



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 95

MAY 2024

CRIMINAL PROCEDURE (NSW)

B Schurr BA LLB

Material Code 42608724

© Thomson Reuters (Professional) Australia Limited 2024

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

COMMENTARY

In this update, Bev Schurr incorporates new material and updates existing commentary relating to Arrest; Bail; Detention and questioning – NSW; Young offenders; Mental illness and cognitive impairment; Summary procedure in the Local Court; Pre-hearing procedures; Hearings; Hearings – conduct of defence; Hearings – conduct of prosecution; Hearings – witnesses; Hearings – jury and verdicts; Sentencing - introduction and principles; Sentencing – procedure and fact finding; Sentencing – pleading; Sentencing – relevant factors; Sentencing options; Appeals – Local / District / Supreme and Court of Appeal; Appeals – Court of Criminal Appeal; The end of appeals - inquiries, vice regal pardons and High Court appeals

Key updates include:

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

Appeals, reviews and pardons – case study of Kathleen Folbigg

The 20-year history of litigation following the conviction of Kathleen Folbigg of the murder or manslaughter of her four children came to an end on 14 December 2023 when the NSW Court of Criminal Appeal quashed all convictions following the report of the second inquiry into her conviction: *Folbigg v The King* [2023] NSWCCA 325: See [31.470] and [30.70]. For a chronological list of the appeals and inquiries, see [31.400].

Applications for leave and special leave and responses – procedure and time limits

The High Court of Australia has revised the procedure for applications for special leave, removing the requirement for application books and amending standard court forms, amongst other things. See [31.10].

Appeals – Local/District/Supreme and Court of Appeal

Review by Supreme Court of constitutional validity of criminal law

The NSW Supreme Court has held that parts of the NSW criminal law imposing serious penalties on protests near “major infrastructure” imposed an unacceptable burden on the implied freedom of political communication: *Kvelde v New South Wales* [2022] NSWSC 1560 (“Knitting Nanas”). As part of the assessment of the applicants’ standing in *Kvelde*, the judgment sets out the extensive political protest history of the two Nanas, one of whom started protesting in anti-Vietnam war demonstrations. See [29.260].

Test and orders in the District Court

A conviction appeal must be upheld unless the appeals judge is satisfied beyond reasonable doubt that the appellant was guilty of the offence: *R v Scott* [2023] NSWDC 271. See [29.730].

Summary procedure in the Local Court

Specialist list – NSW domestic violence charge and apprehended domestic violence order matters

With a September 2023 Practice Note, the NSW Local Court has introduced a Specialist Family Violence List pilot. See [15.400].

Hearings - witnesses

Witnesses not to be present in court before giving evidence

The District Court of NSW has introduced a centralised committals list for child sexual assault trials coming from the Downing Centre, Campbelltown, Parramatta and Penrith, in order to co-ordinate the new regime by which child witnesses' evidence will be completely pre-recorded in the absence of the jury before a jury trial begins. See [21.110].

Detention and questioning – NSW

Detention and questioning of the disadvantaged – Exercising and protecting the right to remain silent

The protections extended to children who are being investigated and questioned by police, which some police were found not to understand, were reviewed in the NSW Law Enforcement Conduct Commission's *Operation Mantus Final Report*. The consequences of police failure to accept a suspect's wish that they did not wish to answer questions or participate in an interview are set out in *Mann v The King* [2023] NSWCCA 256. See [4.385].

Sentencing – pleading

Sentencing benefits to be gained from pleading – Evidence of remorse as a mitigating factor

The difference between remorse and regret as factors in sentencing are examined in *Lin v The King* [2023] NSWCCA 304. The offender does not have to give evidence of remorse if there is other evidence that can be relied upon: *Carl v The King* [2023] NSWCCA 190. See [26.335].

Arrest

Regulation of police tactics during an arrest – Batons

The training manual for police use of batons during an arrest was reviewed in *Director of Public Prosecutions (NSW) v Greenhalgh* [2022] NSWSC 980. See [1.750].

Bail

After charge and at the first court appearance – Duty of police to bring bail refused person before court

The duty of police to “ensure” that a bail-refused person appears before court, and does not leave that to Corrective Services, and the consequences of even a 12-hour delay in doing that, are discussed in *McLaughlin v New South Wales* [2023] NSWDC 525. See [3.230].