

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Borden, 2004 NSCA 84

Date: 20040615

Docket: CAC 203482

Registry: Halifax

Between:

John Arthur Borden

Appellant

v.

Her Majesty The Queen

Respondent

Judge(s):

Glube, C.J.N.S.; Cromwell and Hamilton, JJ.A.

Appeal Heard:

June 15, 2004, in Halifax, Nova Scotia

Written Judgment:

June 17, 2004

Held:

Appeal dismissed per oral reasons for judgment of Glube, C.J.N.S.; Cromwell and Hamilton, JJ.A. concurring.

Counsel:

Lawrence O'Neil, for the appellant
William D. Delaney, for the respondent

Reasons for judgment: (Orally)

[1] On September 11, 2002, Judge Stan Campbell convicted John A. Borden of breach of probation order contrary to s. 733.1(1)(a) of the **Criminal Code**, and of uttering a threat to cause bodily harm to two RCM Police officers contrary to s. 264.1(1)(a) of the **Criminal Code**. This was a second trial following a successful Crown appeal from Mr. Borden's acquittal at his first trial before Judge White. Following his conviction by Judge Campbell on the retrial, Mr. Borden appealed unsuccessfully to Justice Davison in the Summary Conviction Appeal Court. Mr. Borden now seeks leave to appeal to this court on a question of law alone as permitted by s. 839 of the **Criminal Code**.

History

[2] It is necessary to set out the background of this case. On May 22, 2000, John Arthur Borden was charged with resisting an arrest made purportedly on an outstanding warrant. The RCM Police went to the residence where he was staying, entered the residence and arrested him. After a scuffle, Mr. Borden was placed in a police vehicle where, the trial judge found, he threatened one of the two constables. He threatened the other officer after arrival at the Antigonish Correctional Centre. He was charged with resisting arrest (s. 129(a) of the **Criminal Code**); breach of probation (s. 733.1(1)(b) of the **Criminal Code**), and uttering a threat to two police officers to cause bodily harm (s. 264.1(1)(a) of the **Criminal Code**).

[3] At the first trial following an application under the **Charter of Rights and Freedoms**, Judge White excluded all the evidence surrounding the arrest and incarceration, including the alleged threats. He dismissed all the charges against Mr. Borden on the basis that, 1) his arrest in a dwelling house was not an emergency, therefore, it violated s. 515(10)(a) of the **Criminal Code**; and 2) his **Charter** rights, ss. 8 and 10(b), had been breached. Mr. Borden had been remanded in custody from May 22, 2002 until October 18, 2002 when the charges were formally dismissed.

[4] The Crown appealed and sitting as a Summary Conviction Appeal Court judge on February 27, 2001, Justice A. D. MacAdam ordered a new trial on the basis that the trial judge did not analyse and do the balancing required as to whether the admission of the evidence would bring the administration of justice into disrepute (**Charter**, s. 24(2), (**R. v. Collins**, [1987] 1 S.C.R. 265). His order dated May 25, 2001 provided for the case to be remitted to a new judge and that a new summons be issued ordering Mr. Borden to appear in Provincial Court in

Antigonish on May 25, 2001. Over the next two months, Mr. Borden did not appear on four scheduled dates. The appellant submits he had no notice of those four dates.

[5] On November 6 and 23, 2001, Mr. Borden appeared in court requesting that his retrial be scheduled. The set date of January 15, 2002 was adjourned due to weather. On February 13, 2002, by consent, Judge Campbell heard a **Charter** argument based on the transcript of the **Charter** *voir dire* at the first trial. On February 21, 2002, Judge Campbell stayed the charge of resisting arrest, but maintained the other two charges. He found a breach of ss. 8 and 10(b) of the **Charter** and stated: “There was no evidence obtained as a result of the breach of Mr. John Arthur Borden’s **Charter** rights nor was a nexus between the breach of a **Charter** right and the charges established. The latter charges resulted from Mr. Borden’s own words and actions, as heard and observed by the officers.”

[6] Unsuccessful attempts were made to reschedule the conclusion of the trial in July.

[7] The court wrote to counsel suggesting the trial continue on August 19, 2002 with August 26 or 27 as alternates. Counsel wrote on August 15 that he was unable to confirm Mr. Borden had received notice of the 19th as he had moved, did not have a telephone and cannot read. Mr. Borden did not appear on the proposed dates and adjournments were granted each time to allow defence counsel to contact Mr. Borden. On September 11, 2002, counsel appeared and advised the court as follows: “I’m satisfied that he [Mr. Borden] received written communication from me with respect to today’s hearing. I have no reason to believe that the phone message of Monday evening was not ... in response to that correspondence.” Counsel received a voice mail at his home from an unidentified female advising him that Mr. Borden would not be in court on September 11 as there had been a death in his family.

[8] Judge Campbell, after granting defence counsel’s request to be removed as counsel of record for Mr. Borden, proceeded with the trial and sentencing.

[9] Mr. Borden appealed the decision of guilty on the two charges and the sentence of eight (8) months in the Provincial Correctional Centre followed by two years probation.

[10] The appeal was heard by Justice J. M. Davison on June 4, 2003. He gave an oral decision dismissing the appeal. He found no nexus between the **Charter** breaches and the two remaining charges. He referred to **R. v. Goldhart** (1996), 107 C.C.C. (3d) 481 at 494 as to the issue of nexus. He relied on s. 803(2) as the basis for Judge Campbell proceeding in the absence of the accused. Alternatively, he found that Mr. Borden had absconded based on the remarks of his counsel on September 11, 2002, i.e., Mr. Borden knew he was to be in court on that date.

Grounds of Appeal

[11] The appellant raises four grounds of appeal:

1. THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to not exclude evidence of threats pursuant to section 24 of the **Charter**.
2. THAT the Summary Conviction Appeal Court Judge erred in upholding that the Learned Trial Judge gave sufficient reasons for his decision in response to the **Charter** application of the Appellant.
3. THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to conclude the trial on September 11, 2002 in the absence of the Appellant.
4. THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to impose a sentence in the absence of the Appellant.

[12] As stated, this appeal arises under s. 839 of the **Criminal Code**, therefore, leave may only be granted on any ground that involves a question of law alone. At the hearing of the appeal, the appellant withdrew the 2nd issue and we have combined issues 3 and 4.

Issue 1: THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to not exclude evidence of threats pursuant to section 24 of the Charter.

[13] The Summary Conviction Appeal Court judge agreed that although ss. 8 and 10(b) of the **Charter** had been breached, the evidence of the threats should not be

excluded. Assuming without deciding that the evidence was obtained in a manner that infringed the **Charter**, in our view, the evidence could not be excluded under s. 24(2) because in these circumstances its exclusion rather than its admission would bring the administration of justice into disrepute.

Issue 3: THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to conclude the trial on September 11, 2002 in the absence of the Appellant.

Issue 4: THAT the Summary Conviction Appeal Court Judge erred in upholding the decision of the Learned Trial Judge to impose a sentence in the absence of the Appellant.

[14] Section 803(2) states:

803. (2) Where a defendant does not appear at the time and place appointed for the trial after having been notified of that time and place, or where a defendant does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court

(a) may proceed *ex parte* to hear and determine the proceedings in the absence of the defendant as fully and effectually as if the defendant had appeared; or

(b) may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

[15] From the statement made by his counsel, Mr. Borden was aware of the date of September 11, 2002, for the continuation of the trial. He had been notified and a response came forward, although he chose not to appear. The trial judge exercised his discretion and proceeded in Mr. Borden's absence. Justice Davison did not err in confirming that s. 803(2) applied and that the trial judge properly exercised his discretion to both continue the trial and to impose sentence.

[16] Leave to appeal is granted, but the appeal is dismissed.

Glube, C.J.N.S.

Concurred:

Cromwell, J.A.

Hamilton, J.A.