidence did suggest that at the time of the assault charge he was fearful as he tried to drive his car away from the riot. In particular, Mr Thompson said he believed that police were firing live rounds at him, and we accept this could be relevant to the first limb of self-defence, the circumstances as Mr Thompson perceived them to be. However, Mr Thompson's evidence on that point appears quite inconsistent with his demeanour, visible on the extensive video footage, after he had driven at police and then driven off, subsequently parking among, and engaging with, the remaining protesters.

[18] Ultimately, and irrespective of the circumstances as Mr Thompson perceived them to be, we are satisfied the evidence does not support any plausible or credible narrative on either the second or third limbs of the test.

[19] First, there was no suggestion by Mr Thompson in the course of his evidence that he drove his car at police so as to defend himself or other protestors. We are unable to see how in the circumstances it could be said that Mr Thompson could possibly have been "acting in defence of himself … or another" for the purposes of s 48(1) of the Crimes Act 1961 in reversing dangerously and at high speed towards the line of police that were heading northeast along Lambton Quay with the intention of moving the protestors away from Parliament.

[20] On the contrary, it is apparent from the video evidence that at the time of the assault, Mr Thompson's vehicle was in the open some distance ahead of the approaching police line and had a clear route forward away from police. Put simply it is apparent that Mr Thompson was not directly threatened by police at the time he chose to reverse rapidly towards the police line behind him. We also observe that, to the extent Mr Thompson was being fired upon, such fire was not coming from the police on the road that he appeared to target.

[21] The same video footage makes it clear that there is no narrative that would make the force used by Mr Thompson, reversing his car dangerously and at high speed towards the police line, reasonable in the circumstances given the clear path Mr Thompson had in front of him to get clear from the police line behind him. Indeed this was the route that Mr Thompson took a few seconds later, but only after the driving that formed the basis of the assault charge.

[22] Taken together we are satisfied that on the evidence presented in the course of the trial, Judge Davidson was not required to direct on self-defence. The first limb of Mr Thompson's appeal therefore fails.

Issue two — did the trial Judge misdirect the jury on the charge of riot?

[23] On the second ground of appeal, Ms Jayanandan submitted that a material error in law resulted when the Crown was allowed to invite a conviction on the charge of riot on the basis of party liability.

[24] Section 87(1) of the Crimes Act defines a riot as follows:

> A riot is a group of 6 or more persons who, acting together, are using violence against persons or property to the alarm of persons in the neighbourhood of that group.

[25] A member of a riot is liable for up to two years' imprisonment.[11]

[26] The defence position at trial was that Mr Thompson was a peacemaker on the day the riot took place in Wellington and that all the Crown was able to prove was his presence which was not sufficient for him to be liable as a member of a riot.[12] The Crown did not allege that Mr Thompson personally committed any violent act, but nonetheless wilfully participated in the riot through his words and conduct in associating with those rioting.

[27] This was reflected in Judge Davidson's summing up on the rioting charge. The jury was directed that the elements of the offence consisted of:

> firstly, there was a group of at least 6 persons who had a common purpose which included using violence against people or property at and in the vicinity at Parliament grounds;
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> secondly, the group acted together to carry out that common purpose, either by words or conduct or both;
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> thirdly, [Mr Thompson] knowingly participated in that group by his own words and conduct or both;
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> lastly, this caused alarm to persons in the neighbourhood, that is nearby to the group.

[28] The Judge went on to say:

> Now, [Mr Thompson] does not dispute there was a riot that day but says the Crown have failed to prove beyond reasonable doubt that he deliberately

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11 Crimes Act, s 87(2).

12 *R v Wolfgramm* [1978] 2 NZLR 184 (CA) at 187.

> participated in the riot. He says he was a peacemaker. The Crown must show that he was a wilful, that is an intentional, participant in the group by pointing to words and/or conduct that show his association with the group. His mere presence is not enough. The Crown do not need to show that he used violence himself, actual or threatened, but must be able to point to words or conduct that show participation and association.

[29] Ms Jayanandan submitted that contrary to the trial Judge's direction it was necessary for the Crown "to prove [Mr Thompson] had engaged in actual violence against persons or property (in concert with at least five other people also engaging in such conduct)". In Ms Jayanandan's submission even threatened violence was insufficient as that would disrupt the statutory interplay between the charge of riot in s 87(1) and unlawful assembly in s 86. Ms Jayanandan therefore submitted the trial Judge had misdirected the jury.

[30] Furthermore, Ms Jayanandan submitted the summing up also left it open for the jury to consider secondary party liability under s 66 of the Crimes Act when this was plainly not alleged. In Ms Jayanandan's submission this was a misinterpretation of the principles set out by the High Court in *R v Cooper.*[13] It resulted in the Crown not having to prove the precise role of any one participant charged with rioting and overlooked the fact that the appellant in *R v Cooper* was charged expressly in the alternative as either a principal or a party to rioting.

Definition of "riot"

[31] Prior to 1987, riot was defined as "an unlawful assembly that has begun to disturb the peace tumultuously". Unlawful assembly was, and remains, defined somewhat complexly, and indeed has been described as an "elusive concept".[14] Section 86 defines unlawful assembly as:

> **86 Unlawful assembly**
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> (1) An unlawful assembly is an assembly of 3 or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the

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13 *R v Cooper* [2017] NZHC 3275.
14 *R v Wolfgramm*, above n 12, at 187.

> neighbourhood of the assembly to fear, on reasonable grounds, that the persons so assembled—
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> (a) will use violence against persons or property in that neighbourhood or elsewhere; or
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> (b) will, by that assembly, needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood:
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> …

[32] Breaking down the section, unlawful assembly is a group of three or more persons who "with intent to carry out any common purpose" are assembled "in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of the assembly to fear on reasonable grounds the that the persons so assembled … will use violence… or needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood".

[33] The definition of riot was amended in 1987, to the wording set out at [24] above. Perhaps unsurprisingly, given the previous definitions of riot and unlawful assembly, difficulties in prosecuting rioters had been present for some time, and were again apparent following the "Queen Street riot" that took place in Auckland on 7 December 1984.[15]

[34] When introducing the amendment into Parliament, Sir Geoffrey Palmer noted that the need for proof of membership of such a group of persons assembled with a common purpose had caused some of the difficulty in securing convictions.[16] The need to show the fear of violence arising from that assembly was identified as a further source of difficulty.[17] Sir Geoffrey explained the proposed changes in the following terms:[18]

> Accordingly, the [Riot] Bill severs the link between unlawful assembly and riot by providing that a riot is a group of six or more persons, who, acting together, are using violence against persons or property to the alarm of persons in the neighbourhood of that group. The essential ingredients of a riot are maintained, while the appealing symmetrical but technically difficult and

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15 Report of Committee of Inquiry into the Riot at Auckland on 7 December 1984 (24 December 1984).

16 (20 November 1985) 467 NZPD 8269 at 8269. See *R v Wolfgramm*, above n 12.

17 At 8269.

18 At 8269.

> unnecessary ingredients of common purpose and prior assembly are swept away.

[35] The amended offence appears to have been considered for the first time by the High Court in *R v Ruru.*[19] At issue in *Ruru* was whether there were six or more persons acting together in the context of an unplanned fight between two groups of rival gang members, three on one side and five on the other.

[36] In considering the phrase "acting together", Williamson J noted that the phrase was not defined in the Crimes Act, nor were there any helpful authorities on what "acting together" meant. As a result, the Judge found it necessary to consider the plain and ordinary meaning of the phrase in the context in which it occurred in s 87.[20]

[37] His Honour noted that a similar but passive phrase, namely "being together with any other person or persons" contained within one of the alternative definitions of aggravated robbery had been considered by this Court in *R v Galey*:[21]

> [T]he expression "being together with any other person or persons" should be construed as having somewhat similar purpose, and therefore as intended to apply only in situations where the presence together is proved of two or more persons having the common intention to use their combined force, either in any event or as circumstances might require, directly in the perpetration of the crime.

[38] Based on that Williamson J determined:[22]

> The essence of "acting together" is a purpose common to all the participants in the group. From this common purpose springs the joint actions.

[39] The decision in *R v Cooper* referred to by Ms Jayanandan did not undertake any detailed analysis of any aspect of s 87.[23] Instead the case involved applications under s 147 of the Criminal Procedure Act 2011 by multiple defendants in respect of multiple charges including participation in an organised criminal group,[24] unlawful

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19 *R v Ruru* (1989) 4 CRNZ 526 (HC).
20 At 528.
21 At 528, citing *R v Galey* [1985] 1 NZLR 230 (CA) at 234. The Court was considering s 235(1)(b) of the Crimes Act. The provision is now s 235(b). The wording is unchanged.
22 *R v Ruru*, above n 19, at 529.
23 *R v Cooper*, above n 13.
24 Crimes Act, s 98A. Maximum penalty: 10 years' imprisonment.

possession of firearms,[25] and use of a firearm against a law enforcement officer,[26] in addition to riot.

[40] As Moore J noted in that case:

> [40] To a considerable extent, in proving its charges against the defendants, the Crown relies upon party liability in terms of s 66(1) of the Crimes Act.

[41] No analysis was in fact undertaken as to whether it was necessary to invoke s 66(1) of the Crimes Act with regard to a participant in a riot, although Moore J did note specifically in relation to one of the defendants that it was "unnecessary for the Crown to prove his precise role. He was either a principal or an aider or abettor".[27]

Discussion — issue two

[42] Contrary to Ms Jayanandan's submissions it was not necessary for the purposes of the charge of being a member of a riot for the Crown to either prove that Mr Thompson himself carried out actual violence or otherwise had to come within s 66(1) of the Crimes Act as a party if he did not.

[43] We repeat the wording of s 87(1) here, for ease of reference:

> A riot is a group of 6 or more persons who, acting together, are using violence against persons or property to the alarm of persons in the neighbourhood of that group.

[44] It is apparent from the background to s 87, set out above, that the intention of the 1987 amendments was to simplify prosecution of participants in a riot, and by use of the words "acting together" remove the necessity of acting with a common purpose which was a feature of the previous offence.

[45] With respect to Williamson J, we do not think the wording used in relation to aggravated robbery used in s 235 of the Crimes Act, outlined above at [37], casts any light on the meaning of "acting together" for the purpose of s 87 or is otherwise relevant to an analysis of s 87(1). As explained by Sir Geoffrey Palmer when

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25 Arms Act 1983, s 45(1). Maximum penalty: three months' imprisonment or $1,000.
26 Crimes Act, s 198A(1). Maximum penalty: 14 years' imprisonment.
27 *R v Cooper*, above n 13, at [49].

introducing the amended wording (with its focus on a group of people "acting together") the intent of the amendment was to simplify the offence, including by removing the requirement to prove a common purpose. To illustrate the point, with reference to the 1984 Queen Street riots which prompted the amendments, the rioters there appear to have acted together in causing extensive property damage. However, they may have been driven by different motives or purposes. Some of them may have been intent on looting for financial gain, others may have intended to express their frustration at the cancellation of a nearby concert, others may have wished to participate in "anti-police" protest action, and so on.

[46] The obvious difficulty of proving a common intent or purpose in complex and fast-moving situations of civil disorder were addressed by the introduction of the amended wording which clearly uncoupled the offence of being a member of a riot from the definition of unlawful assembly. Accordingly, we are satisfied that the words "acting together" in the current version of s 87(1) say nothing about the intention of a group of six or more. Rather, the focus is on their collective actions, after they have come together (for whatever purpose). Having come together it is only necessary to prove that the group, while continuing to act as such, is using violence as set out in the section.

[47] Four points emerge from this:

(a) Section 87 is a collective offence. Any person who is shown to be a member of the group and that group has used violence will be guilty of being a member of a riot for the purposes of s 87(2). It follows that any suggestion in *R v Cooper* that recourse to s 66(1) of the Crimes Act is necessary in the event that violence cannot be proved on the part of any particular member of the group is incorrect.

(b) Whether any individual is part of the group will be a question of fact for the jury taking account of the evidence, including as the trial Judge summed up in this case, "by pointing to his words or conduct that show his association with the group".

(c) No common purpose to use violence is required to make out the charge. It is enough that violence is used while the group is acting together.

(d) As long as violence has been carried out by the group it is not necessary for the prosecution to show that any individual charged with being a member of riot has personally committed a violent act.

[48] It follows that the prosecutor in the present case was not required to show Mr Thompson personally committed an act of violence in order for him to be a member of the riot. Nor was it necessary for the prosecution to rely on party liability under s 66(1) if Mr Thompson did not personally commit an act of violence. There was therefore no error in the summing up on the riot charge and the second ground of appeal also fails.

[49] As a result of the conclusions we have reached it follows that, if anything, the questions posed by the trial Judge in the present case imposed too high a threshold of liability on the prosecution, requiring as it did that the group had "a common purpose which included using violence" for the purposes of proving the charge under s 87. Therefore, we suggest that a more appropriate question trail on a charge of being a member of a riot and using Mr Thompson's example would be:

(a) Are you sure there was a group of at least 6 persons who were acting together?

(b) Are you sure the group were using violence against people or property at and in the vicinity at Parliament grounds?

(c) Are you sure that the violence used by the group was raising alarm of persons in the neighbourhood of that group?

(d) Are you sure that Mr Thompson knowingly participated in that group by his own words and/or conduct?

Issue three — misdirection on prejudice

[50] In relation to the third ground of appeal, Ms Jayanandan submitted that since the use of highly prejudicial evidence was considered an essential part of the Crown narrative, it was important that the jury was properly directed and carefully guided in how such evidence were to be used in their deliberations regarding the case against Mr Thompson. She submitted that there was a total lack of guidance to the jury in this regard despite an assurance in the course of an oral ruling given by the trial Judge that such guidance would be given late in the trial. As a consequence, Ms Jayanandan submitted this was a material error with serious consequence as it could have led to "guilt by association" type illegitimate reasoning on the part of the jury.

Discussion — issue three

[51] The final issue can be dealt with relatively quickly. As Ms Clark submitted, we are entirely satisfied Judge Davidson's directions on this point were both consistent and appropriate.

[52] Specifically in his opening to the jury, Judge Davidson recorded:

> During the trial you will hear a lot of what might broadly be described as contextual evidence. That is surrounding evidence about how the protest occupation began and dealing in a little more detail about the police operation on the 2nd March to regain control of Parliament grounds and the surrounding streets. Inevitably that means you will hear about some of the events that may be imprinted in your own memories, lighting of fires, throwing of objects and the like. That contextual background evidence is inevitable and forms part of the evidence that you will need to consider when deciding the important issues in this case. But you must steadfastly bear in mind what are the specific allegations against this defendant. What is it specifically alleged he did, have the Crown prove that, what is his answer to it. So the surrounding contextual evidence is important but steadfastly concentrate on the particular allegations that are bought by the Crown against this defendant.

[53] Judge Davidson's directions were even more explicit in his summing up:

> You must put aside feelings of prejudice and sympathy. When you are considering your verdicts, you are taking on the role of a judge. A judge can never allow a decision to be influenced by feelings of prejudice or sympathy for anyone connected with a case. Here, as I said to you earlier, this event and the preceding pandemic period is a period about which we will all have differing memories. It affected all of us in different ways: loss of jobs, loss of income, separation from friends and family, inability to travel. There will be strong views for and against the government response. There may be strong

> views about the police response on that day. This all needs to be put to one side as you judge the case calmly and dispassionately based on the evidence placed before you this week. It is often put this way, that your verdicts will be decided by your head, that is your thinking matter, not by your hearts.

[54] It is difficult to see what other directions could have been given in the circumstances and we do not consider there is anything in this point raised on behalf of Mr Thompson. The third limb of Mr Thompson's appeal also therefore fails.

Decision

[55] The appeal is dismissed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent