



THOMSON REUTERS

# Update Summary

PLEASE CIRCULATE IMMEDIATELY!

**UPDATE 94**

**DECEMBER 2023**

**CRIMINAL PROCEDURE (NSW)**

**B Schurr BA LLB**

**Material Code 42608723**

© Thomson Reuters (Professional) Australia Limited 2023

**Looseleaf Support Service**

You can now access the current list of page numbers at

<http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599>. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195

Fax: 1300 304 196 Email: [Care.ANZ@thomsonreuters.com](mailto:Care.ANZ@thomsonreuters.com)

## [S23.30] November 2023 Update Summary

### COMMENTARY

In this update, Bev Schurr incorporates new material and updates existing commentary relating to **Charging; Bail; Young offenders; Mental illness and cognitive impairment; Committal procedure in the Local Court; Pre-hearing procedures; Hearings – conduct of defence, conduct of prosecution, witnesses, role of judges and magistrates, jury and verdicts; Sentencing – introduction and principles; The end of appeals – inquiries, vice regal pardons and High Court appeals.**

Key updates include:

#### Sentencing

##### Principles of sentencing – Four seminal sentencing cases

Justice Beech-Jones cited the following four sentencing cases as being fundamental:

- *Veen v The Queen (No 2)* (1988) 164 CLR 465; 33 A Crim R 230; [1988] HCA 14 (objective seriousness and proportionality principle);
- *Markarian v The Queen* (2005) 228 CLR 357; 79 ALJR 1048; [2005] HCA 25 (“instinctive synthesis, no mathematical deductions but equally not a soup”);
- *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; 205 A Crim R 1; [2010] NSWCCA 195 (consideration of mental illness and intellectual impairment); and
- *Bugmy v Queen* (2013) 249 CLR 571; 229 A Crim R 337; [2013] HCA 37 (moral culpability, deprived background, protection of the community).

See [24.40].

#### Bail

##### Bail and Commonwealth offences

In *R v Weatherall* [2023] NSWSC 710, the applicant for bail had been charged with offences relevant to the bail restrictions in s 15AAA of the *Crimes Act 1914* (Cth), namely using a carriage service to engage in sexual activity. Justice Weinstein assessed which parts of the *Bail Act 2013* (NSW) had been displaced by s 15AAA of the *Crimes Act 1914* (Cth), and which parts remained relevant when considering a bail application where s 15AAA applied. See [3.75].

##### After charge and at the first court appearance – Detention applications after bail has been granted

The Supreme Court held that the discretionary “may” take steps in s 77(1) of the *Bail Act 2013* (NSW) is only qualified by the requirement to believe on reasonable grounds that

bail conditions have been or will be breached and is “unfettered” by the considerations of alternatives to arrest in s 77(3): *Bugmy v Director of Public Prosecutions (NSW)* [2023] NSWSC 862. See [3.75].

## Charging

### Remedies – Damages for tortious charging and prosecution

The man who was a suspect in the William Tyrrell case had his damages award for malicious prosecution in relation to an unrelated case upheld in the Court of Appeal. Police pressed on with a charge in the hope of turning up evidence relating to William Tyrrell’s disappearance: *New South Wales v Spedding* [2023] NSWCA 180. See [2.850].

## Hearings – conduct of defence

### Representation and withdrawal from representation – Statutory and common law limits on the right to appear for an accused

The Commonwealth Attorney General’s power over who can represent accused in security trials was reviewed when Brett Walker QC sought to represent ACT solicitor Bernard Collaery: *Collaery v The Queen* [2021] ACTCA 1 at [27]. See [19.210].

## Hearings – jury and verdicts

### Representation and withdrawal from representation – Statutory and common law limits on the right to appear for an accused

In *Director of Public Prosecutions (ACT) v Lehrman (No 5)* [2022] ACTSC 296, McCallum CJ set out the reasons for the discharge of the whole jury in the Lehrman trial after a juror brought an academic article about sexual assault trials into the jury room. See [23.490].

## Hearings – conduct of prosecution

### Duty of disclosure – Indemnified and informant witnesses

For the consequences of the non-disclosure that the defence lawyer Nicole Gobbo had become a police informer, see *AB (a Pseudonym) v CD (a Pseudonym)* (2018) 93 ALJR 59; (2019) 362 ALR 1; [2018] HCA 58 and ss 77RD–77RK of the *Judiciary Act 1903* (Cth). See [20.350].

## Young offenders

### Choice of law when sentencing juveniles in New South Wales – deterrence and adult crimes

In *TM v The King* [2023] NSWCCA 185, the court stated that an offender's young age must be taken into consideration when considering moral culpability and the weight to be afforded to general deterrence. The gravity of an offence does not, by itself, demonstrate "adult like" behaviour. The assessment must be one of maturity and conduct, not only the degree of violence. See [13.1480].

## Mental illness and cognitive impairment

### Interviewing procedures – Defence lawyers – Duty to obtain professional assessment of client

In *TM v The King* [2023] NSWCCA 185, the court stated that an offender's young age must be taken into consideration when considering moral culpability and the weight to be afforded to general deterrence. The gravity of an offence does not, by itself, demonstrate "adult like" behaviour. The assessment must be one of maturity and conduct, not only the degree of violence. See [13.1480].

## Committal procedure in the Local Court

### Indictable offences: Fitness to stand trial – Time for application to determine fitness to plead – Assessing fitness at appeal

When fitness to plead is raised for the first time on appeal, the court applies the "RTI test" (*R v RTI* (2003) 58 NSWLR 438; [2003] NSWCCA 283). The RTI test was followed in *Roberts v The King* [2023] NSWCCA 187, where the Court of Criminal Appeal heard fresh evidence from three expert witnesses who gave evidence concurrently and, also, produced reports, one of which set out their areas of agreement and disagreement. The court held that in the light of the fresh evidence they could not conclude that had the issue been raised at trial the court acting reasonably must have found that the accused was fit to stand trial, and the appeal was allowed and a re-trial ordered. See [14.900] and [14.160].

## Hearings

### Presence of the accused – Entering plea of guilty or not guilty – Initiation of proceedings

"The question of when a trial begins may have a different answer for different purposes": *Stephens v The Queen* (2022) 273 CLR 365; 299 A Crim R 124; [2022] HCA 31 at [7]. The hearing of an indictable offence commences at arraignment: *Bektasovski v R* [2022] NSWCCA 246; *Lee v The King* [2023] NSWCCA 203. See [18.725].

### Costs in criminal appeals

In *Hariz v Director of Public Prosecutions (NSW)* [2021] NSWCA 264, the Court of Appeal upheld the award and found that no unreasonableness had been found in the District Court judge's award and in his finding of facts that some of the amounts claimed were "excessive", the use of senior counsel in a bail application was "unnecessary" and that only a "reasonable" amount of preparation would be compensated. See [18.2013].

### Costs after acquittal when accused has been legally aided: Costs in Criminal Cases Act

Under s 2 of the *Costs in Criminal Cases Act 1967* (NSW), a court has a discretion to grant a certificate entitling an acquitted person to apply to have their legal costs paid. The obligations and eligibility of a person granted legal aid under the *Legal Aid Commission Act 1979* (NSW) were outlined in *Rodden v The King* [2023] NSWCCA 202. See [18.2060].

## Hearings – role of judges and magistrates

### Hearings without a jury – Election for a judge alone trial

A person charged in the ACT after 1990 with ACT offences is subject to the limitations on access to trial by jury set out in ACT law and is not treated as having been charged with Commonwealth offences: *Vunilagi v The Queen* (2023) 97 ALJR 627; [2023] HCA 24. See [22.10].

### Language during remarks on sentence

The delivery of sentencing remarks in the third person, rather than directly addressing the offender, assists in ensuring it is delivered in the language of judicial detachment, objectivity and disinterest: *Giacometti v The King* [2023] NSWCCA 150. See [22.1220].

## The end of appeals – inquiries, vice regal pardons and High Court appeals

### Appeals, reviews and pardons – case study of Kathleen Folbigg

The history of the post-conviction litigation of Kathleen Folbigg reveals the numerous avenues available to appellants. Ms Folbigg was charged with murder and manslaughter following the deaths of her four young children over an eight-year period from February 1989 (19 days old), February 1991 (8 months old), August 1993 (10 months old) and March 1999 (18 months). Police began investigating after the last death and Ms Folbigg was charged in April 2001. On 5 June 2023, she was pardoned and released from prison. See [31.400].

