IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA724/2022
[2023] NZCA 459

BETWEEN	JASON DAVID SIGNAL Appellant
AND	THE KING Respondent

Hearing:	4 May 2023
Court:	Cooper P, Moore and Fitzgerald JJ
Counsel:	R E Harrison KC and M C Jaquiery for Appellant R K Thomson for Respondent
Judgment:	22 September 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal against conviction is allowed in part and the conviction on the charge of participating in an organised criminal group is set aside. We direct the entry of a judgment of acquittal on that charge under s 233(3)(a) of the Criminal Procedure Act 2011.

B The ground of appeal against conviction on the manslaughter charge based on jury misdirection is adjourned pending delivery of the Supreme Court's judgment in *Burke v R*, for which leave to appeal has been granted. The parties should file memoranda as to the disposition of this ground of appeal within 10 working days of delivery of the Supreme Court's judgment.

C The appeal is otherwise dismissed.

Table of Contents

REASONS OF THE COURT

(Given by Cooper P)

[1] The appellant Jason Signal was tried before Palmer J and a jury on charges alleging the manslaughter of Codi Wilkinson,[1] the wounding of Kyle Rowe with an intent to commit grievous bodily harm,[2] and participation in an organised criminal group.[3] He was found guilty on all charges and convicted on 21 September 2022.

[2] Although he has not been sentenced, Mr Signal appeals against his conviction and in the circumstances of this case, where issues are raised about the deliberations of the jury brought to the Judge's attention at and shortly after the trial, we accept that was the appropriate course to follow.

[3] There are four grounds of appeal. The first two grounds relate to the jury deliberations. The third ground concerns the way in which the trial Judge summed up the charge relating to participation in a criminal group to the jury. The fourth concerns the manner in which the Judge directed the jury on the "common purpose" that the Crown needed to prove to establish party liability for manslaughter.

Background

[4] For present purposes, much of the relevant factual background may be taken from a notice of admitted facts filed at the trial pursuant to s 9 of the Evidence Act 2006. The notice set out the following, under the heading

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1 Crimes Act 1961 ss 171, 160(2)(a) and 66(2).
2 Sections 188(1) and 66(2).
3 Section 98A.

“Background to this trial”:

> The offending with which Mr Signal is charged is the result of a group attack on two junior patched members of the Mongrel Mob Aotearoa.
>
> The attack took place on 12 September 2019.
>
> One of the victims (Codi Wilkinson) received a number of injuries which were inflicted during the attack, and the other (Kyle Rowe) received a significant wound to his head.
>
> Those involved in the attack, including Mariota Su'a, Quentin Moananui and Dean Jennings, were senior patched members of the Mongrel Mob Aotearoa, Manawatu Chapter. Jeremiah Su'a was the president of the Manawatu Chapter at the time.
>
> Following a jury trial which took place between 9 February and 7 May 2021 ("the 2021 trial") Jeremiah Su'a, his brother Mariota Su'a and Quentin Moananui were found guilty of Manslaughter (Codi Wilkinson), Wounding with Intent to cause Grievous Bodily Harm (Kyle Rowe) and Participation in an Organised Criminal Group.
>
> Although they each faced a charge of Murder in respect of Codi Wilkinson, the jury convicted them of Manslaughter. In acquitting the defendants of murder by inference the jury decided the Crown had not proven any of the defendants subjectively appreciated the likelihood of Codi Wilkinson's death as a result of the attack.
>
> At the 2021 trial Mr Jeremiah Su'a was convicted of Manslaughter and Wounding with intent on the basis that he participated in planning and organising the attack, and he was sentenced on this basis.
>
> At the 2021 trial Mr Moananui was also convicted of two further charges of Kidnapping, which involved taking the victims from where the attack took place in Ashhurst to Bunnythorpe.
>
> Dean Jennings was also a defendant in the 2021 trial. However the jury could not reach verdicts in relation to him.
>
> Dean Jennings subsequently pleaded guilty to Manslaughter, Wounding with intent to cause grievous bodily harm, and two charges of Kidnapping. He admitted his involvement, alongside Quentin Moananui, in taking the two victims from Ashhurst to Bunnythorpe where Codi Wilkinson's body was later found.
>
> There is no independent forensic evidence as to who participated in the physical attack. There is no evidence that Jason Signal was involved in the physical attack on Codi Wilkinson and Kyle Rowe
>
> There is no evidence that Jason Signal was involved in the plan to kidnap the victims Codi Wilkinson and Kyle Rowe, and he is not charged with kidnapping.
>
> Jason Signal is not a Mongrel Mob member, prospect or associate and never has been. He was a close friend of Jeremiah Su'a at the time of the offending

> There is no evidence of a friendship between Jason Signal and any of the following: Dean Jennings, Mariota Su'a, Quintin Moananui or [BL].

[5] Further facts set out in the notice stated that Mr Wilkinson and Mr Rowe had committed an aggravated robbery without the knowledge or approval of the gang. The aggravated robbery was committed against a person associated with the gang, who was a known commercial drug dealer based in Bunnythorpe and an associate of Jeremiah and Mariota Su'a. Mariota Su'a was able to identify Mr Wilkinson and Mr Rowe as having been responsible for the attack by viewing CCTV footage. Under the heading "[t]he common plan" the notice said:

> On 12 September 2019 a plan was formed by members of the gang to inflict serious violence on Codi Wilkinson and Kyle Rowe, to punish them for the unauthorised aggravated robbery and to "de-patch" them. The plan included physically taking their Mongrel Mob patches from them.

[6] The attack on Mr Wilkinson and Mr Rowe was then described in the notice. It was said that Mr Rowe and Mr Wilkinson were "brutally attacked in a confrontation by members of the group". Mr Rowe sustained a "sharp force injury", causing a laceration approximately 10 cm in length to the top of his head, and exposing his skull underneath the wound. There was severe swelling and bruising across his whole body, and an open wound to his left middle finger.

[7] After the attack, Mr Wilkinson was placed in the boot of Mr Rowe's motor vehicle and Mr Rowe was made to sit in the front passenger seat. Mr Rowe managed to escape as the car was being driven. After running away, he found a member of the public who drove him to Palmerston North Hospital. It was unclear what happened to Mr Wilkinson. His deceased body was found in Bunnythorpe some 15 days later. It was unclear whether he had managed to escape from the boot of the car himself or had been assisted out of it. There was also no evidence that any of the defendants (Mariota Su'a, Quentin Moananui, Dean Jennings, Jeremiah Su'a or Jason Signal) were aware that Mr Wilkinson was deceased until after his body was located.

[8] Jeremiah and Mariota Su'a, together with Quentin Moananui were convicted of manslaughter, wounding and participating in an organised criminal group after a 13 week trial in 2021. Mr Moananui was also convicted of kidnapping. The jury

could not agree on verdicts with respect to Mr Signal and the other co-defendant, Mr Jennings.

[9] Mr Jennings subsequently pleaded guilty to the charges. Mr Signal was therefore retried on his own at the trial which has given rise to this appeal.

Relevant events at Mr Signal's trial

[10] On 8 September, the third day of the trial, the Judge discharged a juror who had a passing acquaintance with the victim of the aggravated robbery committed by Mr Rowe and Mr Wilkinson. The trial proceeded before the 11 remaining members.

[11] They retired to consider their verdict on Tuesday 20 September, broke just before 5 pm and resumed the following day. At about 10 am on 21 September, the foreperson sent a note stating that the jury had "reached their unanimous verdict on all 3 charges". However, accompanying it was another note, signed by an individual juror, in the following terms:

> To the judge
>
> Whilst I have agreed that Jason has some responsibility and needs to face the consequences of his part in this Awful Situation.
>
> I also wholeheartedly believe that Jason Played a very small part and acted the way he did to get recognition in a sense of I belong – I do not believe that Jasons heart Intention was to harm Codi or Kyle and that the true Masterminds behind this Crime was the Sua Brothers & Barry Long.
>
> Jason I believe does not deserve to be unduly punished.
>
> I feel to write this because people do things and don't do things for deeper reasons than just what the Evidence shows.
>
> Thank you for taking time to puruse this and good luck to Jason.

[12] In a bench note made on 21 September, the Judge made this record:[4]

> [4] I heard from counsel in the presence of the defendant but the absence of the jury:
>
> (a) Ms Jaquiery, for Mr Signal, was concerned about whether the verdicts were unanimous. She submitted further inquiries should be made of the jury about that or whether a majority

[4] Footnote omitted.

verdict direction was required. She said she was not suggesting there had been intimidation, but she also submitted it might be appropriate to poll the Jury, citing case law.

(b) Ms Davies, for the Crown, agreed that it would be wrong to just take the verdicts without further inquiry. She submitted suggested majority verdicts may be part of the direction required. She stated that, to the extent the letter was a plea for leniency, much of what is in the letter is accepted by the Crown. She was unsure that a direction was needed about bullying because there was no clear evidence of bullying. If such a direction were given, it would need to be made in a relatively neutral way.

[13] After retiring to consider relevant authorities,[5] the Judge told counsel that he did not consider he needed to mention "bullying or intimidation" because there had been no indication of that, nor did he consider it necessary to poll the jury. Rather, he considered it necessary "to make further inquiries about the unanimity of the Jury about the verdicts".

[14] The Judge then discussed with counsel what he proposed to say to the jury. He amended his proposed instructions in accordance with suggestions made by Ms Jaquiery who was leading the case for the defence. At around 11.20 am, the jury returned to the courtroom. In his bench note the Judge recorded what he had said to the jury:

> Members of the jury, thank you for your hard work. Thank you for the indication that you have unanimous verdicts on three charges. Thank you also for the additional note from one juror. I should say the identity of that juror is not known, other than by me.
>
> But before we take the verdicts, I want to make absolutely sure of the implications of the separate note I received from the one juror. No juror should join a decision against their individual judgment, merely for the sake of agreement or to avoid inconvenience. Each juror must be true to their oath or affirmation.
>
> If the juror who wrote the note or any other juror has a different view to the rest of the jury of the answer to any question in the Question Trail, then you will not have reached unanimous verdicts on all charges. And it may be that you would then need a direction on whether and how to give a majority verdict if 10 of you agree.
>
> So I do need to ask you to retire again, to all to confirm by note to me that **all of you** have reached the same answers to **each** question, whether the answer is yes or no, so that we know that you all agree with the verdict for each charge.

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5 *R v N (CA373/04)* (2005) 21 CRNZ 621 (CA); and *Rakena R* [2016] NZCA 357.

[15] At about 11.30 am, the Judge received a further note from the jury. This was in the following terms:

> Every member of the Jury understands the charges and their consequences, implications. All three of our charges are unanimous.

[16] The Judge then heard again from counsel. He recorded that:

> (a) Ms Jaquiery was sure the Jury meant "verdicts" rather than "charges". But she submitted that it would be appropriate to take a poll of the Jury, to protect the validity of the verdict.
>
> (b) Ms Davies submitted that polling is a rare step to take and was not required here. She submitted that the first note could have been consistent with unanimity, this one confirms that, and there is no risk of an unsafe verdict.

[17] Relying on *Rakena v R*, the Judge told counsel that polling the jury is a rare step, only taken where there was reason to doubt the jury's unanimity.[6] He then said that given his previous direction and the response, he considered it sufficiently clear that the verdicts were unanimous. He continued:

> But I said I would remind the Jury of what I said in my summing up about the giving of the verdict by the Foreperson in the presence of the Jury without dissent is sufficient confirmation it is the unanimous verdict of them all, but that if they did dissent they should say so. In addition, of course, before taking the verdicts, the Registrar would again seek confirmation from the Foreperson that the verdicts were unanimous.

[18] At 11.45 am the jury returned to the courtroom. The Judge reminded them that:

> … in taking the verdicts, Mr Foreperson, you will be asked whether you are all agreed. If you are, you will say "yes", and if not, you will say "no". There is no need for the rest of you to say anything unless you disagree. If you do disagree, of course, you should say no.

[19] The proceedings were interrupted because of a failure of the Virtual Meeting Room (VMR) which was needed to enable family members of the deceased to view the taking of the verdicts remotely. However, the jury was able to return at 12 pm when they confirmed to the Registrar that the verdicts were unanimous, and their verdicts were taken. The Judge asked Mr Signal to stand down, and then thanked the

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6 *Rakena v R*, above n 5, at [32] citing *R v Papadopoulos (No 2)* [1979] 1 NZLR 629 (CA).

jury, advised them about arrangements for sentencing and allowed them to go. After Mr Signal returned to the courtroom, Ms Jaquiery confirmed that there were no reasons why the Judge should not enter the convictions.

[20] However, on Thursday 22 September, the juror who had sent the note on the previous day sent a further email to the Registry. Its text was as follows:[7]

> Hello, my name is [Juror], I have recently served as a Juror on the Jason David Signal case at the Palmerston North High Court. The reason for my correspondence, is I need to let someone know that while I was serving on the jury I felt pressured by and concerned by another jury member.
>
> I know that it is not usual practice to be sending letters to Judges however I feel deeply grieved about the situation and I feel that had I said not guilty the outcome for Mr Signal may have been very different, I need the judge to know I feel this way not out of guilt for not saying no but out of anger towards the biased manipulative statements made by Juror 9.
>
> The juror in question was juror 9 [name redacted] who when on the first day of being on the jury stated the following, "Lets just all agree that anyone that associates with a gang is guilty" not only this but from my observations I noted that he also bought to court with him a bias from a previous jury he had been on stating that in the last jury he was on there was a woman who could never find someone guilty because of her religious beliefs.
>
> I found these 2 statements bias and concerning as it resulted in me feeling manipulated and I would like to take the opportunity to ask that in the future that those that are picked to be the foreperson for a jury be given instruction on picking up on statements made like this from jurors as I feel that statements like this can be used to emotionally manipulate others into taking the position of finding the accused guilty or not guilty.
>
> Also I would very much appreciate that this information be passed onto the presiding judge in the case that he took for Jason David Signal, simply so that he is aware and also so that he can in the future provide education to the foreperson to be aware of this type of behaviour amongst those that have bias..... I would appreciate Jason David's Signals lawyer knowing that there was at least one juror that believed he was innocent of 2 of the charges bought against him and that this juror knows what it feels like to be in a position where you feel pressured and unable to go against others decisions and plans.
>
> I would also like to take this opportunity to say thankyou to all the court people including security health and safety officer the judge and the lawyers for providing a safe secure environment and for the professional respectful way in which each of them conducted themselves towards both the Jurors on the Jury, and mainly towards the accused.

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[7] We set out the email as recorded in the Judge's minute of 12 October 2022 in which the juror was anonymised. There is no suggestion that the Registry officer who received the email, or the Judge, was in any doubt that the juror was the person who had provided the note on 21 September 2022.

> Thankyou for your time in perusing this correspondence and trust that the presiding judge in this case will receive my correspondence.

[21] In a minute dated 12 October, the Judge recorded that the juror's email of 22 September was forwarded to him on 4 October. After discussing the matter with the Registrar, he arranged for a copy to be provided to Ms Jaquiery and Crown counsel. On 7 October 2022, having obtained instructions from Mr Signal, Ms Jaquiery sought an urgent telephone conference which was convened on 11 October 2022.

[22] In his minute of 12 October 2022, the Judge recorded that Ms Jaquiery had sought guidance as to the appropriate process to address the implications of the juror's communication. She had identified that the Court could appoint counsel to conduct an independent inquiry into the matters that had been raised, and that Mr Signal could seek leave from the Court of Appeal to appeal his conviction prior to sentencing. In the end, the Judge concluded that the best course to follow would be for the issues raised by the juror's further communication to be considered on appeal, noting amongst other things that s 231(2) of the Criminal Procedure Act 2011, which provides that a notice of appeal must be filed within 20 working days after sentence, did not prevent an appeal being filed prior to sentencing.[8] Consequently, if the matters raised in the email were to be pursued, that should be done on appeal to this Court. In accordance with the approach which the Judge foreshadowed, sentencing was adjourned and is now to take place on 2 October 2023.

The appeal

First and second grounds

[23] The first and second grounds of the appeal relate to the safety of the guilty verdicts rendered by the jury. It will be convenient to deal with these grounds together.

[24] The first ground alleges that a miscarriage of justice occurred because of the Judge's omission to poll the jury in the circumstances summarised in the bench note dated 21 September 2022. Mr Harrison KC submitted that the jury should have been polled either: (a) when the jury first returned to announce their verdicts at around

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[8] Citing *Mathers v Police* [2018] NZHC 1408 at [9]; *Gurney v Police* [2017] NZHC 1581; *Sloss v R* [2021] NZHC 2179; and *R v Rata* [2007] NZCA 431 at [23].

10 am on 21 September 2022; or (b) in the alternative, when the jury returned again at around 12 pm to give the guilty verdicts.

[25] As to the events that took place at around 10 am, Mr Harrison submitted that the note from the individual juror clearly conveyed that the proposed verdict was not unanimous, at the very least, it indicated an absence of belief on her part as to key elements of the necessary mental state for some or all of the offences charged. He emphasised the juror's statement reproduced above at [11]: that the juror "wholeheartedly believe[d]" that Jason played a small part and "d[id] not believe that Jasons heart Intention was to harm [the victims]".

[26] Mr Harrison argued that the concurrent receipt of two inconsistent notes created a significant dilemma. One possible response would have been to take the verdicts as proffered and then poll individual jurors on each verdict. The other approach would have been to direct the jury to retire again for further deliberations, to see whether unanimity could be achieved. He contended that a direction that the jury actively resume deliberation was necessary, given the actual or apparent absence of true unanimity evidenced by the individual juror's note.

[27] Consequently, Mr Harrison submitted that the Judge erred by not directing the jury accordingly and simply telling them to retire again, to confirm that they were unanimous on each question and "all agree[d] with the verdict for each charge". Given that the Judge had declined to poll the jury at that stage, the direction he gave was inadequate to resolve the unanimity issue in the circumstances as they then existed.

[28] Mr Harrison relied in this context on the juror's further email of 22 September 2022. This, he said, showed that there was in fact reason to doubt the jury's unanimity at the stage when the Judge declined to poll the jury. That email made a hindsight judgment appropriate given the juror's statements about feeling "pressured by and concerned by another jury member", "manipulated" and "pressured and unable to go against others decisions and plans".

[29] Through reference to Mr Signal's absolute right to a fair trial, Mr Harrison submitted that the crucial question in determining whether a miscarriage had occurred is whether Mr Signal had received a fair trial in the light of all known facts,[9] irrespective of whether the decision was available to the Judge on the circumstances as they existed at that time. On appeal, the appropriate test was whether the train of events, including the failure to poll the jury with its potential for a lack of unanimity to emerge at that point, gave rise to a real risk that the outcome of the trial was affected. That, in turn, required consideration of whether there was a "reasonable possibility another verdict would have been reached."[10]

[30] In the course of his argument, Mr Harrison distinguished this Court's decisions in *Rakena v R* and *R v Papadopoulos (No 2)*.[11] In *Rakena*, the Judge had wrongly "polled" the jury before delivery of their verdict, with the consequence that a lack of unanimity emerged: three members of the jury said at that point they did not at that stage agree with conclusions reached by the other members of the jury.[12] On appeal it was argued that those events should have led the Judge to poll the jury when it returned after further deliberation, but this Court rejected the argument.

[31] In *Papadopoulos (No 2)* Cooke J, writing for the Court, noted that polling of the jury by the judge has not been a practice in New Zealand, but observed that if the judge has reason to doubt unanimity it is within their discretion to take a poll.[13] He went on to state that:[14]

> Such a departure from usual practice should be necessary in rare cases only; the matter must rest very much in the discretion of the Judge, who will be conscious of the atmosphere of the trial. Perhaps one cannot entirely exclude the possibility of an exceptional case where it might be held by an appellate Court that a Judge had wrongly refused a request for a poll; but the present case is clearly not in that category.

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9 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[79] citing *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [36]; *Jago v District Court of New South Wales* (1989) 168 CLR 23 (HCA) at 56–57; and *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

10 Citing *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [47]–[48].

11 *Rakena v R*, above n 5; and *R v Papadopoulos (No* 2), above 6.

12 *Rakena v R*, above n 5, at [18].

13 *R v Papadopoulos (No* 2), above n 6, at 632.

14 At 632–633.

[32] Mr Harrison noted that *Papadopoulos (No 2)* had been decided prior to the enactment of the New Zealand Bill of Rights Act 1990, which affirmed criminal trial rights including the fundamental right to a fair trial.[15] He contended that access to the polling remedy in an appropriate case should arguably not now be constrained by requirements such as the grant of the remedy being only a "rare step" or only available in "an exceptional case".

[33] In sum, Mr Harrison submitted that, in the particular circumstances of this case, the jury should have been polled when sought by Ms Jaquiery on the second occasion: that is, after the foreperson had given the Judge a note asserting that every member of the jury understood the charges and their consequences, and were unanimous.

[34] The second ground of appeal asserts that a miscarriage of justice occurred by reason of the events set out in the email communication by the juror on 22 September 2022. That email had asserted: predetermination and actual or apparent bias on the part of another member of the jury (Juror 9); complained of pressure to return guilty verdicts; and/or the absence of unanimity on the part of the juror who sent the email.

[35] This ground of appeal relied directly on the content of the subsequent email communication from the juror in its entirety. Mr Harrison submitted that the email had three important elements. First, it demonstrated the juror's belief that Mr Signal was not guilty of at least two out of the three charges brought against him. Second, the juror complained that she had been pressured into going along with the jury's guilty verdicts. Third, she complained that Juror 9 made statements indicating bias and pre-determination. Mr Harrison submitted that considered cumulatively, these issues indicated that there had been a miscarriage of justice. The juror's assertions were plausible, given what occurred on the day the verdicts were taken, and they are presently uncontradicted.

[36] Mr Harrison then referred to *Rolleston v R* in which he submitted a majority of the Supreme Court had left open the question of whether participation by one biased

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15 New Zealand Bill of Rights Act 1990, s 25.

juror in the deliberations would be enough to create a miscarriage.[16] By contrast Glazebrook J had concluded the better view was that the bias of one juror (whether actual or apparent) would give rise to a miscarriage of justice.[17] He submitted that the judgment of the House of Lords in *R v Abdroikov* supported Glazebrook J's position, which should be followed.[18]

[37] Mr Harrison submitted that the three assertions made by the individual juror strongly supported the second ground of appeal.

[38] In sum, considered cumulatively, Mr Harrison's first and second grounds of appeal purported to establish that there had been an "irregularity, or occurrence in or in relation to or affecting the trial" so has to give rise to a miscarriage of justice for the purpose of s 232 of the Criminal Procedure Act.

Admissibility of the juror's 22 September email

[39] We first need to address the preliminary issue of whether the Court should consider the email of 22 September. For the respondent, Ms Thomson submitted that we should not take the email into account, arguing first that it was not part of the record of the trial, and in any event is hearsay.[19] She argued further that it impermissibly purported to recount events said to have taken place in the jury room, contrary to s 76 of the Evidence Act 2006, and there was no basis on which the Court should allow that to occur.

[40] Appeals should be based on the trial record, or if events subsequent to the verdict are to be relied on, they should be the subject of fresh evidence which satisfies

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16 *Rolleston v R* [2020] NZSC 113, [2020] 1 NZLR 772 at [48] per Winkelmann CJ, O'Regan, Ellen France and Williams JJ citing *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72; [2010] 1 NZLR 35.

17 At [75]–[77] per Glazebrook J dissenting citing *Saxmere*, above n 16. We note that at [77], n 72, Glazebrook J stated that she was not definitively deciding the point as the Court did not hear argument on it.

18 *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679.

19 Evidence Act 2006, ss 17–18. Counsel asserted that the email was a statement made by a person other than a witness, offered for the truth of its contents. She asserts that the s 18(1)(b) requirements are not met, and consequently the email cannot be relied on for the truth of its contents.

the requirements that it be credible and cogent.[20] There was no attempt to adduce the 22 September email as fresh evidence. Rather, Mr Harrison said the appellant had made a conscious decision not to apply to do so, in reliance on the comprehensive curial record that the Judge had made of what occurred, including the receipt of the post-conviction email.

[41] In support of this approach, Mr Harrison referred to *R v Taka*, in which the appellant sought to rely on affidavits from two jurors concerning the deliberation process, which had been filed without leave.[21] This Court held that the events referred to in the affidavits fell well short of meeting the high threshold needed to establish that the rule of confidentiality about jury deliberations should not apply and that the affidavits should not have been filed without leave.[22] But Mr Harrison relied on the Court's observations about the appropriate approach where there was a reasonable ground for contending that the disclosure of jury deliberations was admissible. Delivering the judgment of the Court, Cooke P said:[23]

> When there is reasonable ground for contending that, despite the general rule, a disclosure of jury deliberations is admissible, the proper course is an agreed memorandum by prosecuting and defending counsel or, failing that, an application to this Court for directions. Members of the jury should not be approached by counsel without the leave of the Court or the agreement of the Crown.

[42] Mr Harrison noted it was clear the email of 22 September had been received by the Judge, who then treated it as a genuine expression of the views of the juror who wrote it. The result was an undisputed "curial record" of events, which should be regarded as at least as authoritative as an agreed memorandum of counsel.

[43] Our ability to consider the 22 September email on appeal depends on whether it is part of the trial record made by the Judge.

[44] Mr Harrison submitted that the email had become part of the Court's formal record. Although originally opposed to the Court referring to it, Ms Thomson accepted

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20 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273; and *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1.
21 *R v Taka* [1992] 2 NZLR 129 (CA).
22 At 131–132.
23 At 131.

in argument that it was part of the formal record provided to the Court by the Registrar under s 323(2) of the Criminal Procedure Act. It had therefore been properly included in the case on appeal. We agree. If the email had not been provided by the Registrar, the Court could have ordered its production as a document connected with the proceeding.[24] We consider it is clear that this Court can refer to the email.

[45] However, Ms Thomson submitted that even if the email could be referred to, that does not mean that it must be accepted as evidence of the truth of the statements in it. She submitted that was clearly the purpose for which the appellant sought to rely on it. While the email could be referred to, that should not be on the basis that its contents were true and correct. She rejected an argument advanced by Mr Harrison that the email was a public document that could be offered in evidence to prove the truth of its contents in accordance with s 138(2) of the Evidence Act.

[46] In addition, she submitted that even if the 22 September email could be referred to, s 76(1) of the Evidence Act, providing that a person must not give evidence about jury deliberations, should still be applied. Section 76(2) provides that subs (1) does not prevent the giving of evidence about matters that do not form part of the deliberations of the jury. To the extent that the 22 September email is evidence, the criticisms of the conduct of Juror 9 would relate to the intrinsic deliberations of the jury, and would not fall within the subs (2) exceptions to s 76(1).[25]

[47] We are satisfied that we can take the 22 September email into account, for the purposes of considering whether it should cause us to make further inquiry about the jury deliberations, but for reasons that we address below we are not persuaded that it demonstrates that we should do so, or that there was a miscarriage of justice as Mr Harrison claimed. We also record our view that the email was not a public document for the purposes of s 138 of the Evidence Act. Plainly, it did not purport to be a public document; nor had it been sealed or certified as envisaged by s 138(1). That means it could not be offered in evidence to prove the truth of its contents.

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24 Criminal Procedure Act 2011, s 335(2)(e).

25 See the discussion in *Rolleston v R*, above n 16, at [28]–[29] per Winkelmann CJ, O'Regan, Ellen France and Williams JJ.

Analysis

[48] We have not been persuaded that the juror's note of 21 September should be construed as an indication that the verdict was not unanimous. We say that for a number of reasons. First, the note begins by recording that the juror had agreed that Mr Signal had "some responsibility" and needed "to face the consequences" of his involvement. We do not see that as a statement that the juror did not believe Mr Signal was guilty of the crimes alleged. Although the communication recorded the juror's belief that Mr Signal had played a "very small part" before it discussed his motives for participating in the assault, we do not see those observations as an indication that the juror did not agree with the guilty verdicts either. The statement that others were the "true Masterminds" is simply the juror's assessment that the culpability of others was greater than that of Mr Signal. The same applies in respect of the observation that Mr Signal should not be "unduly punished", as well as the reference to people doing things "for deeper reasons than just what the Evidence shows".

[49] Overall, we consider that the communication was consistent with the fact the juror accepted that Mr Signal was guilty in accordance with the verdicts then delivered on the jury's behalf, although it was her view that others should bear a greater responsibility for the events that took place. But the note must not be considered outside the context in which it was sent. Importantly:

(a) in the Judge's summing up, and in the question trail, he had thoroughly instructed the jury on the need for unanimity on the elements of the charges which the Crown needed to prove beyond reasonable doubt;

(b) the foreperson of the jury provided a note to the Registrar advising that the jury had reached unanimous verdicts;

(c) the Judge gave further instructions to the jury, specifically referring to the juror's note received on 21 September, stating that "[n]o juror should join a decision against their individual judgment, merely for the sake of agreement or to avoid inconvenience", emphasising that they must be "true to their oath or affirmation". It was at this point that the Judge spoke in particular to the juror who had authored the note

(although the person was of course not identified) pointing out that if that person held a different view, unanimous verdicts would not have been reached. The Judge then asked the jurors to retire again, to confirm unanimity on each question "so that we know that you all agree with the verdict for each charge";

(d) soon after the jury retired, there was a further note confirming unanimity in the terms set out above;

(e) when the jury returned to the courtroom, the Judge reminded the jury about the process through which the verdicts would be taken by the Registrar and also said, if there was any disagreement with what the foreperson said, a juror who disagreed should say so;

(f) after an adjournment at that point because of the issue with VMR, the jury returned, confirmed to the Registrar that the verdicts were unanimous and gave the verdicts; and

(g) there is no suggestion in the record that there was any indication of dissent to the guilty verdicts, as was announced by the foreperson. After the jury had been excused, Ms Jaquiery confirmed that there were no reasons why the Judge should not enter convictions.

[50] This context confirms what can be taken from the actual words used by the juror in their note: she accepted that Mr Signal was guilty, but thought others were more culpable. At no stage did she disagree with the guilty verdicts, despite having ample opportunity to do so, because of the careful way in which the Judge proceeded.

[51] By the time the verdicts were taken, the jury had been properly directed on the requirement for unanimity a number of times, and the jury had asserted that their verdict was unanimous on three occasions. Neither Palmer J nor trial counsel saw any reason to doubt that the jury agreed with the verdicts delivered by the foreperson. We do not consider this is one of those exceptional cases justifying a decision by this Court that the judge had wrongly refused a request for a poll.

[52] It was not until the following day that the juror wrote expressing her concern about the conduct of "Juror 9".

[53] The only basis on which evidence could be given of the conduct of Juror 9 would be if s 76(3) of the Evidence Act applies. Section 76(3) and (4) provide:

> (3) Subsection (1) does not prevent a person from giving evidence about the deliberations of a jury if the Judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.
>
> (4) In determining, under subsection (3), whether to allow evidence to be given in any proceedings, the Judge must weigh—
>
> (a) the public interest in protecting the confidentiality of jury deliberations generally:
>
> (b) the public interest in ensuring that justice is done in those proceedings.

[54] We do not think requirements of s 76(3) would be met in the circumstances of this case. We say that because, even if the allegations about the conduct of Juror 9 in the 22 September email were accepted at face value, they would not constitute a sufficiently compelling reason to allow evidence about deliberations to be given. In essence, the complaint is that on the first day of the trial Juror 9 suggested they agree about Mr Signal's guilt because he associated with a gang, and also complained about the attitude of a juror in another trial in which he had been a juror. This is not persuasive as to the ongoing attitude or influence of the juror. To treat it as significant would require us to discount the effect of the instructions given by the Judge. The conduct referred to falls well short of establishing that the juror did not carry out his role in the deliberations in a manner that complied with the Judge's instructions.

[55] The complaints in the juror's 22 September email about Juror 9's bias appeared to relate to comments that juror made at the outset of the trial, which commenced on 6 September 2022. It was those statements that are said to have made the complaining juror feel manipulated. They give no explanation for why she might have agreed to the verdicts at the time aside from suggesting she felt manipulated. At the same time, she thanked court staff, the Judge and the lawyers "for the professional respectful way in which each of them conducted themselves towards both the Jurors on the jury, and mainly towards the accused". Given this dynamic, it seems to us inherently unlikely

that, if the juror did not agree with the verdicts at the time, she would have felt unable to say so.

[56] The juror's subsequent statement that she believed Mr Signal was innocent of two of the charges brought against him is not enough to lead us to a conclusion that there was a real risk that the outcome of the trial was affected. We say that because the terms of the letter suggest the juror did agree with the guilty verdicts at the time they were given but subsequently regretted she did so.

[57] In *Chai v R*, this Court emphasised the high threshold that must be met before a case meets the test in s 76(3).[26] The Court said:[27]

> [15] In its report on the proposed reform of the law of evidence which led to the enactment of the Evidence Act, the Law Commission explained that the intention of the exception in what became s 76 was to ensure that an overly strict application of the rule did not result in injustice. However, it was envisaged that evidence about jury deliberations should only be permitted in cases of juror impropriety, such as where a juror was unqualified or incapable of serving as a juror or was in breach of his or her duty as a juror. It is clear from the statutory language — "so exceptional" and "sufficiently compelling" — that the exception was intended to be narrow in scope. It has consistently been interpreted by this Court as imposing a high threshold.

[58] We are satisfied this test is not met here. We do not consider there is evidence of misconduct on the juror's part that would justify us directing further inquiry to be made. The circumstances are less significant than the allegations of bullying amongst the jury that arose in *Neale v R*, which were rejected as a ground for making further inquiry about the deliberation process.[28] In that case, after the trial, a jury member wrote complaining that she had not been allowed to state her reasons for doubting the guilt of the defendant. Following this, she had become upset and had felt bullied by one juror in particular. But she "gave in" on the issue, and the jury subsequently found the defendant guilty. She said in her letter that she was "upset, distraught and disturbed by the way the verdict was reached".[29] This Court emphasised the exceptional circumstances needed to amount to a sufficiently compelling reason to allow evidence

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26 *Chai v R* [2020] NZCA 29.
27 Footnotes omitted.
28 *Neale v R* [2010] NZCA 167 at [14].
29 At [6].

to be given about the deliberations, "a very difficult standard to reach".[30] The Court held that the circumstances came "nowhere near the required standard".[31] We reach the same conclusion here.

[59] Consequently s 76(1) applies to prevent consideration of the content of the 22 September email insofar as the jury deliberations are concerned.

[60] For all these reasons we reject the first two grounds of appeal.

Third ground

[61] The third ground of appeal claimed a miscarriage of justice arose because of a misdirection by the Judge with respect to Mr Signal's participation in an organised criminal group by his "presence and conduct" though reference to Mr Signal "hav[ing] actually advanced or plainly appeared to advance the interests or activities of the group". The argument advanced in the appellant's written submissions was that participation in the organised criminal group should involve mens rea requirements distinct from that for party liability under s 66(2) of the Crimes Act 1961.

[62] However, at the hearing of the appeal, Mr Harrison indicated orally that the appellant was prepared to accept that this issue could be dealt with in the manner proposed by the Crown, and he did not pursue the argument there had been a misdirection.

[63] As noted already, in addition to the charge for participation in an organised criminal group, Mr Signal was also charged respectively with wounding one victim and killing the other, as a party to the common purpose of committing serious violence against them and being aware that more than trivial harm was a probable consequence of that common purpose. The facts on which the Crown relied to establish Mr Signal's participation in the shared objective and his membership of the common purpose were identical. Ms Thomson accepted that Mr Signal had been convicted on three charges for one course of conduct. His participation in the organised criminal group and his

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30 At [12].
31 At [13].

sharing of the group's common purpose under s 66(2) of the Crimes Act were established by the same facts, as Ms Thompson encapsulated in the following table:[32]

	Participating in an organised criminal group: s 98A	**Wounding with intent: ss 188(1) and 66(2)**	**Manslaughter: ss 160(2)(a), 171 and 66(2)**
Mr Signal's acts	Mr Signal participated in the group, by actually advancing or plainly appearing to advance the interests or activities of the group, namely to commit acts of serious violence against Messrs Rowe and Wilkinson.	Mr Signal's acts proving that he shared in a common intention to commit an unlawful act, namely acts of serious violence against Mr Rowe.	Mr Signal's acts proving that he shared in a common intention to commit an unlawful act, namely acts of serious violence against Mr Wilkinson.
Mr Signal's mens rea	Mr Signal knew the other group members shared the objective of committing serious violent offences against Messrs Rowe and Wilkinson; knew his presence and conduct was contributing to the occurrence of criminal activity; and knew that the criminal activity was contributing to the shared objective of committing the serious violent offences.	Mr Signal knew that it was a probable consequence of pursuing that common purpose that one of the group members would wound Mr Rowe with an intent to cause grievous bodily harm.	Mr Signal knew that it was a probable consequence of pursuing that common purpose that one of the group members would attack Mr Wilkinson in a manner likely to cause more than trivial harm to him.

[64] While the charges of wounding with intent and manslaughter were necessarily differentiated because they required a wounding and death respectively, Mr Signal's involvement in both was identical. The actus reus for party liability, to form a common purpose with a group, is the same as that for participation in an organised criminal group, to participate in that group's shared objective. Ms Thomson accepted that for all three charges, Mr Signal's conduct was the same, and the mens rea for the s 98A charge was necessarily included in that for the other charges.

[65] Unlike the position in *Mitchell v Police*,[33] the offences here entirely overlapped, and for each of the three charges Mr Signal's conduct was the same.

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32 We have reproduced only the relevant parts of the table.

33 *Mitchell v Police* [2021] NZCA 417; and *Mitchell v Police* [2023] NZSC 104.

In these circumstances, where both the organised criminal group's shared objective and their criminal activity was committing violence against the particular victims affected, the Crown accepts that Mr Signal's culpability is adequately reflected by his conviction on the wounding and manslaughter charges. It suggests the appropriate outcome is to quash the conviction under s 98A of the Crimes Act, and Mr Harrison also invites us to take that course.

[66] We are satisfied we should do so. Section 26(2) of the New Zealand Bill of Rights Act provides that no one who has been convicted of an offence should be tried or punished for it again. Although the circumstances of this case do not directly engage that rule, it can be applied by analogy. As the Supreme Court has recently emphasised, repetitive prosecution for what is substantially the same offence is proscribed by the rule against double jeopardy.[34] Mr Signal has effectively been subjected to criminal sanctions under s 98A of the Crimes Act for the same conduct as which led to his convictions on the other two charges. The fact that all the convictions arose in the same trial is simply a consequence of the procedure adopted, and that does not detract from the point just made. The course that best meets the ends of justice is for the conviction for participation in an organised criminal group to be quashed. We will allow the appeal to that limited extent.

Fourth ground

[67] The fourth ground concerns the manslaughter conviction. Mr Signal claims a miscarriage arose because the Judge misdirected the jury as to the common purpose mental element which the prosecution needed to prove to find Mr Signal guilty as a party to manslaughter. The focus was on question six of the question trail which the Judge gave to the jury, addressed in his summing up in the following terms:

> Question 6 is about whether you are sure Jason Signal knew it was a probable consequence of pursuing that common purpose [of committing acts of violence against Codi Wilkinson] that one of them would attack Codi Wilkinson in a manner likely to cause more than trivial harm to him.

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[34] *Mitchell v Police* (SC), above n 33, at [37] per Winkelmann CJ, O'Regan, Williams and Kós JJ quoting *Green v United States* 355 US 184 (1957) at 187–188.

[68] Mr Harrison noted this Court's decision in *Burke v R* and the majority's assessment that a direction in those terms was legally correct.[35] However, Mr Harrison adopted the reasoning of Mallon J, who had dissented. He did not develop the argument, noting that the issue was now before the Supreme Court, leave having been granted and the decision on the appeal reserved.[36] Mr Harrison suggested in the circumstances that we reserve our decision on this aspect of the appeal pending delivery of the Supreme Court's judgment, a course that Ms Thomson did not oppose.

[69] We agree that is the appropriate course to follow.

Result

[70] The appeal against conviction is allowed in part and the conviction on the charge of participating in an organised criminal group is set aside. We direct the entry of a judgment of acquittal on that charge under s 233(3)(a) of the Criminal Procedure Act.

[71] The ground of appeal against conviction on the manslaughter charge based on jury misdirection is adjourned pending delivery of the Supreme Court's judgment in *Burke v R*, for which leave to appeal has been granted.[37] The parties should file memoranda as to the disposition of this ground of appeal within 10 working days of delivery of the Supreme Court's judgment.

[72] The appeal is otherwise dismissed.

Solicitors:
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35 *Burke v R* [2022] NZCA 279.
36 *Burke v R* [2022] NZSC 124.
37 *Burke v R* (SC), above n 36.