
AUSTRALIA / JUDGMENT

R v Bobak

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Supreme Court

New South Wales

Amendment notes

Medium Neutral Citation:

R v Bobak [2025] NSWSC 361

Hearing dates:

9 April 2025

Date of orders:

9 April 2025

Decision date:

09 April 2025

Jurisdiction:

Common Law - Criminal

Before:

Dhanji J

Decision:

- (1) The trial of the matter on 5 May 2025 is vacated.
- (2) The matter is set for trial to commence on 1 September 2025.
- (3) I vacate the pre-trial hearing listed to take place on 14 to 15 April 2025.
- (4) I list the matter for pre-trial hearing on 19 and 20 May 2025.

Category:

Procedural rulings

Parties:

Rex (Crown)

Trevor Mark Bobak (Accused)

Representation:

Counsel:

C Taylor (Crown)

C Wasley (Accused)

Solicitors:

Solicitor for Public Prosecutions (NSW) (Crown)

Legal Aid NSW (Accused)

File Number(s):

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ex tempore JUDGMENT (revised)

HIS HONOUR: The accused is charged with murder. His trial is presently set for hearing commencing on 5 May 2025, with an estimate of three to four weeks. Presently, there are two days set aside for pre-trial hearing, on 14 and 15 April 2025.

The accused is in custody awaiting trial having been refused bail. That has been the situation since his arrest on 21 December 2022. The result is that the accused has now been in custody for a period fast approaching two and a half years. In those circumstances, there is a very strong interest in his trial proceeding.

However, on 3 March 2025, the accused filed a notice of motion seeking to vacate the trial date. That application is based on particular health difficulties suffered by the accused. It seems that from around May 2024, he has been suffering from gastroenterological difficulties. That condition, it seems, has persisted since that time and, on the accused's submission, is such that he should not be required to stand trial starting 5 May 2025.

A significant amount of evidence was placed before me. I have before me three affidavits of the accused's solicitor, Maree Flynn, affirmed on 3 March 2025, 27 March 2025 and 8 April 2025 respectively. The affidavit of 27 March 2025 annexed a report from Dr Peter Slezak, a specialist physician, who reported on the accused's condition.

Evidence was also tendered on behalf of the Crown, being the respondent to the motion. The Crown tendered an outline of the opinion of Dr Gary Nicholls dated 27 March 2025. Dr Nicholls is the Executive Medical Director of Justice Health.

Additionally tendered by the Crown were tables forming a summary of the medicines provided and treatment given to the accused, an affidavit of the solicitor for the Director with carriage of the matter, Ms Kathreen Al-Mndwbi sworn on 21 March 2025, a statement of Detective Senior Constable Allen dated 21 March 2025, the content of an email sent by Dr Nicholls on 1 April 2025 and an update on the treatment of the accused prepared by Dr Nicholls on 8 April 2025.

I also heard oral evidence from Dr Nicholls and Dr Slezak. It is unnecessary, for the purpose of the determination of the accused's motion, to canvas the evidence in any detail. The result of the evidence and the procedural history is that, as I have said, the accused has been in custody awaiting his trial for a considerable period. The Crown is ready to proceed. Vacating the trial will result in a significant inconvenience to witnesses. More importantly, it will result in unmet expectations with respect to the accused being brought to trial. That is to say, the community and, in particular, members of the community with some connection to relevant events, have a legitimate expectation that the justice process will operate in a timely and efficient manner so as to determine matters such as this, which are understandably of importance to the community in general, and to some individual members of the community in particular.

It is also, however, the case that with respect to the accused's medical situation, there is no doubt he is suffering from significant gastrointestinal issues. There is room for argument based on the material as to the full extent to which he is affected by symptoms. Wherever the reality lands, with respect to that argument, I would accept that at present the accused is debilitated to a not insignificant extent.

The difficulty is, whilst his symptoms are readily able to be ascertained, the cause of those symptoms is not known. The uniform opinion is that beyond short-term symptomatic relief, there is no clear way forward in terms of treatment.

The particular difficulties for the accused appear to cycle between diarrhoea and constipation. Pain relief is available for issues surrounding the constipation. Medication is available in relation to the diarrhoea. Such short-term solutions are commonly effective in the context of isolated episodes of such problems. As the evidence before me makes clear, they are less effective in the context of an ongoing condition such as that suffered by the accused.

Whilst it is not known what is causing the accused's symptoms, there is agreement between the experts that the accused requires a colonoscopy and, potentially, an endoscopy. To be clear, it is not suggested that that would operate as any form of treatment, rather those processes are investigative rather than therapeutic.

It does seem from the evidence, however, that the colonoscopy at least, is a necessary first step before further progress in managing the accused's condition can be made.

It seems from the evidence that the colonoscopy can only be conducted at the Prince of Wales Hospital. Justice Health had, as I understand it, made arrangements for that to occur.

Unfortunately, it seems that no medical hold was placed on the accused. Prior to him being able to attend for any colonoscopy, he was transferred by Corrective Services from the metropolitan gaol, at which he had been housed, to Bathurst, where he is now located. That transfer occurred on 7 March 2025.

On 25 March 2025, the accused had an appointment with the gastroenterology team at Prince of Wales Hospital. As a result of his location in Bathurst, that occurred by way of audio visual link. The accused was informed that he needed a colonoscopy. He said that he wanted that to occur at Bathurst. The accused's desire in that regard is understandable. Having been housed at Bathurst at that time for some three weeks, I would accept there would be a reluctance on his part to be transported back to Sydney with the discomfort that that would likely entail. That discomfort would, for the accused, potentially be exacerbated by his condition.

Additionally, I was informed that the circumstances of his incarceration at Bathurst were more comfortable for him than they had previously been when incarcerated at a metropolitan gaol. That included greater capacity to lie down for significant periods in order to alleviate the symptoms from which he was suffering.

The difficulty is that whilst the accused's desire to remain at Bathurst may be understandable, there was no option for him to have a colonoscopy at Bathurst Hospital or, in effect, whilst remaining incarcerated at Bathurst gaol. According to Justice Health, based on information received from the gastroenterology team at Prince of Wales Hospital, the accused indicated a lack of consent to the colonoscopy as a result of his unwillingness to leave Bathurst. On the hearing before me I was told, this being his instructions to his representatives, that he did not refuse the colonoscopy.

The resolution of this conflict is not straightforward. I would, however, accept that, given the accused's condition, it seems unlikely that he would refuse a procedure with the capacity to progress his treatment. I am inclined to the view that there was misunderstanding in that the accused did not appreciate that he could not have a colonoscopy while he remained in Bathurst. In other words, the accused did not appreciate that his refusal to have a colonoscopy in Sydney was a refusal of the procedure altogether.

Whatever be the case, the accused has since clearly indicated that he has no opposition to being relocated to Sydney and attending for a colonoscopy. Regrettably, however, through the process I have discussed the accused has lost his place in the queue. It is not known when any colonoscopy will take place. Further, it is not known what that investigation will reveal. That is, the colonoscopy and possibly the endoscopy are simply next steps. The result is that, at this point in time, it being some four weeks out from the trial, it is not possible to have any confidence that the accused will have received treatment to manage his condition beyond what has already occurred by the time the trial is due to start.

The difficulty faced by the accused's representatives is that it is not a matter of simply hoping or potentially advocating for treatment such that the accused is well enough to face trial on 5 May 2025. It is also necessary, in preparation for that date, to obtain instructions.

The evidence of Ms Flynn sets out the endeavours made by her and, more latterly her, together with the accused's counsel, Ms Wasley, to obtain instructions from the accused. Without setting out the detail, the evidence is that a significant time has been allocated to those attempts. Those efforts have been, however, disrupted by the accused either needing to terminate conferences due to his condition or not attending for conferences due to his condition.

The difficulty experienced by the accused's representatives in obtaining instructions is apt to highlight the particular concern with the trial. It need hardly be said that a trial for murder is a necessarily significant event for any individual. The result of that trial, if adverse, will inevitably lead to a significant loss of liberty.

It is a matter of basic fairness that, if the accused is to be tried, he be in a position to, in a calm, or at least as calm and focused a manner as possible, attend to the evidence, to give instructions and to make decisions such as whether to give evidence or not. In the event that he chooses to give evidence, he ought to be in a position to give that evidence as best he can unaffected by physical symptoms which, to date, have caused him to be, in the course of conferences, significantly distracted. He ought to be in a position, in answering questions from his own counsel and in cross-examination, to attend to those questions with a focus, as far as possible, unimpeded by the symptoms of a physical disorder.

At this point in time, it seems to me that the accused's physical condition is impacting on him to an extent such as to raise real concerns with respect to the desirability of him being tried. The evidence before me suggests that there is unlikely to be any real change in that situation between now and 5 May 2025.

A fair trial is not a perfect trial. Inevitably, accused persons will face issues in the course of a trial that it would be preferred did not arise.

The interests of the community in bringing matters such as this to trial must be given significant weight. Concerns with respect to the fading memory of witnesses are real. The further the matter is delayed, the greater the risk that witnesses will die. One witness has already died.

Those concerns are to be seen in the context of a proper understanding of the alternative courses available. After discussion with the parties, it appears that there is an alternative to simply vacating the matter, with the prospect that it might not get a new date until sometime next year. That alternative is to adjourn the matter to a date in September of this year. That does not completely, but certainly will partly ameliorate concerns with respect to the delay that has occurred to date and will ultimately occur.

It is also a period of time sufficient, in my view, for real progress to be made with respect to the treatment of the accused. In that regard, it is my expectation that all that can be done to further the accused's diagnosis and treatment will be done. As I have said, the disruption in his treatment thus far is regrettable and appears to be based on misunderstandings. There should, from this point on, be no such misunderstandings. In that regard I would expect that the proposed process of diagnosis and treatment will be clearly explained to the accused.

In this context, I reiterate observations I made in the course of the hearing. The accused is not in the position of an ordinary person in the community waiting for public health services. He is a person who has been deprived of his liberty for the purposes of bringing him to trial. There is a clear issue with respect to the integrity of the justice system if persons are held in custody for that purpose but cannot attend their scheduled trial because of the failure of those charged with managing their health to treat them in a manner that will allow the trial to proceed.

In addition to being mindful of the concerns of the community, I am mindful of the potential for steps to be taken to accommodate the accused that could occur by way of breaks, symptomatic medication and, as was raised in the evidence, if necessary the use of adult diapers. None of those accommodations, it seems to me, are likely to deal with the fundamental problem of the accused's capacity to focus in such a way as to be able to give instructions and properly participate in his trial.

Given what I have said, I am of the view that the trial should not proceed on 5 May 2025. I am of the view, balancing various competing considerations, that it is ultimately in the interests of justice that the matter be adjourned.

I make the following orders:

The trial of the matter on 5 May 2025 is vacated.

The matter is set for trial to commence on 1 September 2025.

I vacate the pre-trial hearing listed to take place on 14 to 15 April 2025.

I list the matter for pre-trial hearing on 19 and 20 May 2025.

Amendments

29 May 2026

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Unrestricted.

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Decision last updated:

29 May 2026

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