Date: 20080506

Docket: T-90-07

Citation: 2008 FC 580

Vancouver, British Columbia, May 6, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MATTHEW BOWDEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Matthew Bowden (the "Applicant") seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of an Independent Chairperson of the Millhaven Institution made on August 22, 2006. In that decision, the Independent Chairperson convicted the Applicant of an offence of possession of contraband contrary to subsection 40(i) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "CCRA") and sentenced him to 6 days of punitive segregation with no privileges.

[2] On or about June 24, 2006, the Applicant entered into occupation of cell 1L-130 in the Millhaven Institution, a maximum security federal prison. On July 4, 2006, a contraband seizure tag was issued after his cell was searched. The tag indicated that the alleged contraband was a homemade weapon, that is an 8-inch piece of aluminum.

[3] On July 7, 2006, the Offence Notice was signed, formally charging the Applicant pursuant to subsection 40(i) of the CCRA. This Notice was not delivered to the Applicant, but was delivered to another inmate, named Bowen, who resided in cell 1L-102, the cell that the Applicant had previously occupied.

[4] On August 22, 2006, a disciplinary hearing was held. Evidence was heard from Officer Boven, who had conducted the search. Officer Boven testified about the search of the Applicant's cell and the discovery of the contraband. His total testimony is as follows:

> **Officer Boven:** On July 4th this year, while conducting a search, this officer found a homemade weapon in cell 13010. The weapon was made from a piece of aluminum window frame, approximately eight inches in length, and sharpened to a point. The weapon was found under the toilet. The cell's occupant was Inmate Bowden, IFS 3925042. Attached is a copy of the picture.

[5] The Applicant spoke at the hearing but it is unclear whether he was giving evidence or presenting submissions. He was not represented by counsel. The Applicant stated the following as appears from the transcripts of the hearing:

…
ICP: Thank you. Do you wish to call or give evidence, Sir?

MR. BOWDEN: I'd like to make a couple of points, yes.

ICP: Go ahead, Sir.

MR. BOWDEN: The first point I'd like to make is this. When the charge - last time I appeared in court, the charge was supposed to be delivered to me on a Friday and I indicated to you that it hadn't been delivered to me, so I returned to the range and found out that it was actually delivered to another inmate with a similar last name as mine who resided in a cell (inaudible). And consulted, informally contacted the corrections supervisor regarding that matter. He said just to appear in court, and that (inaudible) to ask the officer that delivered the charge to confirm the fact that it was delivered to the wrong person.
…

…
ICP: We are now dealing with the substantive issue of the charge, Sir, and the evidence that I've heard.

MR. BOWDEN: All right, okay, I'm going onto the next.

ICP: Please.

MR. BOWDEN: I resided in the cell for approximately a week and a half and I cleaned up and (inaudible) I saw there was some debris as well as some silicone in front of the toilet. (inaudible) saying we found a weapon in your cell. But I remember the chunk of silicone which seemed to be blocking – seemed to be covering the compartment where the weapon was found, so.

ICP: Which compartment would this be?

MR. BOWDEN: There's a small, underneath the toilet, there's a small gap, about this high and this long. (Inaudible) Like I said it was a chunk of silicone. It had been sealed for some time. So, my argument would be that (inaudible) Like I said, my cell was searched (inaudible).

ICP: Well, had you retained counsel, Sir, your counsel may have requested records as to when you first occupied the cell, the search of

> your cell before your occupancy or for that matter, during your occupancy up to the date of this charge, but you've chosen not to do that. I'm not going to embrace your speculation as to weeks, months or years.
>
> **MR. BOWDEN**: No, I'm just stating that.
>
> **ICP**: I understand.
>
> **MR. BOWDEN**: It's quite possible (Inaudible) That's another thing I have issues and it seems to me that the chunk of silicone (inaudible) and the fact that it was found, the chunk of silicone had dried out.
>
> **ICP**: How do you know, Sir, the silicone came from that particular area, Sir, unless you had occasion to look at that?
>
> **MR. BOWDEN**: Because as I said, the pattern was the same and there was a trail of debris and beside that was a chunk, two chunks of silicone that appeared to fit the size that remained.

[6] The Applicant said that he had occupied his cell for only 10 days before the search and seizure, and that it was possible that a previous occupant of the cell had placed the contraband under that toilet and covered it with a piece of silicone without the Applicant's knowledge.

[7] The Independent Chairperson made the following statement:

> There is no question in my mind, Mr. Bowden, that you had knowledge and you had control, and thus, you had possession of the contraband in question. As such, Sir, based on the evidence which I've heard, which is the only information that I base my decision upon, I am satisfied beyond a reasonable doubt that you were in possession of the contraband as alleged. To that end you are found guilty.

[8] The sole issue arising is whether the Independent Chairperson made a reviewable error in finding the Applicant guilty of possession of contraband: should the Court intervene in the finding that the Applicant had knowledge of the presence of the weapon.

[9] According to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, decisions of administrative decision-makers are to be reviewed on either the standard of correctness or that of reasonableness. The principal issue in this case is one of mixed fact and law, involving the assessment of the evidence in light of the relevant statutory provisions. According to the decision in *Dunsmuir* at para. 53, the standard of reasonableness will apply. The standard of correctness will apply to any breach of procedural fairness.

[10] Pursuant to section 43 of the CCRA, the correct legal test for possession of contraband in prison is that the accused must be proven to have knowledge, care and control of the contraband, such proof to be established beyond a reasonable doubt. That standard is set out in subsection 43(3) of the CCRA, as follows:

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.	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.

[11] In *Lee v. Kent Institution*, 70 F.T.R. 155, the Court said the following at para. 3 about this standard:

> I am prepared to assume, without deciding, that for the Respondent to convict the Applicant of this offence he would have to be satisfied of guilt beyond a reasonable doubt. I further assume (although counsel did not provide precise authority as to the applicability of this test) that possession of contraband is not proven unless the disciplinary court is satisfied that the inmate knowingly had possession of something which was found in his quarters.

[12] Any doubt about the basis for a finding of guilt must be resolved in favour of the prisoner; see *Taylor v. Canada (Attorney General)*, 2004 FC 1536 at para. 14, [2004] F.C.J. No. 1851.

[13] In cases where evidence of opportunity is accompanied by other inculpatory evidence, then something less than exclusive opportunity may be sufficient to establish guilt. That was the situation in *R. v. Yebes*, [1987] 2 S.C.R. 168. Although the Applicant had the opportunity to possess the contraband, as a result of his occupation of the cell, the evidence does not establish that he had the exclusive opportunity to do so.

[14] There does not appear to be any additional inculpatory evidence in this case that would support a conclusion, beyond a reasonable doubt, that the Applicant had control or knowledge of the contraband. In *Smith v. Canada (Attorney General)*, 282 F.T.R. 91, the Court found that the applicant did not have exclusive opportunity to possess the contraband and he presented plausible alternatives to explain its presence in his cell. In the present case, the evidence shows that the

Applicant had only recently occupied the cell, after the prior occupation of someone else with a similar name, to whom the Offence Notice was delivered in place of the Applicant.

[15] In these circumstances, and having regard to the relevant jurisprudence, I conclude that the decision of the Independent Chairperson was not reasonable. He failed to properly apply subsection 43(3) of the CCRA to the evidence.

[16] There is a further error in this decision, in my opinion. The Applicant was not given notice of the disciplinary charge, as required by section 42 of the CCRA. That section reads as follows:

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.

[17] In the course of the hearing, the Applicant raised the issue of the lack of notice. The Independent Chairperson refused to give an explanation in that regard. This omission raises concern about adequate respect for procedural fairness.

[18] In the result, the application for judicial review is allowed and the decision of the Independent Chairperson, made on August 22, 2006, is quashed.

JUDGMENT

This application for judicial review is allowed and the decision of the Independent Chairperson, made on August 22, 2006, is quashed.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-90-07
STYLE OF CAUSE:	MATTHEW BOWDEN v. THE ATTORNEYGENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 31, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
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