CITATION:	*Firth v Burbidge* [2024] NTSC 67
PARTIES:	FIRTH, Justin Anthony v BURBIDGE, Michel Keith
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 14 of 2024 (22229172)
DELIVERED:	9 August 2024
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JUDGMENT OF:	Reeves J

CATCHWORDS:

CRIMINAL LAW – Appeal – Appeal against sentence – Destroy evidence with intent to prevent it from being used as evidence – Whether sentence manifestly inadequate – Whether sentence "shocks public conscience" – Appeal dismissed

Criminal Code 1983 (NT) s 102, s 109, s 155A, s 189A
Sentencing Act 1995 (NT) s 5, s 7, s 16, s 18, s 28

McMaster v R [2019] NTCCA 25; *R v McInerney* (1986) 42 SASR 111; *R v Osenkowski* (1982) 30 SASR 212; *R v Renwick & Johnson* [2013] NTCCA 3, referred to

REPRESENTATION:

Counsel:

Appellant:	S Ledek
Respondent:	M Johnston SC and P Crean with C Dane

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Territory Criminal Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Firth v Burbidge [2024] NTSC 67
No. LCA 14 of 2024 (22229172)

BETWEEN:

JUSTIN ANTHONY FIRTH
Appellant

AND:

MICHEL KEITH BURBIDGE
Respondent

CORAM: REEVES J

REASONS FOR JUDGMENT

(Delivered 9 August 2024)

Introduction

[1] This is a Crown appeal against a sentence imposed on the respondent by a Local Court judge on 8 March 2024. The sole ground of appeal is that the sentence imposed was manifestly inadequate in all the circumstances.

[2] The parties are agreed on the principles applicable to such an appeal. In brief summary the appellant must establish that, having regard to the seriousness of the crime concerned, the inadequacy of the sentence "shocks the public conscience".[1]

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1 See *R v Renwick & Johnson* [2013] NTCCA 3 at [3] quoting *R v Osenkowski* (1982) 30 SASR 212 at 213 per King CJ.

[3] For the reasons that follow, the appellant has failed to establish that criterion. Its appeal will therefore be dismissed.

The charge and the penalty imposed

[4] On 7 December 2023, the respondent pleaded guilty to a charge that, between 28 February 2022 and 13 July 2022 at Maningrida and elsewhere in the Northern Territory, he destroyed a mobile phone with intent to prevent it from being used in evidence knowing that it might be required as evidence in a judicial proceeding contrary to s 102 of the *Criminal Code 1983* (NT). That offence carries a maximum penalty of three years imprisonment.

[5] On 8 March 2024, following the receipt of written and oral submissions, the sentencing judge convicted the respondent of that offence and ordered that he pay a fine of $15,000.

The facts of the offending

[6] On 28 February 2022, the respondent was engaged in crocodile egg harvesting in the remote King River region near Maningrida in the Northern Territory. When one of the heliborne harvesting crews involved in the harvest dropped out of radio contact, the respondent conducted a search for the missing helicopter using his helicopter. He discovered that the missing helicopter had crashed. Upon landing at the crash site he found the pilot was severely injured and that the person who had been conducting the egg harvest from a sling line attached to that helicopter, was deceased.

[7] Sometime later the respondent's co-offender, Neil Mellon, an off duty police officer, and Michael Burns, a principal of one of the companies that was involved in the egg harvest, arrived at the scene. Thereafter, the agreed facts before the sentencing judge recorded that the following occurred:

(a) Mellon unzipped the top pocket of the vest of the deceased and removed a mobile telephone belonging to him. At this time Mellon heard [the respondent] say words to the effect of 'Danni [the deceased's wife] does not need to see what's on that phone'.

(b) Burns also confirmed [the respondent's] assertion that the phone contained information that the deceased's wife would not like to know.

(c) [The respondent] was aware that the deceased was a regular user of his phone and may have been running an application called OzRunways which tracked the movements of the aircraft. The [respondent] was also aware that [the injured pilot] operated OzRunways on his mobile phone and on an iPad in the helicopter. He deleted this data from his mobile phone and the iPad on the helicopter was damaged to the extent that the data could not be recovered.

(d) On leaving the crash site the [respondent] flew his helicopter back to the Greater Darwin region to inform the deceased's wife and family about the circumstances of the crash. On the way back he disposed of the phone. The [respondent] acknowledged that the phone may have been required as evidence in subsequent investigations but was

motivated to protect the reputation of the deceased and protect the deceased's widow.

(e) At the time the [respondent] destroyed the phone [the respondent] was not aware that the data on the iPad and [the injured pilot's] phone had been lost.

The Local Court judge's sentencing remarks

[8] In recognition of the media attention the respondent's case had received, the sentencing judge began her sentencing remarks by saying "… I'm going to read my remarks … because clearly, we need to make sure that it is properly reported and also, I will be ordering a transcript of my remarks be placed on the court file.".

[9] Her Honour then embarked on a detailed and comprehensive analysis of the factors affecting the sentencing exercise she was undertaking by reference to s 5(1) of the *Sentencing Act 1995* (NT). The following is a summary of the salient aspects of that analysis:

(a) The maximum penalty for the offence is three years imprisonment under s 102 of the *Criminal Code* and/or pursuant to s 28 of the *Sentencing Act*, a maximum fine of $52,800.

(b) The respondent was not charged with being responsible for, or contributing to, the death of the deceased.

(c) Instead, his offending related to his destruction of the deceased's mobile phone knowing that there may have been data on that phone which would have shown the movements of the helicopter on that day and without that data any investigation of the crash would have been hindered.

(d) There was no suggestion that the destruction of that evidence would have benefited him personally.

(e) Instead, he destroyed the mobile phone out of misguided loyalty to protect the reputation of his dead friend.

(f) The incident was highly distressing for the respondent having seen his friend deceased and the helicopter pilot badly injured.

(g) Nonetheless, he applied first aid to the injured pilot and secured the scene of the crash.

(h) The offending was in the mid-range for offending of its type.

(i) The respondent had no prior history of offending, was of good character, had entered a plea of guilty and was genuinely remorseful for his offending, evidenced by his letter of apology.

(j) As well he had suffered personally from the prosecution and the media attention associated with it. That had caused him personal distress and his business had been adversely affected.

(k) The *Verdins* principles did not apply to the sentencing exercise.

(l) In the circumstances neither community protection, nor specific deterrence, nor rehabilitation, were relevant sentencing factors.

(m) Instead the primary factors were general deterrence and denunciation to show the community's disapproval of the offending.

(n) The respondent had spent one day in custody after he was arrested on the charge.

(o) The offending was serious and warranted a conviction being recorded.

The contentions of this appeal

[10] The appellant's primary contention was that, having regard to the seriousness of the offence and the respondent's offending, a penalty of actual imprisonment was justified.

[11] In support of this primary contention it submitted that, since s 102 of the *Criminal Code* does not provide for a fine as an alternative penalty to a term of imprisonment that indicates "the inappropriateness of [a] fine as the ultimate disposition".

[12] As well it contended that the penalties imposed for "like" offences in the Northern Territory and other jurisdictions, including New South Wales, demonstrated a sentencing range that did not include the imposition of a fine.

[13] It also contended that, in assessing the seriousness of the respondent's offending, regard should be had to the fact that, by destroying the deceased's mobile phone, he effectively avoided a charge under s 109 of the *Criminal Code* of attempting to defeat or obstruct the course of justice, for which the maximum penalty is 15 years imprisonment. That is, so it contended, because now that the true evidential value of the data on the phone will never be known, the respondent can only be charged under s 102 of destroying the phone knowing that it "might be required as evidence in a judicial proceeding" for which the maximum penalty is the much lesser period of three years imprisonment.

[14] In addition, it contended that there "may have been an over attribution" of the mitigating factors advanced on behalf of the respondent. In this respect, it contended that the true "victim" in this matter was not a group of individuals such as the deceased's family, but rather the community as a whole which relies on "the faithful protection of a justice system … to properly investigate and prosecute criminal offending".

[15] Finally, in oral submissions, it was accepted that, had the sentencing judge imposed a sentence of one day's imprisonment and then ordered that to have been served having regard to the day the respondent had already spent in custody that would have been an appropriate disposition of the matter.

[16] In response to the appellant's primary contention, the respondent submitted that the Legislature had not expressed an intention in the *Sentencing Act* that

there should be a mandatory sentence of actual imprisonment for an offence under s 102 of the *Criminal Code*, as it had in relation to a range of other offences. Instead, he submitted, the Legislature had left open a range of possible sentencing options under the *Sentencing Act*, including the fine and conviction that had been imposed on him.

[17] Against that background, he contended that, if this Court were to conclude that a term of actual imprisonment should always be imposed for offences under that section, it would unduly constrain the discretion of sentencing judges in a way not intended by the Legislature.

[18] In addition, in respect of the conviction that had been recorded against him, he emphasised the significance of that step as signifying the Court's disapproval of his offending.

[19] As well, he contended that it would be entirely inappropriate, in any sentencing exercise, for a sentencing judge to speculate about what more serious offences a person might have committed, in the way contended by the appellant.

[20] Finally, he contended that the comparable sentences provided to the Court by the appellant did not assist because they did not relate to like offences but instead to a range of different and more serious offending e.g. perverting the course of justice, with higher maximum penalties i.e. up to a maximum of 15 years imprisonment.

Consideration

[21] It is convenient to begin by emphasising that the appellant does not allege that the sentencing judge committed any error of principle. To the contrary, it accepts that her Honour properly concluded that denunciation and general deterrence were the predominant sentencing considerations and otherwise had regard to all of the relevant sentencing factors. That being so, the appellant must bear the not insignificant burden that I mentioned earlier: of establishing that the inadequacy of the sentence imposed "shocks the public conscience". In attempting to discharge that onus, I do not consider that the appellant gains any assistance from the supporting contentions it has made.

[22] First, the failure to mention the imposition of a fine in the penalty prescribed under s 102 of the *Criminal Code* is common throughout the myriad offences described in that Code. Indeed my researches reveal only five offences where the penalty expressly includes that option.[2] This state of affairs serves to explain why the general provisions of Division 3, Part 3 of the *Sentencing Act* exist. They include s 16 which contains the power of a sentencing court to impose a fine and s 18 which sets the maximum fine that may be imposed. There is therefore no merit in this contention.

[23] Secondly, I consider the respondent is correct in his submissions about the tables of comparable sentences advanced by the appellant: they do not compare "like" offending and/or penalties. The table of sentences imposed

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2 Sections 43BI, 43BJ, 125B, 125C and 125E.

in the Supreme Court of the Northern Territory is limited to four cases. One concerned the offence of perverting the course of justice for which the maximum penalty was 15 years, two involved the destruction of drugs during the execution of search warrants and the fourth involved a police officer destroying videotape evidence of his assault on an Aboriginal man in protective custody.

[24] While the table of sentences imposed in the Supreme Court and Court of Criminal Appeal in New South Wales is more extensive (21 cases), it suffers from similar deficiencies. It relates to offences under s 315(1) of the *Crimes Act 1900* (NSW) which concern: hindering investigations of serious indictable offences; the discovery of evidence related thereto; and the apprehension of another person who has committed such an offence. Moreover, the maximum penalty for those offences is seven years imprisonment. I do not gain any assistance from this table. Nor, for that matter, do I gain any assistance from the graphs provided by the respondent showing the statistical proportions of sentencing dispositions in the New South Wales Local Court for offences under that section.

[25] Thirdly, I reject the appellant's somewhat remarkable proposition that I should have regard to the more serious offence the respondent might have committed, or with which he could have been charged in different circumstances. Clearly, the respondent can only be penalised in respect of the offence with which he was charged and to which he pleaded guilty.

[26] That brings me, finally, to the appellant's primary contention that a term of actual imprisonment will always be warranted for an offence under s 102 of the Code. The range of sentencing options available to the sentencing judge is set out in s 7 of the *Sentencing Act* as follows:

> Where a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and this Part, make one or more of the following sentencing orders:
>
> (a) without recording a conviction, order the dismissal of the charge for the offence;
>
> (b) without recording a conviction, order the release of the offender;
>
> (c) record a conviction and order the discharge of the offender;
>
> (d) record a conviction and order the release of the offender;
>
> (e) with or without recording a conviction, order the offender to pay a fine;
>
> (f) with or without recording a conviction, make a community work order or community based order for the offender;
>
> (g) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly;
>
> (h) record a conviction and order that the offender serve a term of imprisonment that is suspended on the offender entering into a home detention order;
>
> (j) record a conviction and order the offender serve a term of imprisonment, including by way of a community custody order;
>
> (k) impose any sentence or make any order authorised by this or any other Act.

[27] On this issue the words "subject to any specific provisions relating to the offence" are important. Among other things, they refer to those groups of offences for which the Legislature has prescribed mandatory sentences under Division 6 and 6A, Part 3 of the *Sentencing Act*. Following the recent amendments to that Act, they include aggravated property offences, violent offences and sexual offences. They also include offences under ss 155A and

189A of the *Criminal Code* which concern assaults on people providing emergency aid or response. In all of these cases, unless there are exceptional circumstances as defined, the prescribed mandatory sentence includes a period of actual imprisonment. Significantly, for present purposes, an offence under s 102 of the Code is not included. Given its exclusion, I consider that the respondent is correct in his contention that it would unduly constrain the discretion of sentencing judges in a way not intended by the Legislature if this Court were to conclude that a term of actual imprisonment should always be imposed for offences under that section.

[28] Having dealt with the appellant's main contentions, I return to the sentence that the sentencing judge imposed in this matter. I have already identified the range of sentencing options that were available to the sentencing judge under s 7 of the *Sentencing Act*. Each of those options, except the last, mentioned the act of recording a conviction. This underscores the significance of that step. As the respondent has correctly pointed out it comprises "… a formal and solemn act marking the court's and society's disapproval of the defendant's wrongdoing." [3]

[29] In this matter, the sentencing judge decided to take that step, over the opposition of the respondent. In addition, her Honour imposed a relatively large fine of $15,000 and, noting that the respondent had served one day's imprisonment, decided that was sufficient in all the circumstances. Her

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3 See *McMaster v R* [2019] NTCCA 25 quoting *R v McInerney* (1986) 42 SASR 111 at 124 per Cox J.

Honour concluded that this was the appropriate sentence after finding that the respondent's offending was in the mid-range of seriousness and after having regard to numerous mitigating factors including his plea of guilty, his genuine remorse, his good character and the hardship he had suffered as a result of the prosecution.

[30] Minds may differ as to whether this sentence was towards the lower end of severity having regard to the seriousness of the respondent's offending even allowing fully for the mitigating factors mentioned. Nonetheless, in all the circumstances, I do not consider it could be said to be so inadequate that it shocks the public conscience.

Disposition

[31] For these reasons, I order that the appellant's Notice of Appeal dated 5 April 2024 be dismissed.
