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## SENTENCING OF PATHOLOGICAL GAMBLERS IN CANADA. LESSONS FOR SOUTH AFRICA?

### 1 Introduction

Pathological gambling, also referred to as gambling addiction, has been described as a

“persistent and recurrent maladaptive gambling behaviour. Features of the maladaptive behaviour include a preoccupation with gambling; the need to gamble with increasing amounts of money to achieve the desired excitement; repeated unsuccessful efforts to control, cut back or stop gambling; gambling as a way of escaping from problems; gambling to recoup losses; lying to conceal the extent of the involvement with gambling; the commission of illegal acts to finance gambling; the jeopardizing or loss of personal and vocational relationships because of gambling and a reliance on others for money to pay off debts”. (DSM-IV as cited in Kaplan and Sadock *Synopsis of Psychiatry* (1997) 722. The exact nature of pathological gambling falls outside the scope of this note. See in general Carnelley and Hoctor “Pathological Gambling as a Defence in Criminal Law” 2001 *Obiter* 379 380-381.)

No legal system excludes culpability for a crime as a result of pathological gambling of the offender. Pathological gambling is not a defence in a criminal matter. It has, however, in certain countries, been recognised as a mitigating factor during the sentencing phase. For a discussion of the legal position in the USA, Germany and South Africa, see Carnelley and Hoctor (2001 *Obiter* 383-385).

Canadian law is a further example of a legal system where pathological gambling has been recognised as a mitigating factor, especially in theft and fraud cases (Manson *The Law of Sentencing* (2001) 134). *S v Horvath* ((1997), 117 C.C.C. (3<sup>rd</sup>) 110 (Sask. C.A.)) was the first Canadian case in which the court recognised that a gambling addiction may reduce the culpability of an accused enough to warrant a so-called conditional sentence (Manson 135). For the period 2000 to 2003, there were ten reported judgments in the Canadian courts where pathological gambling was raised as a mitigating factor by a person convicted of a crime to which he/she pleaded guilty. The aim of this note is to establish to what extent the Canadian courts applied the *Horvath* principle in the latest cases and to compare these judgments with the few related South African decisions. As the South African courts will no doubt be faced with the evaluation of gambling addiction as a mitigating factor on a more regular basis, some suggestions are formulated in the conclusion (NCSG/RGNP Report *Gaming and Problem Gambling in South Africa* (November 2001) 13 noted that

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nationally, about 120 000 South Africans can be described as having a gambling addiction, with a further 500 000 as having a gambling problem).

The basic sentencing principles in the South African and Canadian laws are similar even though the Canadian sentencing principles are statutorily defined in their Criminal Code (*Criminal Code*, R.S.C. 1985, c. C-46 (s 718)). The South African sentencing principles have been developed by the courts. Unlike in Canada, the courts in South Africa do not take kindly to a restriction of their sentencing powers and discretion by the legislature (Bekker *et al Criminal Procedure Handbook* (1999) 260 notes that since s 9 of the Constitution of the Republic of South Africa Act 108 of 1996 stresses equality of all people before the law, the courts in future will have to set great store upon equal treatment for equal offenders, including the sentencing phase).

Judicial discretion is the hallmark of both sentencing systems. (Canada: s 718.3 of the Canadian Criminal Code; *R v Proulx* 2000 SCC 5, 140 CCC (3d) 499; and Manson 80. SA: Terblanche *The Guide to Sentencing in South Africa* (1999) 121; and Bekker *et al* 259.) This discretion is, within the legislative boundaries, exercised on an individual basis, purportedly fairly and proportionally, whilst considering the purpose of sentencing, *inter alia*, prevention, deterrence and reformation. (Canada: s 718 of the Canadian Criminal Code; and Manson 81-85. SA: Terblanche 127-128; Bekker 260; and *S v Nkambule* 1993 1 SACR 136 (A) 146C-D.) Each case is considered within its own circumstances, taking into account the crime, the offender and the interests of society. (S 718.1 of the Canadian Criminal Code emphasises the proportionality of the sentence to the gravity of the offence and the responsibility of the offender. The Supreme Court of Canada in *R v Proulx supra* confirmed that society should not be exposed to an offender likely to re-offend. SA: *S v Rabie* 1975 4 SA 855 (A) 862G-H.)

The mitigating and aggravating factors considered are also similar in the two systems. Aggravating factors include the seriousness of the crime, previous convictions and an abuse of trust. (Canada: s 718.2 of the Canadian Criminal Code; and Manson 151-155. SA: Terblanche 213-218; and Bekker *et al* 263-264.) With regard to mitigating factors, both systems recognise as a mitigating factor the fact that the offender is a first offender, has a stable employment record, pleaded guilty and compensated the victim (Manson 131-135; and Terblanche 223-234). It is interesting to note that the (Canadian) court in *R v Hoang* (54 W.C.B (2d) 126 2002 W.C.B. LEXIS 710) expressed the view that the sentence should be discounted by 25% for a guilty plea. This concept of calculation is foreign to South African law, although a plea of guilty is taken into consideration as a mitigating factor.

The Canadian courts specifically recognise evidence of impairment, such as gambling addiction, as a mitigating factor, as well as post-offence

rehabilitative efforts by the offender (Manson 138).

The focus of this note is on one specific type of sentencing, what is called “conditional sentence” in Canada, and “correctional supervision” in South Africa. The principles relating to this form of punishment in the two legal systems are again similar. It is a community-based punishment aimed at keeping the offender out of prison, and within society under strict conditions. The conditions in each case obviously depend on the circumstances of the case. In South Africa the measures mostly include house arrest, community service, monitoring and treatment. (Canada: s 276A of the Criminal Procedure Act, 1977. SA: Bekker *et al* 278-279.) The choice of conditions in the Canadian legislation is wider, but includes a report to a supervisor, community service and attendance of a treatment programme (s 742.3 of the Canadian Criminal Code). The importance of this type of sentence for pathological gamblers is borne out by the fact that there is generally no need for these offenders to be removed from society. They are seldom violent, are susceptible to treatment outside the prison system and as such are capable of being rehabilitated (Lesieur “Gambling, Pathological Gambling and Crime” in Galski (ed) *The Handbook of Pathological Gambling* (1987) 100). It is suggested that pathological gamblers in South Africa should, unless the seriousness of the crime demands otherwise, be sentenced to correctional supervision. This is the approach of the Canadian courts and should be the approach adopted by the South African courts.

## 2 Canadian cases

The 2000-2003 Canadian cases under discussion have various aspects in common. Firstly, the accused pleaded guilty to the crime. Secondly, it was argued that he/she was a pathological gambler and induced into criminal activity as a result of his/her gambling addiction. Thirdly, the offenders had, except in two cases, no previous convictions. However, the crimes for which the offenders were convicted ranged from drug dealing to theft, fraud and robbery. The analysis of the cases is grouped according to the crimes committed.

### 2.1 Drug dealing

<i>R v Le</i> 47 W.C.B. (2d) 334; 2000 W.C.B. LEXIS 5738	3 charges relating to 1g cocaine @ \$80 each	Conditional sentence: 22 months
<i>R v Hoang</i> 54 W.C.B. (2d) 126; 2002 W.C.B. LEXIS 710	\$1.2 million 15403 ecstasy tablets	Imprisonment: 3 years and 2 months
<i>R v Cheung</i> 54 W.C.B. (2d) 167; 2002 W.C.B. LEXIS 746	\$650 4.4g crack cocaine	Imprisonment: 2.5 years

Only in *R v Le* was the court prepared to impose a conditional sentence, notwithstanding the fact that the offender had a previous conviction. Factors

weighing in his favour were the small amount of drugs sold as well as the steps he had taken to rehabilitate himself prior to sentencing. In *R v Hoang* the seriousness of the crime excluded the possibility of a conditional sentence, whilst in *R v Cheung*, the court noted that although the accused had good prospects of rehabilitation, a conditional sentence was not appropriate as it would not adequately meet the principles of denunciation and deterrence.

## 2.2 Theft and fraud

<i>R v Richard</i> 53 W.C.B. (2d) 298; 2002 W.C.B. LEXIS 433	Theft: \$6 479	Conditional sentence: 7 months, including counselling/compensation
<i>R v Horvath</i> [2001] Sask.D.Crim. 270.76.70.00-01 LEXIS 41	Theft: \$234 108 (position of trust)	Imprisonment: 2 years
<i>R v Armstrong</i> [2001] Alta.D.Crim. 270.44.30.00-05 LEXIS 98	Fraud: \$186 202 (position of trust)	Conditional sentence: 2 years, including counselling
<i>R v Dinardo</i> 50 W.C.B. (2d) 442 2001 LEXIS 5289	Fraud: \$246 000	Conditional sentence: 2 years, including counselling
<i>R v Watkinson</i> [2001] Alta.D.Crim. 270.00.70.19-02 LEXIS 40	Fraud: \$182 800	Conditional sentence: 18 months, including compensation

In the 1997 *S v Horvath* matter, the court found that a gambling addiction was a mitigating factor even though there was a serious breach of trust and substantial theft from an employer (Manson 135). Although this judgment was followed in various later cases, its approach was rejected by the Alberta Court of Appeal where substantial amounts were stolen from employers (Manson 135 with references to *R v Holmes* [1999] A.J. No 862 (C.A.); and *R v McIvor* (1996), 106 C.C.C. (3d) 285 (Alta.C.A.)).

In the theft and fraud cases under discussion however, the court imposed a conditional sentence notwithstanding that substantial amounts were stolen, especially where it was shown that the offender made an effort to submit himself to counselling/rehabilitation either as part of, or outside, the conditional sentence programme. Only in the 2001 *Horvath* matter did the court find that the offender would continue to commit offences until her gambling addiction was under control and that it was necessary to physically separate her from society to prevent her from committing further offences. The main reason for this decision was the fact that the offender had two previous convictions for similar offences for which she received conditional sentences, but that did not prevent her from committing another, similar, crime.

### 2.3 Robbery

<i>R v Baldwin</i> 48 W.C.B. (2d) 387 2000 LEXIS 6550	\$540 “asserting she had gun and grenade”	Imprisonment: 3 years
<i>R v Candelaria</i> 53 W.C.B. (2d) 333 2002 W.C.B. LEXIS 463	\$69 With a replica gun	Conditional sentence: 18 months, including treatment

On the face of it, the difference between these two cases regarding sentencing is difficult to comprehend, although the various aggravating and mitigating factors applicable in these cases lead to some insight. In the *Baldwin* case the sentencing judge declined to impose a conditional sentence and stated that such a sentence would not denounce the unlawful conduct of the offender and would not be a sufficient deterrent to the offender and others, as well as failing to be proportionate to the gravity of the offence and the degree of her responsibility. In the *Candelaria* matter, the court took into account the fact that for the 17 months preceding the appeal, the accused had stopped gambling and obtained stable employment. He was further classified as being at low risk to re-offend.

### 2.4 Conclusion

The Canadian courts, bearing in mind the general sentencing principles, lean towards the imposition of a conditional sentence where the accused pleads guilty to an offence and where proof of gambling addiction is submitted in mitigation of sentence. For the past three years, this remained true in theft and fraud cases even where substantial amounts were stolen from an employer from a position of trust. The exception hereto is where the offender has previous convictions and where conditional sentencing was previously shown not to have been an effective sentence. In drug dealing matters, conditional sentencing is not regarded as an option for gambling addicts, except where the offence relates to a very small amount of drugs. With regard to robbery cases, no broad guideline can be formulated.

## 3 South Africa

There have been no reported cases where problem gambling has been considered in mitigation of a sentence. Three unreported cases have been examined, namely *S v Munro* and *S v Croucamp* (Carnelley “Gambling Law” 2004 SACJ (forthcoming)) and *S v Janse van Rensburg* (Carnelley and Hoctor 2001 *Obiter* 388). These cases related to theft and fraud and can be summarised as follows:

<i>S v Munro</i> Cape Town Magistrate's Court 2002-11-05 24/710/2002	Theft: R49 500 (position of trust)	Imprisonment: 2 years suspended for 5 years plus 12 months correctional supervision, including counselling
<i>S v Croucamp</i> Johannesburg Commercial Crime Court 2003-08-19 41/435/2003	Fraud: R1.7 million	Imprisonment: 15 years imprisonment
<i>S v Janse van Rensburg</i> Pretoria Regional Court 2001-06-22 14/07270/2000	Theft: R5.7 million	Imprisonment: 12 years imprisonment

As with the Canadian cases, all three accused pleaded guilty and argued that their gambling addiction was the underlying cause of their crimes. Only in the *Munro* case did the court impose correctional supervision. What weighed heavily in favour of the offender in this case was the fact that her employer was reimbursed in full for the financial loss suffered. Her correctional supervision included a condition relating to participation in a problem gambling programme. In both *Croucamp* and *Janse van Rensburg*, the offenders had one previous conviction each for a crime where dishonesty was an element and in addition, the crimes were serious in that the amounts in question were substantial. Notwithstanding evidence of the addiction of the offender, correctional supervision was not considered as an appropriate sentence.

#### 4 Conclusion

The South African courts can fruitfully refer to Canadian case law in matters relating to the consideration and acceptance of evidence of gambling addiction as a mitigating factor, especially in theft and fraud cases. Although the normal sentencing principles remain applicable, it is clear that the Canadian courts are sympathetic towards gambling addicts and are prepared to impose a conditional sentence, with an element of counselling, in an attempt to rehabilitate the offender. Where the offender is, however, a multiple offender and where conditional sentencing was previously shown to be unsuccessful, further conditional sentencing would not be feasible. The same principles should be followed by the South African courts, as was the case in the *Munro* case. With regard to robbery and drug-dealing cases by gambling addicts, however, no suggestion can be made on the basis of the Canadian cases.

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