

CITATION: R. v. Auckbaraullee, 2019 ONSC 2498
COURT FILE NO.: CR-3796/14
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN) *Michael Lockner*, for the Crown
)
– and –)
)
ANISSAH AUCKBARAULLEE) *Anser Farooq*, for Ms. Auckbaraullee
)
)
) **HEARD:** September 28 & November 26,
) 2018, March 12, April 23, & May 30, 2019

2019 ONSC 2498 (CanLII)

REASONS FOR SENTENCE

GARTON J.

Overview

[1] Anissah Auckbaraullee, age 53, was convicted following a trial before me on one count of fraud over \$5000, contrary to s. 380 (1)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46. I found that between June 17 and October 20, 2010, Ms. Auckbaraullee, by deceit, falsehood or other fraudulent means defrauded the Ontario Hospital Association (“OHA”) of \$80,370.

[2] Ms. Auckbaraullee represented herself at the trial and the first day of the sentencing hearing, which was September 28, 2018. Following the Crown’s submissions, I adjourned the hearing to November 26, 2018 in order to give Ms. Auckbaraullee an opportunity to review the case law provided to her by the Crown, and to consult with counsel in light of her vulnerability to a removal order and deportation pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (“*IRPA*”). As a permanent resident, she is vulnerable to deportation upon conviction for this offence.

[3] Ms. Auckbaraullee was born and raised in Mauritius, East Africa. When she was still a teenager, her father arranged her marriage, and she was sent to Canada to join her husband, who had already emigrated from Mauritius. Although Ms. Auckbaraullee has lived in Canada for 34 years and raised two children here, she never applied for Canadian citizenship.

[4] Mr. Farooq appeared as counsel for Mr. Auckbaraullee on November 26, 2018 and the case was adjourned to March 12, 2019 for sentencing submissions by the defence. It was adjourned again at the request of defence counsel to April 23, 2019, when Mr. Farooq made submissions on Ms. Auckbaraullee's behalf. On May 30, 2019 Ms. Auckbaraullee addressed the court in response to my question as to whether she wished to say anything prior to the imposition of sentence. The matter was then adjourned to today's date.

Circumstances of the Offence

[5] The circumstances of the offence are set out in detail in my Reasons for Judgment. Ms. Auckbaraullee did not testify at her trial and has maintained her innocence. The following is a summary of my findings.

[6] The OHA is a non-profit organization that represents 154 public hospitals in Ontario. It provides various services to its members, including advocacy, collective bargaining, HR support, and education.

[7] On October 28, 2010 the Royal Bank of Canada contacted OHA's Manager of Finance, John Simone, regarding a cheque that a person was attempting to deposit to an account that had just recently been opened. The cheque was made payable to "M.W. Management" in the amount of \$9,755. Mr. Simone requested that a hold be placed on the cheque while he looked further into the matter.

[8] Upon learning that no one within OHA had ever heard of this company, Mr. Simone launched an internal investigation. That investigation uncovered a fraudulent scheme in which eight cheques to six different vendors were issued by OHA between June and October 2010. Three cheques were printed in June, and four were printed in September. The last cheque, dated October 20, 2010 and payable to M.W. Management, was never deposited.

[9] The cheques were issued to the six vendors on the basis of fraudulent invoices or cheque requisitions for goods or services that were never ordered by or provided to OHA. Bank records indicate that Ontario business licences were issued to each of these six enterprises, and that their respective bank accounts were opened only days or weeks before the fraudulent cheques were deposited or, in the case of M.W. Management, were attempted to be deposited. The money was then withdrawn from the accounts. Other than the OHA cheques, there was very little activity in any of these accounts. The businesses in question were located in different cities in Ontario: two were in Toronto, and the remaining four were in London, Brampton, Malton, and Bradford.

[10] "HealthAchieve" was an annual conference run by OHA's Education Department in November for hospital executives and administrative staff. All the fraudulent invoices or cheque requisitions referenced this event. These supporting documents lacked requisite information and contained form irregularities and forged signatures. In some instances, there were no invoices or back-up documents for the fraudulent cheques.

[11] Ms. Auckbaraullee was hired by OHA in January 2005 as the Accounts Payable clerk. As such, she was responsible for issuing cheques to OHA's vendors for services and products. She generated cheques via a computer accounting program known as Cheque Scribe, which allowed cheques for amounts under \$25,000 to be printed with the electronic signatures of the Chief Financial Officer and the Chief Operating Officer. All the fraudulent cheques were for amounts under \$25,000.

[12] The only OHA employees who had the password necessary to access Cheque Scribe were Ms. Auckbaraullee, Mr. Simone, and the Accounts Receivable clerk, Kathleen Stepic. In my Reasons for Judgment, at paras. 543-655, I found that the Crown had established beyond a reasonable doubt that neither Mr. Simone nor Ms. Stepic printed the fraudulent cheques or committed the fraud.

[13] After taking into account all of the circumstances, which are summarized at paras. 769-773 in my Reasons for Judgment, I found that the Crown had established beyond a reasonable doubt that Ms. Auckbaraullee not only printed the eight fraudulent cheques but that she did so knowing that they were fraudulent, and that as a result of her actions, OHA would suffer a pecuniary loss.

[14] Although Ms. Auckbaraullee perpetrated this fraud, there was no evidence linking her to the six businesses, their owners, or their respective bank accounts. There were obviously other individuals in addition to Ms. Auckbaraullee who were involved in this fraudulent scheme.

[15] There is no evidence of any financial gain by Ms. Auckbaraullee as a result of the fraud. For example, there is no evidence of large amounts of money being deposited into her bank account, or of her or her family members living beyond their means. No financial records relating to Ms. Auckbaraullee were filed as exhibits. There is no evidence as to where the money went after it left the six bank accounts.

Impact of the Offence on OHA

[16] Crown counsel indicates that no one from OHA was prepared to provide a victim impact statement.

[17] The OHA's loss was covered by its insurer, which has been involved in civil litigation with Ms. Auckbaraullee. Counsel for the insurance company advised the Crown that a restitution order is a priority for them, as it would obviate the need to continue expending resources in seeking a civil judgment. Mr. Farooq, on behalf of Ms. Auckbaraullee, takes no issue with the court signing a freestanding restitution order in the amount of \$80,370.

[18] Ms. Auckbaraullee had launched a counterclaim for wrongful dismissal – she was dismissed from her job in early 2011 after the investigative firm hired by OHA, ISN Inc.,

completed its interview of employees and concluded its investigation. However, Ms. Auckbaraullee has indicated that she is not pursuing this claim.

Circumstances of Ms. Auckbaraullee

[19] As stated earlier, Ms. Auckbaraullee was born and raised in Mauritius. She told the author of the pre-sentence report, Jennifer Martins, that she had a strict upbringing, where she was taught to listen to and obey her parents. Hence, when her parents arranged her marriage, Ms. Auckbaraullee felt that she had no say in the matter and felt obliged to comply. She ended up coming to Canada at age 19 to live with her husband.

[20] Unfortunately, Ms. Auckbaraullee's husband was an alcoholic and physically abused her throughout the course of their marriage. Her boss at OHA, John Simone, testified that Ms. Auckbaraullee sometimes arrived at work with cuts and bruises. Ms. Auckbaraullee advised the court that her husband was arrested in 2007 or 2008 after threatening to kill her. In 2008, they separated but continued to live under the same roof for financial reasons and for the sake of the children. The abuse continued.

[21] On September 26, 2010 Ms. Auckbaraullee arrived at work after sustaining a serious wound to her finger, which required surgery to repair and which caused her to miss two weeks of work. Ms. Auckbaraullee disclosed to Ms. Stepic that the injury was caused by a knife during an argument with her husband. Ms. Stepic testified that Ms. Auckbaraullee also told her that she was not going to tell anyone else at work about what had happened as she did not want other people to know about it. In explaining the injury to her fellow OHA employees, Ms. Auckbaraullee told them that she accidentally injured her finger while using a blender.

[22] I note that Ms. Auckbaraullee incurred this injury on September 26, 2010, which was during the ongoing fraud and close in time to the printing of the four fraudulent September cheques: one of those cheques was printed on September 24, 2010 and three were printed on September 29, 2010.

[23] During her ISN interview in November 2010, one of the investigators told Ms. Auckbaraullee that he did not believe her story that she had cut her finger in the blender. He suggested that she may be in a "difficult" domestic situation, and that people in similar situations sometimes "do things that they wouldn't normally do." Ms. Auckbaraullee denied any domestic strife and insisted that her home life was "very happy." It is evident from Ms. Stepic's and Mr. Simone's evidence that this was not, in fact, the case.

[24] In my Reasons for Judgment, when assessing Ms. Auckbaraullee's credibility, I placed no weight on the fact that she was less than truthful with the investigators in regard to her domestic situation. There are multiple reasons why a person would be reluctant to disclose that they are a victim of spousal abuse. The circumstances in this case – namely, an interview by two investigators looking into a fraud at one's place of employment – would

certainly not be conducive to disclosing such a personal matter. It was only during her interview for the pre-sentence report that Ms. Auckbaraullee acknowledged the physical abuse that she has suffered at the hands of her ex-husband.

[25] Despite her difficult home life, Ms. Auckbaraullee put on a brave face at work and was well-liked by her fellow employees. Ms. Stepic described Ms. Auckbaraullee as friendly and someone who liked to talk to everyone. Michael White, who was the Mailroom and Facilities Clerk, described her as a happy employee who always had a smile on her face.

[26] During her employment at OHA, Ms. Auckbaraullee worked on weekends on an “on call” basis for Air Canada. She advised the court that part of her motivation in taking this part time job at the airport was “to get away from the home.”

[27] Ms. Auckbaraullee advised Ms. Martins that although her husband physically abused her, he was a good father to their two children. She also stated that in accordance with her Muslim faith and culture, the proper raising of her children was paramount in her mind, and she wanted to ensure that her daughter would “have a chance to marry into a good family.” As a result, Ms. Auckbaraullee stayed with her husband and endured his abuse until the children were young adults. Ms. Auckbaraullee finally divorced her husband after 28 years of marriage.

[28] Following the divorce, Ms. Auckbaraullee married for a second time. However, this marriage ended after two years. The pre-sentence report indicates that the relationship ended because Ms. Auckbaraullee decided to convert to Christianity and her husband wished to retain his Muslim faith. However, Mr. Farooq advised the court that it was actually the other way around: it was her husband who converted to Christianity, and Ms. Auckbaraullee who wished to retain her Muslim faith. In any event, the divorce was described as amicable.

[29] In terms of her education, Ms. Auckbaraullee completed high school and a business accounting course in Mauritius. After arriving in Canada, she attended English as a Second Language classes as her first language is French. She worked in a factory while pregnant with her daughter. After her daughter was born, she returned to school and completed a two-year accounting program at a Toronto area college. Although Ms. Auckbaraullee has a lot of experience in accounting, she is not a certified accountant.

[30] Ms. Auckbaraullee has a steady employment record, which she outlined for the ISN investigators during her November 2010 interview. She worked for Woolworth/Woolco doing their payroll and accounting for 12 years. When that company went bankrupt, she got a job with Signature Vacations, where she was an accounting supervisor for nine years. She then got a job at Burger King’s head office, where she worked for one-and-a-half years before taking the position as the Accounts Payable clerk at OHA. She held that job for almost six years – that is, from January 2005 until early 2011 when she was dismissed. Her employment record following her dismissal is reviewed below.

[31] Ms. Auckbaraullee's involvement with the criminal justice system has had a profound impact on her personal life. Initially, when she was charged with this offence, her daughter and son, who are in their early thirties, were supportive of her. However, Ms. Auckbaraullee advises that neither of her children currently wants anything to do with her. Neither of them has attended at any of Ms. Auckbaraullee's court appearances before me.

[32] At the time that the pre-sentence report was prepared, which was almost nine months ago, Ms. Auckbaraullee was still enjoying visits with her daughter's four-year-old twins. However, her daughter has now cut off all communication with her and will not let her see her grandchildren. Her daughter informed her that she does not want the children to become too attached to her because it would be hard on them in the event that Ms. Auckbaraullee is deported or ends up serving a jail sentence. On an intellectual level, Ms. Auckbaraullee understands her daughter's concern. However, on an emotional level, she is heartbroken at the prospect of playing no role in her grandchildren's lives, of never being able to play with them or even, as she put it, "hold their hands." It causes her great pain every time she sees other grandparents playing with their grandchildren, knowing that she is unable to have any interaction with her own grandchildren.

[33] Ms. Auckbaraullee's daughter is embarrassed by her mother's involvement in the criminal justice system, and has not disclosed it to her husband.

[34] In addressing the court, Ms. Auckbaraullee described how hard she worked to support her children as they were growing up and to teach them how to be good people and have respect for others. Her goal was to raise "two good kids," which she did. She is clearly proud of how well her daughter and son are doing. Both of them are well-educated and have good jobs. They have never been in any kind of trouble. Ms. Auckbaraullee clearly loves her children, which makes it all the more painful for her not to be a part of their lives or to witness first hand their successes in life.

[35] At the time that Ms. Auckbaraullee defrauded OHA, she had no prior criminal record. She is therefore a first offender in terms of determining the appropriate sentence to be imposed. However, during the eight-and-a-half years since the commission of the fraud, Ms. Auckbaraullee has acquired three entries on her criminal record, although none of these entries is for the same type of offence. Defence counsel noted them in his submissions because Ms. Auckbaraullee's further involvement with the criminal justice system resulted in her losing a job when she was held in pretrial custody. It also caused her son to be less supportive of her. Ms. Auckbaraullee advises that her son has decided that he wants nothing more to do with her. He did, however, describe his mother to Ms. Martins as reliable and "genuinely nice." The entries on Ms. Auckbaraullee's record are as follows.

[36] On November 16, 2015 Ms. Auckbaraullee was granted an absolute discharge after pleading guilty to failing to appear in court. Ms. Auckbaraullee did not have legal representation at the time, and had spent four days in pre-trial custody when she entered her guilty plea.

[37] On November 25, 2015 Ms. Auckbaraullee pleaded guilty to impaired driving and was fined \$1500. Ms. Auckbaraullee acknowledged to Ms. Martins that she was impaired, and that her drinking had increased slightly during this period due to the severe stress she was under as a result of the fraud charge. She also told Ms. Martins that she only had two drinks of alcohol but was also taking medication at the time. Ms. Auckbaraullee reported that she has never been a heavy drinker, and currently does not drink at all.

[38] On July 7, 2016 Ms. Auckbaraullee pleaded guilty to uttering a threat to the officer in charge of the present case and was granted a conditional discharge and probation for 12 months. Ms. Auckbaraullee lost the job that she had at the time as a result of spending seven days in pretrial custody. Again, she did not have legal representation. In addressing the court, Ms. Auckbaraullee stated that while in custody, she was sexually touched by another inmate. This incident was obviously extremely upsetting to her and very painful for her to recount to the court.

[39] Ms. Auckbaraullee was assessed by her probation officer as a low risk to reoffend. She had stable housing and employment throughout the supervision period, and was cooperative in terms of her reporting. Ms. Martins concluded that Ms. Auckbaraullee would be an appropriate candidate for community supervision.

[40] Ms. Auckbaraullee has been employed for the past two-and-a-half years as an Accounts Receivable Agent at Nu-Life Medical & Surgical Supplies Inc., where she earns \$35,000 per annum. Although this company is aware of the fraud charge, it has not only continued to employ Ms. Auckbaraullee but has also provided the court with a letter of support. Tanya Vadori of the HR department describes Ms. Auckbaraullee as “an honest and decent person” who has been very forthcoming and honest about the situation that she finds herself in. Ms. Auckbaraullee has been entrusted with funds during the course of her employment, and there have never been any inconsistencies.

[41] With the exception of 2015 and 2016, Ms. Auckbaraullee has managed to maintain steady employment during the eight-and-a-half years that the fraud charge has been pending, despite losing the job she held in 2012 because of her absence from work during the preliminary hearing, and the loss of her job in 2016 as a result of being in pretrial custody. Ms. Auckbaraullee’s annual income for both 2011 and 2012 was \$40,000. In 2013 and 2014 her salary was \$38,000. In 2015 and 2016 she received only \$19,000 annually as she was dependent on employment insurance. However, in 2017, she obtained the job with her current employer.

[42] Ms. Auckbaraullee advised the court that there was a period of time when she lived in the basement apartment of her son’s house. The presentence report also makes mention of this, but describes her as “currently” residing there. According to Ms. Auckbaraullee, that is incorrect. She moved out of her son’s home in 2013 or approximately five years ago.

[43] Ms. Auckbaraullee described the time that she lived at her son's house as very difficult. Her son was charging her \$1100 per month for rent and hydro. In order to relieve some of the financial stress she was experiencing, she agreed to share the apartment with her ex-husband, who paid half the rent. Ms. Auckbaraullee stated that although her ex-husband did not physically abuse her during this period, he was verbally abusive.

[44] Since moving out of her son's home, Ms. Auckbaraullee has lived on her own in a series of basement apartments. She has lived at her current address for the past year. She does not own any property or a vehicle. Her net or take-home pay is \$2118 per month, from which she pays \$1260 in rent. Public transportation to and from work costs her \$100 per week, or \$400 per month, leaving her with just \$500 per month to cover all other expenses. She added that she used all of her sick leave in order to attend court during her trial, and that for the days that exceeded her sick leave, she did not get paid at all. She has been living out of boxes and has not unpacked her belongings since being found guilty because, as she put it, she has not known where she will be after each of her court appearances.

[45] Ms. Auckbaraullee stated that she spent all of her pension funds – approximately \$20,000 – to retain the lawyer who acted for her at the preliminary hearing. She had no other savings, but was refused Legal Aid because of her income. Her *Rowbotham* application was also dismissed. Hence, Ms. Auckbaraullee ended up as a self-represented accused before me for a two-week trial. During the course of that trial, Ms. Auckbaraullee's mother died, and the trial was adjourned so that she could attend the funeral in Mauritius. Ms. Auckbaraullee's father died in 2010. Mr. Simone recalled during his testimony that Ms. Auckbaraullee asked for an advance on her salary so that she could attend her father's funeral. It was Mr. Simone's understanding that Ms. Auckbaraullee's parents were ill and that she was assisting them financially.

[46] During her court appearances before me, Ms. Auckbaraullee was at all times pleasant, courteous, and respectful not only to the court but also during her cross-examination of the witnesses. Her cross-examinations were never prolix but were well-organized and to the point.

[47] Although Ms. Auckbaraullee has maintained her innocence, she expressed to the court at her sentencing hearing that she felt very bad about OHA's financial loss.

[48] The stress that Ms. Auckbaraullee has experienced after being charged with this offence has negatively affected her health. In early 2012, she had a heart attack and, while hospitalized, suffered a mild stroke. A letter from her physician, Dr. B. Kessel, dated September 20, 2018, indicates that Ms. Auckbaraullee has a long history of hypertension. She had apparently stopped taking her hypertensive medication for a while, and was recently found to have greatly elevated blood pressure. After restarting her medication, there was some improvement but her blood pressure remains elevated and is aggravated by the continued stress of this court proceeding. Ms. Auckbaraullee advised the court that she suffers from fainting spells and, for that reason, no longer drives a car. She stated that two

weeks prior to her court appearance on May 30, 2019 she had an anxiety attack, during which her blood pressure rose to 200. She has since been prescribed additional medication and now takes four pills a day in an effort to control her blood pressure.

[49] Ms. Auckbaraullee described the world as crashing in on her, and that she feels as though she has been in prison for the past eight-and-a-half years.

Legal Parameters

[50] The maximum sentence for the offence of fraud over \$5000 is fourteen years imprisonment. Pursuant to s. 742.1 (c) of the *Criminal Code*, a conditional sentence is not available for offences punishable by a maximum sentence of imprisonment of 14 years or life. However, s. 742.1 (c) did not come into force until November 20, 2012. Since Ms. Auckbaraullee committed this offence between June 2010 and October 2010, a conditional sentence remains available to her.

Positions of the Parties

The Crown

[51] Mr. Lockner, on behalf of the Crown, submits that the appropriate sentence for Ms. Auckbaraullee is in the range of 12 to 18 months imprisonment, followed by a period of probation. He also seeks a DNA order, in addition to the freestanding restitution order.

[52] Mr. Lockner opposes a conditional sentence. Although he recognizes that there are a number of mitigating factors in this case, he submits that they do not rise to the level of extreme personal mitigating factors that would justify a conditional sentence. This case falls into the category of a large-scale fraud, albeit at the lower end of that category. It also involves a breach of trust. In such cases, general deterrence is the most important factor. Conditional sentences for large-scale frauds should be rare, and reserved for cases with compelling circumstances.

[53] Mr. Lockner referred in his submissions to the following decisions in support of his position: *R. v. McEachern* (1979), 42 C.C.C. (2d) 189 (Ont. C.A.); *R. v. Pierce* (1997), 114 C.C.C. (3d) 23 (Ont. C.A.) (leave to appeal refused, [1997] S.C.C.A. No. 225); *R. v. Dobis* (2002), 163 C.C.C. (3d) 259 (Ont. C.A.); *R. v. Takeshita*, [2013] O.J. No. 1122 (S.C.); *R. v. Ahmad*, [2018] O.J. No. 2637 (S.C.); and *R. v. Cunsolo*, [2012] O.J. No. 66 (S.C.). *Takeshita* contains a helpful review of a number of sentencing decisions in breach of trust fraud cases.

[54] Mr. Farooq, on behalf of Ms. Auckbaraullee, submits that there are sufficient compelling circumstances in this case to warrant a conditional sentence. He submits that a conditional sentence of two years less a day, with punitive conditions, such as house arrest for the entire duration of the sentence, would adequately address the principle of deterrence. He noted that house arrest would result in Ms. Auckbaraullee being confined to a basement

apartment, as opposed to a lavish mansion. Mr. Farooq submits that a community service order could also be made, and that the conditional sentence be followed by a period of probation.

[55] Mr. Farooq referred to *R. v. Corner*, [2005] O. J. No. 3590 (S.C.), as an example of a conditional sentence being imposed in a breach of trust fraud case involving \$157,270, almost twice the amount of money in the present case. He recognizes, however, that a number of mitigating circumstances in *Corner*, such as a plea of guilty, genuine remorse and the fact that the accused told her employer about the fraud before she was caught, are absent in the present case.

[56] As an alternative to a conditional sentence, Mr. Farooq submits that a 90-day intermittent sentence, followed by a probationary term would be appropriate, and would permit Ms. Auckbaraullee to keep her present employment.

The Law

[57] The case law is clear that general deterrence is the most important principle in sentencing persons convicted of large-scale fraud offences involving a breach of trust.

[58] In *Dobis*, at para. 51, the court stated:

This court has said repeatedly that general deterrence is central to the sentencing process in cases involving large scale frauds with serious consequences for the victims: see *McEachern, Bertram and Wood, Gray and Holden, supra*. Importantly, the court has said the same thing since the introduction of the conditional sentencing regime. Conditional sentences have been rejected in large scale fraud cases such as *Pierce, supra*, and *Ruhland, supra*, and commented on adversely in the leading Ontario case dealing with conditional sentences, *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.)

[59] Where the offender has abused a position of trust, particularly in relation to the victim, general deterrence is the most important factor: *Dobis*, at paras. 52-54.

[60] The sentencing option of a conditional sentence is not, however, excluded from consideration in breach of trust fraud cases. In *Dobis*, at para. 49, the court stated:

It is clear that no category of offence is excluded from the conditional sentence regime: see *Proulx, supra*, at p. 501. Specifically, a conditional sentence is a possible sentence in a fraud case, even with respect to a large-scale fraud: see *Bunn, supra*.

[61] In *R. v. Bunn*, [2000] 1 S.C.R. 183 (S.C.C.), the first time offender was a lawyer who had converted \$86,000 from his trust account. The Supreme Court noted the ruin and humiliation that the offender had brought upon himself and his family, together with the loss

of his licence to practice. The Court concluded that these circumstances would provide sufficient denunciation and deterrence, when coupled with the conditional sentence of two years less a day, with house arrest and 200 hours of community service imposed by the Court of Appeal. The Court also noted that the offender was the sole provider and caregiver for his wife, who suffered from multiple sclerosis and was confined to a wheelchair, and their teenage daughter.

[62] In *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.), at paras. 105 and 107, Chief Justice Lamer stated that the stigma of a conditional sentence with house arrest should not be underestimated. Although incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence, he cautioned that judges should be wary of placing too much weight on deterrence when choosing between a conditional sentence and incarceration. The empirical evidence suggests that the deterrent effect of incarceration is uncertain. Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed.

[63] Although a conditional sentence is not excluded from breach of trust fraud cases, the authorities make it clear that conditional sentences for large-scale frauds should be rare, and reserved for cases with particularly compelling circumstances. In determining whether this is such a case, I have considered the case law referred to by counsel, the aggravating and mitigating factors, and the principles of sentencing set out in ss. 718, 718.1, and 718.2 of the *Criminal Code*. I have also considered s. 380.1, although a number of amendments to that section were not in force at the time that Ms. Auckbarullee committed this offence.

Aggravating factors

[64] The fraud in this case involved a breach of trust and is at the low end of a large-scale fraud. The amount of \$80,370 is a significant amount of money. It is indeed fortunate for OHA that the loss was covered by insurance. This is in contrast to the victim in *Dobis*, where the fraud and theft of over \$2,000,000 had a devastating impact on a mid-sized family company. The trial judge in *Dobis* described the effect on the victim as “absolutely horrific.”

[65] In *Takeshita*, Spies J. declined to impose a conditional sentence with respect to a breach of trust fraud in the amount of \$80,000. In imposing a sentence of 16 months imprisonment, she noted that \$80,000 was a very significant amount of money for a small church congregation, which did not have a large cash flow. The money taken included donations to victims of the South Asian Tsunami Fund, and had been intended by the church to support missionary families and other charities abroad. Mr. Takeshita’s conduct deprived the church of the ability to support those missions, and thereby affected a number of individuals who would have benefitted from the funds. The fraud in *Takeshita* also took place over a period of four-and-a-half years, as opposed to four months in the present case, and involved the writing of 95 fraudulent cheques. Another circumstance that Spies J. took into account in imposing a jail sentence was the fact that Mr. Takeshita testified and was

found not to be a credible witness on a number of fronts. Ms. Auckbaraullee did not testify at her trial.

[66] Ms. Auckbaraullee takes no issue with signing a freestanding restitution order, which will obviate OHA's insurance company from expending any further resources in seeking a civil judgment.

[67] In reviewing the aggravating factors, Mr. Lockner referred to ss. 380.1(1)(a) and (f) of the *Criminal Code*, which state that the court, in imposing a sentence for fraud, shall consider as aggravating circumstances whether:

(a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant; and

...

(f) the offender concealed or destroyed records relating to the fraud or to the disbursement of the proceeds of the fraud.

[68] The fraud in this case spanned four months: three fraudulent cheques were printed in June 2010, four were printed in September 2010, and one was printed in October 2010.

[69] Mr. Lockner fairly acknowledged that this was not the most complex fraud in the world. However, it did require some planning. Fraudulent invoices or cheque requisitions were created as back-up documents for the cheques, although those documents and the cheques themselves contained obvious errors. The fraud also involved the creation of six businesses, although Mr. Lockner does not suggest that Ms. Auckbaraullee took part in that aspect of the offence or in the opening of the six bank accounts.

[70] Although s. 380.1(1)(f) is not exactly on point, the fraud involved the falsification of a number of records. The creation of invoices containing forged signatures of approval were clearly meant to conceal the fraud and thwart any investigation into it.

[71] A further aggravating circumstance is the fact that Ms. Auckbaraullee did not voluntarily terminate her criminal activity. The fraud was brought to a halt when the Royal Bank of Canada notified OHA of their concerns regarding the October 20, 2010 cheque to M.W. Management. This led to Mr. Simone's discovery of the fraud. Mr. Simone then contacted the police, who recommended that OHA retain a private firm to conduct the investigation – hence the involvement of ISN Inc. OHA bore the expense of that investigation.

[72] Mr. Lockner submits that another potential aggravating circumstance is the fact that Ms. Auckbaraullee took the position during the trial that there were two alternate suspects; namely, Mr. Simone and Ms. Stepic, who were the only individuals other than Ms. Auckbaraullee who had the password to Cheque Scribe. Mr. Lockner submits that this put

Mr. Simone and Ms. Stepic in danger of being blamed for a serious crime. I do not consider this to be an aggravating factor in the circumstances of this case. Ms. Auckbaraullee, who did not testify, simply put the Crown to the proof of its case beyond a reasonable doubt.

Non-mitigating or Neutral Factors

[73] Ms. Auckbaraullee does not benefit from the mitigating factor of a guilty plea or an expression of remorse. She did express sympathy for OHA's financial loss, but does not take responsibility for it.

[74] There has been no repayment or restitution made. Failure to make restitution is not an aggravating factor. However, as Ms. Auckbaraullee has not made any payments, she does not benefit from what would otherwise be a mitigating factor.

[75] Section 380.1(2) of the *Criminal Code* states that a court imposing a sentence for an offence under s. 380 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."

[76] Mr. Lockner observed that Ms. Auckbaraullee worked as the Accounts Payable clerk at OHA for almost six years. During that time, she gained the trust of OHA, which enabled her to commit the fraud. Mr. Lockner submits that pursuant to s. 380.1(2) of the *Criminal Code*, her work history ought not to be considered as a mitigating factor. I agree. That said, it should be recognized, in my view, that Ms. Auckbaraullee has always worked hard to support herself and her family, and has never been content to sit idle. Even after she was charged with the present offence, she has done her best during the ensuing eight-and-a-half years to maintain employment. For the past two-and-a-half years, she has worked for the same company as an Accounts Receivable agent. She has been open and honest with her current employer about her legal difficulties. Despite her conviction for fraud, the company has continued to employ her and has provided a letter attesting to her honesty and decency as a person.

[77] There is no evidence as to whether Ms. Auckbaraullee benefitted financially from the fraud. No financial records relating to Ms. Auckbaraullee were filed as exhibits. There is no evidence as to where the money went after it was withdrawn from the bank accounts. It is clear, however, that there were at least six other individuals involved in the scheme and who would potentially have benefitted. Unlike the accused in *Pierce*, who defrauded her employer of \$270,000 by writing 42 fraudulent cheques and who used the funds to buy expensive personal items and pay for a car lease, there is no evidence of Ms. Auckbaraullee or her family members living beyond their means, or purchasing luxury items.

Mitigating factors

[78] Ms. Auckbaraullee is a first offender. She has been assessed as a low risk to reoffend, and an appropriate candidate for community supervision.

[79] Ms. Auckbaraullee has suffered physical abuse at the hands of her husband from the time that she first arrived in Canada at age 19 until their divorce 28 years later. The physical abuse was ongoing during the commission of the fraud. Ms. Auckbaraullee suffered a significant injury to her hand in September 2010 that would have been obvious to all her co-workers. Like many abused spouses, she made up a story as to how she incurred the injury. The ISN investigators obviously did not believe the “accident with a blender” story, and suspected that Ms. Auckbaraullee may have been pressured or intimidated by her husband into committing this offence. Mr. Lockner agreed in his submissions that if that were, in fact, the case, it would certainly constitute an extremely mitigating personal circumstance. However, since Ms. Auckbaraullee has maintained that she did not commit the fraud, she has not acknowledge that she was pressured into committing it by her husband. Without that admission, it remains a matter of speculation. That said, there can be little doubt that at the time of the commission of the offence, Ms. Auckbaraullee was experiencing a great deal of stress and anxiety as a result of the physical abuse and her difficult domestic situation.

[80] An additional source of stress for Ms. Auckbaraullee around the time of the offence in 2010 was the fact that her father was gravely ill and died that year. Ms. Auckbaraullee advised the court that her husband refused to pay for her flight to Mauritius so that she could attend the funeral. As a result, Ms. Auckbaraullee had to ask OHA for an advance on her salary in order to pay for the ticket.

[81] As outlined earlier, Ms. Auckbaraullee’s involvement with the criminal justice system has had a profound impact on her personal life. This matter has been weighing on her for eight-and-a-half years. The resulting stress has taken its toll. Since she was charged, she has suffered a heart attack and a mild stroke. Although she is on four different medications to control her blood pressure, it remains elevated and, according to her doctor, is aggravated by the severe stress she has suffered during these prolonged legal proceedings. Shortly before her last court appearance, Ms. Auckbaraullee had an anxiety attack, during which her blood pressure reached 200.

[82] There have been significant financial consequences for Ms. Auckbaraullee. She used up her pension funds in order to retain counsel for the preliminary hearing. She had no other resources upon which to draw, and consequently ended up representing herself at trial. She was dependent on employment insurance for two of the eight-and-half years awaiting trial. She has no savings, no property, no car and, over the past few years, has lived in basement apartments on a very modest income. No doubt, Ms. Auckbaraullee will be unable to retain counsel with respect to any removal order that may be made against her as a result of her conviction on this offence.

[83] A significant source of stress and anxiety for Ms. Auckbaraullee over the years has been the prospect of her deportation. Ms. Auckbaraullee is a permanent resident. As such,

pursuant to s. 36(1)(a) of *IRPA*, she is “inadmissible” on grounds of “serious criminality” for having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years. Fraud over \$5000 is punishable by 14 years imprisonment. Ms. Auckbaraullee’s inadmissibility by virtue of s. 36(1)(a) makes her vulnerable to a removal order leading to deportation.

[84] Depending on the length of sentence imposed, Ms. Auckbaraullee may or may not have a right of appeal against a removal order. Under s. 63(3) of *IRPA*, a permanent resident may appeal to the Immigration Appeal Division (“IAD”) against a removal order. The IAD can stay a removal order if it is satisfied that sufficient humanitarian and compassionate considerations warrant special relief in all of the circumstances: *IRPA*, s. 68 (1).

[85] However, a permanent resident can only appeal a removal order to the IAD if the ground of serious criminality is based on a crime that was punished by a term of imprisonment that is less than six months. Section 64 (2) of *IRPA* states:

For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

[86] This means that if Ms. Auckbaraullee is sentenced to a term of imprisonment of six months or more, she will not have the right to appeal a removal order. I note, however, that in *R. v. Tran*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 24-25, the Supreme Court of Canada held that conditional sentences are not captured in the meaning of “term of imprisonment” in s.36 (1)(a) of *IRPA*. Thus, if Ms. Auckbaraullee receives a conditional sentence, she would have a right to appeal a removal order.

[87] In *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, the Supreme Court of Canada explained how collateral immigration consequences are to be taken into account on sentencing. Collateral consequences of a sentence are any consequences that the sentence has on the particular offender and may be taken into account as part of the offender’s personal circumstances. They are neither aggravating nor mitigating factors. Their relevance flows from the application of the principles of individualization and parity, and may also flow from the sentencing objective of rehabilitation. When two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offender, the most suitable one may be the one that better contributes to the offender’s rehabilitation. The weight to be given to collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the offence. Therefore, collateral immigration consequences may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case: *Pham*, at paras. 11-13.

[88] The sentence imposed must be fit having regard to the particular crime and the particular offender. While a sentencing judge may exercise his or her discretion to take

collateral immigration consequences into account, the sentence ultimately imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The collateral immigration consequences must not be allowed to dominate the sentencing exercise or skew the process: *Pham*, at paras. 14-16

[89] At para. 19, the Court adopted the position asserted by Doherty J.A. in *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 156, where he stated:

... the risk of deportation cannot justify a sentence which is inconsistent with the fundamental purpose and the principles of sentencing identified in the *Criminal Code*. The sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Act*. As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender.

[90] As stated earlier, the threat of deportation, which has been hanging over Ms. Auckbaraullee's head for the last eight-and-half years, has contributed to her stress and anxiety. Ms. Auckbaraullee has spent her entire adult life in Canada. She has been almost continuously employed since her arrival here at the age of nineteen. She has raised her family here. The threat of deportation as a result of this charge has already affected her in a very concrete and painful way: it has led her daughter, Nailah Ali, to cut off all communication between Ms. Auckbaraullee and her grandchildren. Ms. Ali fears that if the children become too attached to their grandmother, it will be very hard on them if she is deported to Mauritius and disappears from their lives. Ms. Auckbaraullee's chances of strengthening her current and somewhat fragile relationship with both her daughter and son would no doubt be problematic if she is deported.

The Appropriate Sentence

[91] Sentencing is a highly individualized process that requires the assessment of many factors in order to determine the most appropriate sentence. No two cases are identical.

[92] It is clear from the authorities that conditional sentences for large-scale frauds should be rare, and reserved for cases with particularly compelling circumstances. I have concluded that this is one of those rare cases where a conditional sentence is the appropriate disposition notwithstanding that the offence falls into the category of a low level large-scale fraud and there was no guilty plea or expression of remorse. In my view, a conditional sentence with sufficiently punitive conditions can provide the requisite deterrent effect.

[93] In reaching this conclusion, I have taken into account the many mitigating factors in this case, which together, in my view, constitute special circumstances. Ms. Auckbaraullee is a 53-year-old first offender who is a low risk to reoffend and an appropriate candidate for

community supervision. She committed this offence during a time when she was being physically abused by her husband. The abuse was not trivial. Ms. Auckbaraullee required surgery to repair her hand from the wound inflicted, and she was off work for two weeks. Her husband had previously threatened to kill her. In addition to coping with the stress inherent in being an abused spouse, Ms. Auckbaraullee was also coping with the death of her father. She had to ask for an advance on her paycheque in order to attend his funeral. Both her parents had been ailing for some time. According to Mr. Simone, she had been lending financial assistance to her ailing parents in Mauritius. It is in these circumstances that Ms. Auckbaraullee committed the offence and, in so doing, acted completely out of character.

[94] As a result of the stress she has experienced over the last eight-and-a-half years, Ms. Auckbaraullee's health has been adversely affected in significant ways. Her blood pressure is elevated and she suffers from panic attacks, which exacerbate her condition. In 2012, she had a heart attack.

[95] Ms. Auckbaraullee's involvement in the criminal justice system has had significant financial consequences as already outlined in these reasons. Her relationships with her daughter and son have been strained, and the prospect of her deportation has resulted in her daughter preventing her from having any contact with her grandchildren. Given the profound impact that the laying of the fraud charge has had on all aspects of her personal life, it is remarkable that Ms. Auckbaraullee has managed to maintain fairly steady employment, most recently at a company that is apprised of her fraud conviction and prepared to continue to employ her.

[96] I am satisfied that a conditional sentence of imprisonment will not endanger the safety of the community. I am also satisfied that in the unique circumstances of this case, the imposition of a conditional sentence order is consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

[97] Ms. Auckbaraullee is sentenced to imprisonment for two years less one day. Pursuant to s. 742.1 of the *Criminal Code*, I order that she serve her sentence in the community, subject to her compliance with the conditions mandated under s. 742.3 (1) of the *Code*. Those conditions include that she keep the peace and be of good behaviour; appear before the court when required to do so by the court; and report to a supervisor (i) within seven working days after the making of the conditional sentence order, and (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor.

[98] In addition to those mandatory conditions, I make the order that Ms. Auckbaraullee remain in her place of residence during the period of her conditional sentence with the following exceptions. She will be permitted out of her home:

1. To attend work.

2. To attend medical or dental appointments, or emergencies for herself.
3. To obtain necessities on Saturdays between one and four p.m.
4. To attend at the supervisor's office.
5. With the prior written approval of her supervisor. Ms. Auckbaraullee, your supervisor will have the discretion to give you permission to be outside your home, which would include visits with your son, daughter, or grandchildren. Such permission, however, must be in writing and provide for a specific date and period of time.

[99] You will carry a copy of this order when away from your place of residence and produce it upon request to any peace officer.

[100] The conditional sentence of imprisonment will be followed by probation for two years. Pursuant to the statutory terms, you are required to keep the peace and be of good behaviour, appear before the court when required to do so, notify the court or probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation. You will abstain from communicating, directly or indirectly, with John Simone or Kathleen Stepic. In addition, you will report to your probation officer as required.

Ancillary orders

[101] There will be a freestanding restitution order in the amount of \$80,370 payable to the Ontario Hospital Association.

[102] The Crown has applied for an order under s. 487.051 (3) of the *Criminal Code* that Ms. Auckbaraullee provide a bodily sample for forensic DNA analysis. Taking into account that this offence occurred eight-and-a-half years ago, the fact that Ms. Auckbaraullee has not been found guilty of any related types of offences, and also bearing in mind the impact of such an order on her privacy and security of the person, I decline to make this order.

[103] Crown counsel also requested that the court make a prohibition order pursuant to s. 380.2 of the *Criminal Code*. However, s. 380.2 did not come into force until November 2011, or approximately one year after Ms. Auckbaraullee committed the fraud. In *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, the Court of Appeal found that the presumption against retrospectivity applies to s. 380.2. Accordingly, such an order cannot be made in this case.

Garton J.

Released: June 13, 2019

CITATION: R. v. Auckbaraullee, 2019 ONSC 2498
COURT FILE NO.: CR-3796/14
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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

ANISSAH AUCKBARAULLEE

REASONS FOR SENTENCE

Garton J.

Released: June 13, 2019