Federal Court of Appeal | Cour d'appel fédérale

Date: 20190515

Docket: A-195-18

Citation: 2019 FCA 146

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

JEAN-CLAUDE BOUCHARD

Appellant

and

DEPARTMENT OF JUSTICE OF CANADA

Respondent

Heard at Montréal, Quebec, on May 13, 2019.

Judgment delivered at Montréal, Quebec, on May 15, 2019.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] On June 19, 2015, Jean-Claude Bouchard (the appellant) filed under subsection 696.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 an application for review of his conviction for first degree murder, submitting that a miscarriage of justice likely occurred in his case. Essentially, the appellant's application was supported by two affidavits: one by Gilles Bénard, a third party who confesses to having committed the crime and says that the appellant is innocent of the

murder for which he was convicted, and the other by his son, Alexandre Bénard, who says, among other things, that his father once confided to him that he had [TRANSLATION] "shot someone."

[2] On April 21, 2016, the Minister confirmed by letter that she had completed the preliminary assessment of the appellant's application and that she was dismissing it with reasons. She found, among other things, that the new evidence did not fall under the exceptions to the general rule against the admission of hearsay. The Minister gave the appellant one year to provide additional information. The appellant took advantage of that time and sent additional information on January 13, 2017.

[3] A few months later, on March 24, 2017, the Minister dismissed the appellant's application for review since, in her view, the additional information sent on January 13, 2017 was not such as to alter her decision. In the Minister's opinion, there were therefore no reasonable grounds to believe that a miscarriage of justice likely occurred in the appellant's case. On May 30, 2018, the Federal Court confirmed the reasonableness of the Minister's decision and dismissed the appellant's application for judicial review (2018 FC 559). The appellant brought an appeal before this Court against the judgment of the Federal Court.

[4] In an appeal concerning an application for judicial review heard by the Federal Court, this Court must step into that court's shoes and focus on the administrative decision at issue, which, in the present case, is the Minister's decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46). This Court must

therefore, in reviewing the Minister's decision, make sure that the Federal Court has identified the appropriate standard of review and applied it properly. In this case, the Federal Court defined the appropriate standard of review, that of reasonableness, and properly applied it (*Winmill v. Canada (Justice)*, 2016 FCA 250 at paragraph 9).

[5] In my view, this appeal does not raise any grounds justifying this Court's intervention, since the Minister's decision is one of the possible acceptable outcomes.

[6] From the outset, the Minister properly directed herself by referring to *Lucier v. The Queen*, [1982] 1 S.C.R. 28, and then considering whether Gilles Bénard's affidavit, which clearly constitutes hearsay, meets the requirements regarding the exception to the hearsay rule for statements against penal interest. The Minister also stated that the dying declaration exception to the hearsay rule does not apply because it is limited to cases of homicide where "the offence involved the homicide of the deceased," which is clearly not the case here (*R. v. Nurse*, 2019 ONCA 260; [2019] O.J. No. 1636).

[7] The Minister then considered the so-called "principled exception" whereunder a statement such as Gilles Bénard's may be admissible if it is both necessary and reliable (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787). While the Minister was satisfied that the element of necessity was present in this case because Gilles Bénard is deceased, she found, however, that the reliability condition was not met. Several factors may have led the Minister to find as she did. The Minister said that the information provided in Gilles Bénard's affidavit was [TRANSLATION] "extremely vague" and provided [TRANSLATION] "no details" regarding the murder. Moreover,

the affidavit must be considered [TRANSLATION] “in light of the fact that [the appellant] and the affiant [Gilles Bénard] were both living in a halfway house at one point, that they knew each other and that Mr. Bénard seems to be a complete outsider to the investigation of Mr. O’Brien’s murder and to this case” (Minister’s decision at page 13). In view of these facts, the Minister reasonably found that Gilles Bénard’s affidavit was inadmissible hearsay evidence.

[8] In addition, with regard to Alexandre Bénard, Gilles Bénard’s son, the Minister found that [TRANSLATION] “[t]he father’s out-of-court statement cannot be produced as evidence of its content through the son’s affidavit” (Minister’s decision at page 14). Furthermore, in the Minister’s opinion, Alexandre Bénard’s availability for cross-examination has no impact on the reliability of the information provided by his father because Gilles Bénard could not be cross-examined for the purpose of assessing the reliability of the statement made to his son. This finding by the Minister also seems reasonable to me.

[9] The appellant asserts that the Minister erred in analyzing separately Gilles Bénard’s affidavit and the information provided by Alexandre Bénard. My belief, on the contrary, is that the Minister considered the evidence in its entirety, which included consideration of the possibility that the information provided by Alexandre Bénard could serve to corroborate his father’s affidavit. Indeed, it can be seen from the Minister’s final decision rendered on March 24, 2017 that she confirms having dealt with this issue when she states that Alexandre Bénard [TRANSLATION] “provided nothing even remotely approaching what we need to be able to assess the credibility of the information contained in Gilles Bénard’s affidavit,” which shows at the

same time that the information provided by Alexandre Bénard was not sufficient for an exception to be made to the rule of the inadmissibility of hearsay evidence.

[10] After having rejected the affidavits under the hearsay evidence rules, the Minister assessed whether the evidence in question could still be admitted as new evidence on the basis of the criteria stated by the Supreme Court in *Palmer v. The Queen,* [1980] 1 S.C.R. 759. The Minister concluded that the third criterion was not met because it requires that the evidence be plausible, i.e., that it can be believed. In other words, that evidence must be credible. Consequently, on the basis of his analysis of the hearsay issue, it was open to the Minister to find that the information provided in Gilles Bénard's affidavit was not credible.

[11] In short, from the very outset, the appellant was faced with having to meet a high burden for the admission of hearsay evidence on the basis of corroborative evidence. The fact that the evidence allows of various interpretations is certainly a major obstacle for the appellant. The Supreme Court recently made the following comments in *R. v. Bradshaw*, [2017] 1 S.C.R. 865 [*Bradshaw*] at paragraph 31, regarding the reliability standard.

> [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real

> concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

[12] While the appellant's explanation asserting the truthfulness of the statement is possible, the fact remains that it is not the only plausible explanation on a balance of probabilities (*Bradshaw*, at para. 49). Like the Federal Court, I find that the Minister's decision is reasonable because the whole of the circumstances of this case are not such as to remove the risks associated with hearsay evidence.

[13] At the hearing before this Court, the appellant made much of the fact that a previous statement made on May 26, 1983 by Ms. Guliani, a key witness in the trial, was not disclosed, thus depriving the appellant of the opportunity to present a full and complete defence and of the right to a fair trial. I cannot accept this argument either.

[14] On the one hand, the appellant's notice of appeal is silent on this point. On the other hand, the Minister clearly and convincingly explains in her decision of April 21, 2016 that, although it should have been disclosed, the statement made on May 26, 1983 was not necessary in order to discover that Ms. Guliani's testimony at the trial contained new evidence. Indeed, the solicitor of record at the trial had at his disposal all of the evidence needed to challenge Ms. Guliani's credibility, which for his own tactical reasons he refrained from doing when the opportunity presented itself. The Minister summarized the situation as follows, on page 10 of her decision:

> [TRANSLATION]
>
> As stated earlier, the information in the undisclosed statement corresponded to her (Ms. Guliani's) evidence in chief at trial, and no cross-examination was conducted to attack her credibility at that time, even though Mr. Labelle was in possession of three documents that could have been used to undermine her credibility. To challenge her credibility, he could very easily have pointed out the contradictions between her testimony and the other evidence as well as the information that she provided, but he refrained from doing so except to the extent described above.

[15] I also note that the appellant did not bring up the matter of the non-disclosure of the previous statement of May 26, 1983 when he requested a reconsideration of the January 13, 2017, application for review, but that he still tried to introduce this element at the appeal stage.

[16] As regards the notes of the police officer from the Service de police de la Ville de Montréal concerning the interview with Ms. Guliani 35 years after the murder, they confirm that she had never heard of Gilles Bénard, which tends to refute the appellant's argument and therefore confirm the reasonableness of the Minister's decision.

[17] Despite his able argument, counsel for the appellant failed to satisfy me that the Minister's decision was unreasonable.

[18] In conclusion, it must be emphasized that the Federal Court erred by awarding $750 in costs (disbursements and taxes included) to the Minister when the Minister had expressly requested that the appellant's application be dismissed without costs. Moreover, counsel for the parties at the hearing confirmed this. Consequently, I propose that the appeal be dismissed except with regard to the costs awarded by the Federal Court, which I would set aside. I would therefore not award costs before either this Court or the Federal Court.

"Richard Boivin"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Mary J.L. Gleason J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-195-18
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CONCURRED IN BY:	DE MONTIGNY J.A. GLEASON J.A.
DATED:	MAY 15, 2019

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