

# Perjury and Perverting the Course of Justice Considered

By Susan S. M. Edwards\*

\* The subject of this article is derived from a paper delivered on June 29, 2002 at the Sentencing and Society: Second International Conference, Centre for Sentencing Research, Strathclyde University, Glasgow, Scotland. The author is grateful to the anonymous reviewer for the many constructive suggestions for improvement. The author wishes to acknowledge the assistance of the Crime and Criminal Justice Unit of the Home Office Research and Statistics Directorate for permitting access to anonymised data held in the Court Proceedings data base, the Research and Policy Division of the Lord Chancellor's Department for granting privileged access to Crown Court files, the Court Managers of the Crown Courts at which the trials took place and the Crown Court judges for permitting the release of trial transcripts.

*Professor of Law and Social Theory, Buckingham Law School*

**Summary:** *This article examines the prosecution and sentencing of offences of perjury and perverting the course of justice. It considers the sentencing principles established by the Court of Appeal for these two offences and examines how they have been applied in decided cases. It presents the findings of an empirical study of sentencing for perjury and perverting the course of justice and concludes that the upper end of the tariff is only imposed where the offences against justice were committed in circumstances involving murder or large-scale criminal corruption, with one or two notable exceptions.*

Crimes of perjury and perverting the course of justice are offences against justice which in the public mind are at present marked, for example, by the case against Maxine Carr, currently charged with perverting the course of justice in connection with the disappearance and murder of 10-year-olds Holly Chapman and Jessica Wells.<sup>1</sup> Count 1 of the indictment charges Ian Huntley with the murder of Holly Chapman. Count 2 charges Ian Huntley with the murder of Jessica Wells. Counts 3 and 4 charge Maxine Carr with "assisting an offender" (Criminal Law Act 1967, s.4) and Count 5 jointly charges the two defendants with conspiracy to pervert the course of justice.

Academic interest in this much under researched area is the product of a number of broader criminal justice concerns. In this respect the integrity of the criminal justice system is of considerable import as both offences undermine and destabilise that probity. There is also the "knock on" effect of case attrition in those criminal cases where perjury and perverting the course of justice thwart due process of prosecution and conviction. For example, "Over 30,000 cases were abandoned in 2001 because witnesses and victims refused to give evidence in court or failed to turn up."<sup>2</sup> Home Office, *Justice for All*, Cm.5563, July, (2002), p.36.

Many of these aborted cases are the result of witness intimidation.<sup>3</sup> In *Taggart* (1995) 16 Cr.App.R. (S) 789, Smith J. endorsed the remarks of the trial judge who said "... as to assaulting, threatening and frightening a witness, that ... is a very, very common offence these days, ... my colleagues and I have, day in, day out, witnesses failing to attend; witnesses attending but not giving evidence; witnesses coming to court and running away from court" at 791.

The Government, in the White Paper *Justice for All*, expressed a determination to improve the prosecution rate, and stated "... the most pressing task for the CJS is to increase the proportion of offences for which offenders are brought to justice."<sup>4</sup> See n.2, para.9.67, p.158.

In addition, there is also broad concern regarding the problem of police perjury and perverting the course of justice especially in those cases where evidence has been fabricated and innocent men convicted.<sup>5</sup> *Express*, August 29, 2002.

At the other end of the spectrum, recent increases in the sentence tariff for those convicted of perverting the course of justice, through witness intimidation,<sup>6</sup> Criminal Justice and Public Order Act 1994, s.51(2), amended by the Criminal Justice and Police Act 2001, ss.39 and 40, provides that a person who does an act intended to intimidate a victim/witness or harm a victim/witness may receive up to five years' imprisonment.

may act to deter others similarly minded.

## The substantive law

The modern construction of perjury is found in the Perjury Act 1911. Section 1 creates the principal offence of lying on oath<sup>7</sup> This includes false declarations: see Criminal Justice Act 1967, s.89, Magistrates' Courts Act 1980, s.106, where written statements are tendered in committal proceedings and also false representations punishable by any statute.

in judicial proceedings.<sup>8</sup> "Judicial proceedings" includes proceedings before any court, tribunal, or person having by law power to hear, receive and examine evidence on oath and extends to statements made outside the proceedings if made on oath.

This is triable on indictment only and attracts a seven-year maximum sentence. Perjury in respect of making a statement on oath otherwise in judicial proceedings<sup>9</sup> This relates to all other offences except those under the Perjury Act 1911, s.1, to include Criminal Justice Act 1925, s.36, County Courts Act 1984, s.123, Mental Health Act 1983, s.126 (4), Mines and Quarries (Tips) Act 1969, s.12 (7) and the Criminal Justice and Public Order Act 1994, s.75.

(s.2(1)) in matters relating to births and deaths (s.4(1)) and marriage (s.3(1))<sup>10</sup> It is interesting perhaps that perjury attaching to birth, death and marriage is singled out in this way for special disapprobation. In *J v S-T (Formerly J) (Transsexual: Ancillary Relief)* [1997] 1 F.L.R. 402, the court stated: "perjury does strike at the institution of marriage".

is triable either way and also attracts a seven-year maximum sentence. The lesser offence of perjury committed in respect of "a statutory declaration or in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, ... or in any oral declaration or oral answer which he is required to make ..." (s.5) is triable either-way and attracts a maximum sentence of two years' imprisonment.

Perverting the course of justice, an offence at common law, is triable on indictment only, carrying a maximum sentence of life imprisonment. However, no sentence above 10 years has been passed in the last century for this offence.

Three separate types of conduct are embraced by this offence including, fabrication or disposal of evidence or inducing others to do so,<sup>11 11</sup> In *Attorney-General's Reference (No.19 of 1993) (Downey)* [1994] 15 Cr.App.R. (S) 760, the defendant had killed a woman and dismembered her body. Acquitted of murder he was sentenced to three years' imprisonment for manslaughter and one year, concurrent, for perverting the course of justice. See for further cases of perverting the course of justice and perjury where vital evidence is destroyed or disposed, *Attorney-General's Reference. (No.14 of 2001) (Boffey)* [2001] 1 Cr.App.R (S) 16; *Rafique* [1993] Q.B. 843; *Lang* [2002] 2 Cr.App.R. (S) 15.

intimidating a juror, witness or person assisting an investigation<sup>12 12</sup> See Criminal Justice and Public Order Act 1994, s.51(1). In *Toney and Ali* [1993] 2 All E.R. 409, the appellant was charged with doing an act intended to pervert the course of public justice in that he attempted to persuade a witness, who was to give evidence at the forthcoming trial of the appellant's brother for robbery to alter his evidence, for which he received a sentence of 150 hours community service.

and harming or threatening to harm a witness, juror or person assisting an investigation.<sup>13 13</sup> See n.6.

There is considerable duplication between these "offences against justice" and other offences.<sup>14 14</sup> Contempt of court (Contempt of Court Act 1981) not discussed in this article, involves "... an interference with the due administration of justice, either in a particular case or more "generally as a continuing process" *Attorney-General v Leveller Magazine Ltd* [1979] A.C. 440 at 449, *per* Lord Diplock. The offence includes, *inter alia*, refusal to give evidence, as, for example, where Michelle Renshaw convicted of contempt on March 11, 1989, refused to give evidence against a male partner charged with physical assault upon her (unreported) *Daily Telegraph*, March 16, 1989. See also a further case on this same point, *Bird and Holt*, unreported, 1996 (Transcript: Smith Bernal Case No.96/6981/Z3).

Intention is the mental element required for both perjury and perverting the course of justice.<sup>15 15</sup> In *Lalani* [1999] 1 Cr.App.R. 481, whilst serving as a juror, the appellant spoke to one of the two defendants. Charged with perverting the course of justice she pleaded "guilty" following the judge's ruling that "any communication" would satisfy the offence. On appeal, the court held that the prosecution had to establish an intent to pervert the course of justice or an intent to do something which if achieved would pervert the course of justice.

The statement must be one which the person makes wilfully and "knows to be false or does not believe is true".<sup>16 16</sup> Note the similar definition of deception "... to deceive is ... to induce a man to believe that a thing is true which is false": *per* Buckley J. in *Re London and Globe Finance Corporation Ltd* [1903] 1 Ch. 728 at 732. *Metropolitan Police Commissioner v Charles* [1977] A.C. 177, however, establishes a wider meaning. It is deception "to falsely persuade someone that something may be true." Although for deception, recklessness is sufficient, whilst for perjury only intention will suffice.

The law limits the scope of perjury to statements which are material to the issues being tried.<sup>17 17</sup> Materiality is crucial. Therefore a statement intended to provide a cover story for the night in question but actually providing a cover story, albeit mistakenly, for another night may not be material. A report by JUSTICE *False Witness: the Problem of Perjury* (London, Stevens and Sons, 1973) states, "A witness may make a false statement intending to deceive and believing his statement to be material [but if not material] under the present law he would escape prosecution"(para.30, p.11).

Section 13 of the Perjury Act requires corroboration of any allegation of falsity. The evidence of one person is not sufficient.<sup>18 18</sup> The Law Commission n.14, the Criminal Law Revision Committee SIXTH REPORT *Perjury and Attendance of Witnesses* (London, HMSO, 1964) and A report by JUSTICE n.17, para.36, p.13, recommended that the corroboration requirement be abolished.

It is a matter for the judge to direct the jury to any other evidence that might be capable of providing the necessary corroboration.<sup>19 19</sup> See *Rider* (1986) 83 Cr.App.R. 207, *Carroll* [1993] Crim.L.R. 613.

Whilst the motive for perjury is irrelevant to any defence,<sup>19b 19b</sup> See *Attorney-General's Reference (Criminal Justice Act 1972, s.36) (No.1 of 2002)* [2002] EWCA Crim 2392.

duress does provide a defence in circumstances where "the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused."<sup>20 20</sup> *Hudson and Taylor* [1971] 2 W.L.R. 1047 at 1050, *per* Lord Widgery C.J. See also *K* (1984) 78 Cr.App.R. 82.

Anne Bosomworth<sup>21 21</sup> *Daily Telegraph*, November 26, 1996, *Bosomworth*, unreported, 1996 (Transcript: Smith Bernal Case No.96/7172/W2).

lied on oath when she said that she was the driver of her husband's car when it crashed into a brick wall, when in fact he had been driving and was drunk at the time. He had told her to provide this cover story with the words "You are my bloody wife and you will do as I tell you." A nine-month sentence was reduced to six months on appeal.

### **Prosecuting perjury and perverting the course of justice**

Both offences are perhaps an inevitable, albeit unintended, consequence of the adversarial process.<sup>22 22</sup> JUSTICE Report n.17 states: "The adversary system thus sometimes leads to evidence being adduced which is incomplete or likely to mislead the court" (p.3) [and] "In criminal cases it is the general rule that solicitors and counsel may defend a man who has admitted his guilt and they believe to be guilty on the strictly narrow basis of making the prosecution prove its case" (p.30).

"It is often said there is too much perjury committed in courts, and it is regrettably true as everyone sitting in court knows. But it is one thing to suspect that perjury has been committed and another thing to prove it. Perjury is not always easy to prove. Perjurors are not easily brought to justice."<sup>23 23</sup> *Davies* (1974) 59 Cr.App.R. 311 at 313, *per* Roskill L.J.

Whilst prosecutions for perjury have remained static over the last decade (1991–2000) since the introduction of the Perjury Act in 1911 they have increased four fold. In 2000, 183 offences of perjury were recorded<sup>24 24</sup> See *Criminal statistics: England and Wales*, 2000 Supplementary Tables, Vol.3, Recorded crime, recorded crime involving firearms and court proceedings by police force area, cautions, Table 3.1(A).

and 186<sup>25 25</sup> This higher figure includes cases recorded in previous year.

cases of perjury were proceeded with in the magistrates' courts (of which 94 were dealt with in the Crown Court: see Table 1).

Section 9 of the Perjury Act 1911 empowers courts to order prosecutions manifestly committed in proceedings before them. In this respect judges are faced with difficulties in checking perjury since they must not usurp the jury.<sup>26 26</sup> See JUSTICE Report, n.17, paras 85–88, pp.31–32 for a discussion of this issue.



1993	999	805	309	127	68	73	20	9	7	4	0
1	0										
1994	1365	1075	407	186	77	94	19	7	17	3	1
2	0										
1995	1664	1320	595	317	110	101	35	21	8	2	1
0	0										
1996	1890	1500	637	306	133	131	31	20	10	1	3
1	1										
1997	2080	1642	719	300	164	180	36	23	12	4	0
0	0										
1998	2408	1897	825	375	184	179	50	20	10	1	3
2	1										
1999	2373	1815	840	420	175	166	48	18	8	4	1
0	0										
2000	2312	1707	801	362	180	178	40	15	15	5	0
3	3										
Total	16925	13245	5594	2567	1207	1201	315	152	99	26	12
9	6										

Source: Data on defendants tried and/or sentenced compiled from *Criminal Statistics: England and Wales, Supplementary Tables, Vol.2, Proceedings in the Crown Court Table S2.1(A) for the respective years. Data on imprisonment length from Table S2.7 of the same volume and other statistics for the respective years.*

In 2000, 9,763 offences of perverting the course of justice were recorded.<sup>29</sup> <sup>29</sup> See n.24.

In the same year 5,107 cases of perverting the course of justice were proceeded with in the magistrates' courts, of which 2,312 were dealt with in the Crown Court (Table 2).<sup>30</sup> <sup>30</sup> Seventeen suspects were cautioned for perjury and 297 for perverting the course of justice, *Criminal statistics: England and Wales, Supplementary Tables, Vol.3, Table S3.8 (A)*.

Prosecutions for perverting the course of justice have almost trebled over the past decade alone, but as has already been observed since case attrition from "recorded" to "proceeded with", is high, any year on year increase in prosecutions must be interpreted with caution. This increase in prosecutions may follow, in part, from the introduction of the witness intimidation provisions introduced in 1994,<sup>31</sup> <sup>31</sup> See, e.g. *Rogers* [2002] 1 Cr.App.R. (S) 64, where two years' detention was reduced to 18 months'.

rather than from any real increase in the number of persons committing these offences. For example, in 1999, 1,703 persons were proceeded against at all courts for intimidating a juror or witness (of which 385 were found guilty). A further 226 persons were proceeded against for harming or threatening to harm a witness (of which 77 were found guilty).<sup>32</sup> <sup>32</sup> The author is grateful to the Home Office, Crime and Criminal Justice Unit, for this data.

The difficulty for prosecutors in both offences lies in the problem of proof, where intention is the requisite *mens rea* and corroboration requires some material fact beyond one other material witness. Furthermore, where the defendant is charged with the index offence, a prosecution for perjury or perverting the course of justice may not be pursued.<sup>33</sup> <sup>33</sup> See, e.g. the following cases where all defendants were charged with murder but no charges of conspiracy to pervert the course of justice brought. *Francom, Latif and Latif, Bevis, Harker*, unreported, 2000 (Transcript: Smith Bernal Case No.9903936 W5) *The Times*, October 24, 2000; *Bowen*, unreported, 1999 (Transcript: Smith Bernal Case No.9804002 Y3); *Frisby* [2001] EWCA Crim 1482, 2001 (Transcript: Smith Bernal Case No.2000/7267/Y1).

This appears to be common practice in cases where the defendant is charged with murder.<sup>34</sup> <sup>34</sup> It may also be common practice in other offences but the further investigation of this point was beyond the scope of the present research.

The prosecution mortality of such cases, once proceedings are instituted, is roughly comparable with other offences. With regard to perjury in proceedings before magistrates' courts, 30 per cent of cases are variously withdrawn or discharged/discontinued, whereas for perverting the course of justice this figure is 43 per cent. This "discontinuance rate"<sup>35</sup> <sup>35</sup> "Discontinuance rate" here includes cases where proceedings are discontinued, discharged in accordance with s.6 of the Magistrates' Court Act 1980 or where the charge is withdrawn, and is expressed as a percentage of cases proceeded against.

compares with, for example, 39 per cent for violence against the person, 34 per cent for sexual offences, 33 per cent for robbery and 30 per cent for burglary. With regard to conviction, 17 per cent of defendants who proceed to trial in the Crown Court are acquitted of perjury compared to 22 per cent for perverting the course of justice.<sup>36</sup> <sup>36</sup> *Criminal statistics: England and Wales Supplementary Tables, Vol.1 for 2000.*

### General sentencing tariff and range and "harm" of perjury and perverting the course of justice

**What should the protected interest, in such cases, be?**<sup>37</sup> <sup>37</sup> In researching this question a general review of all published cases and outcomes available in both legal and newspaper data bases has been attempted for all available dates for both offences.

At one level perjury and perverting the course of justice perpetrates a constitutional harm since such offences strike at the heart of the legal process itself. There seems to be general agreement that lying on oath not only is a judicial effrontery but also undermines the sacredness of the oath such that perjury was once described as: "interfering with the business of the Gods."<sup>38</sup> <sup>38</sup> F. Pollock & F.Maitland, *The History of English Law*, Vol.II (2nd ed., Cambridge University Press, 1923), p.541.

In *Hall*,<sup>39</sup> <sup>39</sup> *Hall* (1982) 4 Cr. App.R. (S) 153 at 155.

where a woman had provided a false alibi for a man charged with assault, Mr Justice Talbot remarked: "... it is almost inconceivable that a sentence of less than three months' would be given for a deliberate perjury in the face of the court, since such false evidence strikes at the whole basis of the administration of the law."<sup>40</sup> <sup>40</sup> See also *Warne* (1980) 2 Cr.App.R. (S) 42, *per* Chapman J., "Perjury . . . undermines the whole basis of the administration of justice"; *Healey* (1990) 12 Cr.App.R. (S) 297, *per* Poplewell J., "[Perjury] . . . strikes at the root of our system of justice."

Richard Oakenfull, and Susan Walsh<sup>41 41</sup> *Guardian*, May 21, 1991, *Daily Telegraph*, November 21, 1991. The trial involved a total of 30 defendants who lied on oath to protect an antiques dealer who handled 1.25 million pounds worth of stolen antiques, obtained as a result of violent raids on country houses.

were jailed for four years and eighteen months respectively for their part in trial fixing involving both perjury and perverting the course of justice. Passing sentence, Crabtree J. said: "To say that you have poisoned the well of justice is inadequate." In *Archer*,<sup>42 42</sup> Unreported, 2002 (Transcript: Smith Bernal Case No.0104555 S2), para.63.

the Court of Appeal used the word "contaminated" to describe the assault on the proceedings itself. In *Taggart*,<sup>43 43</sup> See n.3 at 791. where the defendant threatened a witness with violence in an attempt to persuade him not to give evidence, the Court of Appeal reduced a seven-year sentence to five years for "a determined attack on the rule of law".

There are also harms to individuals. The greatest individual harm is the false incrimination of an innocent person<sup>44 44</sup> *Attorney-General's Reference No.85 of 2001 (Matthews)* [2002] 2 Cr.App.R. (S) 4, a community punishment order was made in respect of the accused for making a false allegation of burglary and harassment resulting in an innocent person spending 18 days in custody.

(see *Sands* below). There is also the harm to victims and their families that flows from a defendant avoiding a conviction for a serious offence<sup>45 45</sup> See the family of teenager Stephen Lawrence who was murdered on April 22 1993 and a private prosecution of three youths folded in April 1996.

(see *Dunlop* below). For this very reason and because of the very different harms that are occasioned criminal perjury has always attracted a more severe punishment than civil perjury. From all available evidence it would appear that cases of civil perjury on oath or in a declaration attracts either a non-custodial or else a very short custodial sentence. Six months' imprisonment was upheld in *Healey*,<sup>46 46</sup> (1990) 12 Cr.App.R (S) 297.

in respect of perjury committed in the course of a "means inquiry" in a magistrates' court. In *Vianna*,<sup>47 47</sup> (1994) 15 Cr.App.R (S) 758.

the defendant, who engaged a private inquiry agent and offered to pay him if he swore a false affidavit, was sentenced to 30 months' imprisonment reduced to 18 months on appeal. The longest prison sentences passed in civil perjury have been passed in *Aitken*<sup>48 48</sup> *The Financial Times*, June 9, 1999.

(18 months) and *Archer*<sup>49 49</sup> See n.42.

(four years).

In *Archer*, the Court of Appeal seemed at one point to endorse the view that civil perjury was perhaps less serious than criminal perjury, "perjury may be comparatively trivial in relation to criminal proceedings or very serious in relation to civil proceedings. No doubt whether the proceedings were civil or criminal is one of the factors proper to be considered."<sup>50 50</sup> See n.42 at para.63.

However, in the same paragraph, the Court of Appeal, in rejecting counsel's submission that civil perjury was not as serious as criminal perjury, took the view that it would not influence them in sentencing: "there is not in our judgment, any distinction as to the level of sentence to be drawn according to whether the proceedings contaminated were of a civil or criminal nature."<sup>51 51</sup> See n.42 at para.63.

The courts have also been guided by the general sentencing principles of deterrence and proportionality. With regard to deterrence, in cases of perjury Roskill L.J. said: "a custodial sentence is almost always necessary."<sup>52 52</sup> *Davies* (1974) 59 Cr.App.R. 311 at 313.

In *Feldman*,<sup>53 53</sup> (1981) 3 Cr.App.R. (S) 20 at 22.

when presented with a first-time offender, a company director, who had been convicted on three counts of perjury, the Court of Appeal, in reducing a nine-months sentence to six months said: "In the view of this Court this is a case where the mere fact of imprisonment, the clang of prison gates, is the real punishment." The deterrence principle was re-iterated in *Healey*,<sup>54 54</sup> See n.40.

where Popplewell J., adopted what the learned judge said when sentencing and made a sentence for perjury consecutive on the basis that: "This was a separate penalty because it needs to be seen as a deterrent to others who might think that lying on oath is something not to be taken seriously." Sentencing trends over the past 10 years reflect the application of the "Roskill principle" to the extent at least that of those convicted of perjury in the Crown Court, 53 per cent received a custodial sentence compared to 40 per cent<sup>55 55</sup>

*Criminal statistics: England and Wales Supplementary Tables Vols 1 and 2 for the years 1991–2000.*

in the magistrates' court.

With regard to the principle of proportionality, the Court of Appeal has established that sentences for perjury and perverting the course of justice must be proportionate to the wrong or harm of the index offence in which the "offence against justice" was perpetrated. In *Yates*,<sup>56 56</sup> (1989) 11 Cr.App.R (S) 451.

the Court of Appeal said: "all the circumstances of the falsehood must be considered by the sentencing court including the nature of the case in which the falsehood was proffered." In *Knight*,<sup>57 57</sup> (1984) 6 Cr.App.R. (S) 31.

where the index offence was robbery, involving three-quarters of a million pounds, for which the appellant avoided conviction, a sentence of three years was upheld for perjury. The Court of Appeal said: "It was the purpose of perjury to avoid conviction for a very grave offence [robbery]. Punishment must be commensurate with the gravity of that offence." In *Dunlop*,<sup>58 58</sup> [2001] 2 Cr.App.R. (S) 27. See also Current Sentencing Practice B8–13CO4.

where the defendant had stood trial twice for the murder of Julie Hogg and been acquitted, a sentence of six years was upheld for perjury. The Court of Appeal said: "The punishment had to be commensurate with the gravity of the original offence . . . and yet not be seen as a punishment for the original offence." Keith Foad<sup>59 59</sup> *Birmingham Post*, May 11, 2000.

received a sentence of three years imprisonment (contrast with *Hall* above) for providing a false alibi for Tracey Andrews<sup>60 60</sup> Tracey Andrews received a life sentence for murdering her boyfriend Lee Harvey, *The Times*, July 30, 1997.

who was subsequently convicted of the murder of her boyfriend. "Proportionality" has also been interpreted to ensure that the offender should not receive a heavier sentence than those convicted of the index offence.<sup>61 61</sup> In *Hindson and Haskins* [1987] 9 Cr.App.R. (S) 449, this reasoning was applied, reducing a sentence of five years' imprisonment to one year.

In *Yates*,<sup>62 62</sup> (1989) 11 Cr.App.R. (S) 451.

the appellant was acquitted of robbery and sentenced to three years imprisonment for perverting the course of justice. The Court of Appeal reduced the sentence to two years imprisonment which was commensurate to the sentences of the co-accused(s) who had been convicted of the robbery.

Sentencing practice for perjury is also influenced by aggravating and mitigating factors including, amongst others: “the number of offences, the timescale, whether they are planned or spontaneous, the impact the offences against justice have on the proceedings in question.”<sup>63</sup> <sup>63</sup> See n.42, para.63.

Aggravating factors include circumstances where the offence against justice resulted in another person being falsely convicted of the offences and where the defendant through lies, etc. avoids conviction for the index offence. For example, Billy Love received a six-year sentence for perjury; his lies had resulted in T.C. Campbell serving 12 years of a life sentence for killing six members of the Doyle family.<sup>64</sup> <sup>64</sup> *Mirror*, February 11, 1998, the *Daily Record*, December 13, 1996.

Joe Granger received a five-year prison sentence for perjury for lying about his part in the killing of the Doyle family.<sup>65</sup> <sup>65</sup> *Sunday Mail*, December 16, 2001. See also *Granger v United Kingdom* (Transcript: Smith Bernal Case No.2/1989/162/218 March 28 1990). Further aggravating factors include “deliberate perjury” (*Hall* above) and “persistent perjury”. In *Archer* the Court of Appeal considered the lapse in time of 14 years between the offence and the trial an aggravating factor.<sup>66</sup> <sup>66</sup> See n.42 at para.61.

The question of culpability is a central consideration for sentencers. Thus, a deliberate lie in the face of the court (see *Hall* and *Taggart* above) is regarded as more serious than perjury or perverting the course of justice committed on the spur of the moment. In addition, the public standing and reputation of the accused seems to operate as an additional aggravating rather than mitigating factor. Jonathan Aitken,<sup>67</sup> <sup>67</sup> See n.48.

former Chief Secretary to the Treasury, and Minister for Defence Procurement, was convicted of perjury arising from a libel action against the *Guardian* newspaper concerning payment for a bill for his stay in the Paris Ritz Hotel. Following a guilty plea he received an 18-month prison sentence. Jeffrey Archer,<sup>68</sup> <sup>68</sup> See n.42, *The Daily Telegraph*, July 20, 2001.

former deputy chairman of the Conservative Party and best-selling author, was convicted of perjury and perverting the course of justice arising from a libel action over whether he spent a particular night with a Monica Coghlan, for which, following a “not guilty” plea, he received a prison sentence of four years. As Jeffrey Archer’s prison sentence is the longest passed in any case of civil perjury and the sentence length is comparable to prison sentences passed in the gravest cases of criminal perjury including murder and police corruption it requires some rather more detailed consideration. Archer was convicted on Count 1 (perverting the course of justice) which charged that he procured Edward Francis to provide to the solicitors instructed on his behalf in the proceedings against (*Daily Star*) Express Newspapers plc and Lloyd Turner a version of events in relation to September 9, 1986 which he knew to be false, for which he was sentenced to two years imprisonment. Convicted on Count 3 (perverting the course of justice) which charged that he failed to reveal the existence of a diary and provided a blank appointments’ diary instructing his secretary to write into the diary, he received a sentence of four years’ imprisonment. Convicted on Counts 5 and 6 (perjury on oath s.1(1) and s.1(3))—related to proceedings in 1987 in respect of the diaries, he was sentenced to three and four years’ imprisonment respectively. All the four sentences were ordered to be served concurrently,<sup>69</sup> <sup>69</sup> See n.42. and were upheld on appeal.

Mitigatory factors affecting sentence seem to include a conviction of the defendant of the index offence, since where there is a conviction for the index offence the sentence for perverting the course of justice is nearly always derisory. In *Ray*,<sup>70</sup> <sup>70</sup> *Ray* [2002] EWCA Crim 84.

the defendant was convicted of four counts of murder and one count of conspiracy to pervert the course of justice. On each of the murder counts, he was sentenced to concurrent terms of life imprisonment. On the count of conspiracy to pervert the course of justice he was sentenced to 12 months’ imprisonment (concurrent).<sup>71</sup> <sup>71</sup> See also *Taylor and Crabb* [1995] Crim.L.R. 253; *Rasheed* (1994) 158 J.P. 941.

However, where perjury results in the defendant being convicted of a lesser offence, say where the original charge is murder and the perjury results in a conviction for manslaughter, the courts have not been altogether consistent in approach. In *Hogg*,<sup>72</sup> <sup>72</sup> *Guardian*, March 7, 1985. In this case the defendant had lied when his wife disappeared and it was only when, many years later, her body was found at the bottom of a lake that he confessed to killing her. He was not charged with perverting the course of justice for the disposal of her body but with perjury in that he lied during the initial investigation into her disappearance.

the defendant received a three-year sentence for manslaughter (provocation) of his wife and one year for perjury (consecutive). However, in *Nash* (discussed later) the defendant was convicted of manslaughter (provocation) of his wife and at a separate trial for perjury he received a sentence of four years’ imprisonment for fabricating a false defence of provocation. As with all other offences an early guilty plea is also a mitigating factor.<sup>73</sup> <sup>73</sup> See n.42.

A further consideration is whether the sentence for the offence against justice should be ordered to be served concurrent or consecutive to the sentence for index offence.<sup>74</sup> <sup>74</sup> See *Attorney-General’s Reference (No.1 of 1990)* (*Atkinson*) 12 Cr.App.R. (S) 245, the Court of Appeal said: “A sentence for doing an act tending to pervert the course of justice should normally be consecutive to any sentence for the substantive offence in relation to which the act was committed.”

The general rule applying in all offences is that where offences arise out of the same incident or transaction and there are several counts on the indictment then sentences should be concurrent.<sup>75</sup> <sup>75</sup> Archbold, *Criminal Pleading Evidence and Practice* (2003 ed.) para.5–160.

However, as Archbold notes, “much is left to the discretion of the court”<sup>76</sup> <sup>76</sup> See *Lawrence* (1989) 11 Cr.App.R. (S) 580. and “a court may depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances”.<sup>77</sup> <sup>77</sup> See *Wheatley* (1983) 5 Cr.App.R. (S) 417, see also *Jordan* [1996] 1 Cr.App.R. (S) 181.

However, where the defendant is charged and convicted of the substantive offence, say robbery and also perverting the course of justice, it would appear that the sentence for the latter should normally be consecutive to any sentence for the substantive offence in relation to which the act was committed.<sup>78</sup> <sup>78</sup> See n.74.

## The Court of Appeal sentencing and the penal crisis

**A further pertinent *sui generis* consideration in sentencing has been the “system problem” of prison overcrowding. In *James*,**<sup>79 79</sup> (1989) 11 Cr.App.R. (S) 167 at 169.

the defendant made false statements to the court about his financial circumstances, eight months imprisonment was reduced to six months on appeal. The court said: “. . . we have decided that the sentence was too long, especially in view of the recent authorities which suggest that prison sentences should be kept as short as they properly can be.” This approach is favoured in *Kefford*<sup>80 80</sup> [2002] Crim.L.R. 432

(false accounting and theft), where the Lord Woolf C.J. said: “It was highly undesirable that the size of the prison population, the highest level recorded, should continue to rise and, therefore, it was of the greatest importance that only those who needed to be sent to prison should be sent there and that they should not be sent there for any longer than was necessary.” In what appears to be an endorsement of *Kefford* the White Paper abandons deterrence as a paramount principle, in favour of sentencing to imprisonment only those “who cannot be dealt with in any other way.”<sup>81 81</sup> See n.2, para.6.8., p.108.

The prison population is currently 73,192<sup>82 82</sup> At April 26, 2003. See [www.hmprisonerservice.gov.uk](http://www.hmprisonerservice.gov.uk) for latest figures. In this respect the Home Office stopped producing a Monthly Bulletin in November 2002.

and Lord Woolf has continued to display his opposition to the use of imprisonment especially for the short term.

**Sentencing practice for offences of perjury and perverting the course of justice**

**In exploring the application of these principles**<sup>83 83</sup> This exercise included a search of the reported and unreported case law using Lexis, Westlaw and Bailii, to include “all available dates.” A study of all Court of Appeal transcripts on the official Court of Appeal website (Smith Bernal) from 1996 to the present. A search of Nexis—the news data base—for “all available dates” including a trawl of several thousand news items using multifarious word search techniques combining phrases and terms in exhaustive ways. and other relevant factors, the author examined perjury trials from 1991–2000, in those cases where a sentence of over three years imprisonment was passed,<sup>84 84</sup> *Criminal statistics: England and Wales, Supplementary Tables*, Vols 1 and 2 for the years 1991–2000, Home Office anonymised data made available to the author, and Crown Court files and transcripts.

and trials during 2000 for perverting the course of justice where a sentence of over three years imprisonment was passed.<sup>85 85</sup> It is regrettable that for both offences case tracking was confined to trials where the sentence was passed at the upper end of the sentencing scale, this however was inevitable due to the number of cases involved and the impossibility of tracking cases where sentences were short.

*Perjury*

*It was not until 1971 that a sentence of over four years and up to five years imprisonment was passed for perjury.*

*Today, a sentence of over three years remains an exceptional course. From 1981–2000, 11 defendants received sentences of over three years and above (1.26 per cent of all those sentenced to prison in the Crown Court).*<sup>86 86</sup>

*Criminal statistics: England and Wales, Supplementary Tables*, Vol.2, Proceedings in the Crown Court, Tables S2.1(A), S2.6 (for the years 1981 to 2000).

The author tracked the eight cases recorded in *Criminal statistics: Supplementary Tables* 1991–2000 (see Table 1) where sentences of over three years and above were passed (finding that one had been recorded in error).<sup>87 87</sup> One of the eight cases was recorded in the court and the error replicated in Home Office data. Mr X was recorded in published Home Office statistics as receiving a sentence of “over three years up to four years” imprisonment. Additional anonymised (unpublished) data provided by the Home Office allowed for case tracking of court files which revealed in Mr X’s case (who had committed an offence with relation to a passport) an error in court recording as Mr X was sentenced to four months imprisonment. Case tracking methodology involved checking the indictment book at the Crown Court in which the defendant was tried in order to match the anonymised information supplied by the Home Office enabling identification of indictment number and location of court file.

Of the seven remaining cases, two appellants successfully appealed their sentences to below the over three years threshold. In the remaining five cases, where a sentence was passed either by a Crown Court or upheld or varied by the Court of Appeal, the defendants received sentences of four years imprisonment and above. *Dunlop*,<sup>88 88</sup> See n.57.

convicted on two counts of perjury, received a six-year sentence on each count (upheld on appeal), to be served concurrently with an existing seven-year sentence for a separate and unrelated offence of attempted murder. *Nash*,<sup>89 89</sup> Unreported, *Lancashire Evening Post*, February 12, 1998.

after his release from prison following a conviction for manslaughter/provocation of his wife, admitted that in fact there had been no provocation. Tried for perjury he received a sentence of four years imprisonment (not appealed). The judge in passing sentence commented that he could not “fall into the trap” of passing a sentence which would have been equivalent to a sentence Nash might have served for murder. *Sands*,<sup>90 90</sup> *The Guardian*, January 24, 1992. See also Court of Appeal Transcript, December 8, 1994.

together with three others framed a police officer which resulted in the officer being sentenced to 17 years’ imprisonment of which he served 31 months. *Sands* received prison sentences, reduced on appeal to five years for both perjury and perverting the course of justice, to be served consecutively. Mr Justice Tudor Evans in passing sentence said “It is a most terrible story of lies aimed at an innocent man.” The remaining two defendants *Zafar*<sup>91 91</sup> *Zafar, Browne and Green*, unreported, 1998 (Transcript: Smith Bernal Case No.9707010 W4).

and *Moonsinghe*<sup>92 92</sup> *Daily Mail*, April 27, 1999.

had both made false declarations in relation to marriage in order to obtain documents for fraudulent immigration purposes. *Zafar* received a sentence which was reduced on appeal to four and a half years whilst *Moonsinghe* did not appeal against the original sentence of four years.

*Perverting the course of justice*

*During the period 1981–2000, 69 defendants received sentences of over three years and above for this offence.*<sup>93 93</sup>

*Criminal statistics: England and Wales, Supplementary Tables*, Vol.2, Proceedings in the Crown Court, Tables S2.1(A), S2.6. (for the years 1981 to 2000).

From 1991–2000, 53 defendants received sentences of over three years and above (Table 2), which amounted to 0.96 per cent of all defendants sentenced to prison for this offence.<sup>94 94</sup> It is to be observed and deeply regretted that any qualitative analysis of court files data of criminal offences other than murder more than five years old is no longer possible due to the destruction of the data. *The*

*Crown Court Service Manual* states that court files should be kept for seven years in cases for trial (common practice observed by the author is five years), five years in committals for sentence and for three years in appeal cases excepting class one offences, like murder where the court file will be kept in perpetuity. Similarly, court transcripts are retained for up to five years. Following the Criminal Procedure and Investigations Act 1996, s.23, Code of Practice under Pt 2 in relation to retention of material para.5.4 “The duty to retain material includes . . . crime reports . . . custody records . . . any other material which may fall within the test for primary prosecution disclosure in the Act” Para.5.8 “Where the accused is convicted, all material which may be relevant must be retained at least until the convicted person is released from custody, . . . ; six months’ from the date of conviction in all other cases”. Para.5 (9) “If an appeal against conviction is in progress . . . all material which may be relevant to be retained until the appeal is determined.” (*Blackstone’s Criminal Practice 2001* (London, Blackstone Press, 2001) p.2437. See also S.S.M. Edwards “Shredding Police Files” (1997) 147 N.L.J. 336 for a discussion of the implications of the destruction of crime data.

Case tracking was confined to the year 2000 only, where a total of nine defendants received sentences of four years and above. Six of the nine cases, involved serving or retired police officers or informants involved with police in large scale corruption rackets, in the other three cases defendants had been acquitted of murder or other serious offences involving violence and/or drugs. Christopher Drury,<sup>95 95</sup> See the appeal of *Drury and Clark, Reynolds, O’Connell and Kingston* [2001] EWCA Crim 975, (Transcript: Smith Bernal Case No.2000/01310/Z3).

a police officer with the South East Regional Crime Squad, was sentenced to seven years imprisonment reduced on appeal to five years for his part in drugs corruption. Jonathon Rees,<sup>96 96</sup> *The Times*, December 16, 2000.

a police officer, was sentenced to six years for taking cash from a husband in order to frame the wife for possessing drugs (not appealed). Terence McGuinness,<sup>97 97</sup> *The Times*, April 6, 2000.

a police officer with the Flying Squad, planted evidence on suspects and was sentenced to nine years, reduced on appeal to six years. Robert Clark,<sup>98 98</sup> *Independent*, August 5, 2000.

a police officer with the South East Regional Crime Squad, convicted of supplying drugs and conspiracy to pervert the course of justice involving offences over a ten-year period, was sentenced to seven and eight years, concurrent, reduced on appeal to three and seven years concurrent. Fleckney,<sup>99 99</sup> See n.96.

a police informant involved in corruption in the South East Regional Drugs Squad, received a four-year sentence upheld on appeal. Simon James,<sup>1 1</sup> *Observer*, December 17, 2000.

conspired with police officers to have coke planted on his wife so he could gain custody of his son as he and his wife were involved in acrimonious divorce proceedings, was sentenced to six years. The remaining three cases included, *Boodhoo*,<sup>2 2</sup> [2002] 1 Cr.App.R. (S) 9.

where a prison sentence of four years was upheld, in the case of a juror who accepted a bribe from an intermediary on behalf of the two accused. Robert Bradley<sup>3 3</sup> *Hull Daily Mail*, June 28 and July 4, 2000.

received four years’ imprisonment for his part in lying about who owned a gun and ammunition. Jason Lawlor<sup>4 4</sup> *Scottish Daily Record & Sunday Mail*, November 28, 2000, *Daily Record*, December 19, 2000, *Express*, December 19, 2000.

was sentenced to eight years’ imprisonment for his part in perverting the course of justice in a murder trial involving three other defendants (not appealed).

## Conclusion

**This study reveals that prison sentences of over three years and above for both perjury and perverting the course of justice, with one or two notable exceptions, are imposed in cases where the index offence or circumstances in which the offence against justice was committed is very grave, including murder or large scale criminal corruption. The Criminal Justice Bill 2002<sup>5 5</sup>** Criminal Justice Bill 2002 introduced in the House of Commons November 2000.

establishes as the two key determinants of seriousness for all offences, culpability and the harm or risk of harm (cl.127 (1)). Custodial sentences will only be imposed where the offence or combination of offences is considered to be “so serious” (cl.135(2)). Sentence length is further tempered by cl.136(2) which specifies that “custody must be for the shortest term commensurate with the offence”. Reduction in prison sentence is also proposed for those who plead guilty at an early stage (cl.128).<sup>6 6</sup> Cl.126(1) of the Bill establishes as the key purposes of sentencing, punishment, deterrence, rehabilitation, protection of the public and making reparation to persons affected by the offences.

Looking at these proposals and their potential impact on sentencing in cases of perjury and perverting the course of justice, in those cases which do not involve offences of violence and therefore do not involve “harm or the risk of harm” a wider use of community penalties and diminution in the number of offenders sentenced to imprisonment can be expected. Although with regard to the discount for an early guilty plea, it is unlikely that those charged with either perverting the course of justice or perjury are likely to avail themselves of this opportunity given the very nature of the offence. For the more serious offences,<sup>7 7</sup> Criminal Justice Bill 2002, cl.62 “qualifying offences” listed in Sch.4 include, murder, attempt murder, soliciting murder, manslaughter, s.18 of the Offences Against the Person Act 1861, kidnapping, rape, attempt rape, intercourse with a girl under 13, incest by a man with a girl under 13, certain drug offences, robbery, certain offences of criminal damage, certain offences of war crimes and hijacking, including murder and rape, where perjury and/or perverting the course of justice has resulted in an acquittal for the index offence, the Bill proposes retrial for the original offence where there is new and compelling evidence which meets the requirements of cl.65 and such a retrial is in the public interest (cl.66).<sup>8 8</sup> The Bill finished its committee stage at the end of February 2003 where there was much opposition to the abolition of the double jeopardy rule prompting the Home Office to say that its use would be limited to exceptional cases.

The courts may continue to consider such offences highly vexatious as the offences are against the institution of justice and contaminates the rule of law, but there will be less room for the exercise of judicial discretion in such matters. However, the interpretation of “culpability” if read disjunctively from “harm or risk of harm” (cl.127(1)) might allow courts to construe some cases of perjury and perverting the course of justice as “so serious” even in the absence of harm. Sentencing for these offences against

justice deserves further concentrated deliberation and consideration by the Sentencing Guidelines Council and the Sentencing Advisory Panel (cll.151 and 152 of the Criminal Justice Bill).

The complications of these offences in themselves, the circumstances in which they are committed, the individuals involved, the general penal and sentencing objectives together with the way in which sentencing principles are applied in these cases make for great complexity. But there are further issues beyond the scope of this article which require urgent review. Recent proposals for sentencing reform do not address for example the ad hoc and inconsistent manner in which some defendants are charged both with the index offence and with perverting the course of justice/perjury, whilst in other cases defendants are charged with the index offence alone. Nor do current reforms address the issue of the need to make transparent and regularise the process by which proceedings against some defendants for perjury are instituted whilst for other putative defendants no proceedings are brought. It is true that “offences against justice” strike at the very heart of any system of justice but it is also true that the present lack of consistency in the current operation of the law in this area is in itself a slur on “justice”.