Federal Court Cour fédérale

Date: 20110517

Docket: T-1351-10

Citation: 2011 FC 560

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 17, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

STEVE BOISSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

I Introduction

[1] By this application for judicial review, Steve Boissel (applicant), an inmate at the Leclerc penitentiary, is asking the Court to set aside his disciplinary conviction dated July 22, 2010, by the Chairperson of the disciplinary court, who found him guilty of refusing or failing to provide, on March 4, 2010, a urine sample when demanded under the *Corrections and Conditional Release Act* (Act).

[2] Paragraph 40(*l*) of the Act reads as follows:

40. An inmate commits a disciplinary offence who	**40.** Est coupable d'une infraction disciplinaire le détenu qui :
(l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;	*l)* refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

[3] Subsection 43(3) of the Act stipulates the following:

43. . . . (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. [Emphasis added.]	**43. …** (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. [Je souligne.]

[4] On March 4, 2010, the applicant received a Notification to Provide a Urine Sample in Institution. It is undisputed that the applicant did not provide the said sample.

[5] Before being called for the urine test, the applicant testified, and this has not been contradicted, that he had drunk a litre of water while exercising at the gym and urinated twice. He also testified that, when the officers arrived to take him for the test, he had drunk more because [TRANSLATION] "he no longer had the urge to go". Once in the sample location, he drank another three to four glasses to help him urinate.

[6] He informed Officer Hill, who was accompanying him, that he was unable to urinate in front of him given the fact that he was assaulted when he was younger. He suggested that Officer James Hill strip search him so that he would, afterwards, be able to provide his sample in private, an alternative that had been successful when he had been an inmate at the Drummondville penitentiary. This alternative was refused.

[7] It is undisputed that he did not try to urinate in the sense that he did not pull down his pants; however, he stayed at the sample location for the required two hours in case he had the urge to urinate.

[8] The same day, Officer Hill filed an offence report describing the situation as follows: [TRANSLATION] "the inmate was unable to provide a urine sample after the prescribed two hours". He also noted [TRANSLATION] "P.S. no attempt."

II Disciplinary court's decision

[9] The context of the disciplinary court's decision is important. That was not the first time the applicant had appeared before the Chairperson of the disciplinary court. He had appeared before him on February 25, 2010, accused of having failed or refused to provide a urine sample on a prior occasion. He had pleaded not guilty raising the same lawful excuse on the same ground, that is, his inability to urinate in front of another person. The disciplinary court had acquitted him [TRANSLATION] "on a reasonable doubt. I had a doubt, at the time", indicated the Chairperson. He added:

> [TRANSLATION]
>
> I can tell you that I have carefully analyzed the case law since then, namely, the issue of reverse onus and I . . .
>
> The problem is that word seems to have spread and that similar arguments are often given in numerous establishments.
>
> The important test is: am I convinced that it is a lawful excuse? And I have stated repeatedly that my decision dated February twenty-fifth (25) was an error on my part. I prefer to say this right off.
> (Applicant's Record, page 55)
>
> [Emphasis added.]

[10] During the arguments by counsel for the applicant, the disciplinary court began discussing two judgments: (1) *Ayotte v. Canada (Attorney General)* decided by the Federal Court of Appeal, 2003 FCA 429, and (2) *Durie v. Canada (Attorney General)*, 2001 FCT 22, a decision by Justice McKeown of the Federal Court. The two cases dealt with the same problem as the one before me: an inmate's failure to urinate.

[11] During this discussion, counsel for Mr. Boissel stated the following [TRANSLATION] "only a doubt needs to be raised on this issue and no higher burden lies on the accused". In reply, the disciplinary court stated the following:

> [TRANSLATION]
>
> (1) This is what is important, because in my opinion, the issue of beyond a reasonable doubt applies to the offence committed and not the excuse. And, what I just mentioned benefits both sides equally.

(2) I think it is clear; the evidence shows that the offence was technically committed. You will see why I say "technically", it is that he did not provide the sample within those two hours (2:00); therefore, there is no reasonable doubt in that respect.

(3) From that point on, the burden shifts to the inmate and I must ask myself the question: am I satisfied, as independent Chairperson, which is my prerogative, that I was presented with a lawful excuse?

[12] The disciplinary court cited the following excerpt from *Durie*, by Justice McKeown:

> [5] . . . The onus of proof is on the Respondent (prosecutor) in inmate disciplinary hearings. The onus shifts to the Applicant (accused) when the Respondent has shown that the offence has taken place and the Applicant is offering lawful excuse. The Chairperson erred in requiring medical evidence and/or documentation. The Applicant is entitled to offer evidence on lawful excuse and the Chairperson should weigh the evidence and determine whether it constitutes lawful excuse. The Applicant is not required to produce medical evidence or documentary evidence, but in many cases it would be in the Applicant's interest to do so. There is no standard type of evidence that is required by law. [Emphasis added]

[13] The disciplinary court did not cite Justice McKeown's approval that the Chairperson had answered the question properly when she [the Chairperson] stated:

> . . . in terms of Criminal law . . . , if this was a Criminal case, you've certainly raised a reasonable doubt. [Emphasis added]

[14] The disciplinary court agreed with the statement of counsel for Mr. Boissel that when an accused argues a lawful excuse, the Chairperson of the disciplinary court must weigh the evidence and determine whether it is in fact a lawful excuse (emphasis added by the disciplinary court), and added the following:

> [TRANSLATION]
>
> This is not a question of raising a reasonable doubt; if it were, once the excuse submitted was plausible, meaning theoretically feasible, the person would automatically be acquitted.
>
> The independent Chairperson is granted the prerogative to decide whether it is a lawful excuse. It is not a question of beyond a reasonable doubt . . .
>
> Mr. Boissel, or anyone else for that matter, does not have a higher burden. He must merely raise an excuse, not a doubt, a lawful excuse. And determining the lawfulness or unlawfulness of that excuse is up to the independent Chairperson.
>
> [Emphasis added.]

[15] During his argument before the disciplinary court, counsel for Mr. Boissel insisted (1) on the importance of credibility in evaluating the lawful excuse defence presented by the accused; (2) that, in any event, the disciplinary court had to apply the principles stated by the Supreme Court of Canada in *R. v. W (D.)*, [1991], 1 S.C.R. 742; (3) that his client was credible; and (4) that his lawful excuse defence must be assessed on a balance of probabilities.

[16] In reply, the Chairperson reacted in the following way:

- At page 54 of the hearing transcript (transcript), he accepted that Mr. Boissel had informed Officer Hill that he was unable to urinate in front of him but [TRANSLATION] "nevertheless there was no attempt. And I have tightened my criteria for evaluating the lawful excuse . . . ".
  [Emphasis added.]

- Repeated several times that his decision to acquit him on February 25, 2010, was erroneous (transcript at pages 54, 57, 60, 63) and that he had revised his position (transcript, page 57).

- Repeated several times that Mr. Boissel had been required to make an attempt to urinate (transcript, page 57).

- Found, in several areas, that Mr. Boissel had not convinced him that [TRANSLATION] "it is a lawful excuse" and that he was not satisfied (transcript at pages 57, 58, 59, 63).

- However, at page 64, the Chairperson stated: [TRANSLATION] "You must at the very least make an attempt because . . . I am not trying to tell you that if you had made an attempt, I would have come back and told you that I am convinced".

III Analysis

a) Standard of review

[17] The issue Mr. Boissel raised is whether the Chairperson of the disciplinary court breached procedural fairness in the disciplinary hearing by imposing on the applicant the burden of proving his lawful excuse defence rather than requiring that he merely raise a reasonable doubt. This issue is a question of law. It follows that the standard of review is correctness.

b) Discussion and conclusion

[18] In *Ayotte*, above, the accused argued before the disciplinary court his inability to provide the urine sample despite reasonable efforts. Justice Létourneau indicates, at paragraph 17 of his reasons, that " . . . this defence amounted to saying that the elements of the *actus reus* of the offence that he was charged with - be it the omission or the act of refusal - were missing." In other words, Justice Létourneau believes that the defence was that his refusal or omission had been involuntary. The guilty verdict was set aside on the ground that the Chairperson of the disciplinary court had not ruled on this defence. Justice Létourneau states the following at paragraph 20 of his reasons: "Similarly, he could weigh and assess the evidence submitted by the appellant in support of his defence . . . ". He adds the following:

> [22] Moreover, the chairperson of the disciplinary court misdirected himself on the law in this case where credibility was important because all of the evidence rested on the contradictory testimony of the two witnesses. Even if he did not believe the appellant's testimony, he had to acquit him if a reasonable doubt subsisted as to his guilt. Even if he did not believe the appellant's deposition, he should have examined it in the context of the evidence as a whole and the reasonable inferences that he could draw from each and every piece of evidence. But after that examination he had to acquit him if he was not convinced of his guilt beyond a reasonable doubt. A reading of the transcript of the arguments clearly indicates that the chairperson of the disciplinary court did not conduct this exercise. He was content to make an inappropriate equation between the appellant's guilt and his absence of credibility, thereby altering the standard of proof required by the Act to support a guilty verdict.
>
> [Emphasis added.]

[19] Counsel for Mr. Boissel, before this Court, raised the decision of the Supreme Court of Canada in *R. v. Fontaine*, [2004] 1 S.C.R. 702 on the issue of determining the nature of the burden on Mr. Boissel. In that case, Mr. Fontaine had submitted a defence of mental disorder automatism. It was Justice Fish who wrote the reasons of the Court.

[20] What interests us in that decision is the distinction Justice Fish makes between the two types of burdens that may apply when an accused raises a defence: evidential or persuasive. He explains, at paragraph 11 of his reasons, that the evidential burden is not a burden of proof as it determines whether an issue should be left to the trier of facts whereas the persuasive burden determines how the issue should be decided. He specifies the distinction at paragraph 12 as follows:

> 12 These are fundamentally different questions. The first is a matter of law; the second, a question of fact. Accordingly, on a trial before judge and jury, the judge decides whether the evidential burden has been met. In answering that question, the judge does not evaluate the quality, weight or reliability of the evidence. The judge simply decides whether there is evidence upon which a properly instructed jury could reasonably decide the issue.

[Emphasis added.]

[21] At paragraph 14, he states that the evidential burden is discharged "if there is some evidence upon which a properly instructed jury could reasonably decide the issue."

[22] According to Justice Fish, in some instances, the proponent of an issue bears both the persuasive and the evidential burdens, but this is not invariably the case and he explains that this depends on whether it is a "reverse onus" defence. Paragraphs 52 to 57 of his reasons are as follows:

> 52 In some instances, the proponent of an issue bears both the persuasive and the evidential burdens. But this is not invariably the case.
>
> 53 On the ultimate issue of guilt, the Crown bears both burdens. The Crown's persuasive burden on this issue can only be discharged by proof beyond a reasonable doubt. Accordingly, as McLachlin J. explained in *Charemski*, *supra*, the case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt.
>
> 54 In the case of "reverse onus" defences, such as mental disorder automatism, it is the accused who bears both the persuasive and the evidential burdens. Here, the persuasive burden is discharged by evidence on the balance of probabilities, a lesser standard than proof beyond a reasonable doubt. Reverse onus defences will therefore go to the jury where there is any evidence upon which a properly instructed jury, acting judicially, could reasonably conclude that the defence has been established in accordance with this lesser standard.
>
> 55 With respect to all other "affirmative" defences, including alibi, duress, provocation and others mentioned in *Cinous*, at para. 57, the persuasive and the evidential burdens are divided.
>
> 56 As regards these "ordinary", as opposed to "reverse onus" defences, the accused has no persuasive burden at all. Once the issue has been "put in play" (*R. v. Schwartz*, [1988] 2 S.C.R. 443), the defence will succeed unless it is disproved by the Crown beyond a reasonable doubt. Like all other disputed issues, however, defences of this sort will only be left to the jury where a sufficient evidential

> basis is found to exist. That foundation cannot be said to exist where its only constituent elements are of a tenuous, trifling, insignificant or manifestly unsubstantive nature: there must be evidence in the record upon which a properly instructed jury, acting judicially, could entertain a reasonable doubt as to the defence that has been raised.
>
> 57 From a theoretical point of view, “reverse onus” defences and “ordinary affirmative defences” may thus be thought to be subject to different evidential burdens. But in this as in other branches of the law, pure logic must yield to experience and, without undue distortion of principle, to a more practical and more desirable approach. In determining whether the evidential burden has been discharged <u>on any defence</u>, trial judges, as a matter of judicial policy, should therefore always ask the very same question: Is there in the record any evidence upon which a reasonable trier of fact, properly instructed in law and acting judicially, could conclude that the defence succeeds?

[23] My reading of Mr. Boissel’s hearing transcript demonstrates that the Chairperson of the disciplinary court committed the following errors:

(1) He determined that, in raising the defence of his inability to provide a urine sample, the burden of proof was reversed and it was up to Mr. Boissel to convince the disciplinary court that his lawful defence was well-founded. According to *Fontaine*, the burden on the accused was evidential and not persuasive.

(2) What is more, the Chairperson of the disciplinary court did not specify the nature of the burden on Mr. Boissel. He simply ruled that the evidence submitted by Mr. Boissel [TRANSLATION] “did not convince him”. According to *Fontaine*, “the persuasive burden is discharged by evidence on the balance of probabilities”.

(3) The inability defence signifies that his refusal or failure was involuntary. This was an <u>ordinary</u> defence as opposed to a <u>reverse onus defence</u>; the accused bears no persuasive burden. According to Justice Fish, at paragraph 56, once the issue has been put in play, the defence will succeed unless it is disproved by the Crown beyond a reasonable doubt.

[24] In my opinion, the Chairperson of the disciplinary court misdirected himself in law on this matter.

[25] It is true that, in *Fontaine*, Justice Fish indicated, at paragraph 56, that ordinary defences will only be left to the jury where a sufficient evidential basis is found to exist, adding the following:

> . . . That foundation cannot be said to exist where its only constituent elements are of a tenuous, trifling, insignificant or manifestly unsubstantive nature: there must be evidence in the record upon which a properly instructed jury . . . .
>
> [Emphasis added.]

[26] In other words, the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive.

[27] I believe that Mr. Boissel raised a number of pieces of evidence in support of his evidential burden, namely, the fact that (1) he had succeeded in producing a urine sample in private, and (2) on February 25, 2010, his attempt had been unsuccessful on the grounds of an insufficient sample.

[28] For these reasons, I would allow this judicial review, I would set aside the decision by the disciplinary court and I would refer the matter to a differently constituted disciplinary court for rehearing.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The decision by the disciplinary court is set aside with costs.

2. The matter is referred back to a differently constituted disciplinary court for rehearing.

"François Lemieux"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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