# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Tsougranis* [2017] QCA 264 |
| PARTIES: | **R**<br>**v**<br>**TSOUGRANIS, Vasilia**<br>(applicant) |
| FILE NO/S: | CA No 359 of 2016<br>DC No 1550 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane – Date of Sentence: 23 November 2016 (Muir DCJ) |
| DELIVERED ON: | 7 November 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6 June 2017 |
| JUDGES: | Fraser and Gotterson and Philippides JJA |
| ORDER: | **Application for leave to appeal refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was convicted on her pleas of guilty of four counts of dishonestly causing a pecuniary detriment to a person – where the applicant held herself out as a foreign currency trader and accepted funds from four complainants on the premise that she would invest these funds – where all four counts were charged with circumstances of aggravation – where the fraud involved some planning, conniving, and breaches of trust in relation to the complainants – where each offence with those circumstances of aggravation had a maximum penalty of imprisonment for 12 years at the relevant time – where the applicant was sentenced on each count to imprisonment for five years with an order that the imprisonment be suspended after serving 12 months, for an operational period of five years – where a psychologist considered that the offender had a moderate gambling disorder and adjustment disorder with depressed mood at the time of the offending – whether the sentencing judge erred in failing to accord adequate weight to the consideration that the applicant's offending was attributable to a psychological condition<br><br>*Criminal Code* (Qld), s 408C(1)(e), s 408C(2)(c)<br><br>*R v Goodger* [2009] QCA 377, cited |

*R v Huff* [2012] QCA 138, cited
*R v La Rosa; ex parte Attorney-General* [2006] QCA 19, cited
*R v Martin* [2015] QCA 257, cited
*R v Spalding* [2002] QCA 538, applied
*R v Whiting* [2013] QCA 18, cited

COUNSEL: M J Copley QC for the applicant
J A Wooldridge for the respondent

SOLICITORS: Couper Geysen for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant pleaded guilty to four counts of dishonestly causing a pecuniary detriment to a person, contrary to s 408C(1)(e) of the *Criminal Code*. Each count charged the circumstance of aggravation in s 408C(2)(c) that property in relation to which the offence was committed came into the possession of the applicant subject to a condition that it should be applied to a purpose or paid to a person (that it should be applied to foreign currency trading on account of the complainant); and counts 1, 3, and 4 also charged the circumstance of aggravation that the property was of a value of more than $30,000. For each offence with those circumstances of aggravation the maximum penalty at the relevant times was imprisonment for 12 years.

[2] The applicant was sentenced on each count to imprisonment for five years with an order that the imprisonment be suspended after serving 12 months, for an operational period of five years.

[3] The applicant filed a notice of application for leave to appeal against sentence in which the sole ground was that the sentence was manifestly excessive. At the hearing, leave was granted to amend the application by deleting that ground and inserting the ground that the sentencing judge erred in failing to accord adequate weight to the consideration that the applicant's offending was attributable to a psychological condition.

**Circumstances of the offences**

[4] The applicant's offences occurred during a period of about 17 months. There was a different complainant in each count. The complainant in count 3 was a family friend the applicant had known since they were both children. The applicant had known two of the other complainants for some years.

[5] Although the applicant had no licence to engage in foreign currency trading, she accepted a transfer of $50,000 from the complainant in count 1 on 20 September 2012. She regularly told him that she had traded his money for a profit, in consequence of which he gave her additional sums to trade: $50,000 in October 2012, $50,000 in November 2012, and $25,000 also in November 2012. The complainant gave the applicant the last mentioned sum after she invited him to open a joint account with her to benefit a friend of hers who she said had cancer. The applicant gave the complainant weekly statements supposedly recording the state of the account.

[6] The complainant in count 2 was a friend of the applicant's. On 25 February 2013 the complainant gave the applicant $10,000 in response to the applicant's request for that sum. The applicant told the complainant that the applicant invested the sum together with her own funds. The applicant sent the complainant an email advising her about the supposed progress of the investment. The complainant in count 3 was also a friend of the applicant's. The applicant encouraged that complainant to invest funds she had obtained from the sale of her house. On 28 May 2013 the complainant gave the applicant $20,000. On the following day the applicant told the complainant that the applicant had deposited her own funds to improve their joint trading and as a result could not meet a mortgage payment. In response to the applicant's request the complainant gave the applicant another $5,000. The applicant supplied regular statements suggesting that the complainant's investments were profitable. That complainant provided the applicant with $18,000 in June 2013, $200 in July 2013, and another $2,800 a few days later. The complainant in count 4 was the daughter of the complainant in count 2. The applicant again encouraged this complainant to invest, suggesting that she might double or triple her money invested with the applicant. Between July and 30 September 2013, this complainant transferred $90,000 to the applicant by way of seven transfers, encouraged to do so by the applicant's reports to her that her investment was making good returns.

[7] In May 2013 the complainant in the first count told the applicant that he had been advised that his money should be held in his own name. The applicant said she would arrange to move the funds. Thereafter the applicant repeatedly made false excuses for not doing so, including that ASIC had frozen her trading account and that she had been diagnosed with a cancer. The complainant arranged to meet the applicant on 2 December 2013, to pick up a cheque. The account in his name showed that he was entitled to $380,465.03, after a deduction for the applicant's commission. At the meeting the complainant suggested they go to the applicant's accountant's office. The applicant then handed him a letter stating that she had lost all his money because she was a liar, a gambler, an alcoholic, and addicted to trading. During January 2014, the applicant did not respond to attempts to contact her by the complainant in count 2. The complainant in count 2 ultimately confronted the applicant and said that other people had told her that the applicant gambled the money. The applicant said words to the effect that the complainant knew she could lose the money.

[8] Police searched the applicant's home in February 2014. The applicant admitted that she had lied and taken the complainants' money on the basis that she was a very good trader whereas she was just a gambler. The applicant said she had pretended she was a good trader when she knew that she could not even make money for herself. She admitted that sometimes she kept the complainants' money and used it, for example, when she could not pay her mortgage. She admitted that she lied about a friend having cancer so that the complainant in count 1 would give her more money. On 14 October 2015 the applicant voluntarily attended a police station where she was charged and released on bail. She pleaded guilty and was sentenced on 23 November 2016.

[9] The four complainants provided the applicant with a total amount of $318,000, of which the applicant invested only $127,300. She used the rest of the money for her own purposes (including withdrawing cash, making purchases, and making home loan repayments). The applicant became bankrupt and it was unlikely that any of

the complainants would recover any of the outstanding money. The complainants in counts 1 and 2 each lost the amount given to the applicant, $175,000 and $10,000 respectively. The complainant in count 3 lost $37,000, being the total of $43,000 transferred less payments made by the applicant totalling $6,000. The complainant in count 4 lost $88,500, being the total amount entrusted to the applicant of $90,000 less $1,500 transferred to her as a purported return on her investment. The total amount of $7,500 repaid by the applicant to complainants was paid to placate complainants or suggest that the investments were proceeding.

**The applicant's personal circumstances**

[10] The applicant was between 37 and 38 years old during the offending and she was 42 years old when sentenced. She had no criminal history. The applicant's husband and co-workers gave very favourable references for the applicant, which referred to her remorse, her addiction to financial trading, and the adverse effects upon the applicant and her family of incarceration. (The applicant's children were aged between 13 and 18 years old. It was not submitted that this was a significant factor in the determination of the appropriate sentence. The sad fact that the applicant's incarceration necessarily would result in hardship to her husband and family did not justify significant mitigation in the sentence for her serious offending[1]).

[11] The applicant attended counselling on a great many occasions commencing on 3 January 2014 (which was after the complainant in count 1 had insisted upon the return of his money and the applicant admitted to having lost his money).

[12] The ground of appeal in the application for leave to appeal against sentence focusses largely upon a report by a psychologist, Dr Yoxall. The report referred to significant disadvantages in the applicant's upbringing, a long history of depression, and other significant stressors. After the applicant's husband sold some shares, the applicant spent a great deal of money on courses in trading, and she embarked upon trading herself. She lost money but lied about making profit and pretended to be a successful trader. Because she believed her lack of success was attributable to her limited capital she started taking investments from friends and associates. She was extremely remorseful and ashamed. She had recurrent suicidal thoughts, was at an increased risk of self-harm, had taken an overdose, and she had been admitted to hospital for psychiatric review. Dr Yoxall expressed the opinion that the applicant most likely met the criteria for a major depressive episode. Her condition had existed for perhaps 13 years. Her interest in trading became obsessive – a gambling disorder – and that condition was compounded by the underlying major depressive disorder. She engaged in dysfunctional, irrational, and desperate behaviours. There was a clear relationship between her psychological issues and her offending. Dr Yoxall did not express the particular nature of the relationship but the respondent acknowledged it probably referred to impaired impulse control. The applicant submitted that the psychological condition substantially contributed to the offending. I accept that submission.

**Sentencing remarks**

[13] The sentencing judge referred to the circumstances of the offences and the applicant's personal circumstances. Her Honour accepted that the pleas of guilty demonstrated remorse, the applicant had made frank and full admissions, before

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1 *R v Whiting* [2013] QCA 18 at [12].

being charged she had recognised she had a gambling problem and obtained assistance from a counselling organisation, she had a difficult childhood, she found difficulty in developing friendships when she moved to Brisbane 13 years ago, and she developed an interest in currency trading whilst suffering depression in an attempt to supplement her husband's income. Her unsuccessful trading resulted in major losses for the family. Her longstanding depressive disorder led to development of a gambling disorder. Her Honour accepted that the applicant was profoundly ashamed of her conduct and the sentence was likely to have an overwhelming effect on her husband and children.

[14] It was to the applicant's credit that she had engaged in treatment to address the factors that contributed to her offending after the confession she made to one of the complainants led to her realisation that her trading was gambling. The sentencing judge summarised and expressly accepted the evidence of the psychologist and described as mitigating factors the applicant's longstanding depressive disorder which was undiagnosed at the time of the offences and the applicant's steps to rehabilitate herself.

[15] The sentencing judge observed that the applicant's offending involved some planning, conniving, and breaches of trust in relation to the complainants who were her friends. The applicant's fraud was reasonably elaborate and included the deception that she was an expert foreign currency trader. The sentencing judge referred to the amount of money invested as a result of the applicant's dishonesty and the amount of $310,500 outstanding, which the complainants were unlikely to recover. As a result of the applicant's offending one of the complainants had had to return to work, another had suffered grief, sadness and financial problems, and a complainant who was a friend of the applicant's suffered trust issues, anxiety and financial stress, and was required to do extra work and sell her house to make repayments.

**Consideration**

[16] The applicant argued that if the sentencing judge had given the appropriate weight to the unchallenged evidence of the psychologist the sentence should have included actual custody which did not exceed six months. The applicant referred to authorities for the proposition that offending substantially attributable to a mental condition should result in shorter sentences than otherwise would be imposed: *R v La Rosa; ex-parte Attorney-General*;[2] *R v Huff*.[3] In the applicant's submission, the mitigation attributable to the applicant's psychological disorder was confined to a reduction in the period of time before suspension. Upon the footing that five years imprisonment was an appropriate head sentence for an offender with no serious mental condition who pleaded guilty (the applicant cited *R v Martin*[4]) and release after one third of the head sentence is commonly ordered upon a plea of guilty in similar cases, the applicant submitted that the order suspending the applicant's imprisonment after 12 months comprehended an allowance of eight months to reflect all of the matters in mitigation. This was submitted to be insufficient in light of the evidence that a serious psychological condition substantially motivated the applicant's offending. The applicant submitted that the sentence did not accommodate the diminished significance of general and personal deterrence in such a case.

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2 [2006] QCA 19.
3 [2012] QCA 138.
4 [2015] QCA 257.

[17] As the respondent submitted, whilst the evidence of the psychologist was relevant in the formulation of the sentence, the manner and extent of its relevance depended upon the particular circumstances of this case. The respondent acknowledged that the applicant's underlying psychological conditions were relevant to her moral culpability and that she should be regarded as having good prospects of rehabilitation. As the respondent also submitted, however, there is no basis for accepting the applicant's contention that the sentencing judge did not give proper weight to the evidence of Dr Yoxall. The sentencing judge did take that evidence into account but her Honour also was obliged to take into account the aggravating factors of the applicant's offending summarised in [15] of these reasons. It is evident that the applicant engaged in calculated and callous frauds, including conduct designed to induce the complainants to entrust her with their money and subsequently to allay concerns the complainants otherwise might have. In these circumstances it was plainly open to the sentencing judge to attribute weight to the consideration of general deterrence, notwithstanding the psychiatric evidence.[5]

[18] In *R v Martin*,[6] the offender was sentenced to imprisonment for six years with parole eligibility after 20 months. She pleaded guilty to one count of fraud as an employee. The amount involved was $373,131.54, of which $24,770 was repaid. That suggests a somewhat more serious offence. It was more serious also because whilst there was only one complainant in that case, there were 579 separate occasions during four years and two months when the applicant, who was employed as a bookkeeper in a small family business controlled by a husband and wife, transferred money to her own bank account or that of her partner. Even so, *Martin* is broadly comparable with this case. After that offender became aware that she was to be charged, she apologised and promised to repay the money. A psychologist considered that the offender had a moderate gambling disorder and adjustment disorder with depressed mood at the time of the offences, and referred to significant stressors upon the offender. The offender did not have an extravagant lifestyle and threw away most of the proceeds of the fraud in gambling. She had no criminal history and was previously of excellent character. To reflect the matters in mitigation the sentencing judge reduced what otherwise would have been the period before release of 24 months to 20 months. The Court found that: there was no substance in the contention that the sentencing judge did not take into account the offender's psychological condition during the offending or her remorse; there was nothing in the comparable sentencing decisions to support the contention that the head sentence was excessive; and by fixing the parole eligibility date at substantially less than one third of the head sentence, the sentencing judge took into account fully that offender's mitigating factors.

[19] Acknowledging that the psychological evidence referred to in *Martin* did not describe the offender's psychological condition as a factor motivating the offender and that it was a somewhat more serious offence, the circumstance that the more severe sentence in that case was found not to be manifestly excessive provides no support for the applicant's proposition that the sentencing judge in the case failed to attribute sufficient weight to the effect of the contribution of the applicant's psychological condition to her offending. Indeed the applicant's sentence seems entirely consistent with the sentence in *Martin*.

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5 *R v Goodger* [2009] QCA 377 at [24] (Keane JA (with whose reasons I and Atkinson J agreed)).

6 [2015] QCA 257.

[20] It is not possible to infer from any of the other comparable sentencing decisions cited by the parties that the sentencing judge must have attributed insufficient weight to that evidence. Upon analysis, none of the many other sentencing decisions to which the court was referred is truly comparable with the present case, as the applicant appropriately acknowledge in her senior counsel's outline of argument. It is useful to discuss only *R v Spalding*,[7] which supports the respondent's contention. That offender was sentenced to six years imprisonment with a recommendation for post-prison community based release after two years. He pleaded guilty on an *ex officio* indictment to misappropriation as an employee and fraud as an employee. He offended on a great many more occasions and over a much longer period than did the applicant, but the total amount of monies he derived from his offence - a little over $300,000 - was of a similar order to the amount involved in this case, although he also caused some detriments to other employees by wrongly directing other funds to the tax office. That offender made full admissions to police, he had no previous convictions, a good work history, and was married with one child. A psychologist reported that the offender suffered increasing stress and strain which resulted in an adjustment disorder with disturbance of conduct. He acknowledged his responsibility, was remorseful, and was unlikely to re-offend. McMurdo P (with whom Helman and Philippides JJ agreed) observed that, although some cases indicated that a slightly lesser sentence could have been imposed, the sentence actually imposed was within a sound exercise of the sentencing discretion.

[21] A more lenient sentence could be imposed in this case, particularly because of the stronger psychological evidence (especially as to the relationship between the applicant's conditions and her offences) and the substantially shorter period and fewer occasions of offending; and the applicant's sentence of five years' imprisonment with suspension after 12 months is significantly more lenient than the sentence of six years with the recommendation for release after two years in *Spalding*.

[22] Senior counsel for the applicant appropriately acknowledged that the sentencing judge accepted and gave some weight to the psychologist's evidence. It is not discernible from the sentencing judge's reasons for the sentence that the weight given to that factor was in any way inadequate. Nor is there any basis for thinking that the applicant's sentence as a whole, or the custodial period of twelve months before the suspension of the applicant's imprisonment in particular, is so severe as to evidence any error of principle in the exercise of the sentence discretion.

**Proposed order**

[23] I would refuse the application for leave to appeal against sentence.

[24] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[25] **PHILIPPIDES JA:** I agree that the application for leave should be dismissed for the reasons given by Fraser JA.

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7 [2002] QCA 538.