

TOP FIVE 2022

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases (or in this year's resource, six cases) that are of significance in the educational setting. The 2022 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v. Khill, 2022 SCC 37

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<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19020/index.do>

Facts

Melinda Benko woke up her partner Peter Khill in the early morning hours of February 4, 2016. She had heard noises coming from the main floor of their Hamilton residence. The couple slept on the second floor. When he looked out the window, Mr. Khill saw that the dashboard lights of his pickup truck had been turned on. Mr. Khill picked up his shotgun, loaded it with two shells and went downstairs to investigate. When he got to his pickup truck, Mr. Khill saw someone bent over inside the passenger side door of his truck. Mr. Khill yelled "Hey, hands up!" After the individual turned towards him, Mr. Khill shot the individual who was in the truck twice, once in the chest and once in the shoulder. The individual in the truck was Jonathan Styres and he died as a result of the shooting. There was no gun on Mr. Styres but he was carrying a folding knife. The entire situation lasted less than 10 minutes. Mr. Khill argued he had been acting in self-defence because

he had seen Mr. Styres' hands go up, as if he were holding a firearm. Mr. Khill also stated that his previous training as a reservist in the Canadian Armed Forces contributed to the way he acted on the night in question (confronting an intruder), as opposed to calling 911 and waiting for the police to arrive. Mr. Khill was charged with second degree murder.

Procedural History

Mr. Khill had a judge and jury trial at the Superior Court of Justice. Mr. Khill claimed self-defence under section 34 of the *Criminal Code*. Three questions were put to the jury in consideration of the accused's claim of self-defence:

- (1.) Whether Mr. Khill believed on reasonable grounds force was threatened or being used against him and Ms. Benko;
- (2.) Whether Mr. Khill acted for the purpose of defending himself; and

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(3.) Whether Mr. Khill's actions were reasonable in the circumstances.

Notably, however, in their jury instructions, the trial judge made no mention of the accused's role in the incident as required by section 34(2)(c) of the *Criminal Code* and so the charge contained no instruction to the jury to consider the role Mr. Khill played in and throughout the entire incident that led to the shooting. The jury found the accused not guilty.

The verdict of not guilty was appealed to the Court of Appeal, which determined that the jury was not properly instructed, and unanimously overturned the acquittal and ordered that Mr. Khill face a new trial.

Issue

Did the trial judge commit an error of law in failing to instruct the jury on Mr. Khill's role in the incident and did this omission have a material impact on the verdict?

Decision

Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ (Majority)

In an 8-1 decision, the Supreme Court dismissed Mr. Khill's appeal and ordered a new trial. Five judges found that the trial judge had failed to properly instruct the jury under section 34(2)(c) as to the role that

Mr. Khill played in the fatal shooting of the victim from the beginning to the end of the incident. Three judges concurred, meaning they came to the same conclusion but for different reasons. Justice Côté, who would have allowed the appeal and restored Mr. Khill's acquittal, dissented.

Ratio

Where an accused person claims self-defence, the role they played in the incident will be considered from the beginning to the end of the incident to determine whether the accused somehow caused or contributed to their circumstances.

Reasons

In this case, the court analyzed the role an accused person can play in bringing about conflict. The court has to look at the accused's conduct from when the incident first began to when it ended and resulted in the act of self-defence. An accused's role in the incident includes not only provocative or unlawful conduct, but also hotheadedness, the reckless escalation of risk, and a failure to reasonably reassess the situation as it unfolds. The majority considered whether the accused had caused or contributed to the circumstances which they now claim compelled them to respond. The conduct doesn't need to

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provoke a crisis, but it will be enough if they contribute to “the development of the crisis”. The majority decided that an individual’s role in the incident is not limited to just provocative, unlawful or blameworthy conduct, but includes other forms of conduct as well.

A trial judge plays the gatekeeping function through their instructions to the jury. In cases of self-defence, the trial judge has to explain what the law requires, the legal significance of the law, and how each of the factors listed in the law contribute to the assessment of reasonableness. At trial, the judge failed to make any instruction as to the appellant’s role in the incident, an omission which left the jury unable to properly evaluate the reasonableness of the shooting of the victim. The fact that the jury wasn’t properly instructed was a serious error, so serious that a new trial was ordered.



Discussion

1. What are examples of an accused person's role in an incident?
2. When is an accused person's conduct relevant when it comes to claiming self-defence?
3. What is the role of a trial judge when it comes to instructing the jury?
4. What is the legal difference here between contributing to a crisis, and provoking a crisis?
5. What do you think some of the effects of this ruling could be for people claiming self-defence?