NOTE: HIGH COURT SUPPRESSION ORDER OF FOGARTY J MADE 29 SEPTEMBER 2016 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA667/2017
[2018] NZCA 393

BETWEEN	ROBERTO CONCHIE HARRIS Appellant
AND	ARTHUR WILLIAM TAYLOR Respondent

Hearing:	21 August 2018
Court:	Winkelmann, Asher and Brown JJ
Counsel:	A M Simperingham and H B Vaughn for Appellant R K Francois for Respondent
Judgment:	28 September 2018 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] Mr Harris was convicted, following trial before a jury, of eight charges of perjury under s 109(2) of the Crimes Act 1961.[1] The charges related to evidence Mr Harris gave at the 1990 trial of David Tamihere at which Mr Tamihere was convicted of two charges of murder.

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1 Mr Arthur Taylor had brought the charges in a private prosecution.

[2] Section 109 of the Crimes Act provides:

> **109 Punishment of perjury**
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> (1) Except as provided in subsection (2), every one is liable to imprisonment for a term not exceeding 7 years who commits perjury.
>
> (2) If perjury is committed in order to procure the conviction of a person for any offence for which the maximum punishment is not less than 3 years' imprisonment, the punishment may be imprisonment for a term not exceeding 14 years.

[3] Whata J, applying s 109(2), sentenced Mr Harris to eight years and seven months' imprisonment.[2] Mr Harris now appeals against that sentence arguing the starting point adopted by the Judge was too high, and the uplift for personal aggravating factors too great.

The offending

[4] Sometime around 8 April 1989 two Swedish tourists, Heidi Paakkonen and Sven Höglin, went missing on the Coromandel Peninsula. David Tamihere was charged with their murder although at the time of trial their bodies had not been found.

[5] The Crown case at trial was wholly circumstantial. In broad terms, there were three parts to the evidence. The first connected Mr Tamihere to the couple's car and belongings. Mr Tamihere was seen driving the couple's Subaru four-wheel drive station wagon on the evening of 10 April, before abandoning it in Mt Eden. He sold some of the couple's belongings, and when police conducted a search of his home, Mr Höglin's jacket, leggings and binoculars were discovered. Mr Tamihere admitted stealing the couple's car, and some of their belongings, claiming to have found those belongings inside the car.

[6] The second part of the Crown case connected Mr Tamihere to Ms Paakkonen. This was the evidence of two trampers, Messrs Cassidy and Knauf, that on 8 April 1989 they saw a man — whom they later identified as David Tamihere — clearing a tent site with a tomahawk at Crosbies Clearing. The trampers said that a woman similar in description to Heidi Paakkonen was present at the clearing. Their

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2 *Taylor v Witness C* [2017] NZHC 2610 at [58].

evidence also tended to link items found at Mr Tamihere's house to their sighting of him.

[7] The final limb of the Crown case was the evidence of three prisoners. They gave evidence that Mr Tamihere had spoken to them in custody, describing how he had sexually assaulted and killed the couple. The confessions the prisoners claimed to recount were inconsistent with each other. Mr Harris was one of those witnesses. Mr Harris gave evidence that Mr Tamihere confessed the following:

(a) Mr Tamihere had met Heidi Paakkonen and Sven Höglin at a camping or picnic area;

(b) he had assaulted Sven Höglin and tied him up;

(c) he had sexually assaulted the couple;

(d) he had Heidi Paakkonen in the bush with him when "a couple [came] across them and that he almost got sprung due to this couple coming across them";

(e) he had disposed of Sven Höglin by beating his head in with a lump of wood;

(f) he had strangled Heidi Paakkonen;

(g) he had taken the bodies out to sea, weighed them down with metal weights and disposed of them somewhere between Thames and Wilson Bay; and

(h) Mr Tamihere had given Sven Höglin's watch to one of his sons.

[8] Mr Tamihere was convicted of the two counts of murder following his 1990 trial. The next year the body of Mr Höglin was found near Whangamata, 70 kilometres from where the couple's car was known to have been parked. Post-mortem examination suggested he had suffered stab wounds to the neck and shoulder region

with a possible left-handed decapitation. There was no evidence to suggest that he had been beaten about the head with a lump of wood, as Mr Harris had claimed. Mr Höglin had his watch on him when found.

[9] In August of 1995 Mr Harris swore an affidavit recanting the evidence he gave at trial. He admitted Mr Tamihere had never made any confessions of any kind, but rather had maintained his innocence. Following that recantation, Mr Harris gave a broadcast telephone interview confirming the contents of the affidavit. He said he was drawn to the prospect of giving evidence at Mr Tamihere's trial by the offer of $100,000 from a police detective, as well as assistance at a parole hearing. The claim of an offer of money was never substantiated and Mr Harris later retracted it.

[10] The following year Mr Harris retracted his affidavit, claiming he had fabricated the affidavit because he and his elderly parents had been threatened. But then, in 2007, Mr Harris sent Mr Tamihere a letter offering to write a statement exonerating him. It was against this background that Mr Taylor brought charges against Mr Harris for perjury.

Sentence imposed

[11] Whata J identified the following aggravating features of Mr Harris' offending:[3]

a) The evidence was given at a trial to support a prosecution for the most serious charge in the criminal jurisdiction — murder, and on this occasion, two counts of murder attracting a sentence of life imprisonment.

b) The offending involved a high level of premeditation, given the scope and detail of Mr Harris' false evidence.

c) Mr Harris' evidence materially implicated Mr Tamihere in the offending. Whata J noted that Mr Harris' evidence corroborated other evidence described by the Court of Appeal in Mr Tamihere's second appeal as crucial

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3 At [39].

to the Crown case, namely the identification evidence of two trampers, Messrs Cassidy and Knauf.[4]

d) Finally, Mr Harris' evidence was used to support the admission of Mssrs Cassidy and Knauf's identification evidence, pre-trial. Whata J said:[5]

> The Court of Appeal, in concluding the trampers' identification evidence should be admitted, noted its conclusion was "strengthened" by the cumulative effect of the evidence against Mr Tamihere, including the cell mate confession evidence.

[12] Given this collection of seriously aggravating features, the Judge said a starting point at the high end of the range for perjury offending was required.[6] However the Judge rejected the prosecution's submission that the maximum sentence should be the starting point.[7] The Judge considered that this was not the worst perjury of its kind, such as if Mr Harris had purported to give eyewitness evidence, or had acted as part of an orchestrated criminal campaign or had a vendetta against Mr Tamihere.[8]

[13] In selecting a starting point of nine years, the Judge said:

> [45] I am satisfied therefore that a nine year starting point is necessary and appropriate to denounce your perjury. This equates to 64 per cent of the maximum available sentence. It is to be compared to the starting points in *Mackie, Aoapaau* and *Harding*, which were between 43 and 57 per cent of the maximum available sentences for the perjury in those cases. I have acknowledged the more serious nature of your offending, seeking to procure a conviction rather than an acquittal, is reflected in the increased penalty. But, even so, I consider your offending to be materially and proportionately worse than the offending in those cases. The seriousness of the original offence, a double murder, and the level of premeditation in your case was more significant. Furthermore, your obvious awareness, as a person convicted of two murders, of the very serious consequences for Mr Tamihere of guilty verdicts reveals a level of callousness that demands a relatively sterner sentence.

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4 *R v Tamihere* CA428/90, 21 May 1992, at 4.
5 *Taylor v Witness C,* above n 2, at [39] (footnotes omitted).
6 At [40].
7 At [41].
8 At [41]–[42].

[14] The Judge uplifted this starting point a further six months to reflect aspects of Mr Harris' history that were viewed by the Judge as aggravating his offending.[9]

[15] Finally, the Judge came to the issue of mitigating factors. He accepted that Mr Harris' age, his ill health and the high level of recrimination he would face from other prisoners would make a long-term sentence of imprisonment disproportionately severe.[10] He allowed a discount to the sentence of 10 per cent for those combined factors.[11]

[16] By these means, the Judge reached an end sentence of eight years and seven months' imprisonment.[12]

First ground of appeal: was the starting point of nine years' imprisonment too high?

Arguments on appeal

[17] Mr Simperingham for Mr Harris argues that the Judge adopted too high a starting point because he mistakenly attached a significance to the evidence it did not have in the proceedings against Mr Tamihere, and incorrectly applied the sentencing authorities to which he was referred.

[18] In Mr Simperingham's submission, the Crown had a great deal of circumstantial evidence linking Mr Tamihere to the murders and Mr Harris' evidence had no material impact on the guilty verdicts. In support of the latter proposition, he relies upon a statement by this Court in the appeal that followed both Mr Tamihere's conviction and the discovery of Mr Höglin's body.[13]

[19] That appeal was argued on several grounds including that examination of Mr Höglin's body revealed findings inconsistent with Mr Tamihere's alleged (different) confessions to the prisoners. This Court noted the trial Judge's direction to

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9 At [47]–[51]. Note: suppression order remains in force in relation to details contained in [47(a)] of the High Court judgment. See ruling of Fogarty J: *Taylor v C* HC Auckland CRI-2016-404-236, 29 September 2016 at [2].

10 At [53].

11 At [56].

12 At [57].

13 *R v Tamihere,* above n 4, at 15.

the jury as to the proper approach to the evidence of these three witnesses, which was as follows:[14]

> "If they are of any weight they can properly be taken as part of the total pool of circumstantial evidence. That would be the way to have regard to them if you conclude that one or more of them should properly be given weight. The fact that we have got three different statements from three different witnesses at three different times may, it is for you to say, be of some significance. It's not just one person, you have got a number of quite separate and unrelated ones which may provide a bit of support."

[20] In rejecting the appeal ground, this Court added its own view of the evidence:[15]

> This passage reflects a view of the unreliability of much of that evidence manifest from a perusal of the transcript. We would be surprised if the jury had given much credence to any of the detail in the stories Tamihere was said to have told these witnesses. In the case of two of them there are doubts over whether he said anything at all, apart from his own admission that he spread disinformation to suspected inmates.

[21] Mr Simperingham also argues that Whata J erred in his view that Mr Harris' evidence corroborated the eyewitness evidence of the two trampers and so supported the admission of that evidence at the pre-trial stage.

[22] Finally Mr Simperingham argues that Whata J erred in treating Mr Harris' offending as materially and proportionately worse than the offending in *Mackie*, *Aoapaau* and *Harding* in terms of the context and level of premeditation.[16] He submits that the only true difference is in the purpose for which the false evidence was given, which is reflected in the differing maximum penalties. In all these circumstances, Mr Simperingham submits that a starting point equating to between 43 and 57 per cent, or six years to eight years of the maximum available sentence, was appropriate.

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14 At 15.
15 At 15.
16 *R v Mackie* (1998) 16 CRNZ 248 (HC); *R v Aoapaau* [2012] NZHC 700; and *R v Harding* HC New Plymouth, T12/02, 23 September 2003.

Discussion

Was the evidence material?

[23] We agree with Whata J's assessment that the evidence given by Mr Harris materially implicated Mr Tamihere in the offending for which he was charged and was intended by him to do so.[17] We see speculation as to the weight the jury actually attached to the evidence as irrelevant to the task of assessing the seriousness of his offending. This evidence was graphic in its detail, with content obviously calculated to shock. It was evidence that seemed to tie into other aspects of the Crown case, including evidence that Mr Tamihere had given his son a watch to wear, and evidence of the trampers coming across a man they believed to be Mr Tamihere with a blond woman.

[24] The comments by this Court in Mr Tamihere's earlier appeal were made in a different context, namely an assessment of whether Mr Tamihere had suffered a miscarriage of justice.

[25] We do not know how it came to be that Mr Harris' evidence also tied with the evidence of the two eyewitnesses, Mr Cassidy and Mr Knauf. But for whatever reason, it did link with their evidence and on the face of things at least, each appeared to lend credibility to the other. Mr Simperingham argues that the Judge was wrong to say that the Court of Appeal relied upon Mr Harris' evidence when ruling the identification evidence admissible. But that submission is insupportable in the face of the following passage in the Court of Appeal judgment, ruling the trampers' eyewitness evidence admissible:[18]

> Our conclusion is strengthened by the cumulative effect of the evidence against the accused. The Judge mentioned, of the prison inmates, only the one who testifies to the remarks by the accused about nearly being "sprung". But the other two provide indirect supporting evidence also, since the accused's alleged admissions to them suggest he could well have been with the young woman on the afternoon of 8 April 1989. It is true that all three may be described as suspect witnesses. The defence theory, however, presumably has to be that Mr Cassidy and Mr Knauf are both mistaken; that all three prison inmates have contrived or have deluded themselves into false accounts of conversations with the accused, or that he was fantasising in those

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17 *Taylor v Witness C,* above n 2, at [39].

18 *R v Tamihere* [1991] 1 NZLR 195 (CA) at 202.

> conversations; and that, although the accused frequented Crosbies Settlement for camping from time to time and took the couple's car and belongings from their car about or shortly after the time of their disappearance, by coincidence there was a man closely resembling him at the clearing, camping with Heidi Paakkonen, and the two trampers have confused him with that other man. … As it was put in *Turnbull*[19] at p 230, odd coincidences can, if unexplained, be supporting evidence. In cases in this field the strength of any supporting evidence is commonly and in our opinion rightly treated as relevant to whether it is safe to admit the questioned identification evidence.

[26] This shows that the Court of Appeal saw the confessions as strengthening the case for admission of the eyewitness evidence.

Treatment of sentencing authorities referred to

[27] We therefore move to Mr Simperingham's second point, that the Judge was wrong to treat the offending in this case as materially or proportionately worse than that in *Mackie, Aoapaau* and *Harding*, and it followed, on Mr Simperingham's submission, that the Judge should have applied the same percentage of the maximum sentence in this case.

[28] The offending in those cases was under s 109(1). In *Mackie* and *Aoapaau*, a witness gave evidence exculpatory of the accused in a murder trial. In *Harding,* the defendant gave false evidence at his own trial. The offending concerned very different factual circumstances and we see those cases as largely irrelevant to the task for the sentencing Judge. The Judge recognised that they concerned a different type of offending and accordingly used them as a rough cross-check for consistency.

[29] When selecting a starting point the fundamental task for a sentencing judge is to identify, through close analysis of the facts of the case, the criminality involved in the offending and the offender's culpability for that offending, while taking into account the purposes and principles of sentencing set out in the Sentencing Act 2002. Mr Simperingham's submission that the Judge was bound to apply the same percentage of the available maximum for different offending is therefore misconceived.

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19 *R v Turnbull* [1977] QB 224.

Starting point

[30] This Court discussed factors relevant to the selection of a starting point in *Nisbet v R*:[20]

> [14] Perjury may occur in a wide range of contexts. Factors that may impact on an assessment of the appropriate starting point when sentencing a defendant for perjury include the seriousness of the perjury when viewed in the context of the case in which it occurs, the level of premeditation involved in the perjury, the extent to which the perjury is sustained, the motivation for the perjury, and the harm caused by the perjury.

[31] Mr Harris gave evidence in a murder trial which materially implicated the accused in the murder of two people. His offending was premeditated. It was detailed and calculated to have impact. It was for personal gain.

[32] While we accept Whata J's assessment that Mr Harris' offending was not in the most serious class of offending under s 109(2), it was, as Mr Francois for Mr Taylor submits, certainly near to that category of case. One of the principles of sentencing is that the Court must impose a sentence near to the maximum penalty for offences near to the most serious cases for which the penalty is prescribed.[21] We have no doubt that Mr Harris' offending falls into the more serious category of offending under s 109(2). We consider that a nine-year starting point was well within the available range of sentences.

[33] Accordingly, this ground of appeal fails.

Second ground of appeal: excessive uplift for personal aggravating factors

[34] At sentencing, the prosecution submitted that there should be an uplift to reflect the fact that Mr Harris had been untruthful in other proceedings, including in the evidence he gave in his own defence in earlier trials, and in a proceeding before the Human Rights Review Tribunal.[22] The Tribunal records in its decision Mr Harris' admission that he had been a party to the creation of a false document (a canteen

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20 *Nisbet v R* [2017] NZCA 476.
21 Sentencing Act 2002, s 8(d).
22 *Harris v Department of Corrections* [2013] NZHRRT 15.

record) and its finding that Mr Harris was likely, on balance, to have created three letters.[23]

[35] Mr Simperingham submits that the Judge erred in uplifting the starting point by six months to reflect personal aggravating factors. He submits that the Judge should not have taken into account "the fabrication before the Human Rights Review Tribunal and in the other trials", as the Judge characterised it, as there was insufficient evidence of those matters before him.[24] Mr Harris did not, he says, give evidence at his own trials. As to the Human Rights Review Tribunal proceedings, he argues that a record of a purported admission by Mr Harris in civil proceedings cannot be proof beyond reasonable doubt that he fabricated documents. As to the uplift for offending whilst in custody, Mr Simperingham submits that this uplift should have been only two to four months.

[36] These aggravating factors were disputed at sentence. It follows that it was for the prosecution to prove the existence of those aggravating factors beyond reasonable doubt.[25] A finding by the Human Rights Review Tribunal that, on balance, letters have been fabricated cannot amount to proof beyond reasonable doubt on its own. We note the Tribunal also refers to an admission by Mr Harris of having fabricated a document. We agree with Mr Simperingham that cannot be taken into account at sentencing as evidence of earlier offending. We also do not know whether Mr Harris was cautioned against self-incrimination before making that admission. And we also do not have sufficient detail of the circumstances of the alleged fabrication of the canteen record to be sure that an offence was committed.

[37] There also seems to be inadequate evidence of the other occasions on which it was argued that Mr Harris had perjured himself.

[38] But these matters do not really assist Mr Harris, since the uplift imposed was only six months. Mr Simperingham accepts that an uplift of two to four months was appropriate to reflect the fact that Mr Harris offended whilst a serving prisoner.

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23 At [90].
24 *Taylor v Witness C,* above n 2, at [50].
25 Sentencing Act, s 24(2)(c).

Ultimately, the question for us is whether the end sentence imposed was manifestly excessive.

[39] We consider that the starting point adopted by the Judge was well within that available to him, and he would have been justified in adopting a higher starting point. Even if the whole of the six-month uplift for offending whilst in prison were taken away, the end sentence imposed could not be described as manifestly excessive.

[40] The second ground of appeal must also fail.

Result

[41] For these reasons, the appeal against sentence is dismissed.

Solicitors:
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Amicus Law, Auckland for Respondent