Federal Court  Cour fédérale

Date: 20160107

Docket: T-2369-14

Citation: 2016 FC 19

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 7, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MATHIEU L'ESPÉRANCE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mathieu L'Espérance, is seeking judicial review of a decision, dated October 16, 2014, of the Independent Chairperson of the Disciplinary Court of the Drummond Institution. In that decision, the Independent Chairperson found the applicant guilty of a disciplinary offence under paragraph 40(*j*) of the *Corrections and Conditional Release Act*, SC 1992, c. 20 (CCRA).

[2] For the reasons that follow, I am of the opinion that the application for judicial review should be allowed.

I. Background

[3] On September 2, 2014, at about 2:15 p.m., officers of the Correctional Service of Canada (CSC) discovered and seized four (4) gallons of illicit spirits in the applicant's cell while he was incarcerated at the Drummond Institution.

[4] The CSC officers prepared an Offence Report and Notification of Charge wherein the applicant was charged with having in his possession, without prior authorization, an item that is not authorized by a Commissioner's Directive, namely, [TRANSLATION] "a mixture of ingredients, substances, goods, sugars, fruits, yeast or other fermentable substances, destined for the production of alcohol". The Offence Report and Notification of Charge was forwarded to the applicant on September 3, 2014, at about 7:30 p.m.

[5] About twenty (20) minutes before he was to be issued a copy of the Offence Report and Notification of Charge, the applicant went to the institution's health services centre and requested voluntary administrative segregation on the grounds that he feared for his safety. The applicant told the authorities that he had agreed to let some co-inmates use his cell to make illicit spirits as payment for debts between $400 and $500, that he had received a visit by two (2) collectors connected to an organized crime group and that he had categorically refused assistance from the inmate committee. His request for placement in segregation was granted.

[6] On September 11, 2014, the applicant pleaded not guilty to the disciplinary offence of which he was accused.

[7] The disciplinary hearing was held on October 2, 2014, during which the Independent Chairperson of the Disciplinary Court of the Drummond Institution heard the senior correctional officer who had seized the illicit spirits in the applicant's cell. The correctional officer testified that, around lunchtime, the smell of alcohol was detected near the applicant's cell. When the doors of the cell were opened at about 2:00 p.m., when the applicant had exited his cell, the officer entered the cell and found, in the second drawer of the desk, approximately four (4) gallons of fermentable substances. He testified that the applicant was the sole occupant of the cell.

[8] The Independent Chairperson also heard and questioned the applicant, who acknowledged having been in possession of illicit spirits. However, he raised duress as a defence. The applicant explained that co-inmates had used his cell to make illicit spirits, forcing him to keep these in his cell in return for a reduction of part of the debts he had incurred while he was at the Cowansville Institution. The applicant maintained that he had agreed to let the co-inmates use his cell out of fear of retaliatory violence. The applicant testified that he saw no other way out than agreeing to have the illicit spirits kept in his cell. He testified that he had not reported this situation on the grounds that his co-inmates would have known who had spoken out. The following day, after the discovery of the alcohol in his cell, he requested to be placed in administrative segregation because he feared for his safety.

[9] The hearing on October 2, 2014, was adjourned in order to allow the CSC to look into the jurisprudence regarding the defence of duress. At the resumption of the disciplinary hearing on October 16, 2014, the Independent Chairperson found the applicant guilty beyond a reasonable doubt of the offence under paragraph 40(*j*) of the CCRA.

[10] The applicant was transferred to La Macaza Institution at the beginning of January 2015.

II. Issues

[11] The issue raised by this application for judicial review is whether, in finding the applicant guilty of the disciplinary offence set out at paragraph 40(*j*) of the CCRA, the Independent Chairperson committed a reviewable error in his analysis of the defence of duress.

III. Relevant provisions

[12] Paragraph 40(*j*) of the CCRA reads as follows:

40 An inmate commits a disciplinary offence who	**40** Est coupable d'une infraction disciplinaire le détenu qui :
(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;	**j)** sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;

[13] Subsection 43(3) of the CCRA states:

43(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.	43(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

IV. Analysis

[14] In *Ayotte v. Canada (Attorney General)*, 2003 FCA 429 at paras. 11, 18-20, [2003] FCJ No 1699, the Federal Court of Appeal recognized that persons charged with disciplinary offences under the CCRA have the same procedural safeguards as those in ordinary trials, in terms of defences (see also from this Court *Zanth v. Canada (Attorney General)*, 2004 FC 1113 at para. 26, [2004] FCJ No 1344).

[15] Moreover, this Court has also recognized that the burden of proof applicable to disciplinary offences in correctional facilities is the same as that applied to criminal matters. Pursuant to subsection 43(3) of the CCRA, the evidence must establish beyond a reasonable doubt that the inmate committed the offence with which they are charged (see *Alix v. Canada (Attorney General)*, 2014 FC 1051 at para. 9, [2014] FCJ No 1285).

[16] In this case, the applicant admitted to having committed the offence with which he was charged. He did, however, raise the defence of duress.

[17] Since the Supreme Court of Canada's ruling in *R v. Ryan*, 2013 SCC 3 at para. 55, [2013] 1 SCR 14 [*Ryan*], it has been settled law that the defence of duress comprises the following elements:

(i) an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm.

(ii) the accused reasonably believed that the threat would be carried out;

(iii) the non-existence of a safe avenue of escape, evaluated on a modified objective standard;

(iv) a close temporal connection between the threat and the harm threatened;

(v) proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard; and

(vi) the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[18] As to the burden that rests on an accused who raises a defence of duress, it is also settled law that an accused need only introduce sufficient evidence to raise a doubt as to the existence of each one of the elements serving as a basis for the defence. The Crown then has the burden of showing, beyond a reasonable doubt, that the accused did not act under duress (*R. v. Ruzic*, 2001 SCC 24 at paras. 71 and 100, [2001] 1 SCR 687, [*Ruzic*]; *R v. Fontaine*, 2004 SCC 27 at paras. 55 and 56).

[19] In this case, the applicant argues that the Independent Chairperson did not correctly analyze each of the elements referred to in *Ryan* and that he did not discuss elements (ii), (iv) and (v).

[20] For its part, the respondent submits that the Independent Chairperson did in fact correctly analyze the defence of duress raised by the applicant.

[21] Like the applicant, I am of the opinion that the Independent Chairperson did not correctly review each of the elements giving rise to the defence of duress.

[22] First, it is not apparent from reading the decision of the Independent Chairperson whether he considered that the applicant had presented enough evidence to raise a doubt serving as a basis for the defence of duress in relation to the first element, namely, the existence of "an explicit or implicit threat of death or bodily harm proffered against the accused or a third person". He mentions only that the only evidence of the existence of a threat is the applicant's statement to the effect that he had received, or thought he may receive, a threat. He takes pains, however, to add that he does not know [TRANSLATION] "from whom" or [TRANSLATION] "from where" and that [TRANSLATION] "no one is able to verify anything" (see Respondent's Record [R.R.] pp. 51-52). The Independent Chairperson provides no indication as to whether he considers that the applicant had raised a doubt as to the existence of this element.

[23] With respect to the second element, namely the belief that the threat would be carried out, the Independent Chairperson merely affirms that there is [TRANSLATION] "no reason to doubt

that" (R.R. p. 52). He carries out no analysis and his decision provides no clue as to whether he applied a modified objective basis, that is, according to the test of the reasonable person similarly situated (*Ryan*, above, at para. 64).

[24] Regarding the third element in *Ryan*, the Independent Chairperson found that the applicant did have an avenue of escape, namely, reporting the situation to the CSC before being caught.

[25] This element of the defence was analyzed by the Supreme Court of Canada in *Ruzic* at paragraph 61 and was reiterated in *Ryan* at paragraph 65:

> The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.

[26] In this case, the applicant testified that shortly after he arrived at the Drummond Institution, two (2) co-inmates forced him to keep illicit spirits in his cell to repay drug debts he had incurred when he was in the Cowansville Institution. He further testified that he had agreed because [TRANSLATION] "violence would have occurred" and that he could see no other way out. He also indicated that he failed to report the situation because the inmates would have known that he had done so right away.

[27] For its part, the respondent maintained that the applicant had all of the resources for adequate protection nearby and available to him and that his knowledge of an avenue of escape was confirmed by his very conduct when he requested to be placed in voluntary administrative segregation when the alcohol was seized. In failing to report the situation and in refusing to reveal the names of the co-inmates who had threatened him, the applicant deliberately chose to adhere to the inmates' [TRANSLATION] "code of values" under which silence is golden and which is, according to the respondent, an inherent part of prison subculture. The respondent argued that the applicant had willingly placed himself in a situation in which he could be under duress when he purchased drugs inside the penitentiary and, in doing so, could not claim to have had no way out of a situation in respect of which he had voluntarily accepted the risks and from which he had benefitted.

[28] In analyzing the third element from *Ryan*, although having correctly identified the applicable standard as being that of a modified objective basis (R.R. p. 52), I find that the Independent Chairperson failed to apply it in his analysis. Although he claims to be convinced [TRANSLATION] "beyond all reasonable doubt" that the applicant had an avenue of escape, his decision does not show any reflection on his part as to whether a reasonable person in the same situation as the applicant and with the same personal characteristics and experience would conclude that there was no safe avenue of escape or legal alternative to committing the disciplinary offence (*Ryan*, above, at para. 65). His analysis remains confined to an objective level and fails to consider the personal characteristics and experiences of the applicant. The fact of having briefly noted in his decision that it is understandable that in an institutional setting it is

difficult to report someone (R.R. p. 54), is not sufficient, in my opinion, to show that a modified objective standard was applied.

[29] I agree with the applicant's argument that in finding that the obligation to report the situation to correctional authorities was an avenue of escape, the Independent Chairperson imposed on the applicant an additional burden for him to discharge in order to avail himself of the defence of duress.

[30] The Supreme Court of Canada recognized in *Ruzic*, at paragraph 98, that an accused is not required in all cases to seek the protection of police:

> Notwithstanding the argument of the appellant, the law does not require an accused to seek the official protection of police in all cases. The requirement of objectivity must itself take into consideration the special circumstances where the accused found herself as well as her perception of them. Herold J. drew the attention of the jury both to that objective component and to the subjective elements of the defence. This argument must thus fail.

[31] In his decision, the Independent Chairperson conducts no analysis of the applicant's personal circumstances as set out in *Ruzic*. He merely highlights a judgment raised by the applicant's counsel by stating [TRANSLATION] "I do not think that your life was threatened and I do not think that you feel that your life was threatened" (R.R. p. 54). Except that the Supreme Court of Canada points out in *Ryan* that in order to serve as a basis for the defence of duress, there must have been an explicit or implicit, present or future threat of death or bodily harm, directed at the accused or a third person (*Ryan*, above, at para. 63). It was not necessary for the applicant's life to have been threatened.

[32] Reporting to the authorities will always objectively remain an avenue of escape. However, the assessment must be made on the basis of a modified objective standard that takes into account the specific circumstances in which the applicant found himself and the manner in which he perceived those circumstances. In finding, without further analysis, that the avenue of escape was to report the situation to the correctional authorities, the Independent Chairperson failed to apply the correct legal test, thereby committing a reviewable error.

[33] Moreover, the respondent noted at the end of the hearing before this Court that is was not necessarily the reporting requirement that was at issue, but rather, not having sought the protection of the correctional authorities. The respondent submitted that criminality was inherent to the institutional environment and that mechanisms had been put in place to ensure the safety of inmates, such as the possibility of requesting to be placed in voluntary administrative segregation. Although the nuance made by the respondent may have been considered by the Independent Chairperson in his decision, I do not consider voluntary administrative segregation in itself to be an avenue of escape.

[34] As to the three (3) remaining elements from *Ryan*, without determining whether there is a cumulative effect of the elements of the defence of duress, I would note, however, that the Independent Chairperson's decision refers only to the fourth and sixth elements of the defence of duress and that it contains no real analysis of the evidence presented by the applicant in that regard. I further note that the decision fails to identify the fifth element relating to proportionality that requires that the harm threatened be at least equal to the harm inflicted on the accused.

[35] For the reasons outlined above, I am of the opinion that this application for judicial review should be allowed with costs, that the decision of the Independent Chairperson should be set aside and that the matter should be referred to a different Independent Chairperson for redetermination in light of this judgment.

[36] At the hearing before this Court, counsel for the applicant agreed to reimburse the expenses incurred by the respondent for the transcript of the hearings before the Disciplinary Court. In light of the fact that the application for judicial review is allowed with costs, these expenses may be included in the applicant's bill of costs if they have already been reimbursed to the respondent.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is allowed with costs, including the expenses for the transcript of the hearing before the Disciplinary Court;
2. the decision is set aside; and
3. the matter is referred to a different Independent Chairperson for redetermination in light of this judgment.

"Sylvie E. Roussel"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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