COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gour, 2014 ONCA 51
DATE: 20140121
DOCKET: C55796

MacPherson, Gillese and Hourigan JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Adam Gour

Appellant

Sam Goldstein, for the appellant

Philippe G. Cowle, for the respondent

Heard: January 20, 2014

On appeal from the conviction entered on June 28, 2012 and the sentence imposed on November 2, 2012 by Justice John McIsaac of the Superior Court of Justice sitting without a jury.

ENDORSEMENT

[1] The appellant ran a company that purported to raise money to support children with serious illnesses by using canvassers who solicited donations from the public, either by telephone solicitation or by way of display boxes set up near large stores. The appellant instructed his employees to refer to themselves as volunteers, if asked, when in fact they were paid commissions of 14 to 35 per

cent. During the seven month period this scheme operated, the appellant received about $288,000. Less than three per cent of these funds were turned over to any charitable cause. It follows that the appellant, who did not testify at his trial, retained approximately 62 to 83 per cent of $288,000.

[2] The appellant was convicted of fraud over $5,000 by McIsaac J. of the Superior Court of Justice on June 28, 2012. On November 2, 2012, the appellant received a custodial sentence of 15 months, a fine of $280,000, a restitution order for $500, and a victim surcharge of $37,000.

[3] The appellant appeals his conviction and sentence.

[4] The appellant appeals his conviction on two grounds, one factual and the other legal.

[5] The appellant contends that the trial judge erred in fact in finding that he told his canvassers to lie to the public if asked if they were being paid for their work.

[6] We do not accept this submission. The trial judge's finding that the appellant had instructed his canvassers to mislead the public about the profits made from public donations was reasonably based on the testimony of several former employees of the appellant and the testimony of a donor who was told that her donation would go directly to the child that she wanted to support.

[7] The appellant submits that the trial judge erred by concluding that the appellant's failure to disclose a material fact – that his canvassers were not volunteers – was relevant in establishing the offence of fraud.

[8] We disagree. Based on *R. v. Theroux*, [1993] 2 S.C.R. 5 and *R. v. Zlatic*, [1993] 2 S.C.R. 29, which held that the words "other fraudulent means" in the offence of fraud proscribed in s. 380(1) of the *Criminal Code* allow convictions grounded in non-disclosure of important facts, we have no hesitation affirming the trial judge's key conclusions:

> 1. the failure to disclose the handsome commissions being paid to these apparent "volunteers" constituted the hiding of a fundamental and essential element of this fundraiser-contributor relationship; and
>
> 2. this failure to disclose was such as to mislead the reasonable contributor.

[9] We hasten to add that non-disclosure of the status (volunteer v. employee) of a canvasser will not be relevant in every charitable fundraising context. That would be too sweeping a proposition. However, in this case there was extensive evidence that the appellant operated his team of canvassers in a manner calculated to mislead the public. His conduct went beyond mere use of the word "volunteer". He also instructed them to state that all money would be disbursed to the families of the affected children and to deny that they were being paid, and he provided pamphlets that claimed that the charity had no paid staff. In these

circumstances, the combination of material non-disclosure and outright lying supports the trial judge's conclusion that a reasonable contributor would have been misled.

[10] The appellant appeals his sentence. He submits that it ignores rehabilitative considerations and is, therefore, too harsh.

[11] We do not accept this submission. Custodial sentences are the norm in cases of large-scale fraud: see *R. v. Dobis* (2002), 58 O.R. (3d) 536 (C.A.) and *R. v. Bogart* (2002), 61 O.R. (3d) 75 (C.A.). The imposition of a 15-month custodial sentence was entirely appropriate against the backdrop of the trial judge's description of this offender and this offence, with which we agree:

> The offender's fleecing of the unsuspecting public was vile and despicable when one realizes that he did so using the incentives of unknowing sick and terminally-ill children and their families to line his own pockets. I find the extent of moral blameworthiness of the offender to have been at the extreme level. He has not even accounted for the 30 to 40 percent net proceeds that were allegedly to go to the beneficiaries of these so-called "charities".

[12] The conviction and sentence appeals are dismissed.

"J.C. MacPherson J.A."

"E.E. Gillese J.A."

"C.W. Hourigan J.A."