



Case in Brief: ***R. v. Kahsai***

Judgment of July 28, 2023 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2023 SCC 20

The Supreme Court dismisses a new trial request for a man convicted of two murders.

This is a case about determining the proper role of *amicus curiae* in a criminal trial. “*Amicus curiae*” (the plural form is “*amici*”) is a Latin term meaning “friend of the court.” The *amicus* is an independent lawyer asked by a judge to take part in a case. They do not represent a party to the case. The precise role of the *amicus* is case-specific and will depend on the particular needs identified by the judge. When the accused does not have a lawyer, the judge may appoint an *amicus* to assist the court, for example by challenging the prosecution’s case and cross-examining witnesses. The goal is to make sure the judge or jury hears an “adversarial perspective” – an alternative to the prosecution’s version of the case – to come to a fair outcome.

Two *amici* were appointed at different times in the trial of Mr. Emanuel Kahsai, who was convicted by a jury for murdering two women in Calgary in 2015. The accused did not hire a lawyer to represent him at trial – he insisted on representing himself for the entire proceedings. The first *amicus* was appointed before trial to help Mr. Kahsai with the jury selection process. At trial, Mr. Kahsai was repeatedly disruptive. He did not question witnesses or present a defence. Partway through the trial, the judge decided to name a second *amicus* to cross-examine the Crown’s witnesses and ensure the proceedings were fair and appropriate. He was clear that the *amicus* would not act as the accused’s defence lawyer, to respect Mr. Kahsai’s right to represent himself. Despite the lawyer’s limited mandate, Mr. Kahsai resisted the appointment and mostly refused to cooperate with him throughout the proceedings.

At the end of the trial, the judge cut short Mr. Kahsai’s closing argument because he was not saying anything relevant to his defence. The judge did not ask the *amicus* to make closing arguments on behalf of Mr. Kahsai. The *amicus* did not ask permission to do so either because he thought the scope of his role prevented him from arguing on behalf of the defence.

Mr. Kahsai appealed his murder convictions to the Court of Appeal of Alberta. He argued the trial judge’s failure to appoint the *amicus* earlier in the trial and with a more adversarial role created the appearance of unfairness, which justified a new trial. Two of the three judges dismissed the appeal. They said that appointing the *amicus* with adversarial functions would have violated Mr. Kahsai’s right to represent himself. The third judge disagreed and wrote that imposing a lawyer on the accused when the case was complex and the accused was incompetent to self-represent did not infringe their right to control their own defence – rather, it preserved their right to a fair trial. Mr. Kahsai appealed to this Court.

The Supreme Court has dismissed the appeal.

The *amicus*’ delayed appointment and limited role did not justify ordering a new trial.

Writing for a unanimous Court, Justice Karakatsanis said the trial appeared fair to a reasonable observer, such that a new trial was not necessary. She said that while the *amicus* can never fully assume the role of the accused’s lawyer, they can take on “defence-like functions” when an adversarial perspective is necessary to ensure trial fairness.

In this case, Justice Karakatsanis said the appointment of an *amicus* with a broader mandate was at the trial judge’s discretion but that he was under no obligation to do so. She acknowledged the striking imbalance at trial due to Mr. Kahsai’s lack of representation and meaningful defence. However, “it is not clear that appointing *amicus* earlier or with a broader mandate would have provided much value for Mr. Kahsai, who forcefully resisted the appointment of *amicus* and sustained his objection to their participation throughout the trial”. In her view, the trial judge had sufficiently addressed trial fairness concerns in the circumstances. For these reasons, Justice Karakatsanis dismissed the appeal.

Breakdown of the decision: *Unanimous*: Justice [Karakatsanis](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Côté](#), [Rowe](#), [Martin](#), [Kasirer](#) and [Jamal](#) agreed)

More information: [Decision](#) | [Case information](#) | [Webcast of hearing](#)

Lower court rulings: [Convictions](#) (Court of Queen's Bench of Alberta) (unreported) | [Appeal](#) (Court of Appeal of Alberta)
