



Supreme Court
New South Wales

Case Name: Commissioner of Police (NSW) v Supple

Medium Neutral Citation: [2020] NSWSC 727

Hearing Date(s): 11 June 2020

Date of Orders: 11 June 2020

Decision Date: 11 June 2020

Jurisdiction: Common Law

Before: Walton J

Decision: The Court makes an order pursuant to s 25(1) of the Summary Offences Act 1988 (NSW) prohibiting the holding of the public assembly identified in the "Notice of Intention to hold a Public Assembly" dated 5 June 2020 and signed by the defendant.

Catchwords: PUBLIC ASSEMBLY – Summary Offences Act 1988 (NSW) – whether an order pursuant to s 25(1) of the Summary Offences Act 1988 (NSW) should be made prohibiting the holding of a public assembly – order made

Legislation Cited: Public Health Act 2010 (NSW)
Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020
Summary Offences Act 1988 (NSW)

Cases Cited: Commissioner of Police (NSW) v Gabriel (2004) 141 A Crim R 566
Commissioner of Police v Bassi [2020] NSWSC 710
NSW Commissioner of Police v Keep Sydney Open Ltd [2017] NSWSC 5
NSW Commissioner of Police v Folkes [2015] NSWSC 1887

Raul Bassi v Commissioner of Police (NSW) [2020]
NSWCA 109

Category: Principal judgment

Parties: Commissioner of Police, New South Wales (Plaintiff)
James Supple on behalf of the Refugee Action
Coalition (Defendant)

Representation: Counsel:
L Gyles SC and M Spartalis (Plaintiff)
E Kerkyasharian (Defendant)

Solicitors:
Makinson d'Apice Lawyers (Plaintiff)
O'Brien Criminal & Civil Solicitors Pty Ltd (Defendant)

File Number(s): 2020/00173388

EX TEMPORE JUDGMENT

- 1 **HIS HONOUR:** By a summons filed this day, the Commissioner of Police (New South Wales Police Force) (“the Commissioner”) sought an order pursuant to s 25 of the *Summary Offences Act 1988* (NSW) (“the Act”) prohibiting the holding of a public assembly identified in a “Notice of Intention to Hold a Public Assembly” dated 5 June 2020 and signed by the defendant, Mr James Supple, who is a member of a community, not-for-profit organisation called the Refugee Action Coalition (“RAC”).
- 2 In the Notice of Intention to Hold a Public Assembly (hereinafter, “the Notice of Intention”), the RAC identified that the purpose of the proposed assembly was to call on the Government to release refugees held in detention, either in detention centres or hotels, especially those transferred from Papua New Guinea and Nauru over the last year.
- 3 By the Notice of Intention, the RAC sought to agitate that goal by means of an assembly and procession on 13 June 2020, calling for the release of the refugees from detention centres. (That assembly and procession shall hereinafter be referred to as “the Public Assembly”).
- 4 Central to the opposition by the Commissioner to that public assembly and the order now sought prohibiting the Public Assembly were two grounds identified

by Assistant Commissioner Michael Willing APM in his affidavit of 11 June 2020. Those grounds were stated thus:

- (1) It would be in contravention of the current *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (“the Public Health Order”) and the consequent current prohibition of public gatherings of more than 10 persons which came into effect on 1 June 2020.
- (2) It would bring about an unacceptable and unnecessary risk of attendees or other members of the public in the vicinity of the Public Assembly being exposed to transmission of the COVID-19 virus.

5 The Commissioner also relied upon the need to maintain public order and that the welfare of police officers attending upon the regulation of the protest would be adversely affected.

6 So described, the application brings to consideration, to employ the language used by the NSW Court of Appeal in *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109 (“*Bassi*”) (at [34]) “powerful competing considerations” in the instant case. There are competing public interests here which are of great importance. On the one hand there is the right of Australian citizens for free speech and peaceful public assembly for the purposes of promulgating a view about significant public issues, such as the ones sought to be ventilated by the RAC, weighed against public health issues arising from the COVID-19 pandemic and the importance of public health measures that have been put in place to minimise the scope for community transmission of a coronavirus which is, by world experience and as described by the Australia Health Protection Principle Committee (“AHPPC”), highly infectious and dangerous.

7 The provisions of s 25 do not of themselves stipulate the factors which must be taken into account in determining an application for an order prohibiting a public assembly. There must be a balancing exercise which at a broad level incorporates a balance between, in this matter, the right of assembly and of expression, rights of great importance in our democracy, with the need for democratic institutions to provide protections for the community in crises such as the present health issue arising out of the pandemic.

8 That broad balancing exercise needs to be undertaken in the light of the particular facts and circumstances, requiring consideration in the context of an application under s 25 of the Act.

9 There is relevant authority shedding some light on this weighing exercise.

10 In *Commissioner of Police (NSW) v Gabriel* (2004) 141 A Crim R 566 (at 567), Hamilton J explained:

The whole purport of [Part 4 of the Summary Offences Act] is not to prohibit public assembly but, certainly in cases where they are a due exercise of the democratic right of free speech, to facilitate them by protecting participants in appropriate circumstances from prosecution for certain offences which might otherwise be regarded as having been committed.

11 In *NSW Commissioner of Police v Keep Sydney Open Ltd* [2017] NSWSC 5 (20 January 2017), Lindsay J held:

All cases on Part 4 of the Summary Offences Act (which comprises sections 22-27) emphasise the high importance of recognition being given to a democratic right of public assembly, a freedom of association and an associated right to freedom of speech, balanced by a due consideration of other factors, such as the need to address any risk of a breach of the peace and to minimise undue interference with the lives of those not engaged in the particular public assembly.

12 The need for a balance to be struck has been long recognised. In *Hirst and Agu v Chief Constable of West Yorkshire* (1987) 85 Cr App R 143, 151 Otton J said:

The courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other.

13 In *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887, Adamson J observed (at [11]):

[11] The word "prohibit" in s 25 of the Act is inapposite since a prohibition order under s 25 does not prohibit the holding of a public assembly at all. Nor does the Act make it an offence to hold or participate in a public assembly or procession that has not been authorised. All the making of a prohibition order does is deprive the participants in the public assembly of the additional protection that is afforded by s 24 if the assembly is held substantially in accordance with the notice: *Commissioner of Police v Rintoul* at [6] per Simpson J; *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 244-245, per Hunt J.

14 Thus, the authorities mandate that the Court weigh up the important competing public interests.

15 Before turning to those complex considerations, it is necessary to say something further regarding the Act and the antecedent steps leading to the present application. The broader statutory context was outlined by the NSW Court of Appeal in *Bassi* at [10]-[12] as follows:

[10] The procedure in New South Wales for the holding of an authorised public assembly is governed by Part 4 of the Summary Offences Act, entitled "Public Assemblies".

[11] For the purposes of that Part, a "public assembly" is defined as meaning "an assembly held in a public place, and includes a procession so held". "Public place" is defined as meaning "a public road, public reserve or other place which the public are entitled to use".

[12] Broadly speaking, Part 4 of the Summary Offences Act creates a regime whereby a proposed public assembly may secure the status of an "authorised public assembly". A person who participates in such an assembly, so long as it is conducted substantially in accordance with the previously notified details, will not be guilty of any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place.

16 This Court only assumes a role in relation to public assemblies in circumstances where:

- (1) in the case of a notice of intention provided more than seven days prior to the proposed assembly, the Commissioner has not notified non-opposition; or
- (2) where the notice of intention was served less than seven days prior to the proposed assembly (*Bassi* at [17(v)]).

17 In the former case, the Commissioner in effect assumes the onus under s 25 of the Act of securing an order prohibiting the assembly whereas, in the latter case, the onus is placed on the organiser to secure court authorisation for the assembly (*Bassi* at [17(vi)]). This matter concerns the former of those two situations.

18 In the present matter, the following relevant events occurred prior to the filing of the summons:

- (1) On 1 June 2020, the Public Health Order commenced.
- (2) On 5 June 2020, the defendant submitted to the NSW Police Force a "Notice of Intention to Hold a Public Assembly" in respect of the Public Assembly. The following information was included in that Notice:
 - (a) The particulars of the Public Assembly, namely, that the Public Assembly will commence at the Town Hall (Sydney Square) in Sydney at 2.00pm on Saturday, 13 June 2020. The defendant advised the NSW Police Force that it was expected that

approximately 150 persons would participate in the Public Assembly.

- (b) It was proposed that the assembly would initially be static, however, at 2.50pm, the assembly would become a mobile procession commencing at Town Hall and travelling south along George Street before turning left into Bathurst Street, then travelling along Bathurst Street and turning left into Pitt Street, then travelling along Pitt Street and turning left into Market Street, then travelling along Market Street and turning left into George Street, then travelling along George Street and returning to Town Hall where it was proposed that the Public Assembly will conclude, and the participants would disperse, at approximately 4.00pm.
 - (c) It was indicated that the following special characteristics associated with the Public Assembly would be useful for the Commissioner to be aware of in regulating the flow of traffic or regulating the Public Assembly, namely, that there will be speakers addressing the assembly at the beginning of the assembly and one speech at the end of the procession.
- (3) On 9 June 2020, the Assistant Commissioner caused to be served on the defendant a “Notice of Invitation to Confer” dated 9 June 2020 pursuant to s 25(2) of the Act. By that notice, the Assistant Commissioner:
- (a) indicated his opposition to the proposed public assembly;
 - (b) invited the defendant to consider withdrawing the Notice of Intention and cancelling the event;
 - (c) invited the defendant to consider re-planning the public assembly to be held at a future time when the health concerns relating to COVID-19 do not apply; and
 - (d) invited the defendant to meet with Chief Inspector Paul Dunstan to confer with respect to the proposed public assembly.
- (4) On 10 June 2020, the defendant, together with Ms Ruby Wann of the RAC, conferred with Chief Inspector Paul Dunstan, the police officer nominated by Assistant Commissioner, and Sergeant Michelle Hallett, at the Rocks Police Station, Sydney in respect of the proposed public assembly (“the Conference”).
- (5) Following that meeting, the Assistant Commissioner was provided with a briefing note by Chief Inspector Paul Dunstan and Sergeant Michelle Hallett in relation to the matters raised during the Conference in respect of the proposed public assembly.
- (6) On 10 June 2020, the Assistant Commissioner caused to be served on the defendant a “Notification of opposition to public assessment following conference”. By that notification, the Assistant Commissioner:

- (a) advised of his opposition to the Public Assembly. The basis of the opposition was expressed in that notification as follows:

I hereby advise you that I oppose the Public Assembly. The basis of this opposition includes health and safety concerns arising out of the ongoing COVID-19 virus pandemic, and the effect of the current *Public Health (COVID-19 Restrictions on Gatherings and Movement) Order (No 3) 2020*, which prohibits public gatherings of more than 10 people.

- (b) the Assistant Commissioner also put the defendant on notice that he intended to apply to this Court under s 25 of the Act for an order prohibiting the holding of the Public Assembly.

- 19 In the affidavit of Mr Supple he identified some additional measures that the RAC proposed to take with respect to the mitigation of COVID-19 risks which were expressed as follows:

24. RAC has a list of email addresses of people and supporters who have attended refugee rights protests. RAC has sent two separate emails to the supporters of the cause on this list with information on the rally, however, also importantly recommending that anyone who seeks to attend the rally take extra precautions with regard to coronavirus measures and to observe social distancing.

25. These precautions raised by RAC were for the public to not attend the rally if they have been feeling unwell, to wear a mask and if they did not have one RAC would also supply its own masks, and also to practice social distancing accompanied by about 10 marshals to ensure these measures are followed.

26. These marshals will be wearing fluorescent vests and instructed to ensure that at all times people are at least 1.5 metres apart.

- 20 Assistant Commissioner Willing gave evidence with respect to those matters as follows:

- (1) That at the Black Lives Matter march (on Saturday, 6 June 2020) a large proportion of persons attending did not wear masks.
- (2) That the “vast majority” of persons attending did not abide by social distancing.

- 21 Mr Supple accepted in cross-examination that he could not assure that persons would not attend the protest unwell but emphasised that those persons attending were likely to be socially responsible and that there was otherwise a general loosening of restrictions.

- 22 Whilst it may be accepted that persons attending the protest would, in good conscience, seek to abide by social distancing measures and other measures designed to restrict the spread of COVID-19, the evidence revealed that the capacity provide fully effective application of the measures recommended by

health authorities dissipates with the circumstances applying in large gatherings of people around a subject that naturally and understandably invokes emotional responses. This is the case, notwithstanding, prior arrangements for regulation, the existence of marshals and a strong police presence as the Assistant Commissioner indicated in his evidence in relation to last Saturday's march.

- 23 I accept that the force of that conclusion must be mitigated by the significantly lesser number of persons expected to attend this protest but the risks nonetheless remain. There are also particular difficulties associated with tracing arising out of public assemblies, notwithstanding some measures taken in that respect by the RAC as identified in Mr Supple's evidence.
- 24 That brings attention to the evidentiary issue as to the number of persons that were likely to attend upon the protest.
- 25 Mr Supple gave evidence that he initially estimated that it would be an assembly of approximately 150 people. Following RAC's announcement of the public assembly on Facebook on or around 1 June 2020, 180 persons indicated that they would be attending the protest. During examination, Mr Supple gave evidence that the numbers of persons attending on Facebook currently stands at about 200 and that he doesn't expect many more.
- 26 It would appear the best estimates for the attendance upon the public assembly are around 200 people. However, I accept the submissions of the plaintiff that that estimate must be treated with some caution because of the uncertainty attaching to the attendance of the public assembly when it is accompanied by such a high level of publicity and potentially higher community engagement.
- 27 Assistant Commissioner Willing's evidence was, based on his experience, a ratio of approximately 3-4 police officers per 10 people would be required to attempt to enforce the 10 person gathering rule with respect to the public assembly under the public order. Further, the Assistant Commissioner indicated that specialised police officers would be required to maintain social distancing.

- 28 In this matter the parties did not agitate any threshold issue as to the form of the notice or its service pursuant to s 23(1) or s 25(3). Furthermore, it is clear and uncontested that the Commissioner communicated to the defendant that he opposed the holding of the public assembly referred to in the Notice of Intention.
- 29 With that consideration in mind I further turn to considerations bearing upon the balancing exercise I have earlier described.
- 30 The first consideration bearing upon public health risks is the Public Health Order. A submission was advanced by the defendant that the Public Health Order should not be viewed as a reflection of the Government's concern for public health *per se* because the Public Health Order was made by the Executive, namely, Mr Brad Hazzard MP, Minister for Health and Medical Research, under the *Public Health Act 2010* (NSW) and because it was an admixture of health and political considerations as exemplified by the various categories of essential gatherings specified in Sch 2 of the Public Health Order (being exemption to the operation of the order).
- 31 I do not consider that either the terms of the Public Health Order itself or the evidence before the Court, permits of such a conclusion. I accept, rather, the observation of Fagan J in *Commissioner of Police v Bassi* [2020] NSWSC 710 at [27], where his Honour referred to that order as reflecting "the professional view of those who take responsibility for the Government adopting appropriate measures in the interests of community health".
- 32 There seems to be little debate that the provisions of cl 10(1) of the Public Health Order apply in the present circumstances. That provision provides that a person must not participate in a public gathering of more than 10 persons. A "public gathering" is defined in cl 10(4) to mean "a meeting or assembly of persons for a common purpose, including an organised or planned event in a public place (whether ticketed or not)". In my view, the proper construction of the provision is that it applies to the public assembly set out in the Notice of Intention.
- 33 However, I accept the submission advanced for the defendant that that conclusion cannot be determinative of the application because of the operation

of s 24 of the Act. It is merely a relevant factor. The defendant submitted that the Court should take into consideration the prospect of smaller sequential gatherings improving the prospect of social distancing and compliance with the Public Health Order. I have taken into account that consideration but it is of little weight given the evidence of Assistant Commissioner Willing, to which I have earlier referred, regarding the limitations on social distancing measures in the context of a public protest. That conclusion is not diminished by the prospect of the order being varied to 20 persons. Furthermore, any such separation of persons into smaller groups does not effect, as submitted by the plaintiff, the operation of cl 10(1), because they are assembled for a common purpose.

34 The next relevant consideration is the evidence of Dr Kerry Chant. The part of Dr Chant's evidence which attracted the closest attention was as follows:

16. While I cannot quantify the risk of community transmission materialising at the event, I do regard the risk as low given the expected attendance of about 200 people and that NSW has not had a recently acquired case of community infection notified to the Ministry of Health since the 26[th] May 2020 in the context of reasonably high testing rates.

35 Dr Chant is eminently qualified to express a conclusion on the apparent risks operating at the present time in her role as the Chief Health Officer and Deputy Secretary, Population and Public Health, NSW Health. Her evidence as to the nature of the risk should, therefore, be accepted. However, her evidence needs to be considered in its full context. She also stated:

14. In my opinion should a person attend the event who is infectious with COVID-19 there is a risk of transmission to others who are attending the event. This risk can be mitigated by requesting people not to attend if unwell, ensuring social distancing, hand hygiene and the wearing of masks in settings where social distancing cannot be practiced.

15. In NSW, we have had the most cases in Australia because Sydney is an international destination. Whilst community transmission is low, we recognise that as we ease restrictions, there is a risk of an increase in cases as we cannot rule out undiagnosed cases in the community at this time. As a result, caution is required as we ease restrictions.

36 Two considerations arise in that respect.

37 First, as to the observations made in para 14 of Dr Chant's evidence needs to be seen in the light of the practical limitations of persons complying with social distancing measures in a public assembly in the manner I have earlier

discussed. Secondly, her evidence discusses the risk of transmission if an infected person attends an assembly. Thus, she cautions that, notwithstanding, the low community transmission, there is a risk of an increase in cases associated with undiagnosed persons and the need for caution as restrictions are eased.

- 38 In this respect, mention must be made of the recent statement by AHPPC published on 5 June 2020. That Committee, of which Dr Chant is a member, opined that “the virus is still present in the community in low numbers and there remains an ongoing threat of importation of new cases”. The Committee described the low number of cases as permitting a progressive relaxation of mass gatherings but stated that it was “extremely concerned about proposed large gatherings for protests over the coming weekend and beyond”. No doubt that statement paid particular attention to the very substantial gathering last weekend but the statement does not otherwise delineate what was intended by large gatherings. What is important is the statement the AHPPC that “Australians are reminded that in our recent past a single person infected more than 35 others. This virus is very, very infectious. It will be with us in one way or another for many months to come... as such, it is advised that Australians follow the health advice and regulations about public gatherings, and adhere to restrictions on gathering sizes in their state...”.
- 39 It appears to me that the combination of Dr Chant’s evidence and the AHPPC statement is to the effect that, whilst the risk of COVID-19 infections has been reduced to low levels, the reduction in restrictions needs to be moderate and gradual because of the infectious nature of the virus and the grave consequences of further transmission.
- 40 There is one further consideration relevant to the health risk, which is sometimes overlooked, namely, that the risks associated with public assemblies of this kind, invariably involve significant risks for frontline workers such as police.
- 41 In my view, the balancing of those public health risks, even in their now mitigated form, as a result of the success of Governmental public health

measures, outweighs, in the balance, the rights to public assembly and freedom of speech in the present context.

- 42 Justice Fagan was criticised for referring to rights deferred rather than rights extinguished, in that respect, but it seems to me that the true conclusion is that the balance of these considerations will necessarily shift over time, having regard to the changing public health risks and will be affected as well by the nature and circumstances of any public assembly when viewed against public health restrictions and other factors bearing upon the risks associated with a particular public assembly.
- 43 I therefore make an order, pursuant to s 25(1) of the Act, prohibiting the holding of the public assembly identified in the "Notice of Intention to hold a Public Assembly" dated 5 June 2020 and signed by the defendant.

Amendments

29 October 2020 - Typographical errors corrected.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.