
CANADA / JUDGMENT

R. v. Robinson

2015 BCSC 1535

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1535 R. v. Robinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Robinson,

2015 BCSC 1535

Date: 20150724

Docket: 25753

Registry: Vancouver

Regina

v.

Benjamin Robinson

Before: The Honourable Mr. Justice N. Smith

Oral Reasons for Sentence

Counsel for the Crown:

R. Peck, Q.C.

Counsel for the Accused:

E.D. Crossin, Q.C.

E. France

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 24, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2015

- [1] THE COURT: Benjamin Robinson was convicted of perjury on March 20, 2015. I heard sentencing submissions on June 16, 2015, and reserved judgment on sentence to today.
- [2] Mr. Robinson is a former corporal in the Royal Canadian Mounted Police. His perjury conviction arose from testimony he gave at a public inquiry into the death on October 14th of 2007 of Robert Dziekanski. Mr. Dziekanski died at Vancouver International Airport after police used a Conducted Energy Weapon commonly known as a Taser to subdue him. Mr. Robinson was the senior of four RCMP members involved in the incident.
- [3] Mr. Dziekanski's death received widespread media attention, particularly after a video recording made by an eyewitness, Paul Pritchard, (the Pritchard video), became public. Some of the initial descriptions of the incident by the police including a statement that Mr. Robinson made to investigators were not consistent with what the video showed.
- [4] The Government of British Columbia appointed Thomas Braidwood, Q.C., as commissioner to conduct a public inquiry (the Braidwood Inquiry) and Mr. Robinson gave oral testimony under oath at the inquiry on March 23, March 24, and March 25, 2009.
- [5] All four officers involved testified at the inquiry and all four were charged with perjury. Each was tried before a different judge of this court. Two, including Mr. Robinson, were convicted and two were acquitted. That is not as surprising as it may appear to some. Each case was based on specific allegations of perjury and specific evidence that differed from one case to the next.
- [6] The circumstances of the offence and the reasons for my finding of guilt are set in the judgment on conviction indexed at R. v. Robinson, 2015 BCSC 433. I will not repeat them in detail. The reasons for sentencing should be read in conjunction with the judgment on conviction.
- [7] I will repeat one thing that must be kept in mind on sentencing. Mr. Robinson was not charged with any offence arising directly from the death of Mr. Dziekanski and was not alleged to be criminally responsible for that death. This case was not about whether or not Mr. Robinson and the other officers acted properly when they confronted Mr. Dziekanski and it was not about whether Mr. Dziekanski's death could or should have been avoided. It was only about Mr. Robinson's description of the events when he testified before the Braidwood Inquiry almost a year and a half later.

- [8] The indictment contained a single count of perjury based on eight specific allegations or averments. The conviction flowed from a finding that the Crown had proven two of them beyond a reasonable doubt.
- [9] Averment 2 dealt with Mr. Robinson's explanation at the inquiry for a clearly inaccurate assertion he had made in his interview with an investigator from the Integrated Homicide Investigation Team (IHIT), on the morning of October 14, 2007, only hours after Mr. Dziekanski's death. Mr. Robinson told the investigator that Mr. Dziekanski had to be "wrestled to the ground" after the first Taser firing. The Pritchard video showed that was not the case and that Mr. Dziekanski fell to the ground.
- [10] Averment 2 alleged that Mr. Robinson committed perjury:
- ... when he testified that, when he said in his statement on October 14, 2007 that Robert Dziekanski had to be wrestled to the ground, he was mistaken but was telling the truth because at certain points the officers did wrestle with Robert Dziekanski, and that in his statement he sort of blended the whole interaction with Robert Dziekanski;
- [11] Averment 7 was based on alleged collusion among the four officers before they spoke to the Integrated Homicide Investigation Team (IHIT). It alleged Mr. Robinson committed perjury:
- ... when he testified that he did not discuss with his fellow officers the details of the incident involving Robert Dziekanski before providing his statement to the Integrated Homicide Investigation Team on the morning of October 14, 2007;
- [12] Any decision on sentencing is governed by s. 718 of the Criminal Code, R.S.C., 1985, c. C-46 which says the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. The section lists a number of objectives of sentencing that include the denunciation of unlawful conduct, deterrence of the offender and others from committing offences, separation of the offender from society where necessary, rehabilitation of the offender, reparation of the harm done, and promotion of a sense of responsibility in the offender, including acknowledgement of the harm done.
- [13] Each of those objectives applied in isolation may lead to a different result. The job of the court is to balance them and determine which ones should be given greater or lesser emphasis in an individual case.
- [14] The most basic principle of sentencing is stated in s. 718.1. The sentence imposed should be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [15] Section 718.2 sets out a number of other principles. A sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. An offender should not be deprived of liberty if a less restrictive sanction is appropriate. All reasonable sanctions other than imprisonment should be considered with particular attention to the circumstances of Aboriginal offenders. A sentence should be increased or reduced to take account of any aggravating or mitigating factors.

- [16] Turning first to the circumstances of the offender, Mr. Robinson is 45 years old and the father of three children, but separated from his wife. He is a member of the Osoyoos First Nation, although he was born and raised in the Lower Mainland. His father was a commercial fisherman and, therefore, absent from the family for more than half the year so his mother was the primary parent. Alcohol and substance dependence was common in his extended family.
- [17] Mr. Robinson graduated from high school in Delta and ultimately obtained a Bachelor of Arts in Aviation and Economics from Trinity Western University. He joined the RCMP in 1996 and, after basic training in Regina, was posted to Chase, British Columbia, where he remained for seven years. During his time in Chase, he was involved in a non-fatal shooting incident that his counsel says was traumatic for him because he knew the victim's family. He also investigated at least two highway fatalities a year and was involved in managing the police response to the 2001 Aboriginal blockade of the Sun Peaks Resort.
- [18] Mr. Robinson later served in Merritt where he was promoted to corporal and in Richmond. He joined the Vancouver Airport detachment in 2007, but was placed on leave following the Dziekanski incident. He returned to duty with the Olympic Planning Section in February 2008, but went on leave again following a motor vehicle incident on October 25, 2008. That incident ultimately led to a conviction for obstructing justice. He remained on leave until his retirement from the RCMP in 2012.
- [19] Mr. Robinson's time in the RCMP was marked by increasing use of alcohol which his counsel described as a coping mechanism for stress. That does not appear to have had an obvious impact on his job performance. Superintendent Nessel, the officer in charge of the Richmond detachment, has written a letter praising Mr. Robinson's investigative, communication, and leadership skills.
- [20] However, counsel says the addiction spiralled out of control when Mr. Robinson stopped working. He entered an alcohol treatment centre in 2012 and I am told he has now been sober for three years.
- [21] Staff Sergeant Mike Ingalls, an RCMP staff relations representative, says in a letter that the Dziekanski incident [as read in]:
- ... profoundly changed him in a negative way and set his life on a course that resulted in him not only losing his career, but also in becoming reclusive due to the media attention the case received.
- [22] Dr. Georgia Nemetz is a clinical psychologist who began working with Mr. Robinson in 2008. It is her opinion that at the time Mr. Robinson testified at the Braidwood Inquiry, he was suffering from posttraumatic stress disorder arising at least in part from the Dziekanski incident and the subsequent media attention. She also says his drinking remained excessive until he entered the rehabilitation program in 2012. Dr. Nemetz says, [as read in]:

Although the PTSD and alcohol abuse do not absolve him of responsibility for his actions, it must be noted they would most likely interfere with normal decision-making processes. It is also noted that his psychological state while testifying at the Braidwood Inquiry in March 2009 was also substantially compromised as he was dealing with the effects of chronic maladaptive alcohol abuse and cognitive slowing and impairment due to his PTSD. These two conditions would most certainly impact his judgment, memory, and ability to problem-solve.

- [23] The motor vehicle accident that effectively ended Mr. Robinson's RCMP career was one in which his vehicle collided with a motorcycle causing the death of the motorcyclist. Mr. Robinson, who had been drinking prior to the accident, left the scene and drank two shots of vodka at his home. He then returned to the scene and told the attending police officer that he had the vodka to calm his nerves.
- [24] He was charged and convicted of obstruction of justice. The court found Mr. Robinson knew as a trained police officer that alcohol consumption after the accident would make it difficult to determine what his blood alcohol content had been at the time of the accident and that he drank the vodka to create a defence to possible charges.
- [25] On sentencing, Madam Justice Dillon found that at the time of the offence, Mr. Robinson had been an undiagnosed alcoholic suffering from PTSD and had been intransigent in dealing with his longstanding alcohol abuse problem. That finding was based on her acceptance of evidence from Dr. Nemetz that appears to have been similar to the evidence Dr. Nemetz has provided here. Mr. Robinson was given a conditional sentence on that occasion.
- [26] The motor vehicle incident occurred some five months before Mr. Robinson testified at the Braidwood Inquiry, but his conviction and sentence for obstruction of justice occurred much later, in 2012. Because he had not been convicted at the time of this offence, it cannot be treated as a prior conviction that would in itself be a reason for imposing a greater sentence. However, it can be considered as a matter going to character and other considerations relevant to sentencing.
- [27] Because the events giving rise to that conviction occurred in the months leading up to his testimony at the Braidwood Inquiry, I find that it is relevant to Mr. Robinson's mental state and functioning at the time. On one hand, it demonstrates a disregard for the special duties he owed to the law and the public as a police officer. On the other hand, it is consistent with the kind of poor judgment and impaired problem solving that Dr. Nemetz attributes to PTSD.

Victim and Community impact

- [28] The Crown has introduced a victim impact statement from Mr. Dziekanski's mother, Zofia Cisowski. She states:

The lies that were told were meant to make people believe my son Robert acted in a different way than he actually did. If it hadn't been for the video taken by Mr. Paul Pritchard no one would have ever known the truth and my son's memory would have been tainted forever.

- [29] She adds that in order to represent her son's memory, she has attended all the trials with a huge impact on her finances and emotional well-being.
- [30] The impact of this offence on the community has been primarily to the reputation and credibility of the police force in which Mr. Robinson served. Confidence and trust in the police is crucial to the proper functioning of the justice system and society in general. I cannot illustrate what has happened to that confidence and trust any better than by referring again to Ms. Cisowski's victim impact statement. She says:

When I came to Canada I saw the RCMP as the main symbol of Canada and what it stood for, a democracy where people could always trust the police. Unlike police in other countries I believed the RCMP were honest and protectors of people who were in trouble or needed help. I don't feel that any more because of how these policemen were untruthful.

- [31] Perjury is a serious offence because it strikes at the heart of the justice system and undermines the administration of justice. That general principle has been stated by the courts many times including by the B.C. Court of Appeal in *R. v. Reyat*, 2014 BCCA 101, and the Alberta Court of Appeal in *R. v. Jordan* (1986), 47 Alta L.R. (2d) 85.
- [32] A particularly concise statement of the principle is found in *R. v. Martin* (1993), 141 N.B.R. (2d) 227 (Q.B.), where the trial judge said at para. 9:

Unless our system of justice can expect witnesses to tell the truth, there is no reliable basis for a court of law to come to a determination of the issues before it. If witnesses are of the impression that their oath to tell the truth will attract little responsibility or consequence, then their reliability will be suspect and the system will fall into disrepute.

- [33] Parliament has recognized the serious nature of the offence by providing for a maximum penalty of 14 years in prison, although it appears that no one has ever received that maximum sentence. In *Reyat*, the Court of Appeal referred to the nine-year sentence in that case as the longest sentence imposed in Canada for perjury. *Reyat* involved multiple instances of perjury in a trial about the bombing of an aircraft in which more than 300 people died. No one suggested it is comparable to this case for sentencing purposes.
- [34] Other than *Reyat*, the longest perjury sentence that has been cited to me was six years, but most of the decided cases, which I will discuss in a few moments, involved sentences of between one and three years with the longer sentences generally imposed where perjury was committed during trials for serious criminal offences such as murder. The Criminal Code does not set a minimum sentence for perjury.
- [35] The Crown seeks a custodial sentence of between one-and-a-half and three years and closer to the upper end of that range.

- [36] The defence submits this case can appropriately be dealt with by a conditional sentence of 15 to 24 months to be served in the community, while acknowledging that any conditional sentence order would have to include unusually strict and punitive conditions. Counsel suggests Mr. Robinson be confined to his residence 24 hours a day/seven days a week for one year, except for medical emergencies, appointments with the conditional sentence supervisor, and treatment for his addiction and psychological issues. That would be followed by a further period when he would be subject to curfew with 200 hours of community service in the area of alcohol and drug counselling. In that capacity, counsel suggests Mr. Robinson could bring some insight to others, particularly in the Aboriginal community.
- [37] As s. 742.1 of the Criminal Code read on the date of this offence, it is open to the court to consider a conditional sentence. The section referred to specific offences or categories of offence where a conditional sentence was not available. It was also not available for any offence with a minimum term of imprisonment. Perjury was not excluded by those criteria. I note that would not be the case for perjury committed today because subsequent amendments to s. 742.1 make the conditional sentence unavailable where the maximum penalty is 14 years or life.
- [38] The other preconditions for a conditional sentence at the time of this offence included that the term be less than two years, the safety of the community would not be endangered, and that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

Mitigating factors

- [39] Counsel for Mr. Robinson puts forward a number of matters that he submits constitute mitigating factors. The principal one is his posttraumatic stress disorder and alcohol dependence at the time of the testimony. While counsel does not submit these conditions absolve him of responsibility, they would have impaired his judgment and decision-making thus reducing his moral culpability.
- [40] The Criminal Code does require that sentences be proportionate to the degree of responsibility of the offender and I agree that any evidence of diminished responsibility must be considered. It is also to Mr. Robinson's credit that he has finally taken steps to deal with his alcoholism.
- [41] There is evidence in the report of Dr. Nemetz and the statement of Constable Ingalls that Mr. Robinson has been profoundly affected and stigmatized by the unusually wide-spread and long-lasting publicity in this matter. That is a factor that can be considered in mitigation; see, for example, *R. v. Adam*, 2007 BCSC 764. In this case, the weight to be given to that factor is offset by the fact that individuals in positions of authority such as police officers must expect to face a greater degree of public scrutiny when adverse incidents occur or when they are found to have committed offences.

- [42] As a former police officer, Mr. Robinson would likely serve much of any prison sentence in protective custody with associated limitations on social contact and limited access to institutional amenities. As stated in *R. v. Cook*, 2010 ONSC 5016, that ordinarily warrants consideration in mitigation.
- [43] Counsel for Mr. Robinson also referred to, but did not strongly press the sentencing impact of Mr. Robinson's status as an Aboriginal offender. Section 718.2 of the Criminal Code requires the court to consider all possible alternatives to imprisonment with particular attention to the circumstances of Aboriginal offenders. As stated by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, that does not necessarily mean a different sentence for an Aboriginal offender, but it does require the court to take judicial notice of the historical, cultural, and economic factors affecting First Nations communities and individuals. It recognizes the social disadvantage that may have contributed to the Aboriginal offender being before the court. In my view, that is of limited application when an individual, far from being socially disadvantaged, has attained a position of some authority and power.
- [44] As a final mitigating factor, there is no reason to believe that Mr. Robinson is likely to reoffend or that he poses a danger to the public.
- [45] The principal aggravating factor in this case is that Mr. Robinson was a police officer with an obligation and sworn duty to uphold the administration of justice. Police officers give sworn evidence every day before the courts and other tribunals including cases where the guilt or innocence of others is at stake. That evidence may sometimes be found to be incomplete or mistaken, but the system cannot function and cannot be worthy of public respect if there is any suggestion that such evidence is deliberately false.
- [46] The courts have repeatedly emphasized that denunciation and deterrence must be the primary sentencing considerations in perjury cases. In *R. v. Kusnezoff*, [1991] B.C.J. No. 421, the B.C. Court of Appeal said at para. 4:

The seriousness of the offence elevates the principle of general deterrence to the dominant position among the relevant sentencing factors, though, of course, the other factors are not to be excluded.

- [47] In that case, the accused had given false evidence at a trial of a friend who was accused of a relatively minor drug offence. In substituting a sentence of six months' imprisonment for the 18 months imposed by the trial judge, the Court of Appeal noted the minor nature of the offence in relation to which the perjury was committed and the fact that the perjured evidence was not given in an attempt to convict an innocent person. The term of imprisonment was to be followed by two years' probation.
- [48] More recently, the Court of Appeal in *R. v. Corbett*, 2006 BCCA 257, described the Kusnezoff decision as a little dated and said more recent sentences for perjury have tended to be longer.

[49] R. v. Desnomie, [2005] S.J. No. 785, involved evidence at a murder trial that was contrary to the evidence the witness had previously given at a preliminary inquiry. Giving contrary evidence is an offence under s. 136 of the Criminal Code and is a separate offence from perjury which is defined in s. 131. However, both offences deal with false and misleading evidence and they both carry a 14-year maximum penalty. The Saskatchewan Court of Appeal imposed a custodial sentence of two years less a day saying that the conditional sentence given by the trial judge "in no way reflects the gravity of the situation." The court added:

The investigation of who caused a homicide is one of the most significant that a court can undertake and one that must be carried out with openness and with the greatest attention to seeking the truth in order to preserve society's respect for the judicial system. It is fundamental in any judicial proceeding that witnesses treat the process with respect and tell the truth, and that if they do not, the court deal with them appropriately to show not only other witnesses, who may potentially do the same, but society that it takes extremely seriously the process of ascertaining the truth. This can no where be more important, both for the system itself and for the respect society gives to the system as a means of resolving disputes in society, than in the case of a homicide.

[50] The Crown in this case points out that although the proceeding in which Mr. Robinson gave false evidence was not a trial for murder or other form of homicide, it was an inquiry into the circumstances surrounding a death.

[51] R. v. Bermudez, 2013 ONCJ 113, also involved the related offence of giving contradictory evidence in murder proceedings. In that case, the accused appeared as a witness on six different occasions and pleaded guilty to eight counts. He was sentenced to three years.

[52] In R. v. Martin in (1993), 141 N.B.R. (2d) 227, the court imposed a sentence of three-and-a-half years' imprisonment on an accused who pled guilty to perjury in connection with his testimony at a murder trial.

[53] R. v. Glauser (1991), 25 C.R. (3d) 287, involved an accused with a long criminal record who was found guilty of perjury in relation to his testimony at a murder trial. The Alberta court substituted a sentence of six years' imprisonment for the sentence of two years less a day that had been imposed at trial.

[54] In R. v. Johnson, [1990] B.C.J. No. 307, our Court of Appeal upheld a three-year sentence for perjury in a trial for armed robbery. Mr. Johnson had a lengthy criminal record.

[55] In R. v. Jordan, (1986), 47 Alta. L.R. (2d) 85 (Alta. C.A.) referred to earlier, the Alberta Court of Appeal imposed a sentence of two-and-a-half years on two offenders convicted of perjury at a murder trial.

[56] In R. v. C.D., [2001] 132 O.A.C. 133, a one-year consecutive sentence for perjury was upheld where the accused had sworn a false affidavit in support of a bail application.

- [57] A false affidavit on a bail application also gave rise to a perjury conviction in *R. v. Corbett*, 2006 BCCA 257 where the B.C. Court of Appeal reduced an 18-month sentence to one of 12 months.
- [58] Other cases were cited by the Crown and I do not need to refer to any more of them. Suffice it to say there is ample authority for the suggested range of one-and-a-half to three years.
- [59] None of the cases mentioned so far involved perjury by police officers. That issue arose in *R. v. Schertzer*, 2015 ONCA 259, where the Ontario Court of Appeal said at paras. 132 and 136 that:

Public confidence in the honesty of the police is fundamental to the integrity of the criminal justice system.

And:

Police officers owe a special duty to be faithful to the justice system.

- [60] In *Schertzer*, police officers were convicted of perjury and obstruction of justice. The perjury charges related to testimony at a preliminary inquiry in a drug case. The trial judge imposed 45-day conditional sentences which the Court of Appeal found to be demonstrably unfit because they failed to properly meet the objectives of denunciation and deterrence. The Court of Appeal substituted three-year prison sentences, although it stayed the operation of those sentences because of the passage of time and the fact that the conditional sentences had already been served.
- [61] *R. v. Feeney* (2008), 238 C.C.C. (3d) 49, was not a perjury case, but the Ontario Court of Appeal endorsed the general statement that sentences for police officers should be more severe than for others who commit the same offence. That flows from their position of trust and their knowledge of the consequences of their offence.
- [62] However, as the defence points out, the Supreme Court of Canada in the leading case of *R. v. Proulx*, [2000] 1 S.C.R. 61, made clear that a conditional sentence order is a punitive sanction that can achieve the objectives of denunciation and deterrence. There are cases where CSOs have been found to be appropriate for perjury and comparable offences when the accused is a police officer.
- [63] Cases relied on by the defence include *R. v. Spenard*, (24 June 2011) Vancouver Registry No. 219187 (B.C.P.C.); *R. v. Dosanjh*, 2006 BCPC 574; *R. v. Beaudry*, [2005] J.Q. No. 15283; and *R. v. Nelson*, 2015 BCSC 1096.
- [64] With the exception of *Spenard*, police officers in those cases were given conditional sentences for obstruction of justice which the Court of Appeal in *Corbett* characterized as a less serious offence than perjury.

- [65] Spenard did involve a police officer who pled guilty to perjury, but during the same trial in which he gave the false evidence, the accused acknowledged its falsity under cross-examination. In imposing a nine-month conditional sentence, the Provincial Court accepted a joint submission of the Crown and defence.
- [66] In addition to those very different factual circumstances, it is my view that Spenard must now be read in light of the very strong statement in Schertzer which, although not strictly binding on this court, is highly persuasive in suggesting a conditional sentence is not appropriate when a police officer commits perjury.
- [67] In *Reyat*, the B.C. Court of Appeal endorsed a list of five factors that the Alberta Court of Appeal in *Jordan* said should be considered in determining the length of sentence for perjury. These are:
- (1) the relative seriousness of the offence with respect to which the perjured testimony was given;
 - (2) the effect, if any, on the outcome of the trial by reason of the perjured evidence;
 - (3) whether the testimony dealt with a vital part of the evidence;
 - (4) whether the perjured evidence led to the implication of an innocent person in a crime, which would ordinarily be a most aggravating factor;
 - (5) whether the perjury was planned and deliberate or the result of a sudden temptation in the course of giving evidence.
- [68] The Crown and defence take different positions on the applicability of those factors to the circumstances of this case. On behalf of Mr. Robinson, it is submitted that the Braidwood Inquiry, although important, was not a criminal trial wherein an accused's liberty was at stake. The perjured testimony related to two discrete issues before an inquiry with a much broader mandate and had no impact on the outcome of the proceedings. To the extent that perjury can be characterized as planned and deliberate, it is submitted that this must be considered in light of Mr. Robinson's chronic alcohol abuse and PTSD.
- [69] The Crown relies particularly on the first, third, and fifth factors in *Jordan*, adding that although the inquiry was not a criminal trial, it was a serious matter of public interest. Such public inquiries can have broad and long-term impacts on the entire justice system and the community.
- [70] After I heard sentencing submissions in this case, my colleague, Mr. Justice Ehrcke, gave reasons for sentence in *R. v. Millington*, 2015 BCSC 1380. Mr. Millington was the other police officer involved in the Dziekanski incident who was convicted of perjury for his testimony before the Braidwood Inquiry. The sentence in that case was 30 months' imprisonment. The question now arises as to what extent I am bound or influenced by that result.

- [71] In hundreds of cases, both criminal and civil, over the last 60 years, this court has generally applied the approach set out in *Hansard Spruce Mills Ltd., Re*, [1954] 4 D.L.R. 590. Except in limited circumstances, it is the duty of a trial judge to follow the decision of another judge of the same court. As Mr. Justice Smart said in *R. v. Sipes*, 2009 BCSC 285, at paras. 10 and 11, that "is not a rule of law", but "it is a wise and prudent prescription for the exercise of judicial discretion" "based on common sense" and the "interests of justice".
- [72] In sentencing cases, the relevance of *Hansard Spruce Mills* is limited by the fact that sentencing must always be an individualized process specific to the facts of each case. However, to the extent that the decision in *Millington* includes statements of general principle directly applicable to this case, consistency and the interests of justice require that I apply them.
- [73] Further, s. 718.2(b) of the Criminal Code says that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. Apart from aggravating or mitigating factors that may arise from the personal and individual circumstances of each offender, it is difficult to imagine two cases with greater similarity of offenders, offences, and circumstances. If anything, perjury by Mr. Robinson is more serious because he held a higher rank than Mr. Millington.
- [74] On the question of conditional sentence, Mr. Justice Ehrcke referred to *Desnomie and Schertzer* and concluded:

In the circumstances of the present case where a police officer has undermined the administration of justice by committing perjury in the course of a serious public inquiry into the death of a human being, the paramount sentencing objectives must be denunciation and general deterrence. While the other objectives of sentencing, including rehabilitation, must be given serious consideration, they cannot displace the objectives of denunciation and deterrence, and I find that those sentencing objectives cannot adequately be achieved by the imposition of a conditional sentence.

- [75] I respectfully agree with that statement and find nothing in Mr. Robinson's circumstances so different from those of Mr. Millington that would justify a failure to apply it in this case.
- [76] Mr. Justice Ehrcke found that all five of the *Jordan* factors either directly or by analogy mandated a sentence at the higher end of the range of perjury. On the first factor, he found that the *Braidwood Inquiry* was similar to a murder trial in that it was a solemn inquiry into the truth of who or what was responsible for the death of a human being. I agree and find that to be a matter of equal significance in this case.
- [77] On the second and third factors, Mr. Justice Ehrcke said that although Mr. Millington's evidence was not accepted by Commissioner Braidwood, it impaired the ability of the inquiry to obtain a full and accurate answer to the critical question of how a trained police officer could have fired the Taser multiple times into a man who fell to the ground during the first Tasering. That question arose more directly on the evidence of Mr. Millington than

it did on the evidence of Mr. Robinson because it was Mr. Millington who actually fired the Taser.

- [78] But Mr. Robinson's evidence related to another equally important issue, the trustworthiness of statements made by police officers within hours after a death of a person in custody. The question before the inquiry was how a trained police officer could have claimed Mr. Dziekanski had to be wrestled to the ground when that clearly is not what happened. Mr. Robinson's attempt to explain that as an innocent mistake also stood in the way of the inquiry's getting at the truth.
- [79] On the fourth Jordan factor, Mr. Justice Ehrcke found that Mr. Millington's perjury in one sense did lead to the implication of an innocent person because it suggested that Mr. Dziekanski was the author of his own misfortune and unfairly cast him in a negative light. Like Mr. Robinson, Constable Millington had suggested that Mr. Dziekanski did not go down to the ground as a result of the first application of the Taser, but had to be wrestled to the ground by the officers.
- [80] Although Mr. Robinson acknowledged at the inquiry that his initial description had not been accurate, there is no reason to believe that acknowledgement would ever have been made in the absence of the Pritchard video. Thus, while Mr. Robinson's testimony at the Braidwood Inquiry did not directly cast Mr. Dziekanski in a negative light, it arose from an earlier attempt to do so and falsely asserted an innocent explanation for that earlier attempt.
- [81] It is the fifth Jordan factor where some considerations arise that were not before the court in Millington.
- [82] In one sense, the perjury in this case must be seen as planned and deliberate. Mr. Robinson made a false statement to the IHIT investigator. The falsity of that statement was soon made apparent by the Pritchard video. Mr. Robinson had more than a year to consider how he could explain that discrepancy. He had a choice to either admit that his statement to IHIT had been false or compound the falsity with another lie. He made the wrong choice.
- [83] But the fact he made the wrong choice derived, at least in part, from the impaired judgment and reasoning that Dr. Nemetz said is characteristic of PTSD and alcohol abuse. Put another way, his capacity for planning and deliberation was somewhat impaired.
- [84] I find that factor and only that factor justifies a somewhat different sentence than was imposed in Millington, but it cannot be allowed to outweigh the overwhelming need for denunciation and deterrence. All witnesses who give evidence and particularly the police officers must know the serious consequences that will flow from giving false evidence.
- [85] In summary, I agree with the Crown that this case would normally call for a sentence at the higher end of the 18-month to three-year range. Mitigating factors including the difficulties faced by police officers in prison, the loss of his career, and the impact of publicity must be considered. I note, however, that sentences up to three years have been given for civilian witnesses and one would expect sentences to be more severe for police officers. To some

extent, then, these mitigating factors are already reflected in the range of sentence suggested by the Crown. That leaves the question of the extent to which alcoholism and posttraumatic stress disorder should be treated as a mitigating factor.

- [86] A further matter that I have considered is defence counsel's suggestion that Mr. Robinson's experience with alcohol addiction and his eventual success in overcoming it gives him an opportunity to contribute to the community and partially make amends by becoming involved in drug and alcohol counselling particularly directed to the Aboriginal community. Counsel suggested community service of that kind as one of the conditions of a conditional sentence order.
- [87] I have already said a conditional sentence order is not appropriate in this case, but I find there is merit in counsel's submission and the same thing can be achieved by including that condition in a period of probation to follow a custodial sentence. Section 731 of the Criminal Code allows that to be done only if the sentence of imprisonment is not more than two years.
- [88] Considering all these factors, I impose a sentence of imprisonment of two years less a day to be followed by a period of probation of one year during which Mr. Robinson will perform 240 hours of community service. That is the maximum community service permitted by the Criminal Code.
- [89] Mr. Robinson, please stand.
- [90] You have been convicted of perjury, a serious offence against the administration of justice and contrary to your sworn duty as a police officer. In imposing sentence, I must express society's denunciation of that offence and deter others from committing such an offence in the future.
- [91] I sentence to you to a term of imprisonment of two years less a day. Upon your release from prison or if released early on conditional release upon the expiry of your sentence, you will be subject to a further one year's probation.
- [92] The terms of that probation order will be that you:
1. keep the peace and be of good behaviour;
 2. appear before the court when required to do so by the court;
 3. notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
 4. remain within British Columbia unless written permission is obtained from the court or your probation officer;

5. report to a probation officer within two working days of your release from prison or the expiry of your sentence and report thereafter as and when directed by the probation officer;
6. perform 240 hours of community work service at the direction of your probation officer;
7. not to possess or consume any alcohol, intoxicants, or drugs as defined by the Controlled Drugs and Substances Act save as authorized by law;
8. not own, possess, or carry any weapons.

[93] As required by s. 737 of the Criminal Code, there will also be a victim surcharge of \$100 payable within 14 days.

[94] That concludes my reasons on sentence.

"N. Smith J."

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