Date: 20090121

Docket: A-242-08

Citation: 2009 FCA 12

CORAM: **DÉCARY J.A.**
NOËL J.A.
BLAIS J.A.

BETWEEN:

ANTHONY DAOULOV

Appellant

and

ATTORNEY GENERAL OF CANADA

and

CRIMINAL CONVICTION REVIEW GROUP

Respondents

Heard at Montréal, Quebec, on January 14, 2009.

Judgment delivered at Ottawa, Ontario, on January 21, 2009.

REASONS FOR JUDGMENT BY: BLAIS J.A.

CONCURRED IN BY: DÉCARY J.A.
NOËL J.A.

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<u>REASONS FOR JUDGMENT</u>

[1] This is an application for judicial review from a decision dated April 29, 2008, by Justice Orville Frenette of the Federal Court, *Anthony Daoulov v. Attorney General of Canada and Criminal Conviction Review Group*, 2008 FC 544.

[2] This case concerns a decision by Martin Lamontagne, a lawyer with the Criminal Conviction Review Group (CCRG) of the Department of Justice Canada, to the effect that there was

no reasonable basis to conclude that a miscarriage of justice had likely occurred in the appellant's case.

[3] Section 696.4 of the *Criminal Code* reads as follows:

> 696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including
>
> (*a*) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
>
> (*b*) the relevance and reliability of information that is presented in connection with the application; and
>
> (*c*) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

> 696.4 Lorsqu'il rend sa décision en vertu du paragraphe 696.3(3), le ministre de la Justice prend en compte tous les éléments qu'il estime se rapporter à la demande, notamment :
>
> *a*) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;
>
> *b*) la pertinence et la fiabilité des renseignements présentés relativement à la demande;
>
> *c*) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

[4] In accordance with the above section, when making a decision on the appellant's application to have his conviction reviewed, the Minister has the obligation to take into account all matters that the Minister considers relevant.

[5] The respondents acknowledge that the decision of the Attorney General's prosecutor to order a stay in the criminal proceedings resulting from the private complaint filed by the appellant constitutes a new fact under paragraph 696.4(*a*) and that the application is not an appeal within the meaning of paragraph 696.4(*c*).

[6] In terms of the test for the relevance and reliability of this new fact, as stated at paragraph 696.4(*b*), the evidence on record having led to the appellant's conviction is to the effect that he had a large quantity of heroin in his possession at the time of his arrest and that he apparently made a free and voluntary oral statement to police officers subsequent to his arrest. The appellant's allegations regarding the role of the informer, whom he now believes he can identify as a certain Mr. Di Capua, lie in the realm of speculation. In my opinion, the appellant has failed to demonstrate how the staying of the abovementioned proceedings could have influenced his conviction if the judge and jury had known this fact. The record allowed the Minister's delegate to conclude that there was no miscarriage of justice within the meaning of section 696.3 of the *Criminal Code*.

[7] On this point, I refer to the comments of the Chief Justice of the Supreme Court in *R. v. Leipert*, [1997] 1 S.C.R. 281, paragraph 21, quoted by Justice Proulx of the Court of Appeal of Québec in *R. v. D'Aragon*, 150 C.C.C. (3d) 272:

> [21] . . . The court held that the usefulness of the information was speculative and that mere speculation that the information might assist the defence is insufficient. If speculation sufficed to remove the [informer] privilege, little if anything would be left of the protection which the privilege purports to accord.

[8] In fact, at the time of his trial, the appellant had already abandoned the idea of having Mr. Di Capua testify, for strategic reasons.

[9] Mr. Lamontagne concluded that the new evidence filed by the appellant was irrelevant and unrelated to the evidence that had led to his conviction. In his opinion, this new evidence would not have affected the verdict in respect of the appellant. That conclusion is entirely reasonable.

[10] In reviewing Mr. Lamontagne's decision, the trial judge applied the standard of review of reasonableness. He based this conclusion on the four criteria set forth in *Dunsmuir v. New Brunswick*, 2008 SCC 9, namely (a) the existence of a privative clause or right of appeal; (b) the relative expertise of the tribunal (or the administrative body) on the question at issue; (c) the objectives of the governing statute; and (d) the nature of the problem.

[11] In my opinion, the trial judge was correct to conclude that the standard of review applicable to the decision of the Minister's delegate was reasonableness.

[12] In concluding that the appellant failed to show that Mr. Lamontagne's decision was unreasonable, Justice Frenette did not commit any error warranting the intervention of this Court.

[13] I would dismiss the appeal with costs.

"Pierre Blais"

J.A.

"I agree.
Robert Décary, J.A."

"I agree.
Marc Noël, J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-242-08

Appeal of a decision by Justice Orville Frenette of the Federal Court, dated April 29, 2008. (2008 FC 544)

STYLE OF CAUSE: Anthony Daoulov v. Attorney General of Canada and Criminal Conviction Review Group

PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 14, 2009
REASONS FOR JUDGMENT BY:	BLAIS J.A.
CONCURRED IN BY:	DÉCARY J.A NOËL J.A.
DATED:	January 21, 2009

APPEARANCES:

Anthony Daoulov	FOR THE APPELLANT
Jacques Savary	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS