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. Brown, 2022 SCC 18

Date released: May 13, 2022
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19389/index.do

Note

2022 was an interesting year for our Top 5 cases, in that, well… it's actually our Top 6! Let us explain.

R v. Brown is a decision of the Supreme Court of Canada on the constitutionality of section 33.1 of the *Criminal Code*, which prohibited an accused from raising self-induced intoxication as a defence to criminal charges. The Court unanimously held that the section violated the *Charter of Rights and Freedoms* and struck it down as unconstitutional. The Court delivered the *Brown* decision at the same time as another related case, *R v. Sullivan*, which is also included in this resource. Because they delivered together, we've included them both here for your convenience.

Facts

One night at a party in January 2018, Matthew Brown consumed alcohol and magic mushrooms. Mr. Brown was in a state of extreme intoxication when he broke into the house of Janet Hamnett and violently attacked her, causing her grave and permanent injuries. Brown later broke into another home, which belonged to Mr. and Mrs. Varshney. They were able to take shelter in their bedroom. When Mr. Brown was arrested, he was nude and said that he had no memory of what had taken place during the previous few hours. Mr. Brown was charged with one count of breaking and entering into Ms. Hamnett's home and committing the indictable offence of aggravated assault of Ms. Hamnett. He was also charged with one count of breaking and entering into the Varshney's home and committing the indictable offence of mischief to property over $5,000.

In court, Mr. Brown argued he was not guilty because he was in a state of automatism due to his consumption of magic mushrooms in combination with alcohol.

In response, the Crown raised section 33.1 which says that an accused cannot rely on self-induced intoxication that is akin to automatism when they are charged with a general intent offence, like aggravated assault. Mr. Brown brought a constitutional challenge against section 33.1.

Procedural History

At the Alberta Court of Queen's Bench, the court found that section 33.1 was unconstitutional because it violated Mr. Brown's presumption of innocence and principles of fundamental justice. It could not be saved by section 1 of the *Charter*. Because of this finding by the court, Mr. Brown was able to raise the defence of "extreme intoxication akin to automatism". At his trial, experts testified that Mr. Brown's acts on the night of the incident were not those of someone acting voluntarily. The court found that the consumption of magic mushrooms had left Mr. Brown in a state of delirium. It acquitted Mr. Brown.

However, the Alberta Court of Appeal overturned the trial court's finding of unconstitutionality. Court of Appeal Justices Slater and Hughes found that section 33.1 did not violate any sections of the *Charter*. Meanwhile, Justice Khullar did find a violation but determined that section 33.1 could be saved under section 1. As a result of this, the court set aside Mr. Brown's acquittal. Mr. Brown appealed to the Supreme Court of Canada.

Issue

Does section 33.1 violate sections 7 and 11(d) of the *Charter* and, if so, can it be saved under section 1?

The Decision

In a unanimous decision, the Supreme Court found that section 33.1 breached sections 7 and 11(d) of the *Charter* because it allowed Mr. Brown to be convicted without proof of a guilty mind (the legal term is "mens rea") or proof that Mr. Brown had acted voluntarily.

Ratio

Extreme intoxication that is akin to automatism is a defence to crimes of general intent.[1]

Reasons

Case law which has developed over the years has made it clear that intoxication is not a defence to crimes of general intent. However, when somebody is intoxicated

[1] General intent offences require the offender to have intended to perform the illegal action, without the need to intend specific consequences or act for a specific purpose.

to the point of automatism, this results in a person losing voluntary control of their actions. The Supreme Court explained that automatism results in involuntary movements over which the person has no control. Involuntary movements can also arise out of conditions like delirium, sleepwalking, seizures, and heart attack. If somebody is not acting voluntarily, it is impossible for them to have a guilty mind ("mens rea") or commit the guilty act ("actus reus"). When a person is in an intoxicated state which is akin to automatism, they cannot act voluntarily.

Section 7

The *Charter* requires that the mens rea be proven in order for somebody to be guilty of a crime. This is a principle of fundamental justice under section 7 of the *Charter*. The intention required by section 33.1 is an "intention to become intoxicated." Section 33.1 did not consider whether the person foresaw a loss of awareness or control arising out of the consumption of the intoxicant, or in other words, instances of sudden and unexpected onset of involuntariness. It therefore allows for a conviction without proof of mens rea. Section 7 also requires voluntariness but because intoxication akin to automatism results in involuntary acts, section 33.1 criminalizes somebody who is not acting voluntarily, which is also contrary to section 7.

Section 11(d)

The second section of the *Charter* that the court looked at was 11(d). Section 11(d) ensures that an accused is presumed innocent until proven guilty. The court said that section 33.1 improperly substitutes proof of self-induced intoxication for proof of voluntariness and fault. What this means is that conviction is possible under section 33.1 even if there is a reasonable doubt as to whether the person committed the crime.

For these reasons, section 33.1 was found to violate both sections 7 and 11(d) the *Charter*. The court then considered whether section 33.1 could be saved under section 1.[2]

Section 1

The Supreme Court applied the *Oakes* test to determine whether section 33.1 could be saved under section 1. The first question of the test is whether the law has a pressing and substantial objective. The court said that section 33.1 passes this part of the test because one of its goals is the protection

[2] Otherwise known as the "Oakes" test. If a law limits somebody's constitutional rights, the law can still be valid if it passes this 2-part test.

of vulnerable populations, like children and women, from extreme intoxicated violence, which is pressing and substantial. The second pressing and substantial objective of the law is to hold people accountable who voluntarily put themselves at risk of extreme intoxication and try to escape liability for any violent actions committed while in that state.

The second part of the test is called the "proportionality analysis". First, the law must be rationally connected to its objective. The court said section 33.1 passed this part as well. The next part is whether the law "minimally impairs" a person's rights, and this is where section 33.1 failed. The law was not minimally impairing because there were other ways of achieving the government's goals that wouldn't have violated the accused's rights. The court also said that section 33.1 failed the final part of the test, because the benefits of the law did not outweigh its costs.

Section 33.1 was thus found to not be saved under section 1 and was declared unconstitutional and of no force or effect. Mr. Brown's acquittal was restored by the Supreme Court of Canada.

Discussion

1. What does "extreme intoxication" mean in the law?

2. What is the difference between mens rea and actus reus?

3. Voluntariness is a really important concept in this case. Can you think of other legal examples where somebody would not be acting voluntarily?

4. Can you think of a situation where a person could be extremely intoxicated, but are not entitled to use the defence that was used in this case?

5. What options could the government have taken to achieve its goals (like protecting vulnerable people) while passing the proportionality analysis?

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R v. Sullivan, 2022 SCC 19

Date released: May 13, 2022
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Facts

David Sullivan

David Sullivan, who was 43 years old at the time, took an overdose of a prescription drug in an attempt to end his life. Following the overdose, he became impaired and fell into a state of drug-induced psychosis. Mr. Sullivan violently attacked his mother (with whom he lived in a condominium) by stabbing her six times, leaving her with serious injuries. Mr. Sullivan was charged with aggravated assault and assault with a weapon. Following the attack, Mr. Sullivan was observed outside of his building, acting erratically and in an agitated manner. Mr. Sullivan had a history of mental illness and substance abuse problems prior to the attack.

Thomas Chan

The cross-appellant in this appeal, Thomas Chan, had been drinking at a bar with friends on the night of the incident. When they returned home from the bar, Mr. Chan and his friends ingested magic mushrooms. Mr. Chan did not feel the effects of the mushrooms at first and took another dose. After that he became impaired. Mr. Chan left his house, ran over to his father's house and violently stabbed his father and his father's partner. Mr. Chan's father was killed in the attack, while his father's partner was seriously injured. Mr. Chan was charged with manslaughter and aggravated assault.

Procedural History

David Sullivan

At the Superior Court, the trial judge determined that Mr. Chan was in a state of non-mental disorder automatism caused by the voluntary ingestion of an intoxicant. However, he was precluded from using the defence of automatism due to section 33.1. Consequently, Mr. Sullivan was found guilty of aggravated assault and assault with a weapon, and sentenced to five years imprisonment.

Thomas Chan

In a pre-trial application, the constitutionality of section 33.1 was challenged by Mr. Chan. Mr. Chan argued that the trial judge was bound by the decisions of *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. C.J. (Gen. Div.)), and *R. v. Fleming*, 2010 ONSC 8022 in which section 33.1 of the *Criminal Code* was found to be unconstitutional. The judge decided they did not have to follow these decisions because the law around section 33.1 was "greatly unsettled". In their own analysis, the Superior Court found that although section 33.1 infringed both sections 7 and 11 of the *Charter*, it could be saved under section 1 of the *Charter*. The trial judge found Mr. Chan guilty of manslaughter and aggravated assault and sentenced him to five years imprisonment.

After Mr. Chan was sentenced, there was a ruling in *R v. McCaw*, 2018 ONSC 3464, 48 C.R. (7th) 359, which declared section 33.1 unconstitutional. Mr. Chan applied to re-open his case, but trial judge Justice Boswell dismissed Mr. Chan's application to re-open the case because they did not see *McCaw* as being "an accurate statement of the law".

Ontario Court of Appeal

Appeals to the Ontario Court of Appeal for both cases were allowed. Section 33.1 was declared unconstitutional and, therefore, Mr. Sullivan was acquitted of the assault charges because of his intoxication akin to automatism at the time he committed the offences. The court ordered a new trial in the case of Mr. Chan.

Issue

One of the issues was related to the constitutionality of section 33.1. This question was settled in the decision of *R v. Brown* (released alongside this decision and summarized above) in which section 33.1 was found unconstitutional and of no force or effect. The other important issue in this case was:

1. Is a declaration of unconstitutionality by one trial court binding on another trial court in the same province?

Decision - Unanimous

A unanimous Supreme court dismissed the Crown's appeals, and upheld Mr. Sullivan's acquittal, as well as Mr. Chan's order for a new trial.

Ratio

The court said a trial court decision is indeed binding on other trial courts, unless the facts of the case are different enough, or if the court had no practical way of knowing the decision existed.

Reasons

The Supreme Court ruled that courts should follow precedents set by courts of coordinate jurisdiction (courts at the same level), unless the facts are very different, or the other court had no way of knowing about the decision. This is called "horizontal stare decisis". An example of horizontal stare decisis would be the Ontario Court of Justice following a decision made by the Ontario Superior Court of Justice, because they are both trial courts. This does not have the same strict effect as "vertical stare decisis". Vertical stare decisis is where precedents are set by higher courts, to be followed by lower courts (for example, The Ontario Superior Court of Justice following a precedent set at the Supreme Court of Canada, our country's highest court). A court can depart from binding decisions of courts of coordinate jurisdiction when: that decision has been overruled or is inconsistent with the decision of a higher court; when the coordinate court reached their decision without considering the law properly and this impacted the judgement; or when there was no chance for the court to consult other relevant authorities.

In Mr. Chan's case, the Supreme Court found that the trial judge should not have departed from precedent set in a coordinate jurisdiction. The Supreme Court made it clear: disagreement between trial judges is not enough - a binding decision of a coordinate court must be followed unless one of the three exceptions apply.

Discussion

1. What is a court of "coordinate jurisdiction"?

2. Why do you think Mr. Sullivan was acquitted, whereas Mr. Chan must go through the trial process again?

3. Was the trial judge's opinion that the law was "greatly unsettled" enough to depart from the principle of horizontal stare decisis? Why or why not?

4. The Supreme Court clarified that trial courts may depart from decisions made in other trial courts in the province if that decision is inconsistent with the decision of a higher court. Can you think of an example where this might happen?

5. This case talked about horizontal stare decisis. However, this principle is only applied to courts in the same province. Why do you think it would not apply to courts in different provinces?

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Toronto (City) v. Ontario (Attorney General), 2021 SCC 34

Date released: October 1, 2021
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/19011/index.do

Facts

On August 14, 2018, the province of Ontario, under the leadership of Premier Doug Ford, passed the *Better Local Government Act* (the "*Act*") which reduced the number of electoral wards[3] in the City of Toronto from 47 to 25. The *Act* was passed at a time when campaigning for municipal elections was well underway already.

Procedural History

The *Act* was challenged in the Superior Court of Justice by the City of Toronto on the basis that it violated freedom of expression, freedom of association, and equality, and that it also violated the unwritten constitutional principles of democracy and the rule of law. The application judge found that the *Act* violated section 2(b) (freedom of expression) because it limited the freedom of expression of municipal candidates in the election and that it also limited the right of voters to effective representation under section 3, and could not be saved under section 1 of the *Charter*.

The majority at the Court of Appeal later found that there had been no limitation to the freedom of expression of municipal candidates and that the right to effective representation under section 3 of the *Charter* did not apply to municipal elections and bore no influence on the section 2(b) analysis. The Court of Appeal also held that unwritten constitutional principles cannot be used by the courts to strike down legislation which is in compliance with the *Charter*. The court ruled that unwritten constitutional principles did not limit a province's legislative authority over municipal institutions. The Court of Appeal

[3] Wards are political areas of varying size, depending on the city. For instance, the Ontario Justice Education Network is in the University-Rosedale Ward in Toronto, which covers a large portion of downtown and includes some residential areas.

reversed the application judge's decision and allowed the Government of Ontario's appeal.

Issue

Two issues arose in this case:

1. Did the *Act* limit the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election?
2. Can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

Decision

Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ (Majority)

The SCC held in a split 5-4 decision that the province's appeal should be allowed because it had acted constitutionally when it decided to pass the Act to reduce the number of electoral wards to 25.

Ratio

Provinces have legislative authority over municipalities. Unwritten constitutional principles cannot be used to invalidate legislation.

Reasons

Freedom of Expression

Since the City was asking the province to provide access to a specific statutory platform for expression (by increasing the number of electoral wards to 47 again), the Supreme Court stated that the City was advancing a positive claim. This means they were asking the provincial government to do something as opposed to refraining from doing something. The majority of the Supreme Court said that, because the municipal candidates had 69 more days to campaign and express themselves in accordance with the new ward structures, there was no substantial interference with their freedom of expression.

Effective Representation

With respect to the right to effective representation under section 3 of the *Charter*, the majority stated that what is important is the "relative population of the wards" and not the absolute size of the wards themselves. Increasing the number of councillors as the population of the city grows would be very difficult to achieve. Additionally, section 3 democratic rights do not apply to candidates in municipal councils.

Unwritten Constitutional Principles

The City argued that the decrease in the number of wards denied voters effective representation which, in turn, violated the unwritten constitutional principle of democracy. However, the majority at the Supreme Court held that unwritten constitutional principles, including the principle of democracy, cannot be used to invalidate legislation because they don't have the same authority as legislation, and because they are too abstract. Instead, unwritten constitutional principles can only be used to help understand constitutional principles and structural doctrine that isn't stated in the written Constitution. Provinces still have legal power to make laws that have to do with municipalities, which is limited only by the *Charter*. This power isn't restricted by constitutional principles.

Dissent

Abella, Karakatsanis, Martin and Kasirer JJ

The dissenting judges saw things differently. The issue for them was not whether the province had legal authority to change the electoral wards in general but whether this power existed in the middle of an ongoing municipal election which. According to the dissent, the timing of the use of this power destabilized the foundations of the electoral process, infringed section 2(b) of the *Charter* and was therefore unconstitutional. Like federal or provincial elections, section 2(b) applies to protect freedom of expression during municipal elections as well. The dissent found that the infringement on the freedom of expression could not be saved by section 1. The dissenting judges also stated that unwritten constitutional principles could be used to invalidate legislation, albeit only in rare cases.

Discussion

1. What is Freedom of Expression?

2. Why would a provincial government want to decrease the number of electoral wards in a city?

3. The majority at the Supreme Court said the *Act* did not restrict what candidates could say or do to the extent that it violated their Freedom of Expression. If the *Act* had been passed with even less time left in the election, would this still be the case?

4. What did the court say was the role of unwritten constitutional principles as they relate to making the law?

5. How do you think a decrease in electoral wards could affect the constitutional principle of democracy?

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R v. Bissonnette, 2022 SCC 23

Date released: May 27, 2022
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19405/index.do

Facts

On January 29, 2017, Alexandre Bissonnette opened fire in a Quebec Mosque during evening prayers, killing six people and seriously injuring five others. He was found guilty of six counts of first degree murder. The period where somebody is unable to apply for parole for a first degree murder conviction is 25 years. However, under section 745.51 of the *Criminal Code*, the Crown can ask the court to set the parole ineligibility period consecutively[4], instead of concurrently, for multiple convictions of first degree murder. The Crown applied for this in Mr. Bissonnette's case, meaning that the Crown was asking for a total parole ineligibility period of 150 years for the six convictions.

Procedural History

The trial judge at the Quebec Superior Court of Justice found that section 745.51 infringed both sections 12 (cruel and unusual treatment or punishment) and 7 (right to life, liberty, and security of the person) of the *Charter* and could not be saved under section 1. The judge set the parole ineligibility period at 40 years - 25 years for the first 5 counts served consecutively and 15 years for the sixth count, served concurrently.

The Quebec Court of Appeal allowed the appeal and found that section 745.51 was unconstitutional because it infringed sections 12 and 7 of the *Charter*. It decided that a parole ineligibility period which exceeded one's life expectancy was degrading and incompatible with human dignity. The Court of Appeal also found that the provision was overbroad and its effect was disproportionate. It ordered that Mr. Bissonnette serve each of the 25 year parole ineligibility periods on a concurrent basis.

[4] Consecutively means "in a row", as opposed to concurrently, which means "at the same time".

Issue

Two issues arose in this case:

1. Does section 745.51 of the *Criminal Code* infringe section 12 or section 7 of the *Charter*?
2. If section 12 or section 7 is infringed, can section 745.51 be saved under section 1 of the *Charter*?

Decision - Unanimous

A unanimous Supreme Court found that section 745.51 infringed section 12 of the *Charter* and could not be saved under section 1. Given the violation of section 12, the SCC did not need to consider section 7 as well.

Ratio

Consecutive parole ineligibility periods which completely foreclose the possibility of rehabilitation are unconstitutional.

Reasons

The Supreme analyzed the history of section 745.51, the Canadian parole system, and sentencing objectives. The court began with their analysis of section 12 and found that consecutively served parole ineligibility periods under section 745.51 are degrading in nature and intrinsically incompatible with human dignity. This is because they prevent the offender from the realistic possibility of being granted parole and from ever reintegrating into society, entirely negating the principle of rehabilitation. The sentence sought for Mr. Bissonnette (150-year parole ineligibility period) would "bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system".

The section 1 analysis (see examples of the "Oakes" test above) was fairly straightforward in this case. The appellants had not made any arguments with respect to the justification of section 745.51 under section 1 and, even if they had, the Supreme Court stated it would have been very difficult to justify, in a free and democratic society, a punishment that was cruel and unusual by its very nature. Section 745.51 was declared of no force or effect immediately. Mr. Bissonnette would serve the parole ineligibility period concurrently.

Discussion

1. What is a parole ineligibility period?

2. What is the difference between a concurrent sentence and a consecutive sentence?

3. Why did the Supreme Court say that this law likely would not have passed the Oakes test?

4. What was the main problem with a sentence that was longer than somebody is reasonably expected to live?

5. Why is the idea of rehabilitation important in Canada, even to somebody convicted of a heinous crime?

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R v. Stairs, 2022 SCC 11

Date released: April 8, 2022
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19298/index.do

Facts

A 911 call was placed after someone observed a man driving and hitting a woman who was sitting in the passenger seat of the car. The police arrived at the location of the car, which was empty and parked in the driveway of a house. The police ran the license plate number and learned that the car was registered to a Matthew Stairs' father but that it was also driven by Matthew who had a history of violence. Police knocked on the house and loudly announced their presence. Police entered the house despite the fact that no one had answered the door. When the police were inside the house, they observed a woman, who had fresh injuries on her face, come up a flight of stairs from the basement. They also observed a man in the basement who walked past the stairs and locked himself in the laundry room. The man was later identified as Matthew Stairs and was arrested shortly after he had gone into the laundry room.

After the police had arrested Mr. Stairs, they conducted a visual clearing search of the basement living room. When one of the officers walked behind a couch in the basement living room, they located a clear container and a plastic container which contained methamphetamine. In addition to being charged with assault and breach of probation, Mr. Stairs was also charged with possession for the purpose of trafficking.

Procedural History

The trial judge at the Ontario Superior Court of Justice convicted Mr. Stairs of all the charges he was facing and found no breach of Mr. Stairs' section 8 *Charter* rights (right against unreasonable search and seizure) because they determined the search had been lawfully conducted, incident to Mr. Stairs' arrest.[5] Mr. Stairs appealed the conviction of the drug charges alone, arguing that the drugs were wrongly

[5] "Incident to arrest" means within a reasonable time after an arrest.

admitted as evidence and that the test for searches incident to arrest inside of homes had to be modified given the heightened privacy concerns inside of a person's home.

The Ontario Court of Appeal dismissed the appeal, finding that the search had not breached section 8; however, one judge dissented and would have allowed the appeal. The lone dissenting judge at the Court of Appeal found that when police engage in a safety search of a home which is incident to a lawful arrest, they must have reasonable grounds to believe that there is an imminent threat to public or to police safety, which the dissenting judge found the police did not have in this case.

Issue

The main issue that arose in this case was:

1. Whether the search of the basement living room incident to arrest was unreasonable, contrary to section 8 of the *Charter*.

Decision

The Majority of the Supreme Court decided that the common law standard for searches incident to arrest in homes had to be modified. In a 5-4 decision the majority dismissed the appeal of Mr. Stairs because in applying the new modified test, they found no violation of his section 8 *Charter* rights.

Ratio

Searches conducted incident to arrest within a home, where the area searched is outside the physical control of the arrested person, require the higher standard of reasonable grounds to suspect that there is a safety risk to the police, the accused, or to the public which would be addressed by the search.

Reasons

Wagner C.J. and Moldaver, Rowe, Kasirer and Jamal JJ (Majority)

The majority rejected the standard of reasonable belief in imminent harm which was proposed by Mr. Stairs. The police only require some reasonable basis to conduct a search incident to arrest as opposed to the higher threshold of "reasonable and probable grounds". The common law standard for searches that are incident to arrest have been established through past case law and require the following:

(1.) The individual being searched has been lawfully arrested;

(2.) The search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest (a-c, below); and

   a. police and public safety

   b. preventing the destruction of evidence

c. discovering evidence that may be used at trial

(3.) The search is conducted reasonably

The Majority stated that an individual's home gives somebody a higher expectation of privacy, and that means that a change to the common law standard for searches incident to arrest in homes is necessary. Given the heightened privacy interest inside of a home, the majority modified the standard for search incident to arrest "where the police search areas of the home outside the arrested person's physical control":

- The police must have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and
- The search must be conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

When somebody is arrested inside of a home and a search is conducted, the search is conducted of the "surrounding area of the arrest" which encompasses two separate categories:

a. the area within the physical control of the person arrested at the time of arrest; and
b. areas outside the physical control of that person, but which are part of the surrounding area because they are sufficiently proximate to the arrest.

The police need to be able to show that a search of the areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused. In Mr. Stairs' case, the search was conducted in an area that was outside the physical control of Mr. Stairs.

The majority determined that the police did in fact meet this standard, and their search was lawful. Part of the court's reasoning was that the police only visually scanned the area of the basement living room following the arrest to ensure there were no safety concerns.

Dissent

Karakatsanis, Brown and Martin JJ

In the dissent delivered by Justice Karakatsanis, they decided that the standard of reasonable basis was too low to conduct a search of a home incident to arrest. They also refused to adopt the distinction made by the majority of areas of a house that are inside or outside an arrested person's physical control. Instead, they decided that the standard should be that of reasonable suspicion of an imminent threat to police or public safety. In the case of Mr. Stairs, the dissenting judges found

there was no reasonable suspicion to conclude that there was a safety risk after Mr. Stairs had been arrested, only a general uncertainty about the presence of weapons or other people. Consequently, they found the search and seizure infringed section 8 and that the evidence (drugs) seized should have been excluded from evidence.

Concurring reasons of Cote J

Justice Cote agreed with the dissenting judges about the standard of reasonable suspicion for searches incident to arrest within a home. However, unlike the dissent, Cote J said that the evidence should nonetheless not be excluded because its admittance would not bring the administration of justice into disrepute.

One thing every judge at the Supreme Court agreed on was this: a person's home demands a greater expectation of privacy under the law. Police can search a home for safety reasons, but only if the search is conducted in a reasonable manner and takes into account this heightened expectation of privacy.

Discussion

1. What does "incident to arrest" mean?

2. What are the main differences between the legal standards applied by the majority and the dissent, respectively?

3. Do you agree with the majority that there was a safety risk in this case, or with the minority, who said there was no safety risk after Mr. Stairs had been arrested?

4. The majority clarified a new standard for searches in homes, but decided in this case that the police had still met that standard. What factors in the officers' actions might have changed this if things had gone differently?

5. Why do you think there is a higher standard for privacy inside one's home? Do you think this standard affects different people in different ways?

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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-defense:

(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

(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

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?