

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Borden, 2013 NSSC 353

**Date:** 20131030

**Docket:** Cr. Ant. No. 420174

**Registry:** Antigonish

**Between:**

Her Majesty the Queen

v.

John Arthur Borden

**Judge:** The Honourable Justice N. M. Scaravelli.

**Heard:** October 30, 2013, in Antigonish, Nova Scotia

**Oral Decision:** October 30, 2013

**Counsel:** Darlene Oko, for the Crown  
Gerald MacDonald, for the Defendant

**Orally By the Court:**

[1] John Arthur Borden stands charged on a four count indictment namely, attempted murder contrary to **Section 239 (b) of the *Criminal Code***; aggravated assault contrary to **Section 268 (2) of the *Code***; possession of weapon for dangerous purpose contrary to **Section 88 (2) of the *Code*** and uttering death threats contrary to **Section 264.1 (1) (a)**.

[2] Mr. Borden has made an application to review a Bail Order of Judge Richard J. MacKinnon given on August 12, 2013 denying bail.

[3] **Section 520 (7) of the *Code*** provides:

(7) On the hearing of an application under this section, the judge may consider

(a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

(b) the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

(d) dismiss the application, or

(e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

[4] The grounds for denying judicial interim release are set out in ***Section 515 (10) of the Code.***

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

At the bail hearing, the crown sought detention on all three grounds. The bail judge detained Mr. Borden on the grounds that his detention is necessary to ensure his attendance in court and for public safety under *Section 10 (a) (b)*.

[5] The onus lies with the applicant on a review application. *Section 520* does not expressly define the process to be followed by the reviewing court. It has often been described by courts including Nova Scotia, that a review hearing is not limited to an appeal nor is it as wide as a de novo hearing but a combination of both. See *R vs. Charter [2008] NSSC 299*. I have also reviewed the detailed

analysis of the review process by Chief Justice Wachowich in *R. vs. Lysyk, [2003] ABQB 256*.

[6] In summary, absent new evidence the purpose of bail review is to review the transcript of evidence, submissions and the decision of the judge to assess whether there was any error made which justifies setting aside the order. Serious misunderstanding of the evidence or error in law are reversible errors. Where there is new evidence that was not before the bail judge or evidence of material change in circumstances not before the judge, the reviewing court must decide whether it justifies a determination that the bail judge's decision is no longer appropriate. The role of the review court is not to substitute its opinion for the opinion of the bail judge.

## ANALYSIS

[7] Reviewing the transcript of the bail hearing the crown with consent of defence counsel, read into the record the police summary of facts. Briefly, Mr. Borden allegedly stabbed the victim in the torso with a knife outside a residence where both were attending a party. After stabbing the victim twice, Mr. Borden

allegedly chased him uttering death threats. When the victim stopped running he was stabbed a third time. It took 21 hours for the RCMP to locate Mr. Borden with the assistance of information from the community.

[8] Mr. Borden gave evidence of his employment as a concrete finisher. He also stated that he suffered injuries on the date of the alleged offence including a stab wound to his leg. Mr. Borden offered his common law partner and parents as sureties and agreed to comply with any conditions of release.

[9] Mr. Borden's criminal record was reviewed. He has 58 convictions. In terms of violent offences he has five convictions for uttering threats contrary to *Section 264.1*. Eleven convictions under *Section 266* for assault. One conviction for assault with a weapon under *Section 267 (b)*. One aggravated assault conviction under *Section 268*. Two convictions for assaulting a police officer under *Section 270*.

[10] Other offences included three convictions under *Section 129 (a)* obstruction of justice, two convictions for failure to attend court, seven convictions for breach

of probation, and ten convictions for breach of undertakings or other release documents under *Section 145 (3)*.

[11] Having reviewed the provisions of *Section 515 (10) of the Code* and the evidence introduced at the hearing, the bail judge stated as follows:

[14] When one looks at the facts and circumstances as outlined in the Crown evidence with respect to the current charges and the fact that Mr. John Arthur Borden suffered stab wounds ... that ... I'm sorry ... that Mr. Richard Borden suffered stab wounds, that John Arthur Borden was seen chasing Mr. Richard Borden and then a third stab wound was suffered by Mr. Richard Borden, when you look at that with a backdrop of Mr. John Arthur Borden's criminal record, which includes those 11 convictions for assault, five convictions of Section 264.1 of the *Criminal Code* and the convictions for assault with a weapon, assault causing bodily harm, and aggravated assault, and then the 17 convictions for breaching undertakings or court orders, I conclude that based on Mr. Borden's record and based on the evidence that the Crown has presented with respect to the allegations of June 28<sup>th</sup>, 2013, that Mr. Borden's detention in custody is necessary to ensure his attendance in court and that Mr. Borden's detention in custody is necessary for the protection of safety of the public, including any victim of or witness to the offence or any person under the age of 18 years having regard to all the circumstances including ... and this is the phrase that I will emphasize ... any substantial likelihood ... and I find that there is a case that there is a substantial likelihood that Mr. Borden will if released from custody commit a criminal offence or interfere with the administration of justice and therefore bail is denied.

[12] Mr. Borden gave evidence at this review hearing and was cross-examined.

He confirmed his employment and available sureties. Incarceration will cause financial hardship to his common law partner. He entered guilty pleas on all 58

convictions. Mr. Borden acknowledged his record of prior breaches which included recognizance with sureties. He acknowledged being involved in a physical altercation with other inmates while on this current remand. The crown and defence agreed that alcohol was involved on the part of both Mr. Borden and the alleged victim.

[13] I am satisfied on a review of the transcript and the bail judge's reasons there was evidence before the bail judge upon which he could have reasonably determined that Mr. Borden's detention and custody was justified under *Section 515 10 (a) (b)*. The charges before the court are serious. Mr. Borden has a significant historical criminal record indicating a pattern of violence and breaches of court orders.

[14] The evidence called at this review hearing does not constitute a change in circumstances sufficient to justify setting aside the order.

[15] The preliminary hearing with respect to this matter is scheduled for November 12<sup>th</sup>, 2013 approximately two weeks from now. *Section 523 (2) of the Code* provides for a review of an Order of Detention at the conclusion of a



preliminary hearing, where more evidence surrounding the offence will no doubt be given. Moreover, further review by this court is available if there is any material change in circumstances. As a result I dismiss this application for review.