Date: 20090504

Docket: T-1410-08

Citation: 2009 FC 448

Ottawa, Ontario, May 4, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ROBERT LEMOY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision rendered on August 27, 2008 by the chairperson of the serious offence court at the La Macaza Institution, finding the applicant Robert Lemoy guilty of committing the disciplinary offence of assault or fighting pursuant to subsection 40(*h*) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*).

Factual background

[2] On May 29, 2008, the applicant, Robert Lemoy, an inmate at the La Macaza Institution, got into a fight with his fellow inmate Normand Dufresne during a class in the school at the Institution. That same day, an "Offence Report and Notification of Charge" was issued against the applicant, charging him with a serious disciplinary offence under subsection 40(*h*) of the *CCRA* for having assaulted or fought with another person.

[3] The disciplinary hearing started on June 25, 2008, and the applicant, through his representative, informed the chairperson of the disciplinary court that he was pleading not guilty to the disciplinary offence of which he was accused, claiming self-defence.

[4] The parties agreed that the evidence presented at the hearing would consist of the Incident Report of June 2, 2008 and the testimonies of the applicant and Normand Dufresne.

[5] The applicant testified that Normand Dufresne hit him three times before he responded, and that he feared that his fellow inmate had a pencil in his hands. He explained that he was arguing with another inmate and that Mr. Dufresne suddenly threw two punches at him. He stood up to go and tell the teacher and Mr. Dufresne followed him into the hallway and hit him again before he responded. By his account, he stopped punching Mr. Dufresne when he realized that he was no longer in any condition to fight.

[6] The disciplinary hearing resumed on July 9, 2008, and the applicant repeated that Mr. Dufresne had first punched him twice, breaking his partial denture. Mr. Dufresne followed him and hit him a third time before he responded. The applicant then hit Mr. Dufresne four or five times in the face. After a first blow to the nose, Mr. Dufresne kept trying to punch him, but the applicant got the upper hand. According to the applicant, he was beginning to fear for his safety and was not about to let Mr. Dufresne continue to hit him so that he would be the one injured. He did not notice while he was hitting Mr. Dufresne whether the latter was still able to defend himself. The altercation did not last long and the applicant did not give Mr. Dufresne a chance. He stopped when the teacher arrived.

[7] When Mr. Dufresne testified, he admitted that he had thrown the first punch. He also mentioned that he got caught up in a tape-recorder wire during the incident and fell on a table, which accounts for some of his injuries. He also indicated that the applicant punched him twice.

[8] According to the evidence obtained by the chairperson of the disciplinary court, the sequence of events surrounding the fight can be summarized as follows:

- During an argument with a fellow inmate about the use of a fan in the classroom, the applicant was hit by fellow inmate Normand Dufresne;
- Mr. Dufresne admitted that he hit the applicant first, and according to the applicant this was followed by a second blow;
- The applicant testified that after the second blow, he pushed Mr. Dufresne and got up to leave the classroom. He also said that his partial denture was broken. The applicant testified

that as he was leaving, Mr. Dufresne followed him into the hallway, where he punched him again;

- At that point, the applicant responded with a punch to the nose of his aggressor. In fact, the applicant admitted before the chairperson that he got the upper hand in the fight as soon as he threw his first punch. He testified that he then punched him three or four more times;
- The applicant stopped punching Mr. Dufresne when the teacher arrived.

Impugned decision

[9] The chairperson of the disciplinary court rendered his oral judgment on August 27, 2008, finding that the applicant was guilty of the disciplinary offence and that he could not accept the applicant's plea of self-defence because the force he used to repel the attack was excessive.

[10] According to the chairperson, the applicant continued to hit Mr. Dufresne even though he could no longer defend himself. Also according to the chairperson, the theory of self-defence relied on by the applicant was no longer justified because the applicant went at his fellow inmate relentlessly and practically took pleasure in continuing to hit him after realizing that he was no longer reacting.

Issue

[11] Did the chairperson of the disciplinary court err unreasonably in finding that the applicant did not act in self-defence when he assaulted or fought with another person under subsection 40(*h*) of the *CCRA*?

[12] The applicable legislation is appended at the end of these reasons.

Standard of review

[13] In *Sweet v. Canada (Attorney General)*, 2005 FCA 51, 322 N.R. 87, the Federal Court of Appeal determined the standard of review applicable to decisions made during hearings held under the *CCRA:*

> [14] In assessing the standard of review for prisoners' grievance decisions, the Applications Judge adopted the analysis set out by Lemieux J. in *Tehrankari v. Correctional Service of Canada* (2000), 188 F.T.R. 206 (T.D.), at paragraph 44. After conducting a pragmatic and functional analysis, Lemieux J. concluded that a correctness standard would apply if the question involved the proper interpretation of the legislation, a standard of reasonableness *simpliciter* would apply if the question involved an application of the proper legal principles to the facts, and a patently unreasonable standard would apply to pure findings of fact.

[14] Consequently, the reasonableness standard is applicable to the question of whether or not the chairperson of the disciplinary court should have accepted the applicant's plea of self-defence. This new standard was recently established in *Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[15] Issues of procedural fairness are issues of law to which the correctness standard applies (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at paragraph 100).

Did the chairperson of the disciplinary court err unreasonably in finding that the applicant did not act in self-defence when he assaulted or fought with another person under subsection 40(h) of the CCRA?

Applicant's arguments

[16] It is settled law that an inmate accused of a disciplinary offence in a penitentiary is entitled to all of the defences in criminal law, including self-defence (*Zanth v. Canada (Attorney General)*, 2004 FC 1113, 259 F.T.R. 20 at paragraphs 26, 35-36). In this case, the applicant admitted that he was involved in a fight but claimed that he was justified because he was acting in self-defence. For the defence of self-defence to apply under subsection 34(1) of the *Criminal Code,* R.S.C. 1985, c. C-46, one of the conditions is that the force used must be no more than is necessary for the person to defend himself.

[17] The chairperson of the disciplinary court dismissed the applicant's defence on the grounds that he had used more force than necessary. The chairperson deconstructed the event, listing each and every one of the punches, and estimated that the applicant, by his own testimony, had continued to strike his fellow inmate after the latter had stopped defending himself. The applicant maintains that this is wrong because it is easy to judge after the fact that an individual who has been attacked

could have thrown one or two fewer punches, but this assessment cannot be done in a vacuum. Rather, it is a test with a subjective component that must assess the conduct of the individual who is defending himself based on his perception of the events (*R. v. Kandola* (1993), 27 B.C.A.C. 226, 80 C.C.C. (3d) 481 (B.C.C.A.) at paragraph 27). One cannot expect an individual to measure precisely the degree of force used (*R. c. Bélanger*, REJB 2003-51184, [2003] J.Q. no 13233 (QL) (C.S.Q.) at paragraph 15).

[18] The applicant submits that had the chairperson of the disciplinary court not erred in the manner in which he assessed the condition of necessary force, he would have taken into consideration the applicant's testimony of his perception of the situation, which was that he feared for his safety and that he stopped throwing punches once he was certain that his fellow inmate would not hit him any more. The chairperson could also have taken into consideration the fact that the event was brief, and especially that the applicant did not realize in this short time whether his fellow inmate could still defend himself. Thus, the chairperson of the disciplinary court did not consider the relevant evidence and erred in law in his assessment of the necessary-force condition applicable to the applicant's use of self-defence. In so doing, the chairperson interpreted the evidence incorrectly.

[19] Moreover, the decision by the disciplinary court is based on another factor, completely absent from the evidence, which is that the applicant allegedly went at his fellow inmate relentlessly and even took pleasure in continuing to hit him after realizing that he was no longer reacting. The applicant submits that it is unreasonable to base a conviction on non-existent evidence.

[20] In addition to inventing incriminating factors that were not in the evidence, the chairperson of the disciplinary court failed to consider all of the exculpatory factors relevant to assessing the use of necessary force: in particular, he did not take into consideration the fact that the applicant had thought that Mr. Dufresne had a pencil in his hands; he did not take into consideration the fact that Mr. Dufresne had broken his partial denture; and he did not take into consideration Mr. Dufresne's testimony that he had injured himself by tripping over a wire, or his testimony that the applicant had only punched him twice. Failure to consider all of this evidence warrants this Court's intervention (*R. c. Richard* (2001), 155 C.C.C. (3d) 538, 43 C.R. (5th) 278 (C.A.Q.) at paragraph 9).

Respondent's arguments

[21] The respondent explained that the purpose of the disciplinary system, as described in section 38 of the *CCRA*, "is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community". As for how this system operates, it is important to understand the nature and role of the disciplinary court at the La Macaza Institution (*Canada (Correctional Services) v. Plante* (1995), 103 F.T.R. 161, 29 W.C.B. (2d) 299 (F.C.T.D.)).

[22] The respondent submits that the theory of self-defence cannot be accepted because the applicant used excessive force to repel the attack by his fellow inmate. The applicant admitted that he was in a fight but claimed self-defence, alleging that he was justified in fighting to defend himself against an assault by Mr. Dufresne.

[23] However, in claiming self-defence the applicant had to convince the chairperson that he (i) had been unlawfully assaulted; (ii) had not provoked the assault; (iii) had used force without intent to cause death or grievous bodily harm; and (iv) had used only the force necessary to defend himself (*Zanth*, above, at paragraph 23). The only point in issue here, therefore, is the force necessary to repel the assault.

[24] The chairperson was justified in basing himself on the testimony of the applicant himself, because the fellow inmate was unable to remember specific facts.

[25] In fact, in response to one of the questions asked by the chairperson, the applicant replied that after landing a first punch on his attacker's nose, he said "n'est plus capable de m'en donner lui [he won't be able to give me any more that one]" and "je ne lui laisse plus de chance, là au gars, la [I'm not about to give that guy any more chances, there]".

[26] Although the applicant claimed to fear for his safety, testifying that he had continued the fight because he was afraid for his safety, he gave no explanation as to why he feared for his safety when he saw that his fellow inmate could no longer defend himself.

[27] The respondent submits that by acting this way, he changed from victim to aggressor. Knowing that he had overpowered Mr. Dufresne after one punch and that he was no longer fighting back, the three to four extra punches went beyond what was necessary to repel the assault. There

was no threat after the first punch, so the applicant should have stopped, which he did only when the teacher arrived on the scene.

[28] The respondent points out that the purpose of judicial review is not to give one of the parties the opportunity to re-argue the facts already submitted to the administrative decision-maker in the hopes of getting a different result. The chairperson heard the applicant and was able to assess his explanation regarding the amount of force he had used to defend himself, and based on the applicant's admission, he rejected the applicant's claim that he had acted in self-defence.

Analysis

[29] Self-defence is defined in subsection 34(1) of the *Criminal Code*. In *R. v. Hébert*, [1996] 2 S.C.R. 272 at paragraphs 23 and 25, the Supreme Court of Canada specified how this type of defence is to be interpreted in a trial before a jury.

> … The jury must indeed be satisfied that every element of the defence has been met. That is to say for the defence to be successful the jury must be left with a reasonable doubt as to the existence of all the elements of the defence. Namely (i) the accused was unlawfully assaulted; (ii) the accused did not provoke the assault; (iii) the force used by the accused was not intended to cause death or grievous bodily harm; and (iv) the force used by the accused was no more than necessary to enable him to defend himself. The trial judge was correct in stating that the defence would only succeed if a reasonable doubt was raised with respect to all of these elements.
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> …
>
> …The Crown is not required to prove beyond a reasonable doubt that the appellant's conduct fails on every element of the defence. It suffices if the Crown can prove beyond a reasonable doubt that any of the four elements set out above was not established.

[30] As the Federal Court of Appeal held in *Ayotte v. Canada (Attorney General)*, 2003 FCA 429, 320 N.R. 339, the burden of proof on the prosecutor is the same in a disciplinary hearing. The standard of proof that the tribunal must apply is set out in subsection 43(3) of the *CCRA*, which stipulates that "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."

[31] In this case, the chairperson did a blow-by-blow analysis of the fight between the applicant and his fellow inmate. However, as noted by the applicant, the chairperson's consideration of the factual background of the incident was very cursory, so that he overlooked the short duration of the fight, the fact that the applicant thought that Mr. Dufresne had a pencil in his hands (hearing of June 25, 2008), the fact that his partial denture was broken by his fellow inmate and the testimony of Mr. Dufresne, who said that the applicant only hit him twice in the face. As well, at pages 60 and 62 of the transcript, the Court notes that the chairperson mistakenly stated that the applicant noticed after throwing a punch at Mr. Dufresne that the latter was no longer able to defend himself.

[32] In *Ayotte*, above, the Federal Court of Appeal extended to persons charged with disciplinary offences under the *CCRA* the same procedural safeguards, in terms of their defence, that apply in ordinary trials. The Court acknowledged the particular nature of the prison system, where authorities must have a degree of flexibility to ensure that order is maintained. Nevertheless, those who are charged with a disciplinary offence are entitled to procedural fairness.

[33] Whatever the gravity of their faults, inmates have the right to be heard and to assert their rights. The right to self-defence is already defined in the *Criminal Code* and by many court decisions.

[34] Moreover, on page 5 of the transcript of the oral decision, the chairperson commented that the applicant "[translation] practically took pleasure in continuing to hit Dufresne even after realizing–and these are his own words–that Dufresne was no longer responding after the first punch." This finding is not based on any factual evidence, and nothing in the transcript suggests such an attitude on the applicant's part.

[35] It is therefore clear in this case that the chairperson did not give the applicant the benefit of the doubt and did not seriously consider the latter's defence. For these reasons, I am inclined to allow the application for judicial review and to refer the matter back to a new and differently-constituted panel.

[36] There is no need to analyze the applicant's argument that the Correctional Service breached a principle of procedural fairness by filing only the incident report instead of all available observation reports.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the matter be referred back to a differently-constituted panel for a new hearing taking these reasons into account. No costs are awarded.

"Michel Beaudry"
Judge

Certified true translation
Brian McCordick, Translator

APPENDIX

Corrections and Conditional Release Act, S.C. 1992, c. 20:

38. The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.

38. Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à encourager chez les détenus un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.

40. An inmate commits a disciplinary offence who

40. Est coupable d'une infraction disciplinaire le détenu qui:

(h) fights with, assaults or threatens to assault another person;

h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;

42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.

42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.

43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.

43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.

(2) A hearing mentioned in subsection (1) shall be conducted with the inmate present unless

(2) L'audition a lieu en présence du détenu sauf dans les cas suivants:

(a) the inmate is voluntarily absent;

a) celui-ci décide de ne pas y assister;

(b) the person conducting the hearing believes on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

b) la personne chargée de l'audition croit, pour des motifs raisonnables, que sa présence mettrait en danger la sécurité de quiconque y assiste;

(c) the inmate seriously disrupts the hearing.

c) celui-ci en perturbe gravement le déroulement.

(3) The person conducting the hearing shall not

(3) La personne chargée de l'audition ne peut

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.

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.

Corrections and Conditional Release Regulations, SOR/92-620:

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 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

a) un énoncé de la conduite qui fait l'objet de l'accusation, y compris la 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;

(b) state the time, date and place of the hearing.

b) les date, heure et lieu de l'audition.

(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge, by a staff member as soon as practicable.

(2) L'agent doit établir l'avis d'accusation disciplinaire visé au paragraphe (1) et le remettre au détenu aussitôt que possible.

31. (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to

31. (1) Au cours de l'audition disciplinaire, la personne qui tient l'audition doit, dans des limites raisonnables, donner au détenu qui est accusé la possibilité:

(a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and

a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de présenter des éléments de preuve, d'appeler des témoins en sa faveur et d'examiner les pièces et les documents qui vont être pris en considération pour arriver à la décision;

(b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.

b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.

(2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is

(2) Le Service doit veiller à ce que le détenu accusé d'une infraction disciplinaire grave ait,

given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

dans des limites raisonnables, la possibilité d'avoir recours à l'assistance d'un avocat et de lui donner des instructions en vue de l'audition disciplinaire et que cet avocat puisse prendre part aux procédures au même titre que le détenu selon le paragraphe (1).

Criminal Code, R.S.C. 1985, c. C-46 :

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

34. (1) Toute personne illégalement attaquée sans provocation de sa part est fondée à employer la force qui est nécessaire pour repousser l’attaque si, en ce faisant, elle n’a pas l’intention de causer la mort ni des lésions corporelles graves.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1410-08
STYLE OF CAUSE:	**ROBERT LEMOY** **v. ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 30, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	May 4, 2009

APPEARANCES:

Daniel Royer	FOR THE APPLICANT
Nicholas R. Banks	FOR THE RESPONDENT

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