

AUSTRALIA / JUDGMENT

Police v Kumar [2024] NSWLC 9

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Local Court New South Wales

Medium Neutral Citation: Police v Kumar [2024] NSWLC 9 Hearing dates: 12 December 2024 Date of orders: 13 December 2024 Decision date: 13 December 2024 Jurisdiction: Criminal Before: Deputy Chief Magistrate Tsavdaridis Decision: (1) I extend the time within which the Prosecution may file a charge certificate to 17 December 2024.

- (2) For the purposes of further case management, the matter is adjourned for reply and charge certification to 17 December 2024.
- (3) Bail is to continue.
- (4) The defendant is excused if legally represented. See also Notation after paragraph 37
Catchwords: CRIMINAL LAW - Charge certification - EAGP Scheme - Prosecution application to extend time within which to file charge certificate - Defence application to discharge defendant - 'in the interests of justice' - 'exceptional circumstances' - 'special circumstances'
Legislation Cited: Crimes Act 1900 (NSW), s 61I Criminal Procedure Act 1986 (NSW), ss 8(2), 66(2)(a), 67, 67(2), 67(3), 67(3)(b), 67(4), 68, 68(2)(b) Director of Public Prosecutions Act 1986 (NSW), s 7(2)(c) Interpretation Act 1987 (NSW), s 34 Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW) Cases Cited: Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41 Elwood v Director of Public Prosecutions [2023] NSWSC 772 Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55; 250 CLR 503 Harrison v Melhem (2008) 72 NSWLR 380; [2008] NSWCA 67 Herron v Attorney-General for New South Wales (1987) 8 NSWLR 601 Issa v The Queen [2017] NSWCCA 188 Kelly v Motor Accidents Authority (NSW) [2006] NSWSC 1444; (2006) 46 MVR 553 Zahed v Director of Public Prosecutions (NSW) [2023] NSWSC 368 Texts Cited: New South Wales, Parliamentary Debates, Legislative Assembly, 11 October 2017 Category: Procedural rulings Parties: NSW Police (Prosecution) Kamal Kumar (Defendant) Representation: Solicitors: Ms C Chapman, Sgt (Police Prosecutor) Mr Z Khatiz (Solicitor for Defendant) File Number(s): 2024/214468 (Charge No: H81472149)

EX TEMPORE JUDGMENT - REVISED

Overview

1. In these proceedings, the Prosecution makes an application to extend the time within which to file a charge certificate pursuant to s 67(3) of the Criminal Procedure Act 1986 (NSW).
2. The application is opposed by the Defence.
3. The defendant is charged with one count of sexual intercourse without consent (a strictly indictable charge), contrary to s 61I of the Crimes Act 1900 (NSW).
4. The events the subject of these proceedings are said to have taken place on or about 12 June 2024. The charge was laid on 13 June 2024, and the mention on 12 December 2024 represents the 6-month mark since the laying of the Court Attendance Notice.
5. The matter has come before the Court on the following occasions: -
 1. 13 June 2024.
 2. 8 August 2024.
 3. September 2024.
 4. 3 October 2024.
 5. 17 October 2024.
 6. 14 November 2024.
 7. 26 November 2024.
 8. 12 December 2024.
 9. 13 December 2024.
1. On each occasion, the matter was mentioned as part of the Early Appropriate Guilty Plea (EAGP) Scheme, with a view to case managing the proceedings on their path to a trial on indictment in the District Court of NSW.
2. The EAGP Scheme came into effect in 2018, through amendments to the Criminal Procedure Act 1986 (NSW) by the Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW), the reforms of which were intended to reduce delays by improving productivity and ensuring that cases were managed effectively and efficiently. At a basic level, the trajectory of an EAGP matter in this jurisdiction involves brief service, charge certification, case conferencing and committal. The decision which the Court is called upon to make in this application is concerned with the second step, charge certification.
3. At the initial stage of this phase, a NSW Police Prosecutor ordinarily appears, before which the Office of the Director of Public Prosecutions (ODPP) takes carriage of the matter, evaluating the evidence contained in the brief of evidence and confirming that the charge laid is supported by the evidence garnered. This culminates in the charge being certified and a charge certificate being filed of the charge(s) upon which the ODPP intends to proceed.

4. On the first six mentions, the matter was adjourned with brief service orders made each time. On each occasion the matter returned to Court, the brief was not compliant, although partial components of the brief had been served periodically.
5. On 12 December 2024, the Prosecution advised that the brief was compliant and sought to adjourn the proceedings to 6 February 2025 for charge certification.

Relevant legislation

1. Section 67 of the Criminal Procedure Act 1986 (NSW), provides as follows: - 67 Charge certificate must be filed
 - (1) A charge certificate must be filed by the prosecutor in the registry of the Local Court, and served or caused to be served on the accused person, not later than the day set by order by the Magistrate.
 - (2) The day must -
 - (a) be set after the service of the brief of evidence in the committal proceedings, and
 - (b) be not later than 6 months after the first return date for a court attendance notice in the committal proceedings. Note. The first court appearance required by the court attendance notice may be before a registrar exercising certain functions of the court pursuant to rules of the court, or the functions of an authorised justice under the Bail Act 2013.
 - (3) However, the Magistrate may set a day for the filing of a charge certificate that is later than 6 months after the first return date for a court attendance notice in the committal proceedings -
 - (a) with the consent of the accused person, or
 - (b) if it is in the interests of justice to do so.
 - (4) In determining whether or not it is in the interests of justice to set a later day, the Magistrate is to consider the complexity of the matters the subject of the proceedings. This subsection does not limit the matters that may be considered by the Magistrate.
 - (5) If the prosecutor determines that an offence other than an offence specified in the charge certificate filed by the prosecutor is to be the subject of the proceedings against the accused person, the prosecutor must file in the registry of the Local Court, and serve or cause to be served on the accused person, an amended charge certificate before the accused person is committed for trial or sentence.
1. Section 68 of the Criminal Procedure Act 1986 (NSW), provides as follows: - 68 Failure to file charge certificate
 - (1) This section applies if the prosecutor fails to file and serve, or cause to be served, a charge certificate before—

- (a) the day that is 6 months after the first return date for a court attendance notice in the committal proceedings, or
- (b) any later day set by the Magistrate for doing those things.
- (2) The Magistrate must—
 - (a) discharge the accused person as to any offence the subject of the committal proceedings, or
 - (b) if the Magistrate thinks it appropriate in the circumstances of the case, adjourn the committal proceedings to a specified time and place.
- (3) In determining what action to take, the Magistrate is to consider the interests of justice.
- (4) If a warrant has been issued for the arrest of the accused person as a result of a failure to appear at the committal proceedings—
 - (a) a Magistrate is not required to take any action under this section until the accused person is brought before the Magistrate, and
 - (b) the period of 6 months specified in subsection (1) (a) is taken to be extended by the number of days between the issue of the warrant and the day the accused person is so brought before the Magistrate. Note. The Magistrate may extend the time for filing a charge certificate at any time under section 67. [My emphasis added]
- 1. As indicated earlier, the Prosecution is at the door of the 6-month deadline contemplated by ss 67(2) and (3) of the Criminal Procedure Act 1986 (NSW).
- 2. Given the Prosecution's failure to file a charge certificate within the time prescribed by s 67 of the Act, the Defence seeks that the Court discharge the defendant pursuant to s 68 of the Act.

Prosecution submissions

- 1. The Prosecution contended that the time within which to file the charge certificate ought be extended on the following bases: -
 - 1. This was the first application ever made for an extension. I understood this to mean that, unlike other matters where applications of this kind are routinely made and, indeed, in cases well over the 6-month statutory period and in cases where multiple requests for extensions have been sought, this was the first occasion on which the Prosecution sought the Court's indulgence.
 - 2. The adjournment sought was to 6 February 2025, although this submission was revised, after the matter had been stood in a busy DPP List at the Downing Centre Local Court two further times, such that the extension sought was to 19 December 2024 (7 days, and the last day of term) and again revised to 17 December 2024 (5 days).

3. This being a sexual intercourse without consent charge, the forensic evidence was only made available to the ODPP on 12 November 2024.
4. The Officer-in-Charge had indicated that the defendant's solicitors would only accept service of brief service material via registered post.
5. All brief service material is now available and the brief is compliant.
6. The 6-month period within which the charge certificate was to be filed expires today.

Defence submissions

1. The Defence contended that the application to extend should be refused and that the defendant ought be discharged on the following bases: -
 1. Neither the defendant's solicitor (as principal of the firm), nor his office, has ever indicated to the Officer-in-Charge that the Defence would only accept service of brief service material via registered post. Indeed, this has never been a practice adopted by their office. The defendant's solicitor did, however, indicate to the Officer-in-Charge that the brief could be served upon them by post.
 2. The Attorney General's second reading speech in support of the Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017, when the EAGP reforms were being debated, highlighted that: - "There is also a six-month statutory time limit on filing the charge certificate, which should only be exceeded in exceptional and complex cases where there are legitimate operational reasons for the brief of evidence taking a longer time to prepare. If the prosecutor fails to file and serve the charge certificate by the six-month time limit, or a later day set by a magistrate, a magistrate may discharge the accused person under proposed section 68. These provisions ensure that the prosecutor moves swiftly to certify the charges and they provide certainty so that case conferencing can commence." [New South Wales, Parliamentary Debates, Legislative Assembly, 11 October 2017, 9 (Mark Speakman SC, Attorney General)]
1. The brief of evidence was merely 150 pages in length, involving a single charge of sexual intercourse without consent, as opposed to, for example, the circumstances with which Hamill J grappled in *Zahed v Director of Public Prosecutions (NSW)* [2023] NSWSC 368 (at [53] - [57]), and in which his Honour concluded that the nature of the charges (murder and aggravated kidnapping) and the size of the brief of evidence (17 lever-arch folders), taken together, justified a finding that it was in the interests of justice to extend the charge certification period beyond 6 months.
2. The purpose of the legislation was to see matters dealt with expeditiously.
3. There was nothing outlined in the Prosecution's submissions which demonstrated that, based on the Attorney General's second reading speech, this was an 'exceptional and complex case'.

4. Albeit not binding, in an unrelated decision by a Local Court magistrate on 4 July 2024, the transcript of which was tendered in support of the Defence submissions in these proceedings, the Court, citing the second reading speech and the decision in Zahed, refused the Prosecution's application for an extension of the time within which to file a charge certificate and discharged the defendant pursuant to s 68(2)(b) of the Criminal Procedure Act 1986 (NSW).

Consideration

The test to be applied

1. The starting point for the evaluative exercise the Court is to undertake must be the words of the relevant provision, that is, whether it is 'in the interests of justice' to extend the time within which to file the charge certificate to a date later than 6 months after the first return date for the Court Attendance Notice: Criminal Procedure Act 1986 (NSW), s 67(3)(b). The Court is (in a mandatory sense) to consider the complexity of the matters the subject of the proceedings, although the Court is not constrained by any other matter it deems appropriate to take into account when making its determination: Criminal Procedure Act 1986 (NSW), s 67(4), to which I referred earlier in these reasons.
2. In *Kelly v Motor Accidents Authority (NSW)* [2006] NSWSC 1444; (2006) 46 MVR 553, Rothman J held (at [45]) that: - "The word "complex" is, in this context, an ordinary English word and should be given its ordinary meaning. While it may have, once, strictly referred to something which consists of or comprehends various interconnected parts (and is used in a technical sense in psychology and chemistry with meanings derived from that origin) it is now more often used to mean "complicated, involved, intricate, not easily analysed or disentangled". That is one of the definitions given to it by the Oxford Dictionary and is a meaning consistent with that given to it by the Macquarie Dictionary. The Macquarie Dictionary defines "complex" as:
 1. Composed of interconnected parts; compound; composite.
 2. Characterised by an involved combination of parts.
 3. Complicated; intricate. The same dictionary defines "complicated" as:
 1. Composed of interconnected parts; not simple; complex.
 2. Consisting of many parts not easily separable; difficult to analyse, understand, explain etc."
1. As Rothman J observed at [74], the determination of a matter as being complex is an evaluative determination. In the present context, the reference to the complexity of a matter in the relevant provision may refer just as much to legal complexity as it may to factual complexity.

2. There are very few reported decisions in relation to the provision the subject of this application. I hesitate to add that those decisions which I have managed to find have a common thread, namely, repeated applications for extensions of the time within which to certify a charge. Indeed, in *Elwood v Director of Public Prosecutions (NSW)* [2023] NSWSC 772, the Magistrate's frustrations saw his Honour fall into error in circumstances where, the Court, after having granted applications under s 67(3)(b) of the Criminal Procedure Act 1986 (NSW), extending the time for filing a charge certificate on a number of occasions previously, over objection by the Defence, committed the defendant for trial to the District Court. On appeal, Davies J set aside the decision of the Magistrate committing the defendant for trial and remitted the proceedings to the Local Court.
3. In *Zahed*, Hamill J (at [50]) observed: - "I would commence by observing that the six-month time limit established by s 67(2)(b) of the CP Act should not be taken lightly. Six months will be, in the vast majority of cases, ample time for the prosecutor to certify, for the purpose of s 66(2)(a), that the available evidence "is capable of establishing each element of the offences". There should be no expectation that a magistrate will exercise the power to extend the date for filing a charge certificate pursuant s 67(3). While the "interests of justice" encompass a wide variety of factors, Magistrates will expect the Prosecutor to provide good and cogent reasons why charge certification cannot occur within that specified statutory time frame. This is particularly so where, as here, an accused person is in custody pending the resolution of the criminal proceedings or in cases where an accused person is subject to stringent bail conditions."
1. The phrase 'in the interests of justice' has been considered in countless decisions across the judicial hierarchy of both State and Federal courts.
2. In *Herron v Attorney-General for New South Wales* (1987) 8 NSWLR 601, Kirby P (at 613) described the phrase as follows: - "Those words 'in the interests of justice' are plainly words of the widest possible reference. Indeed, there could scarcely be a wider judicial remit. They enliven a discretionary judgment ..."
1. The evaluative task, therefore, is to be approached with this borne in mind, such that the legislative intention was that the presiding magistrate be given the full suite of judicial discretion, unconstrained by limiting phrases such as 'exceptional circumstances' or 'special circumstances' or matters which might involve something unusual, out of the ordinary, rare or outside reasonable anticipation or expectation.
2. This is not to be understated because the Defence submissions, in part, reliant on the second reading speech and, in part, reliant on the decision of Hamill J in *Zahed* (at [50]), to the effect that the Prosecution must surmount a relatively high hurdle to demonstrate that this is an exceptional or complex case and that there are no good or cogent reasons why charge certification could not have occurred within the 6-month period, fail to give sufficient primacy to the breadth of the words in the statute.

3. While s 34 of the Interpretation Act 1987 (NSW) permits the use of extrinsic material to (a) confirm the ordinary meaning of the relevant provision, or (b) determine the meaning of an ambiguous or obscure provision or a provision whose ordinary meaning would lead to manifestly absurd or unreasonable results, the guiding principle with respect to statutory interpretation remains that outlined in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55, in which the High Court (at [39]) held that: - "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text': *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."
1. True it is that, in his second reading speech, the Attorney General stated that the 6-month statutory time limit 'should only be exceeded in exceptional and complex cases where there are legitimate operational reasons for the brief of evidence taking a longer time to prepare'. This is, however, by no means determinative of the 'interests of justice' test, nor does it operate as a constraint on the discretion of the Court. The relevant statutory interpretation exercise involves an assessment not of what Parliament subjectively intended, but of what this provision objectively means. There have been examples where courts have not followed ministerial statements on the basis that they are legally erroneous: see *Issa v The Queen* [2017] NSWCCA 188, [69] - [72]; *Harrison v Melhem* (2008) 72 NSWLR 380; [2008] NSWCA 67, [12].
2. In my view, while applications to extend the time within which to file a charge certificate, should, and ordinarily are, accompanied by good and cogent reasons, creating a quasi-threshold militating in favour of an extension only in 'exceptional and complex cases' raises the second reading speech to an exalted state, above the ordinary text of the relevant statutory provision, which it does not possess. Further, the words 'exceptional and complex cases' in the second reading speech are followed by the words 'where there are legitimate operational reasons for the brief of evidence taking a longer time to prepare.'

Whether an extension of time is in the interests of justice

1. The charge of sexual intercourse without consent, contrary to s 61I of the Crimes Act 1900 (NSW), carries a maximum penalty of 14 years' imprisonment and has a standard non-parole period of 7 years. It is, undoubtedly, a prevalent and serious charge within the criminal calendar of indictable offences dealt with in this State.
2. Investigations involve the gathering of an array of evidence. Invariably, this extends outside the parameters of witness statements, clothing, CCTV footage, digital data and other immediately and readily available tangible items. It includes sensitive (and often 'time-

sensitive') forensic evidence, such as DNA, semen, blood and skin cells, which requires scientific analysis by specialised external competence in an environment of quality control, validation procedures, and chain of custody controls, to maintain the integrity of the evidence and to ensure the accuracy and reliability of results which are put into an admissible form in readiness for trial. Regrettably, resource constraints and backlogs often cause delays which can, at times, prejudice a defendant, particularly one being held on remand, bail refused. The defendant in the present matter, however, has been on bail since 8 August 2024, and is in the community.

3. A cursory perusal of the Facts Sheet in the present matter reveals that the Prosecution allegation is one of 'stealthing', in which it will apparently be asserted that the defendant, during consensual sexual intercourse with a sex worker, intentionally removed or tampered with the condom, without consent, when the only penile-vaginal intercourse consented to was condom-protected sex. The defendant is alleged to have ejaculated inside the complainant's vagina, thereby exposing the complainant to the risk of sexually transmitted infections, unintended pregnancy, physical harm, and psychological and emotional trauma.
4. As a result, there is an inherent complexity in the evidence the subject of the proceedings and in respect of which there will be a live triable issue.
5. On the one hand, the Court is cognisant of the defendant's right to the brief of evidence and a trial without unreasonable delay. On the other hand, objectively viewed, the allegation is serious and one in which there is a significant public interest in the determination by way of a hearing on the merits, especially where an order of the kind sought by the Defence will bring the proceedings to an abrupt end. There is no doubt that there will be cases where a discharge is warranted, but such an order, against the backdrop of the current legislative framework, and the facts of this particular matter, should be exercised with circumspection.
6. In the present case, the post-analysis forensic evidence was only made available to the ODPP on 12 November 2024. It is presumed that the forensic evidence took a little longer than one might have hoped. By 12 December 2024, when the matter came before me and the Prosecution's application to extend, and the Defence's concomitant application to discharge, were pressed, the case had approached the 6-month deadline and the Christmas and New Year frenetic period during which courts and offices ordinarily shut down and leave arrangements for prosecutors (and senior advocates tasked with certifying charges) and defence lawyers typically take some recreational leave.
7. This, together with the Prosecution's prompt application; the revised time within which the learned prosecutor indicated that the charge may now be certified, demonstrating a willingness to address the issue promptly, within 5 days past the 6-month deadline (in contrast with the almost 9-month gestation period in the example provided by the Defence via the transcript tendered of an unrelated decision by a Local Court Magistrate on 4 July 2024); the gravity of the charge and the allegation; the status of the brief's compliance; the lack of prior indulgences or extensions of the kind now sought, making this an isolated

incident; the likelihood that the extension will, ultimately, serve its effective purpose resulting in the filing of a charge certificate so that the proceedings may move to the case conferencing stage of the EAGP Scheme; the status of the defendant on bail in the community; an obviation of the likelihood, to avoid a miscarriage of justice, of an ex-officio indictment by the DPP pursuant to s 7(2)(c) of the Director of Public Prosecutions Act 1986 (NSW) and s 8(2) of the Criminal Procedure Act 1986 (NSW); and the importance of giving the Prosecution, and the Defence, a reasonable opportunity to present their case at trial, do not impose a significant prejudice to the Defence and militate, in my view, in favour of the granting of the Prosecution's application.

8. On the whole, an extension of the time within which to file the charge certificate would ultimately serve the interests of justice, in a matter which consists of such factual and legal complexity such that I am satisfied that an opportunity, modest in time, ought be afforded to the Prosecution so that each party may properly present their case at trial, so as to allow for a fair trial and to ensure that all relevant evidence is considered by the tribunal of fact.

Orders

1. For these reasons, I make the following orders and notations: -
 1. I extend the time within which the Prosecution may file a charge certificate to 17 December 2024.
 2. For the purposes of further case management, the matter is adjourned for reply and charge certification to 17 December 2024.
 3. Bail is to continue.
 4. The defendant is excused if legally represented.

Notation Subsequent to the preparation of these Reasons, a charge certificate was filed in Court, resulting in the following orders and notations being made: -

1. Adjourned for reply and case conference mention on 20 February 2025.
2. Case conference to be held on 30 January 2025.
3. Bail is to continue.
4. The defendant is excused if legally represented.

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