

IN THE MATTER OF THE BILL OF RIGHTS

AND

IN THE MATTER OF THE GRAND COURT RULES ORDER 77A



PETITION



TO: HER MAJESTY'S GRAND COURT OF THE CAYMAN ISLANDS
The Humble Petition of and on behalf of BRIAN EMMANUEL BORDEN

SHOWETH as follows: -

1. The Petitioner, Brian Emmanuel Borden, is charged with the Murder of Robert Mackford Bush and the Possession of an Unlicensed Firearm on 13th September 2011.

2. The Petitioner was arrested on 7th August 2012 and remanded in custody.

3. On 7th September 2012 the Petitioner appeared before Acting Justice Carol Beswick who considered his application for bail pursuant to the Bail Law (2010 Revision). In her written ruling, delivered on 13th September 2012, Mrs Justice Beswick refused the Petitioner's application.

4. The Bail Law (2010 Revision) ("the Law") provides that:

17. (1) Subject to subsection (2), a person is entitled to bail under this Part if he has been -
(a) accused of an offence but not convicted of the offence;
(b) convicted of an offence and the case has been adjourned by the court to enable inquiries or a report to be made to assist the court to deal with him for the offence; or

(c) convicted of an offence under the Misuse of Drugs Law (2010 Revision) and is appearing or has been brought before a court under section 54 or 57 of that Law.

(2) A person accused or convicted of any of the following offences is not entitled to bail -

(a) murder; and

(b) - (s) other specified offences. [emphasis added]

5. The learned judge applied Section 17(2) of the Law by way of guidance from the learned Chief Justice in *R v Whorms* [2008] CILR wherein the learned Chief Justice sought to construe the true meaning of section 17(2) of the Law.

6. *R v Whorms* provides authority for three propositions which have not been challenged by way of appeal or subsequent decision. The three propositions are:

(1) Although the proper construction of section 17(2) of the Bail Law (2007 Revision) [the terms of the Bail Law 2010 are identical] was to deny the presumptive entitlement to bail conferred by s.18, it did not imply a complete prohibition on bail in cases involving those offences listed.

(2) Section 17(2) did not shift the onus of satisfying the court that bail should be granted to the defendant—the onus remained on the prosecution to show that bail should not be granted. Any other construction, including a reversal of the evidential burden, would have been contrary to the European Convention on Human Rights, which could serve as a guide to the construction of domestic legislation in the event of doubt as to its meaning, even though not yet incorporated into domestic law. Section 17(2) should be construed so as to honour that Convention and respect for fundamental rights, including the entitlement to judicial consideration of the grant of bail conferred by Article 5(3)

(3) The existence of a judicial discretion with regard to applications for bail implied that bail should only be granted to persons charged with offences listed in section 17(2) in exceptional circumstances and that the defendant had to discharge an evidential burden in such cases.

7. *R v Whorms* was decided on 28th April 2008. The Bill of Rights came into force pursuant to the Cayman Islands Constitution Order 2009 on 6th November 2012.

8. Schedule 2 of the Constitution of the Cayman Islands Part 1; The Bill of Rights, Freedoms and Responsibilities (“The Bill of Rights”) stipulates in Article 5:

(1) *No one shall be deprived by government of liberty and security of the person; and*

(5) Any person who is arrested or detained—

(a) for the purpose of bringing him or her before a court in the execution of the order of a court; or

(b) on reasonable suspicion of his or her having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought promptly before a court; and if any person arrested or detained in such a case as in mentioned in subsection (2)(e) is not tried within a reasonable time he or she shall (without prejudice to any further proceedings that may be brought against him or her) be released either unconditionally or on reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail.

9. The Petitioner was due to be tried on 18th June 2013 but his trial had to be adjourned by agreement. It has been relisted for the 20th January 2014.

10. Should the Petitioner remain remanded in custody, he shall have been held for a period of 1 year and 5 months before his trial commences.

11. It is submitted that that section 17(2) of the Law is incompatible with the Petitioner's Right to Liberty as enshrined by Article 5(5) of the Bill of Rights in that:

- It unlawfully interferes with the presumption of innocence by repealing the entitlement to judicial consideration of the grant of bail;
- It is inconsistent with the jurisprudence on the European Convention which recognises that the right to personal liberty, although not absolute, is none the less a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention;
- It unlawfully and irreconcilably adds a further arbitrary ground for refusing admittance to bail where The European Court of Human Rights has clearly recognised only five grounds for refusing bail (the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity of detention to protect the defendant)

12. It is further submitted that *R v Whorms* is of no effect as it was decided before the Grand Court had the power to declare enacting legislation incompatible. It attempts to cure an irreconcilable position which cannot be done via "judge made" law but instead only by Legislative Assembly.

13. Further or in the alternative, it is submitted that *R v Whorms* is wrongly decided in that the learned Chief Justice sought to consider the relevant authorities concerning section 25 of the Criminal Justice and Public Order Act 1994 which provides limitations on the admittance to bail for defendants who are charged with or convicted of homicide or rape *after* a previous conviction for such an offence. Section 17(2) law requires:

- (a) no previous conviction for a specified offence only accusation; and
- (b) it provides for a list of specified offences very much less serious than homicide or rape.

14. It is further submitted that the Petitioner's detention was in breach and in violation of the his Right to Liberty as enshrined by Article 5(5) of the Bill of Rights in that it continues pursuant to a decision made under a Law which is incompatible with those rights.

