

Black Lives Matter rally wins last minute appeal

By Benjamin Goodyear reports on *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109

Introduction

Justice delayed is justice denied. But no such criticism could be levelled at the spectacular legal proceedings leading up to the Black Lives Matter rally held in Sydney on 6 June 2020. With the first instance hearing and appeal all heard within 24 hours, the efficiency of the proceedings culminating in *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109 (*Bassi v Police*) was noteworthy.

Bassi v Police had the hallmarks of a showdown for the ages. In the one corner, the implied constitutional freedom of political communication. In the other, the need to enforce public health measures deployed in response to the COVID-19 pandemic. Ultimately, however, the case was resolved via statutory construction.

The context

Mr Raul Bassi (Mr Bassi) organised an assembly in response to the death of Mr George Floyd in Minneapolis, USA; in furtherance of the Black Lives Matter cause in general; and in memory of an Indigenous Australian, Mr David Dungay: at [5].

The Court described the context of the assembly as follows:

‘Mr Floyd’s death and the circumstances in which it occurred have sparked public protests throughout the United States and indeed throughout the world. These protests have been occurring, however, at a time when the world including Australia, has been dealing with the COVID-19 pandemic. One of the public health measures deployed in response to the pandemic has been “social distancing” with related restrictions being placed upon public gatherings. These measures have been designed to minimise the scope for community transmission of the coronavirus.’

In organising that assembly, Mr Bassi had regard to Part 4 the *Summary Offences Act 1988* (NSW) (Act), which creates a regime whereby a proposed public assembly can obtain the status of an ‘authorised public assembly’: at [12]. Participants in such an



assembly enjoy immunity from offences to which they might otherwise be susceptible, such as offences relating to participation in an unlawful public assembly, and offences concerning the obstruction of persons or vehicles in a public place: at [12].

A person seeking to organise a public assembly can use a form prescribed by the *Summary Offences Regulation 2015* (NSW) addressed to the Commissioner of Police (Commissioner), which gives notice of the intention to assemble and sets out particulars of the proposed event (Form 1): at [15]. If a Form 1 is provided to the Commissioner *at least* seven days prior to the event and the Commissioner has not notified non-opposition to it, then (if the Commissioner seeks to block the assembly) the Commissioner assumes the onus of securing an order prohibiting the event. If, on the other hand, a Form 1 is given *less* than seven days prior to the event, then the organiser of the assembly carries the onus to secure court authorisation for it: at [17].

The sequence of events

On 29 May 2020, Mr Bassi emailed a Form 1 to the Commissioner giving notice that, at 3:00pm on 6 June 2020, approximately 50 persons intended to assemble in Chippendale (Notice of Intention): at [19]. Leading up to the assembly, however, public support for the cause intensified, and Mr Bassi contacted the Chief Inspector of Police to inform him that a bigger location was required: at [22].

On 4 June 2020, the Chief Inspector met Mr Bassi to discuss the proposed assembly (Meeting). A certain Sergeant who, it was inferred, also participated in the Meeting, prepared an amended Form 1 to reflect the new particulars of the proposed assembly and sent it to Mr Bassi: at [24]-[26]. The Sergeant’s covering email (Sergeant’s Email) stated:

I have added that the event is a mobile procession as well as a vigil, you will start at Town Hall with about 5,000 people at 3.00pm.

...

Could you please confirm that you agree with this amended Form 1 and please bring a signed copy on Saturday 6 June to hand to [the Chief Inspector].

The Commissioner initiates proceedings

Subsequent to the Sergeant’s Email, the Commissioner’s view as to the advisability of the assembly changed: at [44]. On the afternoon of 5 June 2020, the Commissioner commenced proceedings in the Common Law Division of the Supreme Court of New South Wales seeking an order prohibiting the holding of the rally: at [29]. At the conclusion of an urgent hearing held that evening, the primary judge took the view that, by reason of the radical change in the number of proposed attendees (from 50 to 5000 attendees) as well as the change of venue, there was no notice given on 29 May 2020 for the assembly ultimately proposed: at [31]. The primary judge took the view that notice of the rally, in the form in which it was to occur, was only given on 4 June 2020 following the Meeting that day: at [31].

The appeal

Shortly before noon the next day, Mr Bassi lodged an appeal. The Court of Appeal comprising Bathurst CJ, Bell P and Leeming JA assembled and, at 2.45pm, allowed the appeal and declared the event an ‘authorised public assembly’: at [1]-[2]. Although noting (at [7]) that ‘[c]ompeting public interests of great importance were thus potentially engaged’, and while expressing some



Rocco Fazzari

sympathy with the view taken by the primary judge, the Court ultimately held (at [38]) that:

the better view of the matter is that Mr Bassi gave a timely notice, that is to say, a notice of intention to hold a public assembly more than seven days prior to it taking place, and that, although the particulars of this assembly changed

very significantly, that did not mean that the original Notice of Intention had ceased to have legal efficacy or that the modified notice issued on 4 June 2020 was a new notice which, because only issued within seven days of the proposed assembly, required Mr Bassi to obtain authorisation ...

The final step in the court's reasoning was the finding that the Sergeant's Email 'amounted to a communication of non-opposition' by the Commissioner within the meaning of the Act, as that was the 'natural meaning of the email': at [42].

Some 15 minutes later, the rally commenced. **BN**