

CITATION: R. v. Kalair, 2015 ONSC 6784
COURT FILE NO.: MO41/15
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HER MAJESTY THE QUEEN

- and -

OMAR KALAIR

BEFORE: TROTTER J.

COUNSEL: *Martin Kerbel Q.C.*
for the Accused/Applicant

Jeremy Glick
for the Crown/Respondent

HEARD: OCTOBER 5, 2015

ENDORSEMENT

INTRODUCTION

[1] Mr. Kalair has been committed to stand trial on a number of property-related offences under the *Criminal Code* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).¹ Mr. Kalair, who has been denied Legal Aid, claims he cannot afford to pay a lawyer and seeks an order in accordance with the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

FACTUAL BACKGROUND

[2] The charges arise from an investigation of the Office of the Superintendent of Bankruptcy. It is alleged that two Toronto-based companies operated by Mr. Kalair and his co-accused specialized in home mortgage financing arrangements that were compliant with Islamic Sharia law. The main secured creditor of the two companies was Central 1 Credit Union (“Central 1”). In March 2011, Central 1 applied to the Ontario Superior Court to appoint a Receiver/Manager over the affairs of the two companies. At the time, over \$31 million was owed to Central 1. On October 6, 2011, Grant Thornton Limited was appointed as the Receiver of all

¹ Mr. Kalair is charged with theft over \$5,000 (*Criminal Code*, s. 334) (2 counts); fraud over \$5,000 (s. 380)(2 counts); laundering the proceeds of crime (s. 462.31(1)); fraudulent disposition of a bankrupt’s property (*BIA*, s. 198(1)); failure in the duties of a bankrupt (*BIA*, s. 198(2)); and failure to answer truthfully all questions put to a bankrupt at an examination (*BIA*, s. 198(1)(b)).

assets of the two debtor companies. It filed the assignment into bankruptcy on November 23, 2011. Over the ensuing months, Mr. Kalair submitted to examinations under the *BIA*.

[3] It is alleged that the debtor companies received in excess of \$3.4 million from various mortgagors/homeowners but failed to remit some of these monies to Central 1. It is also alleged that some of these funds were comingled with the funds of the debtor companies and used to purchase silver coins. This occurred as the debtor companies defended the receivership application. Shortly after this transaction, Mr. Kalair made further purchases of gold bars, silver bars and silver coins. While the silver was subsequently recovered, 32 kgs gold valued at \$1.8 million has not been returned and was reportedly given to Muslim scholars in Egypt.

[4] Mr. Kalair was represented by counsel at the preliminary inquiry. He paid just over \$5,300 in legal fees. Mr. Kalair claims to have exhausted all personal funds available to him. He applied for Legal Aid, but his application and all of his appeals have been denied.

[5] Mr. Kalair is 40 years old. He is well-educated. He has a Bachelor of Arts degree from Wilfred Laurier University, as well as a Graduate Business Diploma. At one time he was admitted to an overseas Ph.D. program in economics. However, he never commenced his studies. Mr. Kalair has been a speaker at a number of conferences on Islamic finance in Toronto. He spoke at a conference at Harvard University on one occasion.

[6] Mr. Kalair was in a car accident in March of 2013. He suffered numerous injuries and experiences chronic pain in his neck. He suffers from other muscular-skeletal difficulties, including chronic bilateral carpal tunnel syndrome. This was supported by medical documentation.

[7] Mr. Kalair currently receives government assistance in the amount of just under \$700 per month. He pays rent in the monthly amount of \$750. He receives some assistance from friends. Mr. Kalair is divorced and has 4 children who he is obligated to support in the amount of \$858/month. He has been unable to meet these obligations without the assistance of family.

[8] Mr. Kalair has produced recent bank statements and his Canada Revenue Agency Notices of Assessments for the last few years. He was cross-examined during the hearing of this application. I am satisfied that Mr. Kalair is essentially indigent and that his injuries currently prevent him from being gainfully employed in the field in which he used to work, and for which he has highly specialized training.

ANALYSIS

[9] This case involves a straightforward application of the well-known principles in *Rowbotham*. See also *R. v. Peterman* (2004), 185 C.C.C. (3d) 352 (Ont. C.A.) and *R. v. Rushlow* (2009), 245 C.C.C. (3d) 505 (Ont. C.A.). Mr. Kalair must establish on a balance of probabilities that: (1) he has been denied Legal Aid; (2) because of his present financial circumstances, he is

unable to privately retain counsel; and (3) due to the seriousness of the charges and the complexity of the case, counsel must be appointed in order to guarantee a fair trial.

[10] A *Rowbotham* application is not an appeal from the denial of Legal Aid. However, the refusal of Legal Aid, and the reasons for the refusal, may be helpful in deciding this issue. In the end, however, I must make an independent determination of whether state-funded counsel is necessary to ensure a fair trial: see *Peterman*, at p. 361. Moreover, it is important to bear in mind the following words of Rosenberg J.A. in *Rushlow*, at p. 512:

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.

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; emphasis added]

[11] In that case, the Court of Appeal found that the trial judge erred in requiring the applicant to meet a standard that was too high, involving “unique challenges.” As Rosenberg J.A. said at p. 513:

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.

[12] Mr. Kalair has established that he has been denied Legal Aid. He appealed the denial and, on three separate occasions, requested that his case be reconsidered. At each stage, he has been unsuccessful.

[13] I am satisfied that, in his present circumstances, Mr. Kalair is essentially indigent and is unable to retain private counsel. I accept that Legal Aid Ontario determined that the materials

that were provided by Mr. Kalair were incomplete and, in some ways, inaccurate. However, assessing his situation on the day that this Application was argued (October 5, 2015), and on the basis of the materials filed and Mr. Kalair's testimony, I am persuaded that he is unable to retain private counsel. I am satisfied that, despite the Respondent's arguments concerning a 2003 Porsche Cayenne, worth approximately \$3,000, Mr. Kalair has no assets to speak of, especially since the dissolution of his marriage.

[14] Mr. Kalair's fluctuating bank balance was a cause for concern for Legal Aid. However, after hearing Mr. Kalair's testimony, I am satisfied that the influx of certain funds came from his family. They are no longer willing to help him. I also note that the financial records filed on this application do not reveal any imprudence, let alone extravagance, in Mr. Kalair's spending habits: see *R. v. Munroe*, 2015 ONSC 4814, at para. 8. Acting prudently, he is unable to currently meet his financial obligations.

[15] I am further satisfied that Mr. Kalair is involuntarily unemployed. He survives on social assistance. Since he was charged, Mr. Kalair has been subject to the following bail condition: "Do not operate a business or hold employment in credit or mortgage industries." This condition has essentially prevented him from working in his area of specialty. In any event, Mr. Kalair's accident in March of 2013 has rendered him unfit for work. This was substantiated by medical documentation filed as part of this Application. It was neither contradicted nor undermined by the Respondent.

[16] The case against Mr. Kalair is very serious. Given the vast sums of money involved, if found guilty, he will face a period of imprisonment, likely in the penitentiary.

[17] There are two components to the complexity analysis in this case: factual complexity and legal complexity. The factual foundation of this case is complex. It will be necessary for the trial judge to consider and evaluate voluminous financial and business records, involving the relationship and transactions between the mortgagors/homeowners, Mr. Kalair's companies and Central 1. The preliminary inquiry took five days to complete, with both accused being represented by counsel. The trial is expected to take roughly four weeks. I am satisfied that Mr. Kalair has the intelligence, education and experience necessary to understand this dimension of the case. Due to his experience with Sharia compliant mortgages, Mr. Kalair will probably have a superior grasp of all aspects of the alleged transactions.

[18] However, I am much more concerned about the legal complexity of this case. Mr. Kalair has no legal training. He has no criminal record and, on his own evidence, and has little exposure to courtrooms. In his evidence, he testified that he has no knowledge of some basic legal concepts (such as hearsay evidence and its exceptions). Moreover, through the questions posed by his counsel, Mr. Kerbel, it was suggested that there will be an application for the production of records held by a third-party (the Receiver), pursuant to s. 278.1 of the *Criminal Code*. Mr. Kalair has no knowledge of this procedure. And this points to another unusual feature of this

case – the relationship between some of the *Criminal Code* offences and the bankruptcy and insolvency proceedings. Indeed, charges under the *BIA* are not prosecuted in this court with any frequency.

[19] In sum, from a procedural and evidentiary perspective, this case is very complex. When Mr. Kalair's medical challenges are added to the mix, he will have a very difficult time defending himself, especially alongside a co-accused who has counsel.

CONCLUSION

[20] On the evidence before me, I am satisfied on a balance of probabilities that, in order to ensure a fair trial, it is necessary that Mr. Kalair be represented by counsel. Accordingly, the proceedings are temporarily stayed until the Crown has a reasonable opportunity to arrange for the funding of counsel to represent Mr. Kalair in these proceedings.

TROTTER J.

Date: November 2, 2015