INTERIM ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT UNTIL FINAL DISPOSITION OF APPEAL.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2016-004-7370
[2017] NZHC 2610

ARTHUR WILLIAM TAYLOR

v

WITNESS C

Hearing:	25 October 2017
Counsel:	R Francois for Prosecutor A Simperingham for prisoner
Sentence	25 October 2017

SENTENCING NOTES OF WHATA J

Solicitors:	Amicus Law, Auckland Woodward Chrisp, Gisborne

Name Suppression

[1] Witness C, I would normally invite you to stand but then I would invite you to sit down, so just remain seated for now. Before I commence with the sentence, I want to repeat my decision, or at least the outcome of my evaluation on the application for suppression. The application by various members of the media to revoke the name suppression order made by Tompkins J on 20 November 1990 is revoked. A judgment with reasons for my decision will be released separately. I do, however, make an interim order for suppression, having been advised that Witness C is going to appeal to the Court of Appeal; and so I make an interim order suppressing Witness C's identity pending the outcome of the Court of Appeal matter, but with leave granted to the media outlets to return to this Court to seek further assistance if necessary.

Introduction

[2] Turning then to the sentence, Witness C, you have been found guilty of eight charges of perjury.[1] These charges relate to evidence you gave at the trial of David Tamihere for murder in 1990. You face a maximum term of imprisonment of 14 years.[2]

[3] In order to provide proper context to your offending, it is necessary to describe the background facts in some detail.

Facts

[4] In preparing this background I have referred to the evidence given at your trial and the summary of the evidence given at Mr Tamihere's trial provided by the Court of Appeal.[3]

[5] Mr Tamihere was charged and convicted of the murder of two Swedish tourists, Heidi Paakkonen and Sven Hoglin, in 1990. The Crown case at his trial was wholly circumstantial, as the bodies of the victims had not been located. The Crown

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1 Crimes Act 1961, ss 108 and 109.
2 Section 109(2).
3 *R v Tamihere* CA428/90, 21 May 1992, and *Taylor v C* [2017] NZCA 372.

case included key evidence from two trampers who saw a man they identified as Mr Tamihere with a woman, they said, was similar to Ms Paakkonen. The victims' possessions were also found at Mr Tamihere's address, including the rental car they had hired, the keys, and Ms Paakkonen's poncho. Balanced against this, there was evidence from a number of defence witnesses that the couple were seen at the northern tip of Coromandel Pennisula at the time when the woman resembling Ms Paakkonen was said to have been seen by the two trampers.

[6] Three prisoners also gave evidence that Mr Tamihere had, at different times, spoken to them while in custody describing how he had sexually assaulted and killed the couple. Witness C, you were one of those prisoners. The present offending, eight charges of perjury, relates to eight claims you made at trial that Mr Tamihere confessed to particular details of his offending. In short, Witness C, you told the Court Mr Tamihere had confessed that he had met Ms Paakkonen and Sven Hoglin at a camping or picnic area; assaulted and tied Mr Hoglin up; sexually assaulted Mr Hoglin; disposed of Mr Hoglin's body somewhere between Thames and Wilson Bay by weighing it down with metal weights; strangled Ms Paakkonen; gave Mr Hoglin's watch to one of his sons; kept Ms Paakkonen in a bush when a couple came across them, which almost resulted in him getting "sprung"; and disposed of Mr Hoglin by beating his head with a lump of wood.

[7] The evidence at your trial that these statements were false consisted of two main parts. First, Mr Tamihere's evidence that he did not say these things to you; and, second, admissions by you that you had lied about these matters in an affidavit signed in 1995, in a TV interview in 1996 and in a letter written by you to Mr David Tamihere in 2007.

[8] To elaborate, in 1995, Witness C, you made contact with Mr Tamihere's brother, John, telling him you wanted to recant on your trial evidence. John Tamihere was initially sceptical about your desire to recant, so insisted that you swear an affidavit confirming you had lied at David Tamihere's trial.

[9] Over the course of two to three telephone calls you told John Tamihere what you were prepared to say. John Tamihere then prepared a draft affidavit. He also

sought the assistance of a solicitor to finalise the drafting and arranged for a barrister, Mr Parata, to visit you for the purpose of swearing the affidavit. You did this on 25 August 1995.

[10] In this affidavit you stated, among other things, firstly, Mr Tamihere "never made any confession to [you] of any kind"; secondly, Mr Tamihere actually always maintained his innocence; thirdly, you produced the affidavit because you "no longer want[ed] to be associated with the fabrication of evidence"; and, finally, you were 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.

[11] John Tamihere did not publish your affidavit immediately, but on 16 July 1996 he released the affidavit to the media. This was timed to coincide with a documentary to be shown on national television. Mr Tamihere took the precaution of having Mr Parata visit you in prison again to make sure you remained happy with the affidavit. You confirmed to him that you were happy with it.

[12] The following day, Witness C, you were interviewed on the *Holmes* television show. In that interview you:

(a) assured Mr Holmes you were not lying by recanting, but that at trial "was a different situation" due to inducements;

(b) said you believed the Police knew at the time your testimony was a lie; and

(c) said Mr Tamihere never confessed to you in prison, and always maintained his innocence.

[13] This episode was followed shortly after by an inquiry by the Independent Police Complaints Authority. During that process you went back on your affidavit, denying that you lied at trial and that you had been bribed.

[14] However, in June 2007 you handwrote a note to David Tamihere in which you said your trial evidence "was all false and fabricated by police". At your trial,

you went back on these acknowledgments again. You sought to explain those statements by reference to alleged threats made to you at the time you were preparing the affidavit, gave the interview and wrote the letter.

[15] The jury was plainly sure, in light of the evidence given by David Tamihere and your subsequent admissions, that you perjured yourself at David Tamihere's trial by giving false evidence that he had made the above confessions to you. In doing so, you mislead the jury at that trial in order to procure Mr Tamihere's conviction for murder.

Personal circumstances

[16] Witness C, you are 68 years old, from Ngapuhi. You are currently serving a life sentence at Auckland Prison. You have a home in Pakiri which you intend to return to upon release. You have three children and two grandchildren, both in New Zealand and abroad. You also have support from your sister, in Whangārei, and other siblings living in Australia. You are in contact with a number of family members by mail, phone calls and occasional visits.

[17] You suffer from orthopaedic injuries and have a heart condition which required stents to be inserted into the coronary arteries of your heart.

[18] The indeterminate sentence you are currently serving is for two murder convictions in 1983. You were released on parole in November 1992 only to be recalled in October 1994. You were released again in 2006 but arrested in March 2007 for an offence committed on the day of your release. In total you have accrued a further 14 criminal convictions during these periods. Your most recent convictions were in 2006 and in 2016

[19] The probation officer assesses your risk of further offending and potential for harm as medium to high, given the nature and diversity of your previous offending, and your continued denial of the present charges.

[20] More specifically, you stated to the probation officer that although you accept the convictions, you do not agree with them and maintain your innocence. You

identified four other convicted offenders who you suggest conspired against you to bring about the present convictions. You do not accept responsibility and have made no expressions of remorse; in the probation officer's assessment you shift blame and responsibility to others. You do, however, appear to comply with prison rules, and Mr Simperingham submits you have taken and successfully completed a number of courses in prison including on tikanga Māori.

[21] I have also read your statement in support of sentencing submissions. You describe having been hit over the head because you gave evidence for the Crown, and a strong culture in prison of beating up people who are perceived as "narks". You are worried that if your name suppression is lifted, the risk of threats and harm will increase because your name will become common knowledge. You also say there is no guarantee you will be placed within a safe unit at Auckland Prison.

Victim impact statement

[22] Mr Tamihere has produced a victim impact statement. In it he emphasises the importance of your evidence at his murder trial, and the impact his imprisonment has had on his family. He emphasises the separation he has had from them, and the vilification he and his family has experienced as a consequence of your statements.

Approach

[23] Turning to my assessment, in the first part of my assessment, I am going to describe the principles that guide sentencing.

[24] I have to take into account the purposes and principles of sentencing outlined in the Sentencing Act 2002. There is a need to denounce your offending and to hold you accountable for the harm that you have done. This sentence, or the sentence I will impose, is intended to promote a sense of responsibility in you for that harm. There must also be deterrence, both against future offending by you and against others who might similarly offend. I must also consider your rehabilitation and impose the least restrictive sentence possible. The sentence I impose upon you must be consistent in kind and in length with those imposed on others who have offended in a similar way.

[25] In fixing sentence I will first identify a starting point for your sentence that reflects the gravity of your offending by reference to offending of a similar kind. I will then identify any personal aggravating features that may warrant an uplift in your sentence and any personal mitigating factors that may warrant a discount. An end sentence will then be imposed upon you.

[26] As your offending predates the statutory power to impose a minimum sentence in this context, I will not impose a minimum period of imprisonment.[4]

Submissions

[27] Before I commence my evaluation, I want to acknowledge the detailed and helpful submissions of Mr Francois and Mr Simperingham. I will not repeat them, but I confirm that I have found them of considerable assistance.

Starting point

[28] I turn now to fix a starting point for your sentence. I propose to sentence you concurrently on each perjury charge. While you have been convicted on eight charges, the charges arise out of a single event; the evidence you gave at Mr Tamihere's trial.

[29] The maximum penalty of 14 years reflects the serious nature of perjury offending committed to procure a conviction. As Hammond J said in the case of *Mackie*:[5]

> … the very integrity of the criminal justice process is threatened when witnesses lie on oath.

[30] Understandably, there is no tariff case for perjury given the variety of ways perjury might occur. However, a survey of sentences for perjury reveals a number of factors relating to the offending which, if present, will be relevant to identifying a starting point sentence for perjury.

[31] Those factors include:[6]

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4 See Sentencing Act 2002, s 152.
5 *R v Mackie* (1998) 16 CRNZ 248 (HC) at 249.

(a) *The seriousness of the original offence and the consequence of a guilty verdict for the defendant*.

(b) *Whether there was an organised crime dimension to the perjury*.

(c) *The materiality of the evidence to conviction* – in this regard, perjury evidence which is central or vital to the case against a defendant (for example, direct identification evidence), will attract a higher sentence than evidence which is only peripheral to that case (for example, circumstantial evidence).

(d) *The extent of any premeditation* – to illustrate, perjury evidence that is carefully designed to mislead the jury will attract a higher sentence than evidence which is given spontaneously while on the stand.

(e) *The motivation of the perjurer* – for example, a perjurer motivated by a misguided sense of loyalty or under immediate threat will be treated differently from a perjurer who seeks personal or financial gain from the perjury.

[32] I note these factors broadly mirror the factors identified by Mr Simperingham from Canadian authorities.[7] I prefer however to base my evaluation on New Zealand cases. I also acknowledge the point made by Mr Francois that the difficulties of proving perjury emphasise the need to denounce any offending of this kind.

[33] There have been very few sentences handed down in cases involving perjury committed to procure a conviction, and what few there have been are not particularly helpful. For example, in *Forrest v R*, the Court of Appeal endorsed a starting point of three years for two charges of perjury, both in relation to preliminary hearings in a private prosecution commenced by the perjurer.[8] The private prosecution did not progress beyond these preliminary hearings and the perjurer subsequently purported

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6 These principles are drawn from *R v Mackie* (1998) 16 CRNZ 248 (HC), *Skelton v R* [2011] NZCA 35, *R v Wilkinson* CA277/04, 16 December 2004 and *R v Aoapaau* [2012] NZHC 700.

7 In particular, Mr Simperingham relied on the five factors outlined in *R v Jordan* [1986] 72 AR 167 (ABCA), approved in *R v Reyat* [2014] BCCA 101, (2014) 309 CCC (3d) 372.

8 *Forrest v R* [2010] NZCA 34.

to prosecute himself for perjury. This triggered a police inquiry and formal charges were laid by the police.

[34] But four sentences in the less serious category, dealing with perjury to procure acquittal; *R v Mackie*, *R v Aoapaau*,[9] *R v Wilkinson*[10] and *R v Harding*,[11] provide helpful reference points in terms of fixing where, on a spectrum of available starting points, perjury in serious trials might be properly fixed.[12]

[35] In *Mackie*, the defendant lied about when fingerprints at the location of the murder were left to protect a gang mate. Hammond J commented the starting point would have been four years against a maximum of seven years, but for substantial discounts applied given the defendant's subsequent cooperation. Mr Mackie brought the perjury to light, was remorseful and cooperated with the police. An end sentence of 15 months' imprisonment was handed down.

[36] In *Aoapaau*, the defendant gave false evidence at a murder trial of her husband. She said she had been raped by the victim, which provoked her husband to murder him. The first trial was aborted, but before the second trial she confessed to her perjury. The Judge adopted a starting point of three years, acknowledging the serious nature of the trial, but noting that Ms Aoapaau was motivated by a misguided sense of loyalty and guilt. Her subsequent confession and cooperation, together with the fact her evidence did not lead to an acquittal, reduced the starting point to 22 months. An end sentence of 11 months' home detention was then fixed.

[37] In *Wilkinson*, the perjurer said he was in possession of class A and B drugs, not his associate. If found guilty, his associate faced a maximum sentence of life imprisonment. Mr Wilkinson's evidence, however, resulted in an acquittal. He was subsequently charged with possession, but on the day of trial he pleaded guilty to perjury. The Court of Appeal upheld a starting point of about three years. The Court noted the perjurer "was in effect playing with the justice system".[13]

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9 *R v Aoapaau* [2012] NZHC 700.
10 *R v Wilkinson* CA277/04, 16 December 2004.
11 *R v Harding* HC New Plymouth, T12/02, 23 September 2003.
12 The maximum penalty for perjury other than that which falls under s 109(2) is seven years' imprisonment, pursuant to Crimes Act 1961, s 109(1).
13 *R v Wilkinson* CA277/04 16 December 2004 at [14].

[38] In *Harding*, the defendant gave false alibi evidence in his own rape trial and was subsequently acquitted. At sentencing, the Judge did not consider that but for the alibi evidence, the defendant would "automatically" have been convicted. A starting point of four years was adopted in that case on a maximum sentence of seven years.

[39] Returning to the facts of your offending, Witness C, there are several aggravating features. First, Mr Tamihere's trial involved the most serious charge within the criminal jurisdiction – two murder charges, attracting a sentence of life imprisonment. Second, there was a high level of premeditation given the scope and detail of your false evidence. Third, your evidence materially implicated Mr Tamihere in the offending – it was evidence of a cell mate confession and corroborated other evidence described by the Court of Appeal in Mr Tamihere's second appeal as crucial to the Crown case, namely the identification evidence of the two trampers, Mr Cassidy and Mr Knauf.[14] Fourth, your evidence was used to support, in fact, the application for the admission of Mr Cassidy and Mr Knauf's identification evidence.[15] 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.[16]

[40] Given this collection of seriously aggravating features, the initial starting point must be at the high end of the range for perjury offending. In this regard, I agree with Mr Francois, your perjury is a brazen assault on the foundation of our criminal justice system. It also appears to be the worst example of perjury within this jurisdiction.

[41] But I reject Mr Francois' submission that the maximum available sentence, 14 years' imprisonment, must be the starting point. First, this is not the worst possible perjury of its kind. Your evidence was not detailed direct eye witness evidence of offending (for example, identification evidence) that, if accepted by the jury, would inevitably lead to a guilty verdict. Rather, while it was material, it was indirect evidence only and inconsistent with the other (supposed) cell mate

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14 *R v Tamihere* CA428/90, 21 May 1992 at 4.
15 *R v Tamihere* [1991] 1 NZLR 195 (CA).
16 At 202.

confessions. Its reliability, on the whole, was doubtful. This view was expressed by the Court of Appeal in Mr Tamihere's conviction appeal. The Court noted, when referring to the trial Judge's summing up about the cell mate evidence:[17]

> 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.

[42] Second, while you were motivated by personal gain to give evidence, there is nothing to suggest you were acting as part of an orchestrated criminal campaign, or alternatively, had a vendetta against Mr Tamihere.

[43] In order to attract a maximum sentence, seriously aggravating features of this kind would need to be present.

[44] Returning to the starting point, the present offending is, nevertheless, a very serious example of perjury. While the extent of its impact on the trial cannot be exactly quantified by me, you must have known, given your background, that your evidence would form an important strand in the Crown case against Mr Tamihere, and the consequences of guilty verdicts on two murder charges for Mr Tamihere would be life imprisonment. That you proceeded, nevertheless, to give false evidence was an egregious wrongdoing that must be sternly denounced.

[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

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[17] *R v Tamihere* CA428/90, 21 May 1992 at 15.

guilty verdicts reveals a level of callousness that demands a relatively sterner sentence.

[46] I acknowledge, for completeness, that this starting point coincides with the nine year sentence imposed in *R v Reyat*, a case highlighted by Mr Simperingham.[18] That case involved perjury in a trial for the murder 329 crew and passengers on an airplane destroyed by a bomb. Plainly, the seriousness of the offending in that case was markedly higher and it would be thought you should attract a lesser sentence. But as the sentencing judge noted in that case, there was no prospect of the perjury that implicated another person in the murder.[19] This, in my view, offsets the added seriousness of the offending in that case.

Personal factors

Personal aggravating factors

[47] I turn to personal aggravating factors. Mr Francois claims:

(a) You lied in other judicial proceedings. He refers to your untruthful denial of your offending at trial in 2008 and 2016, at which you were found guilty, your jail house confession evidence in the trial of Mr Lundy, and the findings of the Human Rights Review Tribunal that you lied in proceedings before it.[20]

(b) Your conviction history shows you have a "thumbing the nose" attitude towards the State, that is, a view some laws simply do not apply to you.

(c) Your offending while on parole was serious and egregious.

(d) You are not remorseful.

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18 *R v Reyat* [2014] BCCA 101, (2014) 309 CCC (3d) 372. The maximum penalty for perjury in Canada is 14 years' imprisonment: Criminal Code RSC 1985 c C-46, s 132.

19 At [30].

20 [Suppressed].

(e) Early in your trial for double murder, you blamed the co-accused, a friend, and after conviction admitted to lying about it.

[48] Mr Simperingham accepts the fact you were serving a sentence at the time of your offending is an aggravating factor, but submits your conviction history is otherwise not relevant. He also submits any allegations you have lied in other proceedings have not been proven beyond reasonable doubt and therefore should not be considered. Finally, he submits that by recanting in an affidavit, you assisted the prosecution in bringing the charges against you.

[49] I agree with Mr Simperingham that I should not take into account unproven allegations of perjury to impute a propensity to perjure. The fact you are not remorseful is also the absence of a mitigating factor, rather than an aggravating factor. I am also prepared to find that, by recanting in an affidavit form, Witness C, you assisted the prosecution. But on this your not guilty plea offsets what might otherwise have been a mitigating factor.

[50] However, the fabrication before the Human Rights Review Tribunal and in the other trials, the fact the perjury occurred while incarcerated for other offending, and your other offending while on parole, show a long-standing contempt for the law and the judicial process. The prosecution seeks a very substantial uplift for these factors. But, in my view, this belies that:

(a) you are serving a sentence for the other offending, and

(b) as a prisoner serving an indeterminate sentence, all of these factors are taken into account when you are assessed for parole.

[51] There is a risk that in adjusting for these facts there may be double counting. Having said that, this Court must separately fix a sentence that will serve the principles and purposes of sentencing. In my view, these personal aggravating factors warrant an uplift of six months.

Mitigating factors

[52] As to personal mitigating factors, Mr Simperingham refers to your age and ill health; your supportive family; the numerous courses you have participating in to improve yourself (including counselling and Māori culture); and the effect revocation of suppression will have on you.

[53] I agree your age and ill health, and the high level of recrimination you will face from other prisoners with or without name suppression, will make a long-term sentence of imprisonment disproportionately severe. In this regard, David Tamihere gave evidence that narks are viewed very poorly in prison. There was also evidence that you were known already by some prisoners as witnesses in Mr Tamihere's trial. While I do not assume that you will be physically harmed, I am not naïve to the implications of the present convictions for your standing among the prison population, even if you have the benefit of protective custody.

[54] I also acknowledge that you have a supportive family and that you have taken steps to improve yourself, including through tikanga courses. This is a positive factor in terms of your rehabilitation, though it remains clear that you are not yet ready for release on parole.

[55] In this regard, Mr Francois sought to have the notes from your most recent parole hearing produced for the purposes of showing you have not rehabilitated. I did not consider this was necessary. The probation officer's report to the Court advised that parole was declined because you continue to pose an undue risk of reoffending. This is sufficient evidence that you have not yet fully rehabilitated. I also note that Mr Francois today sought to challenge the health claims, but I accept Mr Simperingham's submission that had the objection been registered well before the sentencing date, he would have had the opportunity to provide the requisite evidence.

[56] In those circumstances, I am prepared to discount the sentence by 10 per cent for these combined factors.

End Sentence

[57] This results in an end sentence of eight years and seven months' imprisonment.

[58] Witness C, please stand. On each of the eight charges of perjury, I sentence you to eight years and seven months' imprisonment, to be served concurrently.

[59] Please stand down.