Federal Court  Cour fédérale

Date: 20170502

Docket: T-1881-16

Citation: 2017 FC 435

Ottawa, Ontario, May 2, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARCUS CHARLES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] On July 7, 2016, Marcus Charles was a resident of the Collins Bay Institution, a penitentiary as defined in the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]. A search of his cell was conducted on that day. A weapon (a so-called "shank") was found hidden in a fan he had in his cell. He was convicted on October 13, 2016, of the disciplinary offence spelled out at paragraph 40 (i) of 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;

[2] It is from that conviction that the applicant seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

I. The issue on judicial review

[3] No one disputes the legality of the search or the fact that an object that would qualify as contraband was found in a fan that was located in the cell occupied by Mr. Charles. There is only one issue raised in the case. Was the applicant in possession of contraband?

[4] The definition of "contraband" found at section 2 of the Act includes the following:

2 (1) In this Part,	**2 (1)** Les définitions qui suivent s'appliquent à la présente partie.
…	…
contraband means	***objets interdits***
…	…
(b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization,	**b)** armes ou leurs pièces, munitions ainsi que tous objets conçus pour tuer, blesser ou immobiliser ou modifies ou assemblés à ces fins, dont la possession n'a pas été autorisée;

[5] The object that was found hidden in the fan in the cell occupied by Mr. Charles was described as "blue punch strap with metal spikes protruding" and, once again, there is no dispute that such an object would constitute a homemade weapon captured by the definition of contraband at section 2 of the Act.

II. The facts

[6] The applicant was in possession of such a weapon if the decision-maker is satisfied beyond reasonable doubt, "based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question" (subsection 43 (3) of the Act). In turn, Mr. Charles will have been proven to be in possession only if he was in control of the object constituting the contraband and had knowledge of the quality of the object that was found. Knowledge is a fundamental requirement. One cannot be in possession if one does not know what he has physical possession of at any given time (*Beaver v R*, [1957] SCR 531). No one is suggesting that the offence of possession of contraband is a strict liability offence.

[7] The evidence before the independent chairperson [the decision-maker] showed that the search conducted by a correctional officer produced the fan. The officer removed the cap from the front of the applicant's portable fan and found an object inside which he characterized as a homemade weapon. As indicated earlier, that characterization has not been in dispute in this case.

[8] The officer explained that the 3-inch wide cavity found behind the fan's cap was a common hiding place. The officer testified that the cap is not screwed on but is rather "pressure

fitted". He noticed nick marks on the fan found in the applicant's cell, which suggested to him that the cap had previously been pried off. However, the object in question would not be exposed until the fan was taken apart. Because the object was made of cloth, it would be difficult to hear it rattling in the fan.

[9] The applicant's evidence, which he offered at the disciplinary hearing, is that he had asked other inmates for a fan because it was hot and he was still waiting for his property to arrive. About 2 to 3 weeks before the cell's search, some inmate gave him a fan that had been left by an inmate who was released a few months earlier. The applicant did not examine the fan when he got it. When asked by his counsel whether he knew how to open the fan's cavity, he responded: "If I wanted to try, yeah, I guess." Evidently, the defence that was offered was absence of knowledge that contraband was lodged in the fan.

III. Arguments and standards of review

[10] The decision is challenged on two fronts. First, the applicant contends that the independent chairperson relied on information that was not made available to him at the hearing, such that this constitutes a violation of the duty to act fairly. Second, the applicant argues that the finding that he was guilty is not reasonable given the evidence that was before the decision-maker.

[11] The standards of review are not the subject of controversy. Violations of procedural fairness are reviewable on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79; *Canada (Attorney General) v Blackman*, 2016 FC 488 at para 26

and 31). Whether or not the finding of guilty is appropriate, is reviewable on a reasonableness standard (*Chshukina v Canada*, 2016 FC 662 at para 19).

IV. Decision under review

[12] Following what appears to have been a short hearing, the independent chairperson rendered an oral decision. He relied on five elements in order to conclude that the applicant was in possession of contraband:

a) Mr. Charles ought to have known that he is not entitled to receive belongings of other inmates. In the words of the decision-maker, "(t)his is the kind of situation that results in this";

b) The explanation given by Mr. Charles that he did not know of the hidden contraband cannot be accepted because that "would create chaos";

c) The fan bore nick marks that must have been noticed by the inmate;

d) The fan in which the contraband was found was in the applicant's cell; he testified that no one but him took possession of the fan in the three weeks he had it (p. 29 of the applicant's record);

e) Mr. Charles had been convicted of having a homemade weapon two months earlier, that weapon being similar in nature. No details about similarities were offered.

[13] Without articulating how these elements lead to conviction, how they can be used and to what effect the decision-maker simply concludes that "on all the evidence before the court, I am satisfied beyond a reasonable doubt and I accept the evidence of Officer Hoekstma and I find Mr. Charles guilty as charged and convict him of the offence."

V. Analysis

[14] In my view, this decision of the independent chairperson must be quashed because it violates procedural fairness. However, the remedy sought by the applicant, his acquittal, would not be appropriate in the circumstances of this case. Rather the normal remedy of returning the matter to a differently composed tribunal for redetermination is more appropriate in light of the facts of the case.

[15] This case turns on whether or not Mr. Charles had knowledge of what was found in the fan. Given the standard in subsection 43 (3), that element of the offence must be proven beyond reasonable doubt. The difficulty in this case is that the independent chairperson chose to rely on information that was not before the panel to reach his conclusion about knowledge of the contraband hidden in a fan possessed for a period of time of up to three weeks. That violates the procedural fairness of the proceeding.

A. *Procedural fairness*

[16] The first inkling that the decision-maker was in possession of more information than what was on the record came during the submissions offered to the panel by a person assisting Mr. Charles in his case. Here is the appropriate passage:

> MS. WOODWARD: It is my submission that, in this case, you cannot be reasonably satisfied that guilt is the only inference that can reasonably be drawn here. There is no inculpatory evidence which supports the assertion Mr. Charles was in possession of the weapon beyond the fact that the fan was found in his cell. The line of questioning directed toward the officer established this. I asked if he had had the weapon finger printed – he had not. I asked if he

> had any prior information that Mr. Charles was in possession of a weapon – he had not. I asked if Mr. Charles had ever admitted ownership of the item – he had not.
>
> MR. ROMAIN: Well, I can tell you that, that he does have a history of weapons.
>
> MS. WOODWARD: We understand that, but prior convictions, with respect, should not be used to establish knowledge in this case of this particular contraband.
>
> MR. ROMAIN: No, but I thought that's what you were saying that you asked the officer?
>
> MS. WOODWARD: No.
>
> MR. ROMAIN: Oh I'm sorry.
>
> MS. WOODWARD: Sorry, this possession of our weapon.
>
> MR. ROMAIN: Oh, Ok, alright.
>
> MS. WOODWARD: Sorry, my mistake. I asked if he had any prior information that Mr. Charles had this particular weapon as means of searching the cell.
>
> MR. ROMAIN: Ok.
>
> (My emphasis)

[17] Evidently, the decision-maker had misunderstood the assertion made in the submission and he jumped in to indicate that this inmate had a history of weapon's possessing in the institution. That was not in evidence.

[18] In the decision which was rendered immediately after submissions were heard, the decision-maker relied on the prior conviction. He said this:

> The onus still is with the institution to prove beyond reasonable doubt that Mr. Charles knew of the weapon. Now, Ms. Woodward pointed out that I can't look at past history to make my determination in this case but I can use past history to assist me,

> and I can use any evidence that I find credible or trustworthy in rendering my decision. Mr. Charles just months earlier, on May the 28th of 2016, some two months prior to this charge, was found guilty of having a homemade weapon, and the weapon was similar in nature, it was a weapon that you wrap around your hand and add tape at the end of the handle, some type of homemade weapon, I don't have it here so I can only go by the information that's available to me.
>
> That is not his first involvement with a homemade weapon, but that does not mean that he is guilty every time something is located, but when you take something that doesn't belong to you, and I don't know whose fan this was, I don't know whether it did in fact come from another inmate, how long that inmate had it, how many other inmates may have had it. I have no information to that at all.
>
> (Applicant's record, p. 37-38)

[19] It is not completely clear why the decision-maker raises twice in a matter of minutes information that was never presented as part of the case for the institution. It is not any clearer how he disposes of the comment made by the person assisting the applicant, when the decision-maker suddenly raises the issue of a history of weapons during submissions, that prior convictions cannot be used to prove knowledge. However, the decision-maker is obviously using the information for the purpose of establishing knowledge in view of the applicant's alleged past involvement with weapons. That is because having listed the various elements before him, including the conviction for possession of homemade weapon, the decision-maker finds beyond a reasonable doubt that the applicant is guilty of possession of contraband. Evidence that was never introduced pops up during submissions and is elaborated on during the rendering of the decision. This constitutes a violation of procedural fairness in that the applicant was not given the opportunity required in law to participate fully in his hearing by knowing what information is alleged against him.

[20] In *Ayotte v Canada (Attorney General),* 2003 FCA 429 [*Ayotte*], the Federal Court of Appeal endorsed the six principles identified by this Court in the case of *Hendrickson v Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 FTR 296 which were said to be derived from the decision in *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602. It is the third such principle that is applicable in this case. It reads:

> [9] …
>
> 3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.
>
> (*Ayotte*, para 9)
> (My emphasis)

[21] This requirement at common law is even strengthened since Parliament requires, at subsection 43 (3) that the decision be "based on the evidence presented at the hearing". No evidence was presented at the hearing. The decision-maker used information he had acquired without disclosing it before.

[22] The respondent argues that the applicant was given the opportunity required in law. The argument seems to be that the applicant was made aware of the information relating to the "history of weapons" through the sudden intervention of the decision-maker during the submissions. Thus, the applicant would have been given an opportunity to respond to the claims of the decision-maker. The Attorney General argues that the applicant would somehow have declined to object at the first opportunity offered to him, that is when the decision-maker raised

the issue of "history of weapons" after having misunderstood the submissions made. With respect, that to me misses the mark and does not conform to the passage cited from *Ayotte*. The decision-maker was reacting as the applicant was making his submission through Ms. Woodward. I fail to see how this could constitute the evidence and the nature of the evidence against him and that he was afforded reasonable opportunity to respond to the evidence and to give his version of the matter. In fact, what has occurred in this case is the very opposite of providing someone an opportunity to respond, let alone a reasonable opportunity to respond.

[23] Instead, the decision-maker indicated in his decision that he "can use past history to assist me, and I can use any evidence that I find credible or trustworthy in rendering my decision." The Court is not asked to decide whether that is possible or not, and to what effect such information can be reasonably used. Without turning these disciplinary hearings into full blown criminal trials, it might be good practice for the parties and decision-makers to consider more fully the precise use of and value of evidence of that nature in the circumstances of the cases heard. That was the admonition of Doherty J.A. of the Ontario Court of Appeal concerning the use to be made of prior consistent statements (*R v Khan*, 2017 ONCA 114, para 59) in criminal trials. Considering what reasonable inference may be drawn may be part of the reasonableness analysis in the context of decisions made by those disciplinary tribunals that pronounce on offences.

[24] Rather, the Court must decide on a correctness standard whether the evidence and the nature of the evidence to be used were disclosed in such a way that the applicant can participate. The only articulation of the "evidence" is to be found in the decision itself. To my way of

thinking, this is not evidence presented at the hearing and that does not constitute an opportunity for the applicant to put the matter in its proper context in order to invite an appropriate response. It does not meet the test of acting fairly to bring onto the applicant, during the submissions, that he has a history of weapons, which suggests that the decision-maker had the information without disclosing it as part of the hearing itself. Then, the decision-maker makes it an important part of his decision, providing for the first time the details of a charge against this applicant concerning some homemade weapon, going so far as to suggest that the weapon was similar in nature. That information, if it is admissible, ought to have been disclosed to the applicant as part of the case against him and not as part of a decision. That is the only way for the applicant to be put in a situation to comment on the evidence, to argue more fully for instance that the evidence is inadmissible or can be used for limited purposes. Such opportunity was simply not afforded.

[25] That is sufficient to dispose of the judicial review application in favour of the applicant. Since I have concluded that the matter needs to be sent back to a new independent chairperson, it may be of assistance to add the following.

B. *Clarifying knowledge, wilful blindness and recklessness*

[26] As part of the decision, the decision-maker indicated that Mr. Charles ought not to have used a fan received from another inmate. The decision-maker mused that "this is the kind of situation that results in this." The decision-maker then goes on to say that if he is "to accept totally his evidence that it was just given to him, then it would create chaos because you would have every inmate coming in and saying "well it wasn't mine, it was given to me by somebody else and therefore I don't know anything about it" ". These kinds of statements are problematic

because they suggest that the law of possession should not apply within a penitentiary institution. The law is clear that must be proven beyond reasonable doubt that the person charged with the possession offence had knowledge, as well as control of the thing possessed. Short of that evidence, a person accused of that kind of an offence is entitled to an acquittal. Here, the decision-maker suggests that the applicant put himself at risk by accepting a fan from another inmate. The decision-maker does not explain how that can have any relevance with respect to the knowledge required to have possession.

[27] The knowledge element of the offence is satisfied if it is proven beyond a reasonable doubt that the accused person was wilfully blind (*R v Jorgensen*, [1995] 4 SCR 55 [*Jorgensen*], at para 102). The Supreme Court relied on the authority of Professor Glanville Williams in his treatise *Criminal Law: The General Part* (2nd ed 1961) where one reads:

> . . . A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness.
>
> (p. 158)

As the Court put it at paragraph 103 of *Jorgensen*:

> A finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

[28] However, there is the danger of confusing wilful blindness, which is the equivalent to knowledge, and recklessness, which turns on the notion of risk. In *Sansregret v The Queen*,

[1985] 1 SCR 570 [*Sansregret*], the Supreme Court explains clearly the difference between wilful blindness and recklessness:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
>
> (p. 584)

[29] In the case at bar, it is less than clear what the decision-maker makes of the risk there would be in getting a fan from another inmate. But that quip would appear to be more consonant with recklessness than wilful blindness. The decision-maker identifies a risk and the applicant proceeds in the face of it. That is no more than recklessness. Both *Sansregret* and *Jorgensen* cite the same passage taken from Professor Williams and reproduced at paragraph 27 of these reasons. It is not enough to have a suspicion; the accused would have to virtually know and intentionally declined to secure the knowledge. Establishing merely that there is a risk in acquiring the fan from another inmate does not assist in establishing knowledge and it falls short of establishing wilful blindness.

[30] The statement about chaos that would ensue if the version of the applicant were to be retained is even more problematic. It suggests that, for policy reasons, inmates ought not to be believed. The assessment is not to be performed on a case-by-case basis, but rather, as a matter of policy, knowledge is to be assumed, not established beyond a reasonable doubt.

[31] The offence of "possession" requires that knowledge be proven. The decision-maker's statement leaves the reader with the distinct impression that it is possible to dispense with the burden of proving knowledge beyond a reasonable doubt when the inmate testifies that he unknowingly received the contraband from someone else. He seems to suggest that knowledge can be assumed in such cases otherwise chaos would ensue.

[32] It seems to me that similar policy concerns about proving knowledge were raised in *Jorgensen* (paras 98-99) where the offence was knowingly selling obscene material. Other than being able to rely on wilful blindness where the evidence is present, the Court noted in answering the policy concern that knowledge can be inferred from the evidence such, for instance, as evidence of clandestine behaviour. Nevertheless, the difficulty of proving knowledge does not diminish the need to prove it. No argument was offered in this case to even suggest that the proof of knowledge was not required in the context of a penitentiary. Nothing in the scheme of the Act would allow in my view such relaxation of the requirement of proving beyond a reasonable doubt the essential elements of the offence.

C. *The remedy*

[33] In this case, the issue becomes whether having the exclusive possession of a fan for two to three weeks and that fan having some nick marks around the cap under which the contraband was found constitutes enough evidence to rule beyond a reasonable doubt that possession was established, which includes the knowledge as well as the control.

[34] The powers of the Federal Court on judicial review include the ability to set aside a decision and refer it back for determination in accordance with directions (subsection 18.1 (3) of the *Federal Courts Act*). This may well include something akin to a directed verdict of acquittal in criminal law.

[35] The applicant asked that he be acquitted as a result of a successful judicial review application. I have come to the conclusion that it would not be appropriate for this Court to seek to substitute itself for the decision-maker. There remains the power in a reviewing court to make the decision that ought to have been made. However, it should be exercised in exceptional circumstances, such as when the outcome is so clear that to send the matter back would only create delay and add costs without any benefit.

[36] I share the view of Justice Mactavish of this Court who ruled in *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 [*Freeman*], that this ought to be done only in the clearest of circumstances. My colleague found support in the decisions of Justice Rothstein, then of this Court. We read in *Freeman*:

> [78] Section 18.1(3)(b) of the *Federal Courts Act* provides that this Court may refer a matter back to a decision-maker with such directions as the Court may consider appropriate. While this includes directions in the nature of a directed verdict, "this is an exceptional power that should be exercised only in the clearest of circumstances": *Rafuse v. Canada (Pension Appeals Board)*, [2002] F.C.J. No. 91 at para. 14, citing *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125, [1994] F.C.J. No. 286, at paragraph 18.
>
> [79] In *Xie*, Justice Rothstein stated that: "the Court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal": at para. 18.

> [80] This "will rarely be the case when the issue in dispute is essentially factual in nature": *Rafuse*, above at para. 14, citing *Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73, 76 F.T.R. 182 (T.D.).
>
> [81] The issues in this case are largely factual, and the evidence, both public and confidential, should be evaluated in its totality by the officials who have been assigned the responsibility for making such assessments by Parliament.

[37] Here, the only issue to be resolved is whether the evidence left before the decision-maker, once is removed the prior conviction which was not put in evidence, and comments about risks and chaos are ignored, proves knowledge beyond a reasonable doubt. This is a decision Parliament has left to an administrative tribunal to make.

[38] I would not allow the institution to supplement its case or to start anew. The evidence has been adduced and the case heard. The problem that has been encountered is solely with respect to the decision itself. Hence, the redetermination will be limited to a new decision on the knowledge element of the offence charged.

[39] Finally, given the views expressed by this independent chairperson, the matter is remitted to a differently constituted tribunal on the limited question to be determined. I add that the parties are entitled to make fresh representations, on the basis of the evidence led at trial, before the differently-constituted decision-maker. The new independent chairperson will have to decide if the submissions must be in writing or presented orally.

VI. Costs

[40] Both parties sought their costs in case of success. The applicant was successful in having the decision quashed. Although the applicant is not granted an acquittal in the nature of a remedy akin to a directed verdict, he has largely prevailed. At the hearing, counsel for the applicant indicated that an award of costs of $1000.00 would allow to cover the expenses incurred. The draft bill of costs submitted by the Crown was significantly higher than the applicant's request. It seems to me that the applicant's requested amount is very reasonable. Pursuant to Rule 400, an amount of $1000.00, all-inclusive, is awarded in favour of the applicant.

JUDGMENT in T-1881-16

THIS COURT'S JUDGMENT is that the judicial review application is granted. The matter is remitted to a differently-constituted tribunal on the limited question of determining whether there is guilt beyond a reasonable doubt on the record as already constituted, once is removed from consideration a prior conviction and are expunged comments about the "risk" encountered when receiving goods from other inmates and the "chaos" that would ensue if the defence of absence of knowledge offered in this case were to be accepted in disciplinary cases in penitentiaries.

Costs in the amount of $1000.00, all-inclusive, are awarded to the applicant.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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