

CANADA / JUDGMENT

R. v. Penttila

2020 BCCA 63

COURT

British Columbia Court of Appeal

DECIDED

21 February 2020

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2020 BCCA 63 R. v. Penttila

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Penttila,

2020 BCCA 63

Date: 20200221

Docket: CA46297

Between:

Regina

Respondent

And

Debra Velma Penttila

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated
July 25, 2019 (sentence) (R. v. Penttila, Prince George Docket 45795-1).

Counsel for the Appellant:

R. Mansoori-Dara

Counsel for the Respondent:

B. Petherbridge

Place and Date of Hearing:

Vancouver, British Columbia

January 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 21, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Butler

Summary:

Appeal from a sentence of two years' imprisonment for fraud involving a breach of trust on grounds that the sentencing judge erred in principle, including by concluding that a gambling addiction could never be treated as a mitigating circumstance in a case of this kind. Held: Appeal dismissed. A gambling addiction may impair an offender's decision-making processes and be causally connected to an offence such as fraud. If so, a sentencing judge may, in appropriate circumstances, find that the offender's moral culpability is attenuated. In this case, the judge found that the appellant was well able to control her gambling. In light of this finding, the result would not have been different had the judge approached the issue differently. The sentencing judge committed other errors in principle but none that had a material impact on the sentence. Further, the sentence was not shown to be demonstrably unfit.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] This is an appeal from a sentence of two years' imprisonment imposed on the appellant by a Provincial Court judge following her guilty plea to one count of defrauding her employer of \$362,740.46 between November 2004 and March 2011. Leave to appeal was granted on September 20, 2019, when the appellant was admitted to bail pending appeal.

- [2] In accordance with the version of s. 380(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], that was in force when the offence was committed, the maximum penalty for "fraud over" was 14 years' imprisonment. There was no mandatory minimum term of imprisonment for this offence.
- [3] The Crown sought a sentence of three years' imprisonment. The appellant sought a conditional sentence of imprisonment of two years less one day to be followed by a three-year probation order. When the offence was committed, a conditional sentence of imprisonment was available for the offence of fraud over. In the alternative, the appellant sought a sentence of two years plus one day so she could avail herself of programs offered in a federal institution.
- [4] The sentencing judge concluded that a conditional sentence of imprisonment would not be consistent with the principles of sentencing applicable to this case, including, most significantly, general deterrence. He determined that a three-year sentence would be appropriate, but reduced the sentence to two years in recognition of the appellant's health challenges and her husband's disability.
- [5] Pursuant to s. 738 of the Code, the judge also ordered the appellant to make restitution to her employer in the full amount of the fraud. Neither the restitution order nor various ancillary sentencing orders made by the judge are at issue on this appeal.
- [6] The appellant argues that the sentencing judge erred in principle in his treatment of aggravating and mitigating circumstances, including by: (1) failing to consider her gambling disorder as a mitigating factor; (2) treating her failure to make post-offence restitution as an aggravating circumstance; (3) finding that the appellant lacked insight into her offending behaviour; and (4) relying on a sentencing provision not in force at the time of the offence. Alternatively, the appellant submits that the sentence imposed is demonstrably unfit.
- [7] In support of the appeal, the appellant filed two reports and an article addressing recent approaches policy makers and the medical community have taken to gambling disorders, including emerging scientific evidence respecting the similarities between gambling and substance abuse disorders. This material was not before the sentencing judge. No application was made to have this material admitted as fresh evidence on appeal. The appellant's counsel abandoned reliance on this information in oral argument.

II. Circumstances of the Offence

- [8] The appellant was the office manager at a company that supplies construction materials. She had co-signing authority and was responsible for the issuance of cheques to suppliers. The appellant was a trusted and long-term employee. Her work was largely unsupervised.
- [9] In the course of her employment, the appellant altered 166 company cheques by making herself the payee on almost all of them. The vast majority of these cheques were deposited into her personal account.

[10] The offending conduct continued unabated and undetected for over six years.

[11] The scheme employed by the appellant was not sophisticated, but the steps she took to avoid detection necessitated an extensive investigation. The circumstances of the offence were summarized by Crown counsel:

The offender in 2011 was a trusted 14-year employee. She was the office manager here in Prince George. Twice a month it was her responsibility to create a large batch of cheques. It could be up to 60 cheques. She would sign them and then give them to the general manager to co-sign along with a remittance stub for each cheque. The general manager would then review the remittances and sign the cheques in turn.

And what happened next was that the offender would alter some of the cheques to make the payee herself. The books -- the company books would reflect that the supplier had been paid when, in fact, they had not. The cancelled cheques which, of course, showed that the offender was the payee and not the supplier, those would disappear.

[The company] also found that cheques from customers to [the company] had not been recorded in the books even though they had been deposited into the account, and the belief there was that the money was being misattributed to other suppliers in order to string out the fraud and delay discovery.

This went on until 2011 when Ms. Penttila got to a point, I think, where it was year-end and she realized she couldn't cover up the fraud anymore and this is touched upon in the reports, but it's my understanding that at that point she had a breakdown, she left the office and the person who was appointed to do her work uncovered what was going on.

In any event, the books, when she left, were in terrible shape. There were documents that had physically been hidden away in the office or documents such as the cancelled cheques that were missing entirely. And so, it took a long time to investigate and uncover the full extent of the fraud and once that was done, it further took the RCMP a long time to investigate it, to draft the report to Crown counsel in an acceptable format and to gather the evidence in a way that was admissible.

[12] Plainly, the appellant's conduct constituted a gross breach of trust.

[13] The appellant was fired when the fraud was discovered. By that time, all of the money obtained through the fraud had been spent by the appellant -- most of it through gambling at casinos.

[14] The guilty plea was entered six days before the trial was scheduled to commence.

[15] Needless to say, the offence had a significant impact on the appellant's employer and its employees. The company had to contact creditors because they were unable to determine from their own records what, if anything, they owed to suppliers.

III. Circumstances of the Appellant

- [16] The appellant's background and personal circumstances were addressed in a pre-sentence report prepared by a probation officer and a report authored by Dr. Lopes, a registered psychologist. In addition, the appellant put before the sentencing judge a psychiatric report prepared by Dr. Morgan at the appellant's request.
- [17] Regrettably, the authors of these reports did not seek out collateral sources of information concerning the appellant's behaviour after she started gambling. The probation officer relied on information supplied by the appellant, her husband (who was unaware of the fraud at the time the offence was committed), the appellant's bail supervisor, and information obtained from police records and Dr. Lopes' report. Dr. Lopes noted that his assessment was based largely on the appellant's own account which had not been corroborated by other sources of information. Dr. Morgan relied on the appellant's self-report, the indictment and the Report to Crown Counsel.
- [18] The appellant was 64 years of age at the time of sentencing. She was 49 at the commencement of the fraud.
- [19] She had no prior criminal record.
- [20] She lives in a home that she has owned with her husband since 1984.
- [21] The appellant pursued post-secondary studies in accounting, business, computer programming, and project management.
- [22] After the offence was discovered, the appellant was diagnosed with a neurologically-based movement disorder in which muscle contractions result in repetitive movements or abnormal postures with associated pain.
- [23] The appellant is married with one adult child. Her husband developed some health issues in the late 1990s and retired in 2013. Her mother-in-law died in 1997. In 1998, the appellant's father passed away. The appellant told Dr. Morgan that around this time "she became depressed to a certain degree [but] did not go to see the doctor." The appellant's mother was diagnosed with Alzheimer's disease a couple of years before the fraud commenced. The appellant's mother was eventually institutionalized.
- [24] There was no evidence before the sentencing judge that the appellant had been medically treated for depression before the offence was discovered.
- [25] The appellant told Dr. Lopes that after her mother was diagnosed with Alzheimer's and her husband had retired due to health-related issues, she had "a lot of things going on in [her] life" and "started gambling and it just got worse, worse, and worse." She said she became "totally addicted to the gambling." She told Dr. Lopes that going to the casino elevated her normally depressed mood.
- [26] Dr. Lopes reported that:

From a perspective of speculation, it seems that Ms. Penttila found herself addicted to gambling because it was an escape that would easily alter her brain chemistry to make her feel better. Her addiction resulted in her need for money and this led to her being able to override reason and proper moral choices.

[Emphasis added.]

- [27] On February 4, 2011, when the appellant realized she could not continue to conceal the fraud, she deposited another company cheque to her personal account in the amount of \$2,440.99. Later that day, the appellant was admitted to hospital after taking an overdose of Tylenol. It was at this point the fraud was discovered.
- [28] The appellant told Dr. Lopes that she did talk to "a gambling counsellor" a few times after the offence was discovered but was unable to identify any concepts she worked on. This suggested to Dr. Lopes that the appellant likely did not attend enough sessions to address her underlying issues.
- [29] There was no evidence that the appellant continued to gamble after the detection of the offence or that she required professional support to assist her in abstaining from the behaviour that she says motivated the offence.
- [30] Dr. Lopes reported that the appellant displayed no real insight into her offending behaviour or mental health and appeared to be unable to make the connection between the two.
- [31] Dr. Lopes diagnosed the appellant with a major depressive disorder and an addiction to gambling that was in remission.
- [32] The appellant told Dr. Morgan that she started going to the casino when her mother was sick. Over time, she began betting larger amounts. She said she used all of her own money first, maxed out her credit cards, and took out a line of credit without telling her husband. She said her gambling got out of control and she was trying to win back what she lost.
- [33] Relying on the Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (Arlington, Va.: American Psychiatric Association, 2013) ("DSM-5"), Dr. Morgan found that the appellant met the diagnostic criteria for gambling disorder (in early remission) and adjustment disorder with depressed and anxious mood.
- [34] The appellant reported to Dr. Morgan that she became depressed "to a certain degree" in the late 1990s but did not go to see a doctor. Dr. Morgan concluded that the appellant's current symptoms of depression and anxiety were related to the sentencing proceedings.
- [35] With respect to the appellant's gambling disorder, Dr. Morgan said this:

Ms. Penttila probably began to gamble at the casino in the context of multiple stressors; the death of her father, mother-in-law and mother, and her husband becoming seriously ill, and was related to the stress of this. Her gambling over time got out of control, and she used up large amounts of her own money. The duration of her gambling, together with the lack of functional

impairment, is strong evidence against a manic episode. Given that her offending behaviour began in 2004, as detailed in the Report to Crown Counsel Narrative, and she reported using all her own money to begin with, she had probably begun gambling some years before the offending behaviour started.

Gambling is highly addictive because the reward (winning) occurs on a random schedule; operant conditioning (learning in response to a reward) underpins this, and random patterns of reward are the most difficult to extinguish. Each win would have been accompanied by pleasurable feelings; in the context of her unhappiness and stress, this would have been a powerful, unpredictable reward.

- [36] The appellant's mother died in January 2011, a month before the offence was discovered. The death of the appellant's mother therefore could not have contributed to the stressors leading to the behaviour underlying the offence. The sentencing judge did, however, accept that the daily care the appellant provided to her mother after the Alzheimer's diagnosis was an additional stressor in her life that was operative at the time of the offence.
- [37] The appellant told Dr. Morgan that her reputation was destroyed by what she had done and that she worries for her future.
- [38] The appellant also expressed remorse for her conduct and a desire to make amends for her actions.
- [39] At the time of sentencing, she had taken no steps to make restitution to her former employer for the amount of the fraud.
- [40] The appellant advised the author of the pre-sentence report that "she was struggling with her finances at the time of the offence but they are better now."
- [41] Between 2013 and 2018, the appellant worked as a housing manager for a First Nations community in the Northwest Territories. She was described as a dedicated and knowledgeable employee.

IV. Reasons for Sentence

- [42] In oral reasons for sentence, the judge made a number of factual and legal findings relevant to the grounds of appeal:
- the appellant's gambling habit probably took root after the death of her father in 1998 and before the commission of the fraud;
 - the appellant was not treated for depression until after the offence was detected and there is no evidence she suffered from a diagnosed mental illness, such as depression, when the offence was committed;
 - the appellant provided most of the information used to complete the reports and she is, at times, not a reliable source;

- the appellant spent the proceeds of the fraud on "gambling and other lifestyle choices" [I note that the Crown acknowledged in oral argument that most of the proceeds of the crime were spent on gambling];
- the appellant recognized as she was committing the offence that she had a gambling problem;
- there were no "extreme mitigating personal circumstances" or "special circumstance[s]" unique to the appellant that justified the imposition of a conditional sentence of imprisonment;
- he was bound to follow *R. v. McIvor*, 1996 ABCA 154 at para. 8, a decision cited with apparent approval in at least two Supreme Court of British Columbia decisions, in support of the proposition that "an addiction to or an obsession with gambling is neither an exceptional circumstance justifying the imposition of a non-custodial sentence nor a mitigating factor warranting a sentence of less than what would otherwise be fit and proper";
- the breach of trust was "enormous";
- the appellant concealed and destroyed records to cover up the fraud;
- while the appellant was remorseful, she had little insight into her behaviour or how it affected others; and
- given the nature of the offence and the absence of special circumstances, general deterrence had to play a primary role in sentencing.

[43] In addressing the appellant's contention that her addiction to gambling was a mitigating circumstance, the sentencing judge said this:

[68] Now, in terms of the analysis, I am satisfied that Ms. Penttila did act throughout these seven years or so with design and care to complete the deception. She was a rational and responsible adult. She may have had a gambling habit, a behavioural disorder, but as I view it there is nothing to indicate any diagnosis that I can rely on to say that she was mentally ill that would put her into a special circumstance for the court to consider perhaps a conditional sentence order.

[69] And to be reminded that Ms. Penttila was able to carry on onerous family duties in taking care of her mother and dealing with her financial situation perhaps at the home, and being responsible for the care of her husband, as well. All of that, in my view, substantiates or confirms my opinion and conclusion that she was well able to conduct her behaviour and, for a number of reasons, chose not to stop the gambling and to confess, as it were, to her criminal activity.

[Emphasis added.]

[44] The sentencing judge referred to the fact that no restitution had been made by the appellant in his discussion of the aggravating circumstances of the case. He said:

- [74] The other aspect is that, and the courts have alluded to this, an aggravating factor is that restitution has a remote prospect, and that is something that courts have recognized. I do not put a lot of weight on that. I think we are dealing with a person at age 64, although engaged in employment with this firm at age 49, so it is somebody who has had a number of years of opportunities to deal with the matter and to perhaps begin restitution. But nonetheless, here we are with the matter resolved in 2019 and she is now 64.
- [90] The issue there really is the lack of restitution, so up to the very end, Ms. Penttila was taking money and she finally could not deal with it any further, but she did, in that very same day, did take that sum.
- [91] But in addition, she has had employment, she has had that five-year period of employment in the Northwest Territories and, as I understand the circumstances, there has been no payment of restitution whatsoever, and it seems to me that the matter has -- although she has shown remorse, she has not attended to sorting out any type of restitution.
- [45] In imposing the sentence, the judge gave effect to some of the statutorily defined aggravating factors set out in s. 380.1 of the Code. The Crown concedes that the judge erred by relying on a version of s. 380.1 that was not in effect when the offence was committed.
- [46] For convenience, the version of s. 380.1 that was in effect when the offence was committed provided as follows:

Sentencing -- aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:

- (a) the value of the fraud committed exceeded one million dollars;
- (b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
- (c) the offence involved a large number of victims; and
- (d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community.

Non-mitigating factors

- (2) The court shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

- [47] The current version of s. 380.1 provides as follows:

Sentencing -- aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:

- (a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
- (b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
- (c) the offence involved a large number of victims;
- (c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
- (d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
- (e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
- (f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Aggravating circumstance -- value of the fraud

(1.1) Without limiting the generality of section 718.2, when a court imposes a sentence for an offence referred to in section 382, 382.1 or 400, it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.

Non-mitigating factors

- (2) When a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

Record of proceedings

- (3) The court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence.

[48] In applying the current version of s. 380.1 to the circumstances of this case, the judge said this:

- [75] The sentencing regarding a conviction under s. 380 also requires the court to make reference to 380.1, aggravating circumstances, and to make comment for the record on that. And of course, in addition to the principles I have outlined that we rely on from 718, in particular I have to consider the magnitude, complexity, duration, and degree of planning of the fraud, and was it significant, and I conclude it was. That is an extended period of time. It may not be of a magnitude that we have heard of in terms of some of these cases where the amounts are 600,000 or perhaps over a million dollars, but nonetheless for this firm, for that amount, in this particular locale, that is, in my view, an enormous sum of money to have gone missing. That is item (a) in that particular section, 380.1.
- [76] Subsection (b) is one that perhaps is not relevant to our consideration in terms of if the actions have affected the financial market, and certainly it may have affected the ability of [the company] to carry on with further opportunities of loans or investments, but that is not before me.
- [77] Similarly, (c) number of victims, in my view, we just have the victim being the company, but they are the ones that lost the money. However, as I have alluded to, there were a number of employees that were involved who also had ongoing emotional impact from the actions.
- [78] The (d) is an element that I need to consider, that is in committing the offence, the offender took advantage of the high regard in which the offender was held in the community. That is of limited value to this particular circumstance, but nonetheless, it is my view that, yes, this person was held in regard by the firm, not the entire community, although it is clear there were members in the community that found that Ms. Penttila was of good character and was contributing both to the family and to their own relationships.
- [79] Item (f), in my view, is one that needs to be recognized. The offender concealed or destroyed records related to the fraud or to the disbursement of proceeds of the fraud, and that is very much the case here.
- [80] So I have taken those particular subsections (a), (d), and (f) into particular consideration. As I say, the other aspects of this s. 380.1 are not as relevant and pertain directly to what is before the court today.
- [49] As is apparent from the foregoing, s. 380.1(a) and (f) were not statutorily recognized aggravating factors at the time of the commission of the offence.

V. Analysis of the Grounds of Appeal

1. Alleged Errors in Principle

a) Failing to treat the appellant's gambling disorder as mitigating

- [50] The appellant submits on appeal that a diagnosed gambling disorder shown to have caused or contributed to the commission of an offence should be treated as a mental disorder that diminishes the moral culpability of the offender. She submits that the judge erred by characterizing her addiction as a mere behavioural disorder. She argues that if her addiction

had been properly considered as mitigating, a departure from the general rule -- that conditional sentences for fraud involving a breach of trust with significant consequences for the victim do not give adequate expression to the principles of general deterrence and denunciation -- would have been justified.

[51] The position the appellant advances on appeal is substantially different than the argument she made to the sentencing judge.

[52] The appellant's counsel on sentencing (not counsel before us) did not argue that a gambling disorder should, by itself, be regarded as a mitigating factor. Rather, he argued that it was open to the judge to infer the appellant was suffering from an undiagnosed and untreated clinical depression throughout the relevant time and that she began gambling as a way of elevating her mood. After canvassing stressors in the appellant's life in the late 1990s and early 2000s, defence counsel said this:

I don't seek to argue that an isolated obsession with gambling is necessarily by itself a mitigating factor, but my respectful submission is that in the interpretation of how that came to be in the case of Ms. Penttila, it's not really a -- something that should be considered in isolation, and that there are mitigating factors from Ms. Penttila's background at -- or circumstances that are worthy of consideration.

[53] The essence of the appellant's position at the sentencing hearing was that a gambling disorder could be regarded as a mitigating circumstance if it had its origins in a pre-existing mental illness. Crown counsel advanced a similar position. As a consequence, the focus of the sentencing hearing was on whether it was open to the judge to infer that the appellant suffered from a pre-existing mental illness (depression) which gave rise to her obsessive gambling behaviour. The defence argued that it was open to the judge to draw this inference. The Crown argued there was no evidence upon which a non-speculative inference could be drawn that the appellant was clinically depressed at the time of the offence.

[54] Given the way in which the issue was framed by the parties, the Crown did not dispute that the appellant had a gambling disorder or that the proceeds of the fraud were spent on gambling. The way in which the case was argued in the sentencing court also explains why the evidentiary record is so sparse on issues that would ordinarily have been canvassed in support of the submission made on appeal that the appellant's gambling disorder should be treated as a stand-alone mitigating circumstance. For example, the sentencing judge had no independent evidence concerning the appellant's banking activities, financial transactions or attendance at casinos. He also had no independent evidence concerning the extent to which the appellant had depleted her own funds when the fraud commenced. This state of affairs simply underscores problems that inevitably arise respecting the adequacy of the record when issues are redefined for appellate purposes.

[55] Despite my concerns about the adequacy of the record and the fairness of permitting one party to redefine the issues on appeal to the detriment of another, I am of the view that the record before us is adequate to fairly address the question of principle raised on appeal. In

addition, I think it fair to say that in taking the position she did before the sentencing judge, the appellant was attempting to contend with an unfavourable line of arguably binding authority that might reasonably have been regarded as precluding the argument made to us. It is to those authorities I now turn.

- [56] Whether an established gambling disorder can be considered a mitigating factor in a case of this kind and, if so, the circumstances in which such a disorder could potentially operate to diminish an offender's moral culpability, has not been addressed in a consistent way in the sentencing jurisprudence.
- [57] In *R. v. McDougall*, [1977] B.C.J. No. 889 (C.A.), an appeal from a three-year sentence imposed on a bookkeeper who stole \$40,000 from her employer over a substantial period of time was dismissed. In brief oral reasons for judgment, Justice Bull, speaking for the Court, rejected a submission that the sentence was excessive because the embezzlement was said to have been caused by the appellant's compulsive gambling. As he put it, "that is no excuse whatsoever". It is unclear what the phrase "compulsive gambler" was meant to convey or whether there was any evidence in that case linking the commission of the offence to an underlying gambling addiction or mental disorder. In my view, this three-paragraph decision cannot reasonably be read as endorsing an inflexible rule of general application that a diagnosed gambling disorder shown to have caused or contributed to the commission of the offence can never be treated as a mitigating circumstance. I do not understand the Crown to suggest otherwise.
- [58] The Alberta Court of Appeal has, however, consistently expressed the view that an addiction to or an obsession with gambling is neither an exceptional circumstance justifying the imposition of a non-custodial sentence, nor a mitigating circumstance in frauds involving a breach of trust. The proposition derives from *McIvor* which was followed in *R. v. Holmes*, 1999 ABCA 228 at paras. 7-9; and *R. v. McTighe*, 2005 ABCA 30 at paras. 17-18.
- [59] The Saskatchewan Court of Appeal has not endorsed a bright-line rule in this area, holding that in extreme cases the existence of a gambling disorder may operate to mitigate penalty in frauds involving a breach of trust. In *R. v. Horvath* (1997), 117 C.C.C. (3d) 110 (Sask. C.A.), the court dismissed a Crown appeal from a conditional sentence of imprisonment imposed on a first-time offender for defrauding her employer of about \$200,000 while in the throes of a chronic and progressive gambling addiction. Notably, the offences were found to have been caused by a severe disorder of the mind so controlling that the acts of the accused could not be regarded as emanating from the exercise of free will: at paras. 41-43. In *Horvath*, a psychiatric nurse trained to treat gambling disorders testified on sentencing that the offender's disorder was among the worst he had ever seen. In addition, the offender had committed herself to a course of treatment. The nurse was of the view that incarceration could have a detrimental impact on the offender's rehabilitation.

- [60] Subsequently, in *R. v. Harding*, 2006 SKCA 118, the court clarified that the result in *Horvath* was responsive to a "near singular situation, given the quality of the evidence and the extent of Ms. Horvath's disorder": at para. 17. The court concluded that while Mr. Harding's gambling disorder could appropriately have been taken into account to diminish his degree of responsibility "to some extent," the sentencing judge made too much of this consideration in imposing a conditional sentence for a fraud committed by an employee that involved about \$300,000 and spanned several years: at para. 19.
- [61] In *R. v. Gurske*, 2017 MBCA 46, an offender's appeal from a sentence of 42 months' imprisonment for stealing about \$900,000 from her employer over a period of about six years was dismissed. On appeal, the offender argued that the offences resulted from an undiagnosed mental illness and a gambling addiction which ought to have been given more emphasis in mitigation of penalty. As in the case at bar, the offender had taken no meaningful steps to deal with her gambling addiction by the time of sentencing but was able to refrain from further gambling without treatment. The offender identified herself as a victim and did not acknowledge the serious breach of trust inherent in her actions. The probation officer assessed the offender as being a medium risk to reoffend. In dismissing the appeal, the court said this at para. 8:

We agree with the Crown's submission that the facts do not support an inference that a mental disorder (not diagnosed until after the accused's arrest) was the reason for the accused's criminal conduct. While the sentencing judge accepted the diagnosis of two psychiatrists that the accused is a pathological gambler, it was open to him to find that this played a limited role in the overall assessment of the sentence. The sentencing judge gave appropriate consideration to the accused's mental health issues, and the sentence imposed was within the range for large-scale financial crimes involving a breach of trust.

- [62] In *R. v. Smith*, 2015 BCSC 1267, a civilian exhibits custodian employed by a police force stole money from the exhibits room. The offender, who had no prior criminal record, used the stolen money to feed her addiction to gambling. She sought a conditional sentence of imprisonment arguing that her gambling addiction was a compelling mitigating circumstance justifying departure from the general rule that large-scale thefts and frauds involving a breach of trust generally attract a custodial disposition.
- [63] The offender in *Smith* relied on *R. v. Dickson*, 2007 BCCA 561 at paras. 63, 64, 67 and 70, for the proposition that in the face of extreme personal mitigating circumstances, the principle of general deterrence can be satisfied by a conditional sentence of imprisonment. When the offence was committed, Ms. Dickson was suffering from an undiagnosed and untreated bipolar disorder. A psychiatrist concluded that there was a causal nexus between Ms. Dickson's behaviour and her mental disorder.
- [64] In *Smith*, in the absence of a proper evidentiary foundation that a gambling disorder is the same or substantially the same as a diagnosed mental disorder, the sentencing judge declined to come to that conclusion. He said this:

- [89] In her favour, Ms. Smith entered a guilty plea and expressed sincere remorse for her crime. These are not controversial as mitigating factors and I accept them as such, without reservation. The more troubling question is whether Ms. Smith's gambling disorder/addiction falls under the rubric of "extreme personal mitigating circumstances" as described by Finch C.J.B.C. in Dickson. The cases of McDougall, and McIvor, clearly state that it does not. It is fairly observed, however, that McDougall is a very brief and somewhat dated statement of the law on this question in British Columbia; nonetheless, I am not persuaded that Dickson has modified McDougall despite defence counsel's able arguments to the contrary. In this regard, the more recent and fulsome decisions of the Alberta Court of Appeal in McIvor and McTighe are instructive and persuasive. In these decisions the court explores the issue fully and concludes, unequivocally, that a gambling addiction is not a mitigating circumstance in cases of breach of trust for personal gain.
- [90] In Dickson, it must be noted that the extreme personal mitigating circumstance was an undiagnosed bi-polar mental disorder. In contrast, Ms. Smith suffered from a behavioural disorder of which she was well aware. Even before she began her employment as exhibit clerk she knew she was "addicted" to gambling. Her gambling had already led her into serious financial trouble and she was not oblivious to this fact; indeed, she had promised her parents she would never gamble, again.
- [91] The evidence tendered at the sentencing hearing establishes that Ms. Smith suffered from a gambling disorder at the time of her crime. Ms. Simms explained that this meant that Ms. Smith was addicted to a behaviour; she did not, however, suggest that Ms. Smith had a mental disorder nor is it likely that she would be suitably qualified, in any event, to make such a diagnosis.
- [92] In the absence of expert evidence on the similarities/differences between mental disorders and behavioural disorders, I would not conclude that they are the same or substantially similar, even if there are commonalities between the two; to the contrary, the application of common sense and human experience would suggest that they are not. People with serious mental disorders cannot, through sheer willpower and resolve, rid themselves of their afflictions. In notable contrast, once Ms. Smith's crime was discovered and she resolved to stop gambling, she was able to do so without apparent difficulty and with lasting results. If only it were so easy for the mentally disordered.
- [93] For the foregoing reasons, I am unable to agree with the defence submission that the differences between an undiagnosed bipolar disorder and a gambling addiction are insignificant as far as moral blameworthiness and mitigating circumstances are concerned. I am not persuaded that Ms. Smith's gambling addiction is properly considered as a mitigating circumstance, let alone an extreme personal mitigating circumstance that would justify a departure from the well-established general rule that breaches of a position of trust for personal gain will attract a period of imprisonment.

[Emphasis added.]

- [65] The sentencing judge in this case considered that he was bound to follow *Smith* which, as noted, adopts as persuasive the bright-line rule expressed in *McIvor*.
- [66] In *R. v. McLean*, 2016 BCSC 2191, a case not brought to the judge's attention, the offender defrauded her employer of about \$225,000 over a six-year period. The fraud involved 88 separate transactions. There was expert evidence before the sentencing judge that the offender suffered from a major depressive disorder and a borderline personality disorder that likely impaired her judgment and played a significant role in the commission of the offence. There was also expert evidence before the sentencing judge that the offender met the diagnostic criteria for being a pathological gambler and that she stole from her employer in order to feed her addiction. The court imposed a conditional sentence of imprisonment noting that "courts have recognized that gambling addictions are a mental disorder where the person does not have the same power of control over his or her acts as someone who does not suffer from such an affliction": at para. 52. *Horvath* was cited in support of this proposition. No reference was made to *Smith*.
- [67] The medical classification of gambling disorders for diagnostic and treatment purposes has changed considerably since *McDougall* was decided. As noted earlier, the appellant was found by both Dr. Lopes and Dr. Morgan to meet the diagnostic criteria for Gambling Disorder/Addiction. In my view, and without having regard to any of the new material put forward by the appellant, this Court can take judicial notice of the fact that with the release of the fifth edition of the DSM in May 2013, pathological gambling was reclassified from an impulse control disorder to a non-substance addictive disorder.
- [68] The attachment of a medical label to an identified cluster of behaviours for diagnostic and treatment purposes does not, however, mean that the diagnosis will always be mitigating. But it is important for sentencing judges to consider whether an offender has a medically recognized disorder and, if so, whether that disorder caused or contributed to the commission of an offence. In cases of this kind, sentencing judges should, as one aspect of the analysis, consider the evidence addressing the nature and magnitude of the disorder and determine the overall role it played in the commission of the offence: *R. v. Badhesa*, 2019 BCCA 70 at paras. 40, 42-44.
- [69] A medically recognized disorder, shown to have caused or contributed to the commission of the offence, may be regarded as a mitigating factor warranting a reduction in sentence on the grounds that the offender's moral culpability is attenuated. In addition, general deterrence and denunciation, which ordinarily figure prominently in sentencing offenders for thefts and frauds involving a breach of trust, may be entitled to less weight where the offender's behaviour is attributable to an underlying pathology.
- [70] Where the disorder is found to have contributed to the commission of the offence, the weight it should be given as a mitigating factor will necessarily be fact-driven and context-dependent. In cases like the one at bar, where the offending conduct occurs over a lengthy period and involves the repeated unlawful taking of funds, sentencing judges must

be particularly attentive to whether the evidence justifies a conclusion that a gambling disorder impaired the offender's decision-making processes. A sentencing judge's decision about the weight to be given to a behavioural disorder shown to have played a contributing role in the commission of an offence will, of course, attract a deferential standard of review.

- [71] To the extent that *McIvor* and its progeny stand for the proposition that a diagnosed gambling disorder found to have caused or contributed to the commission of an offence can never amount to a mitigating circumstance warranting the imposition of a lesser sentence, I would decline to follow this line of authority.
- [72] With respect, a more nuanced and flexible approach is required. In my view, this is the inevitable consequence of an individualized sentencing process. To measure and properly reflect the moral culpability of an offender, sentencing judges must take into account the existence of disorders that are capable of impairing judgment. I understand this to be the cornerstone of this Court's judgment in *Badhesa*.
- [73] It follows, in my view, that the sentencing judge erred by applying the bright-line rule expressed in *McIvor* to the circumstances of this case.
- [74] At the same time, those in positions of trust who steal significant amounts of money from their employers must understand that there will be no easy refuge in an unsubstantiated claim made by counsel that the offending conduct is attributable to a gambling disorder. In a case where a dispute exists about whether the offending behaviour was caused by a gambling disorder, detailed and specific evidence, including medical evidence, will generally be required. That evidence should set out the diagnosis, the factual foundation upon which the diagnosis rests, whether the disorder was operative at the time of the commission of the offence and, to the extent it can be determined, whether the disorder caused or contributed to the offending behaviour. Ideally, it should also canvass the offender's prospects for rehabilitation with appropriate treatment. Such an assessment will usually involve canvassing collateral sources of information.
- [75] In addition, it should, as a general rule, be expected in a case of this kind that independent documentary and viva voce evidence will be tendered to establish that the stolen money was, in fact, used for gambling purposes. I note in this regard the comments of Justice Brine in *R. v. Quinn* (15 April 2005), New Westminster XO66517-2 (B.C.S.C.) at para. 35.
- [76] I will consider whether the judge's error in principle on this point, and others, had a material impact on the sentence later in these reasons.
- b) Treating the failure to make restitution as aggravating

- [77] In my view, the judge's treatment of the appellant's failure to make restitution went beyond simply observing that it aggravated the impact of the offence on the company victimized by her conduct. Reading his reasons as a whole, I am satisfied that the judge characterized the appellant's failure to make restitution as an aggravating factor on sentencing. In my view, he erred in doing so. Failure to make restitution is, at best, the absence of a mitigating circumstance: *R. v. Dwyer*, 2013 ONCA 34 at para. 11.
- c) Finding that the appellant lacked insight
- [78] Both the probation officer and Dr. Lopes reported that the appellant displayed no real insight into her offending behaviour. Thus, there was an evidentiary foundation for a conclusion that the appellant lacked insight into what she had done.
- [79] Counsel who appeared for the appellant on sentencing submitted that "it's not so much that Ms. Penttila has no insight into the behaviour [she just] has a very difficult time articulating or communicating her insight or her remorse". The appellant's counsel at sentencing did not call evidence contradicting the probation officer and Dr. Lopes on this point, nor did he seek leave to cross-examine either of them. Neither Crown nor defence counsel suggested to the judge that resort to the legislative framework for resolving factual disputes set out in ss. 723-724 of the Code was necessary in relation to this issue.
- [80] On appeal, the appellant submits that her insight or lack thereof was a disputed fact and the judge erred by failing to hold what is commonly referred to as a Gardiner hearing (*R. v. Gardiner*, [1982] 2 S.C.R. 368) to resolve the matter. She submits that the failure to do so nullifies the judge's factual finding that the appellant lacked insight into her behaviour. I do not agree.
- [81] In the case at bar, the appellant's lack of insight was supported by admissible evidence. The judge was entitled to rely on that evidence. He was not required to hold an evidentiary hearing on this issue and nothing said in *R. v. Pahl*, 2016 BCCA 234, suggests otherwise. *Pahl* stands for the narrow proposition that "it is not open to a judge to accept as fact an assertion made by counsel that is disputed and unsupported by any admissible evidence": at para. 56 (emphasis added).
- [82] In any event, while the judge found that the appellant lacked insight into her conduct and how it affected others, he accepted that she was remorseful for her behaviour. As he put it, "I accept that she fully recognizes, and did so, that she was acting in a criminal manner and that she is very sorrowful for the damage that she has caused to the victims." In light of this favourable finding of fact, whether the appellant expressed insight into what motivated her to commit the offence was of no moment. I would not give effect to this ground of appeal.
- d) Relying on s. 380.1(1) of the Code
- [83] The Crown concedes that the judge erred in principle by relying on the current version of s. 380.1(1) of the Code and, in particular, s. 380.1(1)(a) and (f). These provisions were not in force when the offence was committed. Subsection (a) directs sentencing judges in fraud

cases to treat as aggravating that the offence was significant in its magnitude, complexity, duration or degree of planning. Subsection (f) directs sentencing judges in fraud cases to treat as aggravating that an offender concealed or destroyed records related to the fraud or to the disbursements of the proceeds of the fraud.

- [84] The appellant also submits that the judge erred in principle by relying on s. 380.1(1)(a) and (d), as they read at the time of the offence, as aggravating circumstances. Subsection (a) directed sentencing judges in fraud cases to treat as aggravating instances of the offence involving amounts in excess of one million dollars. Subsection (d) -- which survived the amendments -- directs sentencing judges in fraud cases to treat as aggravating a circumstance in which the offender took advantage of the high regard in which the offender was held in the community in committing the offence. I see no merit in this submission. The judge was well aware of the quantum of the fraud. He did not place reliance on the previous iteration of s. 380.1(1)(a) and did not "double count" the magnitude of the fraud as an aggravating circumstance. Further, I am of the view that the judge did not err in having regard to subsection (d). It was open to the judge to conclude that the high regard with which the appellant was held in her community -- including the community in which she worked -- facilitated the undetected commission of the offence for over six years. In any event, the judge considered this factor to be "of limited value" in this case.

e) Other alleged errors

- [85] The appellant submits that the sentencing judge erred in disregarding other mitigating circumstances, namely that she did not commit any further offences after 2011, that she controlled her gambling addiction, and that she found employment following the offence. I see no merit in the appellant's submission that the judge erred in principle by failing to characterize these circumstances as mitigating. Further, I see no merit in the appellant's submission that he failed to take these circumstances into account.

2. Whether the Errors in Principle had a Material Impact on the Sentence Imposed

- [86] The appellant has identified three errors in principle in the sentencing judge's approach. First, he erred in principle by adopting the proposition articulated in *McIvor* that the existence of a gambling disorder can never be a mitigating circumstance in frauds involving a breach of trust. As I have explained, the approach is more contextual than *McIvor* suggests. Second, he erred in principle by treating the appellant's failure to make restitution as an aggravating circumstance. Third, he erred in principle by relying on a statutory provision enumerating certain factors that must be treated as aggravating in cases of this kind when that provision was not in force at the time of the offence.

- [87] In light of these errors, the judge's assessment of what would constitute a fit sentence in this case is not entitled to the deference customarily afforded to sentencing decisions on appellate review. We are, however, obliged to accord deference to factual findings made by the sentencing judge that do not reflect palpable or overriding error, and to determinations he made respecting the relative weight to assign the various goals of sentencing where those determinations are untainted by error in principle: *R. v. Agin*, 2018 BCCA 133 at para. 55.
- [88] In determining whether these errors had a material impact on the sentence, it is necessary, in my view, to consider them both individually and cumulatively.
- [89] With respect to the first error in principle, I am of the view that the judge's reliance on *McIvor* had no impact on the sentence imposed. I say this because of the judge's factual finding that the appellant was "well able" to control her behaviour and simply chose not to stop gambling with her employer's money. In my view, it was open to the judge to come to this conclusion given the paucity of reliable evidence before him concerning the relationship between the appellant's gambling addiction and the offence.
- [90] Dr. Lopes speculated about the existence of that relationship. Dr. Morgan did link the appellant's gambling disorder to a clinically significant impairment in behaviour, but relied entirely on the appellant's self-report in coming to his conclusion. For example, he relied on the appellant's self-report that she exhausted all of her own resources before beginning to steal from her employer. There was no evidence confirming this version of events. Additionally, Dr. Morgan concluded that the appellant began gambling in response to multiple stressors in her life, including the death of her mother. As I have noted, the appellant's mother died in 2011 after the offence had been committed. Further, the appellant appears to have stopped gambling when the offence was detected without any meaningful therapeutic intervention.
- [91] Given the sentencing judge's factual finding that the appellant was not significantly impaired in her behaviour while the offence was ongoing but well able to control that behaviour, his reliance on *McIvor* was not consequential. Put differently, even if the judge had adopted the more contextual approach I favour, it would not have mattered in this case given the factual findings that he made. I consider those findings to be untainted by error in principle. As a consequence, I am not persuaded that the error in principle had a material impact on the sentence imposed.
- [92] With respect to the second error in principle -- treating the failure to make restitution as aggravating -- the judge said that he would "not put a lot of weight" on this factor. Given the judge's approach to this issue and the number and kind of aggravating circumstances present in this case that were properly relied on by the judge, I am not persuaded that this error had any material impact on the sentence imposed.
- [93] With respect to the third error in principle -- reliance on statutory aggravating sentencing factors not in force when the offence was committed -- I am of the view that the error had no material impact on the sentence imposed because both considerations relied on by the

judge (the magnitude of the offence and the concealment or destruction of records relating to the offence) would inevitably have been treated as aggravating circumstances under the common law: R. v. Slobbe, 2011 BCCA 107 at para. 27 (magnitude); and R. v. Dunkers, 2018 BCCA 363 at paras. 33, 57 (concealment or destruction of records).

- [94] Considering the errors in principle in a cumulative way does not change my view that they did not have a material impact on the sentence imposed. In fact, but for the appellant's ill health and the personal circumstances of her husband, the sentence could well have been higher. The judge expressly acknowledged this in deciding to reduce to two years' imprisonment the three-year sentence of imprisonment he would otherwise have imposed.

VI. Conclusion

- [95] I conclude that the errors in principle did not have a material impact on the sentence. Further, the sentence has not been shown to be demonstrably unfit. For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Butler"

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