Federal Court  Cour fédérale

Date: 20171031

Docket: T-2133-16

Citation: 2017 FC 971

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 31, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CAMPBELL, ORVILLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The correctional disciplinary system is governed by the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act] and the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations]. Specifically, "[a]n inmate commits a disciplinary offence who... threatens to assault another person..." (paragraph 40(h) of the Act). This is an application for judicial review of the decision rendered by an independent chairperson from Donnacona Institution's disciplinary court finding the applicant guilty of threatening a Correctional Service

of Canada [Service] officer and imposing a fine of $25 and a suspended sentence of six days in segregation in the event of recidivism [impugned decision].

[2] The applicant's alleged offence was reportedly committed on August 21, 2016, at Donnacona Institution. At approximately 11:27 a.m., the applicant was talking with fellow inmates in the yard and reportedly threatened a Service officer, Jean-Christophe Rhéaume-Drouin [officer], who was passing by [the incident]. In his observation report dated August 22, 2016, the officer detailed the incident from the day before:

> [TRANSLATION]
> When I was walking from Cell Block I to the Industry sector, at approximately 11:27 a.m., inmate Campbell, FPS 290325F, was in yard 240 and shouted "Hey!" When I looked at him, he imitated a pistol with his hands, gestured as though he was loading the weapon and pointed at me, shouting "Boom, boom, boom, boom" as though he was shooting me.

[3] On August 24, 2016, the applicant was charged with the following offence: [TRANSLATION] "The subject [Campbell] is reported for threatening me by pretending to shoot me," which violates paragraph 40(h) of the Act. For a serious offence, as is the case here, the hearing will be conducted by an independent chairperson (subsection 27(2) of the Regulations). This disciplinary hearing is conducted as an inquisitorial inquiry proceeding in which witnesses are heard, and, although the independent chairperson is not required to consider all possible defences, he or she must examine both sides of the matter after having heard the evidence on record and considered the submissions made (see *Ayotte v. Canada (Attorney General)*, 2003 FCA 429 at paragraphs 9 and 10 [*Ayotte*]).

[4] After the applicant pleaded not guilty, two disciplinary hearings were held on October 19 and November 8, 2016, before Réjean Doyon, a retired lawyer acting as an independent chairperson [decision-maker]. The Service was represented by Patrick Lachance [the assessor], and defence for the accused was provided by Marie-Claude Lacroix [counsel for the applicant]. The transcripts of those hearings are included in the applicant's application record. The decision-maker heard testimony from the officer, the applicant and another inmate. For the present purposes, below is a brief summary of those three testimonies.

[5] According to Officer Rhéaume-Drouin's testimony, on August 21, 2016, he was walking by the yard on his way to the Industry sector. He was alone and had finished his shift. The applicant supposedly shouted "Hey!" Believing that the inmate was talking to fellow inmates, he apparently ignored him. The applicant allegedly yelled "Hey!" a second time. The officer turned around. The applicant was about 50 feet away from him. At that time, the applicant allegedly pretended to load a pistol and point it at him, shouting "Bang, bang, bang, bang!" three or four times before looking at him and laughing. Note that some details of the officer's testimony differ from his observation report ("Hey!" twice instead of once; "Bang, bang, bang, bang!" instead of "Boom, boom, boom, boom"). The fact that the officer raised his hand as a sign of enquiry—because he did not understand why the applicant was doing that—and that the applicant then started laughing are new facts that were not mentioned in the observation report. The officer also states that he did not approach the applicant to speak with him after the incident had occurred. The officer explains that the applicant was leaving the yard at that time to go back inside the institution. He is unable to identify the other inmates who were with the applicant (apparently three or four) because he supposedly did not hear them. He states that no such incident involving

the applicant had occurred in the past, that they had never spoken—either before or after the incident—and that the applicant is a quiet inmate.

[6] In his testimony, the applicant provides a version that contradicts the main points of Officer Rhéaume-Drouin's testimony. His own recollection of the incident is therefore completely different. He alleges that he never threatened the officer by pretending to fire a pistol. He was walking in the yard and was with one or two other inmates. They were talking about a mutual friend, Randall Palacio, who had been killed in Toronto in 2011. The applicant does not recall pretending to point a gun at the officer, but during his discussion with the fellow inmate, he did say "pow" and might have raised his hand to imitate firing a pistol. The applicant also denies calling out to the officer. He states that he does not even remember seeing the officer walk by. Furthermore, he had never had any problems with this officer. He had been at Donnacona Institution for roughly 10 days and only learned the officer's name during his first appearance before the disciplinary court.

[7] Edward Steven was in the yard during the incident on August 21, 2016. He testified that he was talking to the applicant at the time. His testimony contains minor factual differences regarding the details of the story of the mutual friend who had been gunned down in Toronto; however, in general, he corroborates the applicant's version of the facts. He did ask the applicant what had happened to one of their mutual friends, a man named Randall, who had been shot in Toronto in 2012. He did not see the applicant pretend to fire a pistol at the officer or at least does not recall seeing it. He remembers, however, seeing an officer walk by and apparently give them an odd look. He explains that young black men (like the applicant) sometimes have very

animated and loud conversations and, therefore, that he would not be surprised if the applicant had made gestures and noises during their conversation and imitated gunshots.

[8] On November 8, 2016, after hearing the brief submissions of the assessor (transcripts from November 8, 2016, at pages 28 and 29) and of counsel for the applicant (*ibid* at pages 29 to 31), the independent chairperson found the applicant guilty on the spot. The oral reasons for finding the applicant guilty of the alleged offence are very brief. In short, the decision-maker believed the officer—whose testimony was clear (*ibid* at pages 32 to 33)—and did not believe the applicant, who lacked credibility, such that he could not give him the benefit of a reasonable doubt (*ibid* at page 33). I will reproduce the crux of the decision-maker's reasoning on this point:

> [TRANSLATION]
>
> ...
>
> I am telling you, sir, you have. .. I do not believe you, you have no credibility on this matter. I do not believe you. Because. .. you do not just complain about something. You have no reason to do that, you have no reason to do that, you had nothing against the officer, you had nothing against...
>
> But I can. .. it is not an argument that will be (inaudible), I will tell you why: because the officer had nothing against you either. Why would he make that up? What would he. .. with (inaudible) and that. .. testify, be a witness in this case, make that up.
>
> Your counsel ably argues, because you told her so, that you had. .. nothing against Officer Rhéaume, you had never spoken. .. never spoken with him, and you had nothing against him, but he had nothing against you either. So why would he make that up? Your explanations do not convince me, because the officer would not have made all that up. And I do not believe you.
>
> I think, as Mr. Lachance stated, that it is a bit late, but, now, you actually realize, and I know that you. .. this kind of situation will not happen to you again because you realized too late that you made a gesture and that you made a threatening sound, a threat, in fact. This kind of behaviour is not allowed here, it is against the

> law and it cannot be tolerated. I cannot give you the benefit of the doubt, because I do not believe your testimony.
>
> It seems implausible to me. I cannot believe it, because I would have to (inaudible) that the officer was passing by, looked you straight in the eyes, when he never spoke to you and supposedly made up the rest.
>
> That does not make any sense, and now you have to lie to get out of this mess, and I actually think that you are not telling the truth and that you should be punished for that reason. I think that you have a lesson to learn from all this. You are in prison; the rules are very strict and they must be followed. You cannot act as though you were in the outside world, where you can act this way. In fact, these actions, if they are made seriously, are not even allowed.
>
> I therefore find you guilty...
>
> [Emphasis added.]

[9] The decision-maker therefore found the applicant guilty of the alleged disciplinary offence. After hearing the respective submissions from the assessor and from counsel for the applicant regarding the sentence (transcripts from November 8, 2016, at pages 34 to 36), the decision-maker gave the applicant a fine of $25 and a suspended sentence of six days in segregation in the event of recidivism within 90 days (*ibid* at pages 36 to 37).

[10] The parties agree that the impugned decision is reviewable on the reasonableness standard. I agree (see *Dutiaume v. Canada (Attorney General)*, 2008 FC 990 at paragraphs 27 to 28).

[11] According to the applicant, the impugned decision is unreasonable. First, the decision-maker apparently erred in law by equating the applicant's lack of credibility with proof beyond a reasonable doubt of his guilt. Second, faced with contradictory testimonies, the

decision-maker could not, without analyzing all the evidence, simply gratuitously state that he was unable to believe the applicant because that would mean that the officer had lied. In this case, the decision-maker did not conduct a serious analysis of the evidence on record. His superficial analysis of the applicant's and the officer's testimonies is biased and does not consider the rest of the evidence. Furthermore, the decision-maker made no reference to the testimony of fellow inmate Steven, which was in fact consistent with the applicant's. Moreover, the officer and the applicant did not know one another before the incident; there had been no verbal exchange nor physical contact. In addition, the officer might have mistaken the meaning of the applicant's gesture, given the context of the incident. It was also essential to consider the lack of *mens rea*. Given the presumption of innocence, there remains a reasonable doubt.

[12] On the contrary, the respondent submits that the impugned decision is reasonable. The fact that the decision-maker's oral reasons are not exhaustive should not affect their validity or the guilty verdict (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16 [*Newfoundland Nurses*]). The officer's version is clear and unequivocal, while those of the applicant and his fellow inmate are vague and convoluted. Moreover, the applicant's and the officer's versions are mutually exclusive. The decision-maker is presumed to know the applicable legal principles concerning proof beyond a reasonable doubt, and it must also be assumed that he considered all the evidence—including inmate Steven's testimony. In his reasons, the decision-maker was not required to refer specifically to the aspect of intent (*mens rea*), because it could have been implicitly inferred once the material aspect (*actus reus*) was proven (see *R v. Roedling*, 2001 MBQB 89 at paragraphs 18 to 20). The respondent submits that, under the circumstances,

no reasonable doubt could remain in the decision-maker's mind if there was no basis to set aside the officer's testimony and if he considered the applicant's testimony not to be credible.

[13] Intervention is warranted in this case because the impugned decision is unreasonable.

[14] From the outset, I cannot accept the respondent's arguments regarding the adequacy of the reasons. On one hand, it is true that an analysis of the reasonableness of a decision must focus on the conclusion and examine whether that conclusion is reasonable in light of the evidence on record and the applicable law, and that brief and transparent reasons may be adequate in some cases (see *Newfoundland Nurses* at paragraph 16). On the other hand, as the Supreme Court reiterates at paragraph 54 of *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, "[t]he direction that courts are to give respectful attention to the reasons 'which could be offered in support of a decision' is not a 'carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result'" [reference omitted].

[15] In the case at hand, the reasons do not allow me to find that the decision-maker understood and applied the principles of *R v. W(D)*, [1991] 1 SCR 742, 122 NR 277 [*W(D)* with references to SCR] and that he otherwise considered all the evidence and context of the case to find the applicant guilty of the offence.

[16] First, it should be recalled that under subsection 43(3) of the Act, "[the independent chairperson] 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." In this regard, when it comes to establishing an inmate's guilt beyond a reasonable doubt, the independent chairperson must follow the principles set out in *W(D)* (see *Ayotte* at paragraphs 12 to 16). This is a three-step approach (see *W(D)* at page 758):

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[17] Although the decision-maker is not required to "religiously follow" the steps in *W(D)*, this analytical framework is nonetheless intended to ensure that the decision-maker focuses on the principle of reasonable doubt rather than on a simple analysis of the credibility of the accused and/or the Crown witnesses (see *R v. CLY*, 2008 SCC 2 at paragraphs 7 and 8 [*CLY*]). Consequently, the decision-maker cannot merely equate guilt with an inmate's lack of credibility (see *Ayotte* at paragraph 22). As the Supreme Court notes at paragraph 8 of *CLY*:

> ... the verdict should not be based on a choice between the accused's and Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt.

[18] Believing or disbelieving the accused's version does not put an end to deliberations because the burden of proof is never reversed in a criminal trial (see *Chshukina v. Canada (Attorney General)*, 2016 FC 662 at paragraph 30). In addition, the decision-maker's failure to understand or apply the principles arising from the obligation to be satisfied of the inmate's guilt

beyond a reasonable doubt irreparably violates the fairness of the hearing (see *Ayotte* at paragraph 16). This is a determinative error of law that vitiates the decision as a whole (see *W(D)* and *Zanth v. Canada (Attorney General)*, 2004 FC 1113 at paragraph 16). That was the decision-maker's error in this case.

[19] Although it is true that the correctional disciplinary process requires flexibility and efficiency, that flexibility and efficiency cannot be to the detriment of procedural fairness or the imperative provisions of the Act—specifically the requirements of subsection 43(3)—and the principles established in *W(D)* (see *Ayotte* at paragraphs 11 and 22). In his brief oral reasons, the decision-maker essentially states that he does not believe the applicant's version, because he does not consider him to be credible. According to him, the applicant cannot be telling the truth, because that would mean that the officer had lied, which he considers to be unthinkable or unlikely. For these reasons, he states that he cannot give the applicant the [TRANSLATION] "benefit of a reasonable doubt." However, the applicant's alleged offence includes both a material element (threat of assault) and an intentional element (intent to make such a threat). As the Federal Court of Appeal notes at paragraph 14 of *McCoy v. Canada (Attorney General)*, 2003 FCA 118, the Supreme Court held that to prove a threat it was necessary to establish whether the accused had the intent to intimidate, or whether his or her words were meant to be taken seriously. The entire correctional context, as well as the specific circumstances of the alleged act and how it may be interpreted, must be considered by the decision-maker (see *Boucher-Côté v. Canada (Attorney General)*, 2014 FC 1065 at paragraphs 34 and 42 [*Boucher-Côté*]; see also *Swift v. Canada (Attorney General)*, 2014 FC 1143 at paragraph 75; *Alix v. Canada (Attorney General)*, 2014 FC 1051 at

paragraph 39). Clearly, that was not done here, and it is not for me to substitute myself for the decision-maker to address the shortcomings of incorrect and incomplete reasoning, as is the case here.

[20] This case also differs from those cited by the respondent. In passing, in *Boucher-Côté*, our Court refused to intervene because the decision-maker had first explained why he did not believe the applicant's version. He also considered the other evidence, including the testimonies of the officer and the fellow inmate, before finding that none of the evidence raised a reasonable doubt in his mind. That is not the case here. A number of questions relating to the *mens rea* remain unanswered, and the decision-maker ignored or otherwise arbitrarily disregarded relevant evidence without an objective analysis of all the evidence, based on the act committed and the context in which the incident occurred. Consider, for example, the fact that a distance of 50 feet separated Officer Rhéaume-Drouin from the applicant, that Officer Rhéaume-Drouin raised his hand as a sign of enquiry, that the applicant started laughing, that they had never had prior contact, that they did not speak during the incident, that the applicant did not have any intention or reason to make threats, etc. Even if he did not believe the applicant (and fellow inmate Steven), the decision-maker could not ignore or otherwise dismiss without just cause these undisputed elements in the analysis of the applicant's guilt beyond a reasonable doubt. As a whole, the impugned decision is unreasonable.

[21] For these reasons, the application for judicial review is allowed. The impugned decision is set aside, and the case is referred back for a new hearing before a different independent chairperson from Donnacona Institution's disciplinary court. Without costs.

JUDGMENT in T-2133-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The decision rendered on November 8, 2016, is set aside, and the case is referred back for a new hearing before a different independent chairperson from Donnacona Institution's disciplinary court. Without costs.

"Luc Martineau"
Judge

Certified true translation
This 21st day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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