Federal Court of Appeal | Cour d'appel fédérale

Date: 20161013

Docket: A-392-15

Citation: 2016 FCA 250

CORAM: **NADON J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

THOMAS WINMILL

Appellant

and

CANADA (MINISTER OF JUSTICE)

Respondent

Heard at Toronto, Ontario, on October 11, 2016.

Judgment delivered at Toronto, Ontario, on October 13, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
RENNIE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20161013

Docket: A-392-15

Citation: 2016 FCA 250

CORAM: **NADON J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

THOMAS WINMILL

Appellant

and

CANADA (MINISTER OF JUSTICE)

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Winmill appeals from the judgment dated June 5, 2015 of the Federal Court (*per* LeBlanc J.) that dismissed his application for judicial review of certain decisions of the Minister of Justice: 2015 FC 710.

[2] Mr. Winmill had applied under section 696.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 for Ministerial relief against his conviction for first degree murder. The combined effect of the decisions of the Minister was to dismiss Mr. Winmill's application.

[3] The procedure for reviewing an application for Ministerial review of a criminal conviction is set out in sections 696.1 to 696.6 of the *Criminal Code* and the Regulations *Respecting Applications for Ministerial Review—Miscarriages of Justice*, SOR/2002-416. The Minister dismissed Mr. Winmill's application during the "preliminary assessment" phase of the review process. This phase is governed by subsection 4(1) of the Regulations.

[4] During the preliminary assessment phase, if the Minister "determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred," the application proceeds to the next phase, the investigation phase: paragraph 4(1)(*a*) of the Regulations. On the other hand, if the Minister "is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred," then the Minister "shall not conduct an investigation": subparagraph 4(1)(*b*)(ii) of the Regulations.

[5] In determining whether there is a "reasonable basis to conclude that a miscarriage of justice likely occurred," the Minister "shall take into account all matters that the Minister considers relevant," including "whether the application is supported by new matters of significance," "the relevance and reliability of information presented in support of the application," "the fact that an application…is not intended to serve as a further appeal," and the fact that "any remedy available on such an application is an extraordinary remedy": *Criminal Code*, section 696.4.

[6] In this case, on the basis of information filed in support of the application and further information received by the Minister, discussed below, the Minister was satisfied there was no reasonable basis to conclude that a miscarriage of justice likely occurred and further investigation was warranted. Therefore, under subparagraph 4(1)(*b*)(ii) of the Regulations, he was obligated to dismiss the application and did so.

[7] Before the Federal Court, the parties differed concerning what was being reviewed. Mr. Winmill maintained that all of the Minister's decisions were in issue. The Minister submitted that only the last decision made by the Minister, a reconsideration decision, was in issue. The Federal Court agreed with the Minister but nevertheless dealt with all the decisions, finding them reasonable.

[8] During argument in this Court, the Minister conceded that the appeal should proceed on the basis that all of the Minister's decisions should be reviewed. This is a fair and appropriate concession.

[9] The parties agree that the standard of review is reasonableness. I agree. The Minister's decision turns largely on the weighing and assessment of facts to decide whether a qualitative threshold is met—specifically whether there may be a reasonable basis to conclude that a miscarriage of justice likely occurred (paragraph 4(1)(*a*) of the Regulations) or whether "there is no reasonable basis to conclude that a miscarriage of justice likely occurred" (subparagraph 4(1)(*b*)(ii) of the Regulations). The Minister's determinations on applications for relief are protected by a privative clause: subsection 696.3(4) of the *Criminal Code*.

[10] Though a factually-suffused decision such as this normally attracts a high degree of deference, section 696.1 applications concern the applicant's liberty interests, a matter of great significance. Therefore, while "[r]easonableness is a deferential standard" (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47), deference here does not resemble anything close to handing the Minister a *carte blanche*. Far from it.

[11] We are a reviewing court obligated to enforce the rule of law and legislative standards. In a case like this, we must ensure that during the preliminary assessment phase the Minister followed a methodology appropriate to the purposes of the legislative framework and had a firm evidentiary basis for the decision. What we cannot do is engage in our own *de novo* weighing and assessment of facts, substituting our conclusions for those of the Minister.

[12] I conclude that during the preliminary assessment phase in this case the Minister followed a methodology appropriate to the purposes of the legislative framework. The Minister carefully considered the information offered in support of the application. With the legal standard in *R. v. Babinski* (1999), 44 O.R. (3d) 695, 135 C.C.C. (3d) 1 (Ont. C.A.) front of mind (see appeal book, page 72), the Minister went further and interviewed a witness to the crime, Ms. Tina Prevost. In a fact-based, discretionary decision, the Minister, mindful of the legislative standards set out above, declined to investigate the matter further through the use of the investigatory powers set out in section 696.2 (2) of the *Criminal Code*. In particular, the Minister declined to examine Ms. Prevost under oath and make her available for cross-examination conducted by those acting on behalf of Mr. Winmill.

[13] Mr. Winmill submits that the Minister was obligated to do just that. To evaluate this submission, we must review the Minister's assessments of the evidence and determine whether a firm evidentiary basis underlies the Minister's judgment calls.

[14] In my view, the Minister had a firm evidentiary basis for the decision. In support of the section 696.1 application is an affidavit sworn by Mr. Winmill's son, Robert. In that affidavit, Robert confesses to the murder and purports to exonerate his father. The Minister found that this was neither new nor significant evidence. At Mr. Winmill's trial, the jury had before it a cellblock confession by Robert that he was the murderer, supported by a motive to murder; the jury nevertheless found that Mr. Winmill, not Robert, was the murderer. This finding was supported by other evidence, including the evidence of another trial witness, Mr. Cvetkovic. Mr. Cvetkovic, now deceased, identified Mr. Winmill as the killer.

[15] The Minister also noted that Robert "has communicated inconsistent accounts of the murder over time to various people…and there is nothing to substantiate his current account." The Minister searched for independent corroborating evidence demonstrating that Robert committed the murder—as opposed to corroborating evidence that Robert made admissions to have committed the murder—and found none. Finally, the Minister noted that Robert may have had a motive to confess to the murder to exonerate his father, as he was facing charges that, if convicted, would place him in jail for a lengthy period of time; the confession was not necessarily against his interests.

[16] This evidence shows that the Minister had a firm evidentiary basis to conclude that Robert's confession was neither "new" nor "significant" evidence, and could not be used to show

that there "may be a reasonable basis to conclude that a miscarriage of justice likely occurred," such that further investigation was warranted. Put another way, the Minister had an acceptable and defensible basis to conclude that Robert's confession could not supply any reasonable basis to conclude that a miscarriage of justice likely occurred, and so no further investigation was warranted. In a case like this, it is no part of our task under the reasonableness standard to reweigh and reassess this evidence finely or to second-guess acceptable and defensible conclusions reached by the Minister.

[17] At its highest, the information supplied to the Minister by Ms. Prevost during the interview suggests only that Robert may have assisted in the killing; in no way does it exonerate Mr. Winmill. This is not inconsistent with Ms. Prevost's trial testimony that Mr. Winmill killed the victim. Indeed, in the interview, Ms. Prevost strongly reiterated Mr. Winmill's role in the killing. This is seen from a portion of the note of the interview:

> I explained to [Ms. Prevost] that her name and coordinates had been provided to us by the Innocence Project [which was acting on Mr. Winmill's behalf] and that we were following up.
>
> I asked her directly was her trial evidence truthful? She responded "yes." I then asked her what Thomas Winmill did on the day in question. She replied that he had stabbed the victim and with the help of his son [Robert] also cut the victim's throat.
>
> There was no doubt in her mind that Thomas Winmill had stabbed and killed the victim that morning. She remembers it clearly. It was in the morning hours.
>
> She added that she is not prepared to change or recant her evidence that she gave at trial as she was truthful at trial when she testified.

[18] In considering whether there was any reasonable basis for concluding that a miscarriage of justice likely occurred and whether any further investigation was warranted, the Minister was

entitled to consider this information alongside all of the other evidence and conclude that there was no such basis.

[19] Overall, I agree with the following observations of the Federal Court (at paragraphs 87-89 and 91):

> [87] Here, as the Minister points out, [Mr. Winmill] submitted no evidence that [Ms. Prevost] was having any recollection problems as to who committed the murder when she testified shortly after the events or that she had given false evidence at trial. Furthermore, the information [Mr. Winmill] submitted in support of his Conviction Review Application substantially confirmed [Ms. Prevost's] evidence at trial that he had committed the murder. As I indicated previously, the Innocence Project did examine [Ms. Prevost] in June 2011 and she did confirm her testimony at trial that the Applicant had stabbed and killed [the victim].
>
> [88] In such context, I agree with the Minister that there was no necessity for [the Criminal Convictions Review Group of the Department of Justice] to speak to [Ms. Prevost], much less to examine her under oath in order to determine whether she was standing by her trial testimony as the materials in support of the Conviction Review Application was clearly indicative that she was.
>
> [89] The Innocence Project has been urging [the Criminal Convictions Review Group of the Department of Justice] to examine [Ms. Prevost] under oath because although she maintained that [Mr. Winmill] was responsible for the murder of [the victim], her account of events was inconsistent with her testimony at trail. However, no particulars with respect to these alleged inconsistencies were provided in the Conviction Review Application materials, nor did [Mr. Winmill] explain how these inconsistencies may have been significant in the overall context of her testimony at trial.
>
> …
>
> [91] For now, the materials in support of the Conviction Review Application show that [Ms. Prevost's] version of events as to who committed [the] murder remains consistent with her testimony at trial and the alleged inconsistencies in her account of events of June 2011 have not been substantiated by [Mr. Winmill]. Thus, [Ms. Prevost's] version of events remains consistent with the trial testimony of Mr. Cvetkovic's who, as we have seen, was found by the Ontario Court of Appeal to be less untrustworthy than [Ms. Prevost] and Robert because of his clean criminal record, steady employment, and lack of motive to kill [the victim] or to help Robert or [Ms. Prevost], whom he barely knew.

[20] Mr. Winmill also submits that the Minister failed to disclose the note detailing the Minister's interview of Ms. Prevost and this worked procedural unfairness because the note discloses inconsistencies between Ms. Prevost's trial testimony and other evidence. Mr. Winmill adds that the letter from the Minister to Mr. Winmill regarding the interview was misleading.

[21] On the facts of this case, I reject this. Where the undisclosed information is material and might conceivably support the need for further exploration of the matter—*i.e.*, where it is or suggests that there is a new or significant matter that could be capable of showing that there was likely a miscarriage of justice—there may well be a finding of procedural unfairness arising from its non-disclosure. But that is not the case here. In the Minister's interview, Ms. Prevost did not depart from her earlier testimony that Mr. Winmill committed the killing—she confirmed it. None of the undisclosed information was capable of being, in whole or in part or relating to, a new or significant matter that could be capable of showing that there was likely a miscarriage of justice.

[22] Mr. Winmill submits that the Minister cannot make a credibility assessment of Robert during the preliminary assessment phase based only on a paper record. I disagree. First, in this case, the Minister went further and interviewed Ms. Prevost; the decision was not just on a paper record. Second, as mentioned above, the Minister is legislatively empowered to assess whether the information in support of the application raises "new matters of significance" and whether it has "relevance" and "reliability." Beyond that, the Minister may consider "all matters…the Minister considers relevant." These legislative standards contemplate that the Minister may take into account the credibility of the information supplied in support of the application.

[23] Although invited by counsel for Mr. Winmill, I decline to define in this case for all time the exact legal responsibilities of the Minister when engaged in a preliminary assessment of a section 696.1 application. It is unnecessary to do so. On the facts of this case, it is enough to find that the Minister followed a methodology appropriate to the purposes of the legislative framework and had a firm evidentiary basis for dismissing this application at the preliminary assessment stage.

[24] Therefore, despite the able submissions of Ms. Gonsalves and Mr. Schumann, I would dismiss the appeal with costs.

"David Stratas"
J.A.

“I agree
M. Nadon J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-392-15
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE LEBLANC OF THE FEDERAL COURT DATED JUNE 5, 2015, NO. T-729-13.	
STYLE OF CAUSE:	THOMAS WINMILL v. CANADA (MINISTER OF JUSTICE)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. RENNIE J.A.
DATED:	OCTOBER 13, 2016

APPEARANCES:

Andrea Gonsalves Fredrick Schumann	FOR THE APPELLANT
Sean Gaudet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stockwoods LLP Barristers Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT