
CANADA / JUDGMENT

R. v. Kim

2011 BCSC 137

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 137 R. v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2011 BCSC 137

Date: 20110203

Docket: 24492-2

Registry: Vancouver

Regina

v.

Chol Hwan Kim

Before: The Honourable Mr. Justice Smart

Reasons for Judgment

Counsel for the Public Prosecution Service of Canada:

J. Whiting

Counsel for Mr. Kim:

P. Smith-Gander

Place and Date of Hearing:

Vancouver, B.C.

January 7, 10 and 24, 2011

Place and Date of Judgment:

Vancouver, B.C.

February 3, 2011

I. INTRODUCTION

- [1] The applicant, Chol Hwan Kim, seeks a conditional stay of proceedings of the charges he is facing until such time as the Attorney General of Canada provides state-funded counsel for him.
- [2] Applications such as the present one for state-funded counsel are commonly referred to as Rowbotham applications because they are based on the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).
- [3] Mr. Kim claims that he cannot afford to retain counsel and that he will not receive a fair trial without the assistance of counsel.
- [4] I will first provide the background to this application. I will then review the evidence and the submissions of counsel. Finally, I will set out the applicable law and provide my analysis for my decision.

II. BACKGROUND

- [5] Mr. Kim is charged with the following two offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19:
 - (1) possession of cocaine for the purpose of exportation from Canada; and
 - (2) possession of cocaine for the purpose of trafficking.
- [6] The charges arose out of the following events. On May 17, 2004, Mr. Kim was approached by officers with the Canada Border Services Agency (CBSA) in the departure area of the Vancouver International Airport. The officers questioned him regarding currency and his travel documents. Mr. Kim was ultimately escorted to another area of the airport where he was searched. During the search an officer found packages containing two kilograms of cocaine secured to Mr. Kim's midriff.
- [7] Mr. Kim was arrested at the airport along with five other individuals, including a person named Sang In Choi.
- [8] The procedural history of what occurred thereafter is unusual.
- [9] All six accused were represented by the same lawyer whose fees were said to have been paid by a friend of Mr. Choi. On October 14, 2004, Mr. Kim and four of the other accused pleaded guilty to possession of cocaine for the purpose of exportation from Canada. Mr. Choi did not and a week later the charges against him were stayed.

- [10] On February 3, 2005, Mr. Kim was sentenced to imprisonment for a term of three years.
- [11] Mr. Kim obtained new counsel, Sheldon Goldberg, and applied to the Court of Appeal to set aside his guilty plea. In the Court of Appeal he raised the defence of duress, claiming that he had committed the offence and pleaded guilty under threats made by Mr. Choi against his life and the lives of members of his family. He also argued that his original counsel was in a conflict because he also represented Mr. Choi. On January 15, 2007, the Court of Appeal set aside Mr. Kim's guilty plea and remitted the matter to the Provincial Court (see *R. v. Kim*, 2007 BCCA 25).
- [12] Mr. Kim has since entered a plea of not guilty to the charges and was committed to stand trial after a preliminary hearing held on January 8 and 9, 2008. Mr. Kim had the assistance of counsel, Mr. Goldberg, and an interpreter at the preliminary hearing.
- [13] I was provided with some of the procedural history of this file, including that a 20-day trial set to proceed in July 2010 was adjourned as a result of an unexpected change in circumstance of Mr. Kim's then counsel. A new trial was scheduled for October 2010 but that date was also adjourned after counsel learned that the Legal Services Society (LSS) had terminated funding for Mr. Kim.
- [14] Pending a decision on this application, a new trial date has not yet been fixed.

III. THE EVIDENCE

- [15] Two affidavits and additional documentary evidence were filed in support of this application. In addition, Mr. Kim gave evidence and was cross-examined by the Crown. After hearing the submissions of counsel, I adjourned the matter to give Mr. Kim an opportunity to file supplementary evidence of his financial circumstances. Mr. Kim did so at the continuation date, and was further examined and cross-examined by counsel on these additional materials.
- [16] The evidence relevant to Mr. Kim's application can be summarized as follows:
- (a) he is presently 29 years of age;
 - (b) he came to Canada in 1997 and has landed immigrant status;
 - (c) he completed his high school education in Canada and obtained a degree in aircraft mechanics from the B.C. Institute of Technology;
 - (d) English is his second language and he requires some assistance from an interpreter;
 - (e) he lives with his parents and brother in a rental apartment in Surrey;
 - (f) his parents' only source of income is a pension from the Korean government;
 - (g) he has a fiancé who is not Canadian and who currently resides in Japan;

- (h) he worked full time at a foreign student placement agency from April 2009 to June 2010, earning approximately \$1,935 per month;
 - (i) he has no savings and has debts totalling \$15,000 that he owes on his student loan, bank overdraft and credit card account;
 - (j) his only asset is a 1997 Acura motor vehicle which he has been trying to sell for many months for \$2,700;
 - (k) since 2004 he has received financial support from his family;
 - (l) he has been released on bail for the last six years reporting weekly (by telephone over the past year; in person before);
 - (m) his parents borrowed money to pay Mr. Kim's \$10,000 cash bail; and
 - (n) until October 2010 he had legal counsel funded by legal aid.
- [17] Mr. Kim's evidence at the continuation of this application discloses that in the fall of 2010, particularly in November, he engaged in significant betting through the British Columbia Lottery Corporation. He bet over \$5,000 in total during this time. He has won close to the same amount he has bet. The bets and winnings generally offset each other and were usually in amounts of a few hundred dollars at a time.
- [18] The applicant also spent several hundred dollars during this time on a website for his church.
- [19] Mr. Kim agrees that over the last few months he could have looked for casual work delivering pizzas or similar employment but did not because he did not know when his trial was likely to commence and because he was reluctant to start work without disclosing to his employer his circumstances.

IV. SUBMISSIONS OF COUNSEL

- [20] Ms. Smith-Gander, who is assisting Mr. Kim on this application, first addresses the question of whether counsel is necessary for Mr. Kim to receive a fair trial.
- [21] She submits that the charges he is facing are serious and that, if convicted, he will likely face imprisonment. Further, she submits that if Mr. Kim is sentenced to a period of imprisonment of more than two years he will likely be deported to Korea.
- [22] She also submits that the proceedings are complex. She says the trial is currently expected to be held before a judge and a jury and is estimated to take 10 to 14 days. Ms. Smith-Gander anticipates that a voir dire will be required to deal with a novel Charter issue. She says that the authority of CBSA officers to conduct a pat-down search in a departure area is unclear. Also, Ms. Smith-Gander anticipates that Mr. Kim will be advancing a defence of duress at trial. She says that duress is a difficult defence and that it is far beyond the ability of someone without legal experience to understand and properly advance.

- [23] She argues that Mr. Kim's language skills and background would not enable him to participate effectively without counsel. She concedes that while he has some facility in the English language, he is not at a level necessary to understand legal terminology. She points to the fact that Mr. Kim required the assistance of an interpreter when giving evidence of his financial circumstances in this application. She also notes that while he does have a post-secondary degree, it is a degree in a technical field. Finally, she submits that Mr. Kim would not be able to represent himself as he has no understanding of the case itself.
- [24] Ms. Smith-Gander says that, given the above circumstances, Mr. Kim has demonstrated that without the assistance of counsel he would not receive a fair trial.
- [25] With respect to his financial means to fund counsel, Ms. Smith-Gander submits that Mr. Kim has provided sufficient documentary and testimonial evidence to demonstrate his financial inability to engage a lawyer.
- [26] She submits that Mr. Kim was very forthright when giving his evidence. She also submits that the evidence demonstrates that Mr. Kim has made good efforts to mitigate his financial difficulties and there is nothing excessive or unusual about his expenses.
- [27] She notes that Mr. Kim worked from April 2009 to June 2010 and that he resigned from his position due to his understanding that he would be required to attend a month-long trial in July. Ms. Smith-Gander submits that Mr. Kim was being a responsible employee by resigning. Further, given that the trial was rescheduled to October 2010, she submits that it was not reasonable for Mr. Kim to obtain employment for a period of only a few months.
- [28] Ms. Smith-Gander notes that Mr. Kim has no savings, no income, a sole asset valued at \$2,700 and carries debts of \$15,000 on account of his student loans, bank overdraft and credit card balance. She submits that given his parents' limited income and lack of assets, as well as the financial support they have already given Mr. Kim, it is not reasonable for him to borrow money from them. Ms. Smith-Gander says that Mr. Kim's reliance on his parents for financial support, as well as his inability to complete his arrangements for marriage, is a great cause of stress and shame on Mr. Kim.
- [29] Finally, she notes that Mr. Kim has located counsel who is willing to work at legal aid rates.
- [30] Mr. Whiting, on behalf of the Crown, argues that a stay of proceedings is an exceptional remedy to be granted only in the clearest of cases. He concedes that the charges faced by Mr. Kim are serious and that if convicted he could be sentenced to a period of incarceration. However, he submits that, notwithstanding the issues that will arise, legal representation for Mr. Kim is not essential for a fair trial.
- [31] Mr. Whiting submits that Mr. Kim's case is not particularly complex. He points to the fact there are no co-accused or co-conspirators, that there are no judicial authorizations to be reviewed, and that there is no hearsay or similar fact evidence. He says that the Crown does not concede that the Charter issue has merit. Further, he argues that given Mr. Kim's educational background and his employment experience, he is well able to learn and

understand new matters. He says the elements of each offence are straightforward and that with the assistance of the presiding judge Mr. Kim can receive a fair trial without the assistance of counsel.

- [32] Mr. Whiting notes that Mr. Kim possesses a functional ability in English that would enable him to fully participate in his own trial; that he was articulate when giving evidence in this application; and that an interpreter could be available at trial to address any unfamiliar terminology.
- [33] Finally, the Crown submits there is a duty on Mr. Kim to attempt to familiarize himself with his case and to obtain information on the process he faces rather than simply advise the court that he does not understand his case. He notes that Mr. Kim was present at the preliminary hearing and had the opportunity to listen to evidence and observe exhibits.
- [34] Mr. Whiting submits that Mr. Kim has failed to demonstrate that there is a substantial risk that he would not receive a fair trial without the assistance of counsel.
- [35] Mr. Whiting further submits that Mr. Kim's supporting materials are inadequate to demonstrate financial eligibility. He notes that Mr. Kim must provide extensive evidence to demonstrate that his financial circumstances have gone beyond mere financial difficulty and extend to the extraordinary circumstances that must exist to show indigency. Mr. Whiting submits that Mr. Kim had an obligation to save, borrow and otherwise arrange his affairs to pay for a lawyer from the date of his committal on January 9, 2008.
- [36] He submits that Mr. Kim is well-educated, articulate and owns a vehicle, yet he has been employed for just over a year since January 2008. He argues that Mr. Kim has not provided a reasonable explanation for why he did not have employment for the remaining two years. Mr. Whiting notes that in his summary statement of financial circumstances, Mr. Kim has taken the position that weekly bail reporting has made it difficult to get a regular, full-time job. He submits that this is not a reasonable position for Mr. Kim to take when asking for a stay of proceedings.
- [37] Mr. Whiting also points to evidence that he says is not consistent with indigency. He points to the following: (i) expenditures on lottery tickets, liquor and restaurants; (ii) numerous, unexplained cash withdrawals for hundreds of dollars; (iii) multiple expenditures on his girlfriend's rent; (iv) expenditures on both a bus pass and vehicle insurance; and (v) expenditures on a website for his church.
- [38] In his submissions, Mr. Whiting invited me to find that Mr. Kim was not a credible witness. He points to the following as illustrative of the fact that Mr. Kim was not forthcoming in his evidence:
- (i) his explanation that a number of significant deposits in his personal bank account were on account of work-related funds;

- (iii) his initial position that he did not know what the \$840 payment was for when, in fact, the expense was for his girlfriend's rent and was incurred on multiple occasions over the past year;
 - (iv) his explanation that certain information on his credit card statement was scribbled out to protect private information when, in fact, it was covering up lottery and liquor purchases; and
 - (v) the fact that it was not until cross-examination that he admitted that a credit card statement in evidence was not his and suggested that he was trying to sell his car.
- [39] Finally, Mr. Whiting submits that even if one accepts Mr. Kim's explanation concerning the work-related deposits, for the period of April to June 2010 there remain unexplained expenses in excess of \$3,000.
- [40] He submits that Mr. Kim has failed to establish that his financial circumstances are extraordinary.

V. APPLICABLE LEGAL PRINCIPLES

- [41] In a Rowbotham application a conditional stay of proceedings is sought on the basis of a prospective breach of ss. 7 and 11(d) of the Charter. As was explained by the court in Rowbotham and quoted in *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505, at para. 17:
- [17] In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at 69, this court held that:
- [A] trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. [Emphasis added.]
- [42] In addition to demonstrating that legal aid has been applied for and refused, and all avenues of review exhausted, there are two criteria an applicant must establish on a balance of probabilities: first, the appointment of legal counsel is essential to receive a fair trial; and second, the applicant does not have the financial means to pay counsel.
- [43] In considering an accused's fair trial interests, the benchmark "is not a perfect trial, nor even removing all risk of an unfair trial": *R. v. Cai*, 2002 ABCA 299, 170 C.C.C. (3d) 1, at para. 66. The question is whether, in all the circumstances, the applicant will receive a fair trial.
- [44] It is also important to recall that a stay of proceedings is an extraordinary remedy. As the Alberta Court of Appeal stated in *Cai*, at para. 94, a "[s]tay of prosecution is the bluntest remedy, to be sparingly used in the clearest of cases. ... That is even more true when it is combined with a court's inducing or coercing the Crown to spend funds which the Commons has never even heard of."

- [45] In *Rushlow*, the Ontario Court of Appeal allowed an appeal from conviction for an accused whose Rowbotham application had been denied by the trial judge. The primary issue on appeal was the first branch of the Rowbotham test: whether counsel was essential for a fair trial.
- [46] Justice Rosenberg, on behalf of the Court, provided a helpful summary of the factors a court should consider when dealing with the fair trial branch of the test, at paras. 19-21:
- [19] In considering whether to appoint counsel the trial judge is required to consider the seriousness of the charges, the length and complexity of the proceedings and the accused's ability to participate effectively and defend the case. Because of the pervasiveness of legal aid, it will be the rare and exceptional case that the court will find it necessary to appoint counsel. This does not mean that counsel is only required in exceptional cases. Rather, it is the fact that legal aid is available for accused who cannot afford a lawyer that Rowbotham orders are exceptional.
- [20] Courts have considered a number of factors in determining whether appointing counsel is essential in view of the complexity and seriousness of the case. Generally, the courts look at the personal abilities of the accused such as their education and employment background, their ability to read and their facility with the language of the proceedings. The courts will also consider the complexity of the evidence; the procedural, evidentiary and substantive law that applies to the case; the likelihood of especially complex procedures such as a *voir dire*; the seriousness of the charges; the expected length of the trial; and the likelihood of imprisonment: [citations omitted].
- [21] In considering whether counsel is essential, the court will also take into account the prosecution's duty to make full disclosure and the trial judge's obligation to assist the unrepresented accused: [citations omitted].
- [47] The offence in *Rushlow* was arson, and the Crown had called approximately 30 witnesses as part of its case, including three expert witnesses who testified that the fire was not accidental. Justice Rosenberg found that the trial judge had applied too stringent a test in deciding whether counsel was necessary for a fair trial and that she had erred with respect to some of the factors she considered. He said, at para. 24:

In my view, the trial judge applied too stringent a test. This court has never said that a Rowbotham order is limited to an extreme case where Legal Aid's decision is completely perverse and there is a substantial possibility of lengthy imprisonment. The passage from Rowbotham quoted by the trial judge is from the reasons of the trial judge in that case. This court did not endorse that test. Nor need the case be one posing "unique challenges". The authorities hold that the case must be of some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and that the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial.

[48] Justice Rosenberg found that the fair trial branch of the test had been established on the evidence. He then moved to consider the second branch, the financial means of the accused. He briefly reviewed the evidence and noted at paras. 29 and 30:

[29] Counsel for the respondent points out some shortcomings in the fresh evidence. In particular, the appellant seems to have consulted only one counsel after the preliminary inquiry. He also acquired some debts after the fire, so that money that might have been used to retain counsel was unavailable.

[30] Perhaps the appellant could have made further efforts to privately retain counsel and he may have made some poor financial decisions. However, I accept the very fair concession from counsel for the respondent, which is stated in these terms in her factum:

This is not a case in which the appellant's finances reveal that he could have retained counsel and made a calculated decision not to.

[49] Accordingly, Rosenberg J. found the accused had satisfied both branches of the Rowbotham test, and allowed the appeal and ordered a new trial.

[50] Counsel also referred me to *R. v. Malik*, 2003 BCSC 1439. In *Malik*, Stromberg-Stein J. identified the following criteria as relevant to a determination of whether an accused is financially unable to engage counsel, at paras. 22-23:

- (i) the applicant's financial circumstances must be extraordinary;
- (ii) the applicant must provide detailed evidence of his or her financial circumstances;
- (iii) the applicant must make efforts to: save money, borrow money (including from a spouse or family), obtain employment (or additional employment), look for counsel willing to work at legal aid rates and use assets to raise funds; and
- (iv) the applicant must be prudent with his or her expenses and prioritize payment of legal fees.

[51] In applying the above factors, one must consider that *Malik* was an exceptional case. Mr. *Malik* was a successful and sophisticated businessman who, at his bail hearing, had provided evidence that he had assets worth millions of dollars to post as security for his release. Two and a half years later at his Rowbotham application he argued that he lacked the financial means to pay his legal team or even make a contribution towards payment.

[52] Most accused persons who come before the courts making a Rowbotham application are not sophisticated businessmen like Mr. *Malik*. Nor are they likely to be employed as financial advisors or accountants. They are often unsophisticated individuals with little financial support to assist them in dealing with their legal problems.

- [53] While the burden on an accused to establish financial need is quite properly an onerous one, it is not an unrealistic one. We do not expect perfection from people in planning their finances to ensure they can retain counsel. We do, however, expect a reasonable and sincere effort to save or otherwise obtain the funds necessary to retain counsel when they do not qualify for legal aid. Rowbotham orders are not for those accused who deliberately or recklessly fail to do all they reasonably can to be able to fund counsel themselves.
- [54] Mr. Whiting has challenged Mr. Kim's evidence on this application. I agree with him that the applicant was not candid in answering some of questions. This requires me to scrutinize Mr. Kim's evidence with particular care.
- [55] I will now turn to consider the two branches of the Rowbotham test.

VI. ANALYSIS

a) Fair Trial Interests

- [56] The applicant is charged with committing two offences, both of which carry a maximum punishment of up to life imprisonment. There can be no dispute that the offences charged have serious consequences for the applicant. He was sentenced to three years' imprisonment in 2004 after his guilty plea to one of the charges. In addition, if convicted, he faces other serious consequences including his ability to remain in Canada with his family or to sponsor his fiancé's application to live in Canada.
- [57] Mr. Kim became quite emotional when describing this later consequence during his evidence. Mr. Whiting, properly and fairly, offered him an opportunity to compose himself before continuing his cross-examination and I accept the applicant's emotion as genuine.
- [58] While the presentation of the Crown's case may be described as relatively straightforward, the possible defences are not. Ms. Smith-Gander submits that there is a serious challenge available to him concerning the lawfulness of the search. In addition, the defence of duress was presented in the Court of Appeal. Justice Low, writing for the Court, explained the circumstances giving rise to the charges and the explanation provided by the applicant:
- [8] The appellant, Choi and four others were arrested at the airport at the same time. The other four, two young men and two young women, were students who had been recruited in Korea to come here to transport cocaine to Australia. It appears that the appellant had little to do with them. The appellant says that Choi, a onetime school friend, had recruited him by offering him a free trip to Australia and later requiring him to transport contraband which Choi represented to be ground bull horn for the possession of which he would only be fined. As already noted, the appellant further says that it was Choi who threatened his life and the lives of members of his family in order to get him to participate.

[9] It is established by an affidavit filed by counsel for the appellant and sworn by a travel agent, Sunja Lee, that a young Korean male made the airline reservations for all six accused by telephone prior to 13 May 2004. The same male attended at the travel agency and paid cash for all the tickets. The tickets for the four Korean students were issued on the 13th and the other two were issued on the 14th, the intended day of travel.

...

[12] The police knew Choi to be an associate of a known drug dealer. Choi's name on the airline manifest for Korean Air flight 72 scheduled to depart on the offence date triggered the interest of the police in the activities of all six accused. All the co-accused except Choi possessed cocaine when arrested. Choi had \$6,100 in his possession. In preparing its case it was the theory of the Crown that Choi was the overseer of the other five accused. ...

[59] If the evidence given in the Court of Appeal concerning the threats is accepted, it would likely be a significant factor on sentencing even if the defence of duress was unsuccessful. So too would be a determination about what he was transporting. In addition, the fact that it has been almost seven years since the applicant was charged may be a relevant consideration both at trial and sentencing if he is convicted.

[60] I had the benefit of hearing Mr. Kim testify. He was fairly and thoroughly cross-examined by Mr. Whiting. In my view, while he has a fairly good grasp of the English language, his ability to understand and to effectively communicate is hampered by the fact that English is his second language. Several times during his testimony I encouraged Mr. Kim to use the interpreter who was available for him because I was having difficulty understanding his answers and I was unsure whether he fully understood the import of some of the questions asked.

[61] The trial is scheduled to take two to three weeks, and while Mr. Kim appears to be an intelligent young man with a post-secondary diploma, his English is limited and his post-secondary training is in aircraft mechanics.

[62] I am satisfied that the applicant has demonstrated that counsel is essential for a fair trial. He is facing serious charges, with serious penal and personal consequences including deportation; and the possible defences involve relatively complex areas of law including duress and search and seizure. While the trial judge and the Crown can assist Mr. Kim, such assistance is limited, particularly with respect to properly preparing his defence and Charter applications.

[63] I now move to the second branch of the Rowbotham test.

b) Financial Circumstances

- [64] This branch of the test on this application is the most challenging to decide. This is in part because the evidence from the applicant was incomplete and poorly presented. It was insufficient and needed to be supplemented by adjourning the hearing and giving Mr. Kim the opportunity to obtain further documentary evidence.
- [65] I expect that this is because Mr. Kim has no experience in making an application such as the present one and because counsel is merely assisting Mr. Kim and is not retained. A thorough direct examination of Mr. Kim, a thorough and organized review of the documents presented, and additional evidence to supplement that which has been presented would have assisted the court and Mr. Kim.
- [66] None of these deficiencies change the onus on Mr. Kim to establish the financial branch of the Rowbotham test on a balance of probabilities.
- [67] I begin with my assessment of Mr. Kim's credibility.
- [68] There is no scientific formula for assessing credibility but there are a number of factors that are commonly considered. These include: a consideration of the witness's attitude and demeanour; whether his or her evidence is internally consistent and consistent with other independent evidence; the character of the witness; whether the witness has a motive to be untruthful or a bias in favour of the party that called him or her; and the inherent reasonableness or probability of his or her evidence. Special considerations, of course, apply when assessing the credibility of an accused who testifies at his or her criminal trial.
- [69] As I said earlier, I agree with Mr. Whiting that there were portions of Mr. Kim's testimony where he was not candid. However, I am satisfied that this occurred with respect to collateral matters and was likely the product of a concern that these collateral matters would undermine his evidence on the material issues before me. This means, as I have said, that I must carefully scrutinize his evidence on the material issues.
- [70] Having done that, I am satisfied that Mr. Kim has been truthful on questions that are central to this application, including: the nature of his employment; his employment income; the source of funds into and out of his bank account; his family's financial circumstances; and his efforts to obtain employment.
- [71] This is an unusual case in many respects. It appears from the Court of Appeal's reasons that Mr. Kim was not well served by his first counsel. He was sentenced to three years in jail and spent a number of months in jail before being released. Ultimately, his guilty plea was set aside by the Court of Appeal in January 2007.
- [72] I accept Mr. Kim's evidence that, based on what he had been told by those working in the industry, he would not be able to obtain employment as an aircraft mechanic on account of the outstanding charges, and that he believed it would be unfair to any potential employer to attempt to obtain other employment knowing that he may have to quit because of the criminal proceedings.

- [73] I also accept that he had been told by his second counsel, Mr. Goldberg, that his trial may last up to 60 days or 12 weeks.
- [74] Throughout all of this time, Mr. Kim was supported by his family. When it became clear that Mr. Kim would not be going to trial for a number of months, he obtained employment placing foreign students in schools in Vancouver. I accept his evidence that he took this employment for a year believing that he would be going to trial in July 2010.
- [75] I accept Mr. Kim's evidence that because of the nature of the business and the instability of some of the schools in which his clients were placed, he attempted to assist his clients to obtain flights, received money at times directly from them, and kept tuition fees in his account and paid them in instalments. In other words, because of the kind of employment and employer he had, to assist his clients he used his personal bank account to receive and disburse funds on his clients' behalf. I also accept his evidence as to the source and use of funds that flowed in and out of his bank account.
- [76] I make these findings based on his evidence and the documentary evidence he has provided. I find it more probable than not, that Mr. Kim was simply naive in failing to appreciate the risks associated with mingling his personal funds with his clients' funds.
- [77] I also accept Mr. Kim's evidence that much of the money he made from his employment between March 2009 and June 2010 was given to his family for payment of his living expenses and family expenses. He was living at home, his family's income was limited, and his family had been supporting him since his arrest. I also find that his expenses were reasonable during this time given his employment circumstances.
- [78] Mr. Kim's employment ended in June 2010. His lawyer had been funded by LSS for a number of years and Mr. Kim had no reason to believe that this funding would not continue. His counsel thought so too.
- [79] The July trial dates were changed because his previous counsel had left the practice of law and his new lawyer, Mr. Miller, was unavailable. A trial date was fixed for October. None of this was Mr. Kim's fault.
- [80] Mr. Kim was again left waiting for his trial and no doubt worrying about what his future held in store for him. He had been waiting for months for his trial, not knowing if he would be convicted and sent back to jail, and eventually deported out of Canada and away from his family.
- [81] After the adjournment of his trial from July to October, Mr. Kim was left with little time to look for new employment with the trial only a few months away. Most importantly, he and his lawyer believed that his lawyer would continue to be funded by LSS.

- [82] It was only in September, approximately a month before his trial, that Mr. Kim became aware through his new counsel, Ms. Smith-Gander, that LSS may not fund his trial. Ms. Smith-Gander applied to have his trial date adjourned as a result of this unexpected development and sought a review of the LSS's decision to refuse funding. I infer from Ms. Smith-Gander's submissions to me that she was confident that Mr. Kim's review would be successful. No doubt her confidence would have been communicated to Mr. Kim.
- [83] With Ms. Smith-Gander's assistance, Mr. Kim provided additional information to LSS but his review was unsuccessful. LSS advised him by letter dated October 12, 2010 that, based on his financial records, it appeared that his income was approximately \$3,880 per month, an amount in excess of LSS eligibility guidelines.
- [84] Mr. Kim, again with Ms. Smith-Gander's assistance, filed this Rowbotham application on November 17. The application was originally scheduled to be heard in December but was adjourned and commenced before me on January 7, 2011. It continued on January 24. The delay in continuing was primarily to accommodate Ms. Smith-Gander's other court commitments.
- [85] Until September 2010, Mr. Kim believed that his counsel would be funded by LSS. This belief was a reasonable one, given that LSS had been funding his counsel on these charges for a number of years. He also likely had reason to believe that his review would be decided in his favour.
- [86] Until mid-October 2010, Mr. Kim was not someone who had failed to save or failed to obtain employment knowing there was a real risk he may have to retain counsel privately. He was a young man living at home with his family and expecting to go to trial soon.
- [87] The reason LSS declined funding was because Mr. Kim's income and the funds available to him to be used to pay counsel appeared to be significantly more than I have found.
- [88] I emphasize that I am not sitting in appeal of LSS's decision and I am not critical in any way of its decision. My decision is based on the evidence before me. I have accepted Mr. Kim's evidence respecting his income up until the end of June 2010 and the source of the other funds that flowed through his bank account.
- [89] Having made those findings, I must consider also his conduct since June 2010. In my view, his failure to obtain employment between July and October was not unreasonable given what he knew at the time and his pending trial. In considering his failure to obtain employment after October, I note that the hearing of this application had been delayed and that Mr. Kim has been left waiting not knowing when a decision will be made and when his trial will proceed.
- [90] However, Mr. Kim could and should have been more financially prudent after October 12, 2010.

- [91] Among other things, he gambled on sports lottery tickets. He explained that he did so because he was depressed over his predicament and hoped that if he "won big" that would solve his financial problems. This included not just his need for counsel but his outstanding student loans, Visa and overdraft now totalling approximately \$15,000. While the amount gambled totals over \$5,000, he won almost as much as he lost. He was betting small amounts in the hopes of winning but the wins and losses tended to almost balance out.
- [92] He also acknowledges that he could have attempted to obtain temporary employment delivering pizzas or other similar work. I accept his evidence that he was depressed. This is not surprising when one looks at the history of his case. He has had four different lawyers acting for him, through no fault of his own. He has been waiting for almost seven years for his trial. He has been unable to obtain employment in the field in which he is trained. He does not know if he will be going back to jail, if he will be deported and separated from his family, or if he will be able to sponsor his fiancé to come to Canada. Now he has found out that he no longer is entitled to state-funded counsel and may have to defend his case on his own. He does not even know when his trial will proceed.
- [93] Although Mr. Kim has not attempted to obtain employment over the last few months, I note that there is no way he could ever make enough money in a few months to pay counsel to prepare for and conduct this trial.
- [94] I frame the question I must decide as the following: having concluded that Mr. Kim cannot receive a fair trial without counsel, should I deny him state-funded counsel because he has not been financially prudent during the last few months in the circumstances that I have summarized?
- [95] I am satisfied that the answer is no.
- [96] While the applicant should have provided more information to me about his circumstances, I have accepted what is central to his application - what his income has been and is, as well as his present financial circumstances. I am satisfied that Mr. Kim does not have the financial means to pay counsel.
- [97] The circumstances surrounding this application are unusual for many reasons. I am satisfied that this is one of those rare cases where a conditional stay should be entered until state-funded counsel is provided.

VII. CONCLUSION

- [98] For the reasons set out above, I conclude that Mr. Kim requires the assistance of counsel to ensure that he receives a fair trial and he does not have the financial means available to fund counsel. Accordingly, I intend to order a conditional stay of proceedings until state-funded counsel can be provided.

[99] However, if the trial is to proceed, it needs to do so as soon as possible given that it has been almost seven years since Mr. Kim was first charged. A conditional stay would likely delay the commencement of the trial because the Crown would be required to reinstitute proceedings. Mr. Kim would likely have to be arrested again and another bail hearing conducted. To enter a conditional stay now will also terminate his present bail conditions.

[100] I have decided, therefore, to delay entering a conditional stay for a brief period to provide the Crown with the opportunity to make a considered decision as to how it wishes to proceed. I invite submissions from counsel as to a suitable date to return before me.

"SMART J."

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