Date: 20051214

Docket: T-734-05

Citation: 2005 FC 1688

Montréal, Quebec, December 14, 2005

PRESENT: THE HONOURABLE MR. JUSTICE HARRINGTON

BETWEEN:

SERGE EWONDE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] On a routine basis, correctional officers at the Donnacona Detention Centre carry out general searches of the institution, including the search of the inmates' cells. On January 6, 2005, during a general search, the correctional officers found in the cell of the applicant, Serge Ewonde, an envelope containing personal photos and four wrapped pieces of a black substance. The analysis of that substance revealed that it was 0.8 grams of an illegal substance, namely hashish.

[2] One of the correctional officers wrote an offence report in which he reported that the applicant was in possession of, or dealing in, contraband, which is an offence under paragraph 40(*i*) of the *Corrections and Conditional Release Act* (hereinafter "the Act").

40. An inmate commits a disciplinary offence who	**40.** Est coupable d'une infraction disciplinaire le détenu qui:
(i) is in possession of, or deals in, contraband;	*i*) est en possession d'un objet interdit ou en fait le trafic;

[3] In order to be able to make a finding of guilt, the chairperson of the disciplinary hearing must be satisfied beyond a reasonable doubt that the inmate is guilty. Following such a hearing before Chairperson Paul Maranda, the applicant was found guilty of the offence and was sentenced to nine days in detention with only a radio. It is this decision that is under judicial review before this Court.

The facts

[4] The applicant points out that prior to this search, he had been placed in segregation following an altercation with two other inmates on his row. The applicant contends that it is impossible that he could be guilty of possession of an illegal substance given that he was not in his cell at that time. Furthermore, he alleges that the two individuals with whom he had the altercation could have placed the hashish in his cell.

The standard of review

[5] Before deciding on the arguments raised by the applicant, it is necessary to determine the appropriate standard of review in this case. The applicant alleges that the Chairperson made a patently unreasonable decision in interpreting the facts and that he erred in law in determining that

he was guilty beyond a reasonable doubt. In response, the respondent claims that the Court must exercise its judicial discretion moderately and that the standard of patent unreasonableness must be applied.

[6] While there is a panoply of case law regarding the appropriate standard of review for a decision by a disciplinary tribunal within a penitentiary, in *Knight v. Canada*, 2005 FC 727, [2005] F.C.J. No. 909 (QL), my colleague Mr. Justice Blais properly stated the appropriate standard of review. With regard to applying the facts, the standard of review is that of patent unreasonableness while the standard of reasonableness must be used when applying the law to the facts. In this case, the application of the law had been interpreted in light of the facts, which necessarily gives rise to the application of the reasonableness standard.

Analysis

[7] In order to support his position that the Chairperson's decision was patently unreasonable, the applicant raised six issues. As the first issue, he claims that he should be acquitted based only on the fact that there was an inaccuracy regarding the location designated in the indictment. It is not necessary to dwell on this argument since the indictment clearly stipulates that the location of the offence was cell K-110, Mr. Ewonde's cell. Given that the designation of the location is very clear and that it satisfies paragraph 25(1)(*a*) of the *Corrections and Conditional Release Regulations*, this argument is unfounded.

25. (1) Notice of a charge of a disciplinary offence shall	**25.** (1) L'avis d'accusation d'infraction disciplinaire doit contenir les renseignements suivants:
(*a*) describe the conduct that is the subject of the charge, including the	*a*) un énoncé de la conduite qui fait l'objet de l'accusation, y compris la

time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and	date, l'heure et le lieu de l'infraction disciplinaire reprochée, et un résumé des éléments de preuve à l'appui de l'accusation qui seront présentés à l'audition;

[8] As a second issue, he alleges that he should have been acquitted since there was no evidence that there were attempts to resolve the matter informally. Subsection 41(1) of the Act gives an inmate the right to benefit from an attempt to resolve the matter informally. However, that argument was only raised in his application for judicial review and had never been raised before Chairperson Maranda. As cited by Mr. Justice Létourneau in *Laplante v. Canada (Attorney General)* (C.A.), 2003 FCA 244, [2003] 4 F.C. 1118; [2003] F.C.J. No. 896 (QL), the applicant who attempts to raise his right to an informal resolution pursuant to subsection 41(1) of the Act must raise this right as soon as possible. He must therefore mention it to the chairperson, and if he chooses not to mention it he waives that right.

41. (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.	**41.** (1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les mesures utiles afin de régler la question de façon informelle.

[9] As a third issue, the applicant alleges that the Chairperson erred in law in considering two of his disciplinary records. He alleges that sections 2, 10, 11 and 12 of the *Canada Evidence Act* have the effect of preventing those records from being used in order to determine his guilt. While the applicant is entirely correct to rely on the *Canada Evidence Act* in the context of a criminal proceeding, we must not forget that an administrative tribunal is not governed by the rules of

evidence. Mr. Justice Joyal confirmed this principle in *Barnaby v. Canada*, [1995] F.C.J. No. 1541 (QL) at paragraph 8:

> Curial respect for an administrative tribunal's disciplinary decisions in a correctional environment is as high as for any other tribunal. The tribunal is set up as an internal investigative or inquisitorial process. The rule of evidence in criminal matters does not apply to it. The tribunal may admit any evidence which it considers reasonable or trustworthy.

It is also important to note that it was the applicant's counsel who raised his record. The applicant, therefore, cannot then criticize the tribunal for having noted those facts.

[10] The applicant argues, as a fourth issue, that he should have been acquitted since – even if he is considered to have had an illegal substance in his possession – he had to have voluntary possession of it, which was not the case. In this case, it is true that there were unusual circumstances since the applicant was in fact outside his cell at the time of the search. However, his cell was locked during those two weeks and it is clear that the Chairperson, in dismissing the allegation that someone else had placed the envelope in his cell, had determined that it was a voluntary act.

[11] The applicant raises as a fifth issue that the Chairperson erred in law in allowing the advisor, Mr. Bénard, to testify about certain facts. Specifically, he alleges that the advisor's testimony is not admissible since the Chairperson is relying *inter alia*, on that testimony to determine his guilt. Once again, the procedure during a disciplinary hearing of this type is not dictated by specific rules of evidence. Therefore, there is nothing to prevent the Chairperson from allowing the advisor to testify. Further, bear in mind that the advisor has extensive knowledge about what goes on in the Donnacona Detention Centre and that the applicant's counsel had the opportunity to cross-examine him if she thought it necessary.

[12] The last issue and the most important argument raised by the applicant involves the Chairperson's assessment of the facts and the testimony. The applicant alleges that the Chairperson did not properly interpret the principle of "beyond a reasonable doubt". He points out that for the Chairperson to be able to find him guilty, he must be satisfied of that fact beyond a reasonable doubt as provided by subsection 43(3) of the Act.

(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.	(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.

[13] According to the applicant, the Chairperson did not properly interpret the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26 (QL), in order to assess the testimony and the concept of "beyond a reasonable doubt". He contends that reasonable doubt is tied to the presumption of innocence and that the Chairperson reversed the burden of proof in stating that he did not believe him. While the applicant maintains that it was not his place to establish that it was not he that was in possession of that illegal substance, or the reasons why anyone would hide it in his cell, the Chairperson states that the inmate was not credible. He made a reasonable decision.

[14] In *R. v. W.(D.)*, *supra*, there was an issue regarding the judge's charge to the jury. In the context of a criminal trial, like in *R. v. W.(D.)*, the judge must provide instructions to the jury regarding principles of law including instructions on the principle of "beyond a reasonable doubt". However, when a proceeding takes place without a jury, the judge does not have to state how he is undertaking the analysis of the principles of law. In that context, the final result must be interpreted

in order to analyze whether the judge in fact properly interpreted a principle of law. In this case, there is nothing in the result of Chairperson Maranda's analysis that indicates that he did not properly interpret or apply the appropriate test as stated in *R. v. W.(D.).*

[15] It is important not to interpret the Chairperson's analysis out of context. He analyzed the applicant's defence and asked himself whether he could dismiss the scenario where another individual may have placed the illegal substance in applicant's cell. It is clear that the Chairperson had to ask himself the question and consider all of the scenarios in order to determine whether they were likely. Further, the Chairperson's decision was made following a hearing where all of the evidence was heard and where the applicant had the opportunity to make his submissions. As stated earlier, by analyzing the facts in this case, it was neither patently unreasonable nor unreasonable for the Chairperson to have determined that other inmates would not have had the opportunity to place the illegal substance in the applicant's cell, given that the cell was locked for two weeks. The Chairperson had the duty to consider the applicant's credibility in this case, but it was not on that basis that he made a decision. The Chairperson assessed the applicant's credibility in the context of the evidence filed and determined, beyond a reasonable doubt, that the applicant was guilty. The Chairperson properly assessed the facts and did not err in applying the test in *R. v. W.(D.), supra*.

[16] Based on the submissions made by the parties, this Court does not believe that the Chairperson's decision was patently unreasonable or that he erred in law. The application for judicial review is therefore dismissed.

ORDER

THE COURT ORDERS that:

1. The application for judicial review be dismissed with costs.

"Sean Harrington"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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