2023 SCC 20 (CanLII)

SUPREME COURT OF CANADA

CITATION: R. *v.* Kahsai, 2023 SCC 20

APPEAL HEARD: March 14, 2023
JUDGMENT RENDERED: July 28, 2023
DOCKET: 40044

BETWEEN:

Emanuel Kahsai
Appellant

and

His Majesty The King
Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Empowerment Council, Independent Criminal Defence Advocacy Society, Criminal Trial Lawyers' Association, Canadian Civil Liberties Association and Criminal Lawyers' Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78) Karakatsanis J. (Wagner C.J. and Côté, Rowe, Martin, Kasirer and Jamal JJ. concurring)

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2023 SCC 20 (CanLII)

Emanuel Kahsai *Appellant*

v.

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

2023 SCC 20 (CanLII)

Criminal law — Trial — Amicus curiae — Proper scope of role of amicus curiae in criminal trial — Self-represented accused disrupting criminal trial and failing to advance meaningful defence — Trial judge appointing amicus curiae with limited mandate mid-trial — Whether guarantee of trial fairness permits or requires trial judge to appoint amicus with adversarial mandate to advance interests of accused — Whether delayed and limited appointment of amicus led to appearance of unfairness rising to level of miscarriage of justice.

K chose to represent himself at trial for two counts of first degree murder. When given the opportunity to address the court, K failed to cooperate with the trial process or advance any coherent defence. He was repeatedly excluded from the courtroom and trial process because of his chronically disruptive behavior. Partway through the trial, the trial judge determined that the appointment of *amicus curiae* was necessary to ensure a fair trial. An *amicus* was appointed to cross-examine Crown witnesses, but was instructed not to advocate on behalf of the defence. K resisted the appointment and mostly refused to cooperate with the *amicus*. K's attempt to deliver his own closing argument was cut short by the trial judge, who did not solicit any supplementary closing argument from trial *amicus*. K was convicted by a jury on both counts of first degree murder. He appealed his convictions, arguing, among other grounds, that failing to appoint *amicus* with an adversarial role at an early stage in the proceedings tainted the perceived fairness of the trial. A majority of the Court of Appeal dismissed the appeal, finding there was no miscarriage of justice.

2023 SCC 20 (CanLII)

Held: The appeal should be dismissed.

No miscarriage of justice arose. There is no doubt there was a striking imbalance in this trial. K was unrepresented and often excluded from participating in the proceeding. When he did participate, he advanced no meaningful defence. Although an *amicus* assisted at trial, more preparation time and a broader adversarial role could have enhanced his ability to advance the interests of the accused. That said, the law imposes a high standard for proving a miscarriage of justice. Any irregularity arising from the *amicus* appointment in this case does not rise to the level of a miscarriage of justice.

The power to appoint *amicus curiae* flows from the inherent jurisdiction of courts to manage their own procedure to ensure a fair trial. In specific and exceptional circumstances, a judge may appoint *amicus* when the judge believes doing so is required for the just adjudication of a case. The role of *amicus* is highly adaptable and can encompass a broad spectrum of functions, including adversarial functions. However, the role is not without limits, as there are dangers that arise from blending the roles of defence counsel and *amicus*. The court may not appoint *amicus* with functions that would interfere with the right of the accused to represent themselves or undermine the duty of loyalty that an *amicus* owes to the court. Similarly, an *amicus* may not perform functions that would undermine the impartiality of the court, a provincial legal aid scheme or a judicial decision to refuse to grant state-funded counsel to the accused. These dangers preclude appointing *amicus* to assume all of the powers

2023 SCC 20 (CanLII)

and duties of defence counsel, but they do not impose a bar on appointing *amicus* with defence-like functions when an adversarial perspective is needed to ensure a fair trial.

The discretion to appoint *amicus* and to determine their mandate is informed by the nature of Canada's adversarial system of justice. The adversarial system depends on the ability of parties to advance their own position and to challenge the case presented by an opposing party. A risk of imbalance is particularly acute when an accused is unrepresented. In the vast majority of cases, the duty of the trial judge and Crown counsel to ensure a fair trial for an unrepresented accused will suffice to prevent a miscarriage of justice. However, appointing *amicus* with adversarial functions may be required in unusual cases, including when an unrepresented accused displays symptoms of mental health challenges but is fit to stand trial or where the unrepresented accused refuses to participate in the trial process. Where assistance from the trial judge and the Crown may not suffice, *amicus* can be a flexible tool to maintain the integrity of the trial process.

The trial judge is best positioned to determine what help is required and has wide discretion to tailor the *amicus* appointment to the exigencies of a case. Exceptionally, appointing *amicus* with an adversarial mandate may be necessary, particularly when imbalance in the adversarial process threatens to create a miscarriage of justice. In determining the scope of an *amicus* appointment, the trial judge should consider the circumstances of the trial as a whole, including the nature and complexity of the charges; whether it is a jury trial or judge alone; the attributes of the accused;

2023 SCC 20 (CanLII)

whether assistance is needed to test the Crown's case or advance a meaningful defence; and what assistance the Crown and trial judge can provide. The judge should canvass the parties for their perspectives about an *amicus* appointment and should consider whether a limited appointment would suffice. The trial judge should consider whether the mandate assigned to an *amicus* will make a confidentiality order necessary for the *amicus* to effectively discharge their role.

In the instant case, K has not shown that the *amicus* appointment in his trial created an irregularity so severe that it rendered the trial unfair in fact or in appearance. Although it was open to the trial judge to have instructed *amicus* to assume a more partial role, the trial judge was under no obligation to do so. Moreover, it is not clear the trial judge would have mandated a broader adversarial role for *amicus* given the strenuous objections of the accused. There were many troubling aspects to the trial, but the *amicus* appointment did not create an irregularity so severe that it would shake the public confidence in the administration of justice. The trial judge was managing an exceedingly difficult trial and took many steps to ensure trial fairness, including enlisting the help of *amicus*. He appointed *amicus* with a limited mandate in the context of an accused who repeatedly insisted on representing himself without interference, reflecting respect for K's right to conduct his own defence. This was a highly discretionary decision made in balancing the entire circumstances of the proceeding. In any event, it is not obvious that appointing *amicus* earlier or with a broader mandate would have provided much value for K given that he resisted the appointment and refused to cooperate with *amicus* throughout trial. A reasonable member of the public,

2023 SCC 20 (CanLII)

considering the circumstances of the trial as a whole, would not find that a miscarriage of justice occurred.

Cases Cited

Referred to: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. Bissonnette*, 2022 SCC 23; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Walker*, 2019 ONCA 765, 381 C.C.C. (3d) 259; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Vescio v. The King*, [1949] S.C.R. 139; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *R. v. White*, 2022 SCC 7; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Bharwani*, 2023 ONCA 203, 424 C.C.C. (3d) 197; *R. v. Ledesma*, 2020 ABCA 410, 395 C.C.C. (3d) 259; *R. v. Fabrikant* (1995), 97 C.C.C. (3d) 544; *R. v. Whalen*, [2009] O.J. No. 6467 (QL); *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637; *R. v. C.M.L.*, 2016 ONSC 5332; *R. v. J.D.*, 2022 SCC 15; *R. v. Jayne*, 2008 ONCA 258, 90 O.R. (3d) 37; *R. v. Galna*, 2007 ONCA 182; *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284; *R. v. Sabir*, 2018 ONCA 912, 143 O.R. (3d) 465; *R. v. Jaser*, 2014 ONSC 2277; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Brooks*, 2021 ONSC 7418; *R. v. Imona-Russel*, 2019 ONCA 252, 145 O.R. (3d) 197; *R. v. Samra*

2023 SCC 20 (CanLII)

(1998), 41 O.R. (3d) 434; *R. v. Borutski*, 2017 ONSC 7748; *R. v. Chemama*, 2016 ONCA 579, 351 O.A.C. 381; *R. v. Ryan*, 2012 NLCA 9, 318 Nfld. & P.E.I.R. 15; *R. v. Mastronardi*, 2015 BCCA 338, 375 B.C.A.C. 134; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828; *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222; *R. v. Schmaltz*, 2015 ABCA 4, 599 A.R. 76; *Schmidt v. The King*, [1945] S.C.R. 438; *R. v. Olusoga*, 2019 ONCA 565, 377 C.C.C. (3d) 143; *R. v. Sherry* (1995), 26 O.R. (3d) 782; *R. v. Simpson*, 2018 NSCA 25, 419 C.R.R. (2d) 174; *R. v. Al-Enzi*, 2014 ONCA 569, 121 O.R. (3d) 583; *R. v. Pastuch*, 2022 SKCA 109, 419 C.C.C. (3d) 447.

2023 SCC 20 (CanLII)

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2023 SCC 20 (CanLII)

APPEAL from a judgment of the Alberta Court of Appeal (McDonald, O'Ferrall and Khullar JJ.A.), 2022 ABCA 12, 39 Alta. L.R. (7th) 12, 410 C.C.C. (3d) 477, [2022] A.J. No. 47 (QL), 2022 CarswellAlta 93 (WL), affirming the convictions of the accused for first degree murder. Appeal dismissed.

Daniel J. Song, *K.C.*, and *Katherine E. Clackson*, for the appellant.

Julie Morgan and *Elisa Frank*, for the respondent.

Blair MacPherson and *Judy Kliewer*, for the intervener the Director of Public Prosecutions.

Avene Derwa, for the intervener the Attorney General of Ontario.

Anita Szigeti, *Carter Martell*, *Cassandra DeMelo* and *Maya Shukairy*, for the intervener the Empowerment Council.

Matthew Nathanson and *Rachel M. Wood*, for the intervener the Independent Criminal Defence Advocacy Society.

Zachary Al-Khatib and *Jennifer Ruttan*, for the intervener the Criminal Trial Lawyers' Association.

Sarah Rankin and *Heather Ferg*, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Ian B. Kasper*, for the intervener the Criminal Lawyers' Association.

The judgment of the Court was delivered by

KARAKATSANIS J. —

I. Overview

[1] At issue in this appeal is the proper scope of the role that *amicus curiae* — a "friend of the court" — can play at criminal trial. When an unrepresented accused seems unable to advance a competent defence, does the guarantee of trial fairness permit or require the trial judge to appoint *amicus* with an adversarial mandate to advance the interests of the defence?

2023 SCC 20 (CanLII)

[2] This appeal invites us to define the limits to the role of *amicus*. It also presents an opportunity to clarify and affirm the principles established by this Court in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (*CLAO*). As I will explain, in exceptional circumstances, the trial judge retains wide discretion to appoint *amicus* with adversarial functions that can respond to the needs of a particular case. In tailoring the role for *amicus*, the judge must respect both the right of the accused to conduct their own defence and the right to a fair trial. These principles of fundamental justice, along with the nature of the role, help define the assistance that *amicus* can provide. While the role of *amicus* therefore has limits, the scope is broad enough to assist the judge where necessary to ensure a fair trial.

[3] We must also determine whether a miscarriage of justice arose from the circumstances of Mr. Kahsai's trial: Did the delayed and limited appointment of *amicus* create an appearance of unfairness so serious that it taints the administration of justice?

[4] There is no doubt there was a striking imbalance in this trial. Mr. Kahsai was unrepresented and often excluded from participating in the proceeding because of his disruptive behavior. When he did participate, he advanced no meaningful defence. Although *amicus* assisted with cross-examination of Crown witnesses and submissions to the court, more preparation time and a broader adversarial role could have enhanced his ability to advance the interests of the accused.

[5] That said, the law imposes a high standard for proving a miscarriage of justice. The inquiry must consider the circumstances of the trial as a whole. Here, the

2023 SCC 20 (CanLII)

trial judge faced the difficult task of managing a jury trial that Mr. Kahsai seemed determined to derail. Once it became obvious that Mr. Kahsai would not cooperate with the court or advance any viable defence, the trial judge took several measures to preserve trial fairness and restore balance to the proceeding. This included the appointment of an *amicus*. Although the trial judge seems to have held the view that *amicus* could not play a more adversarial role, it is not clear that he would have granted a broader mandate in the circumstances, particularly given Mr. Kahsai's objections to the appointment of the *amicus*, and he was under no obligation to do so. Any irregularity does not result in a miscarriage of justice. I would dismiss the appeal.

II. Background

[6] Selmawit Alem and Tam "Julie" Tran were found dead in their Calgary home on October 19, 2015. At the time of their death, Ms. Alem was 54 years old and Ms. Tran was 25 years old. Ms. Alem was the biological mother of the accused, Emanuel Kahsai. She lived with Ms. Tran, working as her primary caretaker. Ms. Tran required care because of serious developmental challenges. She had no relation to Mr. Kahsai.

[7] Both victims sustained multiple stab wounds to their face, neck and abdomen, along with blunt-force injuries to the face.

[8] Mr. Kahsai emerged as the primary suspect. Evidence led by the Crown suggested that he had a history of threatening to kill his mother. Ms. Alem sought and

2023 SCC 20 (CanLII)

obtained an emergency protection order against her son in June 2015 and then again in September 2015, which was still in place at the time of her death.

[9] The Crown's theory of the case was that Mr. Kahsai targeted his mother out of personal animus. On this theory, he only killed Ms. Tran to eliminate her as an eyewitness. The Crown led circumstantial evidence that connected the appellant to the killings. This included eyewitness and surveillance evidence that after the murders, a man who looks like Mr. Kahsai drove Ms. Alem's vehicle from her Calgary home to an Edmonton parking lot near the building where Mr. Kahsai was apprehended, stopping en route to dispose of unknown items in a dumpster. It also included forensic evidence showing blood from both victims on several items seized from the apartment building where Mr. Kahsai was found at the time of his arrest, including his jeans and running shoes.

[10] Mr. Kahsai was charged with two counts of first degree murder, contrary to s. 235(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[11] Leading to his trial, Mr. Kahsai displayed behavior that put his fitness to stand trial into question. Three psychiatric assessments found that he was fit to stand trial but feigning symptoms of mental illness for ulterior motives or strategic purposes. Relying on these assessments, the trial judge found there were no reasonable grounds to proceed with a hearing on the question of fitness. That determination is not challenged on this appeal.

2023 SCC 20 (CanLII)

[12] Mr. Kahsai discharged his lawyer before his preliminary inquiry and then refused to retain counsel. He insisted on representing himself for the entire proceedings.

A. *Court of Queen's Bench of Alberta (Poelman J.)*

[13] Mr. Kahsai was tried by a jury in the Court of Queen's Bench of Alberta. Before trial, the case management judge appointed counsel under s. 486.3 of the *Criminal Code* to cross-examine certain Crown witnesses on behalf of the defence. The trial judge appointed an *amicus* to help the accused with jury selection.

[14] Mr. Kahsai was repeatedly excluded from the courtroom because of his chronically disruptive behavior. He often interrupted the trial judge and trial process with belligerent and disorderly conduct, despite repeated cautions from the judge. When given the opportunity to address the court, the accused expressed various conspiracy theories about the FBI, the U.S. Army, and mind control, rather than asking relevant questions of witnesses or advancing relevant argument. Once Mr. Kahsai was excluded from the courtroom, he would generally participate in the proceedings from a separate room via video conference. Because his outbursts persisted from seclusion, the trial judge ordered that Mr. Kahsai's microphone be muted over 60 times.

[15] Partway through the trial, the trial judge determined that the appointment of a second *amicus* was "necessary for this case to be justly adjudicated":

2023 SCC 20 (CanLII)

In this case, I have observed and listened to Mr. Kahsai during the *voir dire* proceedings and this first week [of trial] before the jury. He has not participated in a reasonable fashion. Rather, he has taken every opportunity to disrupt the proceedings. I have had to place him in another courtroom to observe and listen to the proceedings. I have had to mute his mic most of the time. His questioning of witnesses has been ineffective and, insofar as relevant inquiries go, nonexistent.

(A.R., vol. V, at p. 577)

2023 SCC 20 (CanLII)

[16] The judge appointed the same lawyer who acted as s. 486.3 counsel as *amicus* to identify and test relevant evidence. He explained that appointing this counsel was in "the interest of justice and a fair trial" because he was available for much of the remaining trial, already familiar with the case, and another lawyer likely would not be available for the role on such short notice (A.R., vol. V, at p. 577).

[17] The trial judge made explicit in his appointment order that *amicus* would not be representing Mr. Kahsai. Rather, his role was "to assist the Court in ensuring that the proceedings are conducted fairly and appropriately" (A.R., vol. V, at p. 577). Seeking not to infringe Mr. Kahsai's right to represent himself, the trial judge instructed *amicus* not to advocate on behalf of the defence but to cross-examine Crown witnesses as he saw fit. The accused retained his right to represent himself and cross-examine Crown witnesses himself. In his charge to the jury, the trial judge repeated that trial *amicus* did not represent the accused and that anything he said was strictly in his capacity as a friend of the court.

[18] Mr. Kahsai resisted the appointment of *amicus* and mostly refused to cooperate with him throughout the proceedings. On appeal, the trial *amicus* gave

evidence that the accused was generally hostile to him, was not interested in discussing strategy, and disclosed no potential defence. While at times, Mr. Kahsai cooperated with trial *amicus* — for example, by providing questions for him to ask Crown witnesses — more often, he was confrontational and "belligerent" towards *amicus* and the court (A.R., vol. II, at p. 27).

2023 SCC 20 (CanLII)

[19] Throughout the proceeding, trial *amicus* made remarks that conceded his lack of familiarity with the case. For example, 10 days after he was appointed as *amicus*, counsel acknowledged that he might have trouble determining an appropriate line of cross-examination for a key Crown witness because "[he] was appointed late in the case and [was] not thoroughly familiar with the case" (A.R., vol. VI, at p. 972). On the same day, *amicus* acknowledged that he had still not reviewed all of the disclosure he received from the Crown. On appeal, trial *amicus* gave evidence that more preparation time would not have changed his capacity to fulfill his role effectively, given "Mr. Kahsai's attitude of non-cooperation and failure to disclose a viable defence" (A.R., vol. II, at p. 30).

[20] Mr. Kahsai advanced no theory that would give rise to a defence. But he maintained that the Crown had not proven his guilt beyond a reasonable doubt because the evidence was not reliable. In particular, he urged the jury to find him not guilty because the running shoes found on site at the time of his arrest were not his shoe size and did not belong to him.

[21] Mr. Kahsai's attempt to deliver his own closing argument was cut short by the trial judge once it became obvious that he was not going to speak coherently on relevant matters. Instead, he used his closing argument as an opportunity to repeat various conspiracy theories, like his theory that "the FBI understands and believes [his] testimony, understands the situation at hand, the breaches of national security" (A.R., vol. VII, at p. 1236). After a few minutes of this closing address, the trial judge ordered that Mr. Kahsai be removed from the courtroom. The trial judge solicited no supplementary closing argument from trial *amicus* before proceeding with his final jury charge. Trial *amicus* did not ask the court for permission to deliver any closing argument, based on his understanding of the scope of his role. Both the judge and the *amicus* seem to have held the view that *CLAO* prevents *amicus* from advocating or making closing argument on behalf of the defence.

[22] At the close of trial, Mr. Kahsai was convicted by the jury on both counts of murder. He was sentenced to life in prison with no possibility of parole for 2 consecutive periods of 25 years. The accused has appealed that sentence separately, given this Court's decision in *R. v. Bissonnette*, 2022 SCC 23, which held that parole ineligibility periods for first degree murder cannot be served consecutively.

B. *Court of Appeal of Alberta, 2022 ABCA 12, 39 Alta. L.R. (7th) 12 (McDonald, O'Ferrall and Khullar JJ.A.)*

2023 SCC 20 (CanLII)

[23] Mr. Kahsai appealed his convictions. He argued, among other grounds, that failing to appoint *amicus* with an adversarial role at an early stage in the proceedings tainted the perceived fairness of his trial.

[24] Writing for the majority, McDonald J.A. and Khullar J.A. (as she then was) found there was no miscarriage of justice and dismissed the appeal. In the view of McDonald J.A., the appellant deliberately abused the court process to derail the proceedings and abort his trial. After that strategy failed, the appellant sought to complain that a miscarriage of justice had occurred. McDonald J.A. concluded these tactics should not be rewarded with a new trial.

[25] The majority reasoned that deference is owed to the discretionary decision of a trial judge not to appoint *amicus* with an expanded role. Here, the trial judge was limited in his ability to appoint *amicus* with adversarial functions because the appellant insisted on representing himself and objected to the appointment of even a neutral *amicus* in his case. Appointing an *amicus* with defence-like functions would have violated the appellant's asserted right to represent himself. In any event, McDonald J.A. found the appellant had not shown how the trial would have unfolded differently had the trial judge made a different *amicus* appointment.

[26] In concurring reasons, Khullar J.A. emphasized this Court did not squarely address the specific functions that *amicus* may perform in *CLAO* — it simply made general remarks about the role of *amicus*. In her view, a bright line should not be drawn for whether *amicus* can be appointed with defence-like functions in every case with an

2023 SCC 20 (CanLII)

accused who insists on actively conducting their own defence. Respect for the autonomy of the accused is not always incompatible with *amicus* performing roles like those of defence counsel. Khullar J.A. found that in this case, it was open to the judge to assign an expanded role to trial *amicus*, but it was not required by law. She agreed with McDonald J.A. that the appellant had not shown that a miscarriage of justice arose from the role of *amicus* in his case.

2023 SCC 20 (CanLII)

[27] In dissent, O'Ferrall J.A. would have allowed the appeal and ordered a new trial, with the direction that the appellant be assisted by defence counsel or *amicus* who could advocate on behalf of the defence.

[28] O'Ferrall J.A. reasoned that the *obiter* in *CLAO* should not prevent a trial judge from appointing an *amicus* with an expanded mandate in an exceptional case when it is necessary to ensure a fair and orderly trial. In a complex case in which the accused wishes to self-represent but is hopelessly incompetent to do so, and the court is satisfied that the conduct of the accused will make a fair trial impossible, imposing counsel on the accused does not infringe their right to control their own defence. Rather, it preserves their right to a fair trial.

III. Analysis

[29] The issue to be decided is whether a miscarriage of justice arose. Mr. Kahsai does not claim to have suffered actual unfairness, but contends that the

delayed and limited appointment of *amicus* led to an appearance of unfairness that rises to the level of a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*.

[30] This question implicates the issue of whether *amicus* may play an adversarial role to protect the interests of an unrepresented accused. This Court discussed the nature of the role of *amicus* in *CLAO*, in the context of deciding whether courts have jurisdiction to set rates of compensation for *amicus*. *CLAO* established that *amicus* can never essentially *become* defence counsel, identifying several dangers that might arise if *amicus* were appointed to act as counsel for the defence. However, *CLAO* did not canvass the many functions that *amicus* can legitimately perform without engaging the dangers identified by the Court. Nor did it limit *amicus* to assuming a strictly neutral role. The case law that has emerged shows that trial judges have since struggled to define the permissible scope of roles for *amicus*. This decision seeks to clarify the functions that *amicus* can perform to assist the court and the factors that trial judges should consider when tailoring the scope of an *amicus* appointment.

[31] Mr. Kahsai submits that the role of *amicus* must be sufficiently flexible to protect against the threat of a miscarriage of justice. In particular, where an unrepresented accused does not advance a meaningful defence, *amicus* should be entitled to discharge a broader adversarial role. Here, Mr. Kahsai failed to advance his own defence, and the neutral role assumed by trial *amicus* did little to restore balance to the proceedings. He pleads that in such a circumstance, the trial judge had to appoint

2023 SCC 20 (CanLII)

amicus who was properly prepared to advocate on behalf of the defence. Failing to do so resulted in an appearance of unfairness that warrants a new trial.

[32] In response, the Crown concedes that *amicus* can assist the court in various ways, but contends there must be limits to the role. The Crown maintains that *amicus* can never be forced on an unwilling accused or appointed with functions that would undermine the autonomy of the accused to conduct their own defence. In any event, appellate courts must show deference to discretionary decisions about the role of *amicus* — particularly in cases that involve a party whose conduct undermines trial efficiency and progress. Here, the trial judge took measures to ensure fairness to all the parties, and a miscarriage of justice did not occur.

[33] In the following reasons, I affirm and build on the principles established by this Court in *CLAO*. In the vast majority of cases, trial fairness can be assured by the trial judge, the Crown, and the defence performing their unique roles. However, in exceptional circumstances, the help of *amicus* may be needed to avoid actual unfairness or the appearance of unfairness. While *amicus* can never fully assume the role of defence counsel, they can discharge many adversarial functions typically performed by defence counsel where necessary to a fair trial. Although there are limits to the roles *amicus* can play — informed by the nature of their role as a friend of the court and the constitutional rights of the accused — the scope is broad enough to encompass adversarial functions where those are "necessary to permit a particular proceeding to be successfully and justly adjudicated" (*CLAO*, at para. 44).

2023 SCC 20 (CanLII)

[34] As to whether the delayed and limited *amicus* appointment in Mr. Kahsai's trial created an appearance of unfairness that rises to the level of a miscarriage of justice, I conclude that it did not. The trial judge was under no obligation to appoint *amicus* at a particular point in the proceeding or with particular adversarial functions. And even if the *amicus* appointment were based on a misapprehension of the role of *amicus*, it did not create an irregularity so severe that it would shake the public confidence in the administration of justice.

A. *Inherent Jurisdiction to Appoint Amicus to Ensure Trial Fairness*

[35] Trial fairness is a principle of fundamental justice that is guaranteed under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 185; see also *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603). It encompasses both the rights of the accused, including the right to make full answer and defence, and broader societal interests, like the interest in an effective and truth-seeking adversarial process (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 48, citing *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76; see also *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 22, citing *R. v. Harrer*, [1995] 3 S.C.R. 562, per McLachlin J.).

[36] The power to appoint *amicus curiae* flows from the inherent jurisdiction of superior courts to manage their own procedure to ensure a fair trial (*CLAO*, at para. 46; I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). This jurisdiction empowers a superior court judge to appoint *amicus*

2023 SCC 20 (CanLII)

when the judge believes doing so is required for the just adjudication of a case. The power of a statutory court to appoint *amicus* is necessarily implied from the court's authority to control its own process and function as a court of law (*CLAO*, at paras. 12 and 112). The discretionary power to appoint *amicus* should be used "sparingly and with caution, in response to specific and exceptional circumstances" that arise (para. 47).

2023 SCC 20 (CanLII)

[37] Although not a party to the proceedings, an *amicus* may help the court by providing a perspective or performing a function that the judge considers necessary to decide the issues in dispute (*CLAO*, at paras. 44 and 87). This role is justified on the reasoning that a court should not have to decide "contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions", which may not be available from the parties acting alone (para. 108). The defining feature of *amicus* is that they owe their duty of loyalty exclusively to the court, regardless of the circumstances or the specific terms of their appointment (paras. 53, 87 and 118). While the purpose of an *amicus* appointment must be to assist the court, it may have the incidental effect of advancing the interests of the accused (see M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales 2022* (29th ed. 2022), at para. 26.6, citing *CLAO*, at para. 119).

[38] The role of *amicus* is highly adaptable and can encompass duties that exist on a broad spectrum of functions (see *R. v. Walker*, 2019 ONCA 765, 381 C.C.C. (3d) 259, at para. 65; *CLAO*, at para. 117). The precise role for *amicus* will depend on the

particular needs identified by the trial judge. But the role of *amicus* is not without limits. In *CLAO*, this Court established that *amicus* would exceed the proper scope of their role once "clothed with all the duties and responsibilities of defence counsel" (para. 114, per Fish J., dissenting, but not on this point). *CLAO* identified several dangers that arise from blending the roles of defence counsel and *amicus*. First, the Court recognized that such an appointment may interfere with the constitutional right of the accused to represent themselves (para. 51). Second, the Court articulated concerns that arise from the role of *amicus* as friend of the court. These include the potential conflict of interest between the duty that an *amicus* owes to the court and the duty they would owe to the accused; and the risk that an *amicus* might undermine the impartiality of the court by giving strategic litigation advice to the accused (paras. 53-54). Finally, the Court identified additional dangers that may arise in particular cases, including the risk that an *amicus* appointment could undermine the legal aid scheme or a judicial decision to refuse to grant state-funded counsel to the accused (paras. 52 and 55).

[39] These dangers will preclude a court from appointing *amicus* to assume all of the powers and duties of defence counsel. That said, there is a wide range of adversarial functions that *amicus* can execute without engaging these concerns, as the subsequent cases show. In some cases trial fairness may be best served by appointing *amicus* to oppose the position of the Crown where the accused is unrepresented. The dangers identified in *CLAO* help tailor the role for *amicus*, as I explain below. But they

2023 SCC 20 (CanLII)

do not impose a bar on appointing *amicus* with defence-like functions, when the court determines that an adversarial perspective is needed to ensure a fair trial.

B. *Limitations on the Scope of Roles for Amicus*

(1) Role as Friend of the Court

[40] To begin, the scope of permissible functions for *amicus* is limited by their fundamental role as a friend of the court. As this Court recognized in *CLAO*, two primary constraints emerge from the nature of this role.

[41] First, assuming the role of *amicus* imposes a duty of loyalty to the court that *amicus* must always uphold, regardless of the specific functions they are assigned to discharge. To prevent a conflict of interest, counsel acting as *amicus* cannot uphold a simultaneous duty of loyalty to the accused (*CLAO*, at para. 53). This means that once counsel is appointed as *amicus*, they cannot maintain any solicitor-client relationship with the accused. An *amicus* does not take instructions from the accused and cannot be dismissed by the accused. Thus, while *amicus* can advocate in ways that advance the interests of the defence, they do not "represent" the accused. This may be especially important for the trial judge to make clear when appointing *amicus* in a proceeding with an accused who is unrepresented despite their efforts to seek or retain counsel.

[42] Second, and relatedly, as a friend of the court, the mandate of *amicus* is to act as a lawyer of the court and for the court. Thus, *amicus* cannot be given functions

2023 SCC 20 (CanLII)

that would essentially undermine the court's duty of impartiality — for example, by advising the accused on strategic litigation decisions (*CLAO*, at para. 54). If in performing their assigned mandate the *amicus* encounters a conflict with the duty of loyalty they owe to the court, they must always privilege their duty to the court. The *amicus* should alert the court immediately if they are put in a position that would compromise their ability to discharge their duty of loyalty to the court.

(2) Rights of the Accused

[43] The roles that *amicus* can perform may also be restricted by the constitutional right of the accused to conduct their own defence (*CLAO*, at para. 51, citing *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 972). This right encompasses control over key litigation decisions, including whether to proceed with representation; what mode of trial to elect; whether to plead guilty or not guilty; whether to lead any defence; whether to testify; and what witnesses to call (*Swain*, at p. 972; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 9, citing *Vescio v. The King*, [1949] S.C.R. 139, at p. 144; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at para. 2; *R. v. White*, 2022 SCC 7). Empowering the accused with control over key strategic decisions advances trial fairness by ensuring they may bring forward the defence they see fit. The right is a principle of fundamental justice, flowing as a "reflection of our society's traditional respect for individual autonomy within an adversarial system" of justice (*Swain*, at p. 972). An accused can thus make strategic decisions that may be seen as unwise, or even detrimental to their position — so long as they are fit to stand trial and the court

2023 SCC 20 (CanLII)

is satisfied that the choice stems from an informed and reality-based decision (see *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Bharwani*, 2023 ONCA 203, 424 C.C.C. (3d) 197, at para. 167; *R. v. Ledesma*, 2020 ABCA 410, 395 C.C.C. (3d) 259; *Walker*, at para. 35).

[44] However, the right of the accused to control their own defence is not absolute (*Swain*, at p. 976). It is still subject to the ordinary rules of law and does not confer the accused with special privileges. For example, an accused can only advance defences available at law and elicit evidence that complies with the rules of evidence. A defendant's conduct is also subject to the direction of the court in managing its process; the right to represent oneself does not give "licence to paralyze the trial process by subjecting an endless stream of witnesses to interminable examination on irrelevant matters" (see *R. v. Fabrikant* (1995), 97 C.C.C. (3d) 544 (Que. C.A.), at p. 574). Similarly, a defendant's choice of representation is always subject to counsel's duty of professional integrity. Where counsel feels unable to continue without breaching their oath, they must seek to withdraw, despite any resistance from the accused (see *Cunningham*, at paras. 48-49; see also, e.g., Law Society of Alberta, *Code of Conduct*, r. 3.7-5; Law Society of Ontario, *Rules of Professional Conduct*, r. 3.7-7). Thus, the conduct of a defence operates within the legal and ethical framework of the justice system, alongside other rules and principles of fundamental justice.

[45] The right of the accused to control their own defence restricts the adversarial functions that *amicus* can assume. As noted by the intervener the Canadian

2023 SCC 20 (CanLII)

Civil Liberties Association, *amicus* cannot make submissions or seek to elicit evidence that would contradict any defences or theories raised by the accused (see I.F., at p. 8). At the same time, a defendant's choice to represent themselves will not prevent *amicus* from assuming *any* adversarial role, because the right to control one's own defence does not entitle the accused to determine what assistance the court requires. Thus, while a trial judge can appoint *amicus* with adversarial functions over the objections of an accused, the judge must consider any objections in tailoring the scope of the appointment, with particular sensitivity to the limitations imposed by the right to control one's defence. This may be especially crucial where the accused is unrepresented not for failure to secure counsel, but because they insist on representing themselves.

[46] Some adversarial functions should generally be available for *amicus* because they do not conflict with the right to control one's own defence. For example, *amicus* can seek to advance the interests of the accused through examinations or submissions that do not conflict with the key strategic choices of the accused. Within those limits, *amicus* should always be entitled to test the strength of the Crown's case to put the Crown to its burden of proving guilt beyond a reasonable doubt.

[47] Tailoring the role for *amicus* will be case-specific, shaped both by how the accused exercises their constitutional rights and what is needed to ensure a fair trial. Both principles of fundamental justice can be accommodated, including where trial fairness requires the *amicus* to provide an adversarial perspective. I agree with

2023 SCC 20 (CanLII)

Khullar J.A. that "respect for the accused's autonomy is not always necessarily incompatible with an *amicus* performing roles similar to those of defence counsel" (appeal reasons, at para. 175). In general, the trial judge should seek to give effect to the asserted key litigation decisions of the accused while also keeping in mind what is required to avoid a miscarriage of justice.

(3) Other Limitations

[48] Finally, permissible roles for *amicus* may be limited where other concerns identified in *CLAO* are relevant in a particular case. For example, *amicus* appointments cannot be used strategically to circumvent the provincial legal aid scheme or reverse a judicial decision to refuse to grant state-funded counsel following a *Rowbotham* application. These concerns will arise most frequently when the accused is unrepresented because they were unable to secure counsel. The facts of *R. v. Whalen*, [2009] O.J. No. 6467 (QL) (C.J.), one of the cases appealed in *CLAO*, are illustrative. In that case, the accused sought the appointment of defence counsel as *amicus* because defence counsel was unwilling to act on legal aid rates. The trial judge appointed defence counsel as *amicus* but with higher rates. On appeal, without commenting on that order, this Court noted that an *amicus* appointment must not circumvent the legal aid scheme (para. 55). Trial judges should proceed with caution before appointing *amicus* with adversarial functions that may engage these concerns.

[49] In sum, the proper scope of the roles for *amicus* is limited by necessary constraints inherent in the nature of the role. First, the role of *amicus* as a friend of the

2023 SCC 20 (CanLII)

court means that *amicus* can never discharge functions that would violate their duty of loyalty to the court or undermine the impartiality of the court, such as by advising on key strategic defence choices. Second, the mandate assigned to *amicus* should respect the key strategic decisions asserted by the accused while also respecting what is required for trial fairness. Finally, the appointment of *amicus* cannot be exploited to circumvent the legal aid scheme or judicial decisions to refuse to grant state-funded counsel. While these limits do not preclude *amicus* from performing any adversarial functions, they do restrict the kinds of assistance that *amicus* can provide.

2023 SCC 20 (CanLII)

C. *Discretion to Appoint Amicus with Adversarial Functions*

[50] The trial judge has a broad discretion to appoint *amicus* and to determine the scope of their mandate. I turn now to some of the relevant considerations that inform those decisions, flowing from the nature of our justice system and the jurisprudence.

(1) When the Assistance of *Amicus* May Be Required

[51] The duties arising from the guarantee of trial fairness are shaped, in part, by our adversarial system of law. Unlike an inquisitorial model, where the judge assumes an active investigatory role, the trial judge in an adversarial system must remain impartial. It is for the parties to bring forward relevant evidence and argument that can prove the issues while the trial judge presides as an objective decision-maker (see D. Stuart and T. Quigley, *Learning Canadian Criminal Procedure* (14th ed. 2022), at pp. 593-94).

[52] The adversarial system depends on certain conditions being present to function as an effective mode of procedure. For example, the adversarial system "assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions" to enable the court to resolve the dispute (*Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 (C.A.), at p. 657). The system also depends on the ability of parties to advance their own position and challenge the case presented by an opposing party through the exercise of adversarial functions. This would include, for example, the litigation strategy; the selection of a jury; submissions raising or responding to evidentiary or other legal concerns; examining and cross-examining witnesses; and opening and closing argument. In a criminal proceeding, trial fairness is particularly dependent on the ability to challenge the Crown's case to ensure the interests of the accused are protected. If there is an imbalance in the capacity of the parties to bring forward a viable case by performing adversarial functions, "the adversarial process upon which the strength of our justice system is predicated risks losing much of its force" (*Walker*, at para. 63; see also *R. v. C.M.L.*, 2016 ONSC 5332, at para. 80 (CanLII), per Molloy J.). In this sense, adversarial functions advance both the interests of individual litigants, including the accused, and the broader public interest in an effective adversarial process.

[53] The risk of imbalance in the adversarial process is exacerbated when an accused is unrepresented (see P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at pp. 155-56). In defending criminal

2023 SCC 20 (CanLII)

charges without representation, the accused lacks the benefit of independent legal expertise and professional advice while facing what may amount to profound legal jeopardy. Proceeding to criminal trial without representation will often put the accused at a significant disadvantage, sometimes risking a trial in which no meaningful defence is advanced. This is a choice that the accused has a right to make, provided they are fit to stand trial and informed about the consequences of their decision. But that choice may jeopardize the fairness of a trial. To protect the integrity of the adversarial system from these inherent vulnerabilities, the trial judge and the Crown have unique roles to play to ensure a fair trial for an unrepresented accused.

[54] The trial judge has a duty to help an unrepresented accused to ensure the proceeding respects their fundamental rights (*R. v. J.D.*, 2022 SCC 15, at para. 34). While this duty can typically be fulfilled by explaining the trial process to the accused, some circumstances will require the judge to more actively intervene. For example, the duty may require the trial judge to suggest that the accused seek counsel; to identify the material issues; to frame questions to elicit relevant evidence for the defence; or to raise potential *Charter* breaches on the judge's own motion (*R. v. Jayne*, 2008 ONCA 258, 90 O.R. (3d) 37; *R. v. Galna*, 2007 ONCA 182, at para. 6 (CanLII); *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 113; *R. v. Sabir*, 2018 ONCA 912, 143 O.R. (3d) 465, at paras. 32-36). At the same time, judges must always remain neutral, which limits the scope of their duty to help an unrepresented accused. For example, the judge cannot provide the accused with strategic advice or take over cross-examination for the defence (*R. v. Jaser*, 2014 ONSC 2277, at para. 32 (CanLII); *Richards*, at

2023 SCC 20 (CanLII)

para. 111). To balance these competing obligations, the judge must ensure the accused will benefit from a procedurally fair trial, while being mindful not to offer help that would be seen to undermine the impartiality of the court.

[55] The Crown also has considerable responsibility in ensuring trial fairness. As local ministers of justice and officers of the court, Crown counsel have a duty to preserve the fairness of the criminal justice system for all parties, including the accused, victims, and the public (see Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*, last updated May 6, 2023 (online)). Because of the public and quasi-judicial dimension to the Crown's role, their function is not adversarial or partisan in the traditional sense. Rather, it is driven by their purpose to advance the public interest (*R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 27). As famously expressed by Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, the goal of the Crown is "not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime" (p. 23). The Crown must always act fairly, dispassionately, and with integrity, both in the courtroom and in all their dealings with the accused (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 155, per Binnie J., dissenting, but not on this point).

[56] The mandate of the Crown to advance the public interest means counsel will assume additional obligations when prosecuting an unrepresented accused. For example, the Crown must advise the unrepresented accused of their right to disclosure of all relevant materials in the possession or control of the Crown, whether that

2023 SCC 20 (CanLII)

evidence is inculpatory or exculpatory (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 343). Crown counsel also has a duty to frankly alert the court if they suspect that "all available legal proof of the facts" is not being presented to the court by the unrepresented accused (*Boucher*, at p. 24). Further, it has been suggested that the Crown must be especially careful to present only legally admissible evidence, given that an unrepresented accused will generally be less familiar with the rules of evidence and less likely to challenge Crown evidence (see I. J. Schurman, "The Unrepresented Accused: Duties and Obligations of Trial Judges and Crown Counsel, and the Preparation of Petitions for State-Funded Counsel", in G. A. Smith and H. Dumont, eds., *Justice to Order: Adjustment to Changing Demands and Co-Ordination Issues in the Justice System in Canada* (1999), 297, at pp. 310-11). Finally, Crown counsel must cooperate with the trial judge to enable the court to assist an unrepresented accused and facilitate a proceeding that upholds their fundamental rights.

[57] The responsibilities of the trial judge and the Crown can go a long way to ensure trial fairness and, in the vast majority of cases, will suffice to prevent a miscarriage of justice. Yet there are limits tied to the roles of judge and Crown counsel in an adversarial proceeding, and their assistance will not always be enough to ensure a fair trial. Appointing *amicus* with adversarial functions may be required to restore some balance in "unusual cases", including when an unrepresented accused displays symptoms of mental health challenges, but is nevertheless fit to stand trial, or where the unrepresented accused refuses to participate in the trial (see *C.M.L.*, at para. 68). It may also be required where the nature of the charges or the mode of trial make an

2023 SCC 20 (CanLII)

adversarial perspective from *amicus* necessary for the case to be justly adjudicated (see *Walker*, at para. 64; *R. v. Brooks*, 2021 ONSC 7418, at para. 44 (QL, WL); *C.M.L.*, at paras. 76 and 86).

2023 SCC 20 (CanLII)

[58] Generally, the court must respect the strategic choices of an accused person who is fit to stand trial, even where those choices seem irrational or unwise (see *Bharwani*, at para. 157). Still, courts have recognized that in "complex cases involving self-represented accused with mental, behavioural, and/or cognitive challenges", the risk that the adversarial process will be compromised is particularly acute (*Walker*, at para. 63). And as the intervener the Empowerment Council notes, the low threshold for fitness means that defendants may be fit to stand trial despite experiencing serious mental, behavioural, or cognitive challenges (see I.F., at para. 18). In that event, it may be challenging to ensure a fair trial, and assistance from the trial judge and the Crown may not suffice. *Amicus* can be a flexible tool to mitigate these risks and help trial judges maintain the integrity of their trial process when these types of unusual circumstances arise (*R. v. Imona-Russel*, 2019 ONCA 252, 145 O.R. (3d) 197, at para. 72; *Jaser*, at para. 35; *Walker*, at para. 71).

(2) Considerations in Determining the Scope of the Role of *Amicus*

[59] Subject to the limitations we have identified above, the trial judge is best positioned to determine what type of help is required and has wide discretion to tailor the appointment to the exigencies of a case (see *R. v. Samra* (1998), 41 O.R. (3d) 434 (C.A.); *Imona-Russel*, at para. 92). Exceptionally, appointing *amicus* with an

adversarial mandate may be necessary for the court to fulfill its responsibility to maintain a fair and effective trial — particularly when imbalance in the adversarial process threatens to create a miscarriage of justice.

2023 SCC 20 (CanLII)

[60] Many recent cases illustrate where courts found it necessary to appoint an *amicus* with adversarial functions. For example, courts appointed an *amicus* with a defence-like role where the accused was unwilling to retain a lawyer and did not actively participate in the proceeding (*R. v. Borutski*, 2017 ONSC 7748; *R. v. Chemama*, 2016 ONCA 579, 351 O.A.C. 381; *C.M.L.*); where the accused represented themselves, but could not advance a competent defence (*Walker*; *Jaser*, at para. 35; *R. v. Ryan*, 2012 NLCA 9, 318 Nfld. & P.E.I.R. 15); where the accused was disruptive, abusive of court process, or determined to derail the proceedings (*Brooks*; *R. v. Mastronardi*, 2015 BCCA 338, 375 B.C.A.C. 134, at paras. 9-10 and 50; *C.M.L.*); and where complex issues or serious criminal charges made an adversarial perspective necessary for trial balance and fairness (*Mastronardi*; *Imona-Russel*, at paras. 30-31; *Brooks*, at paras. 43-44; *Borutski*; *Jaser*). In many of these cases, the court appointed an *amicus* with an adversarial role only after explicitly determining that the dangers identified in *CLAO* would not materialize (*Borutski*, at para. 29 (CanLII); *C.M.L.*, at para. 71; *Mastronardi*, at paras. 44-47; *Imona-Russel*, at para. 93).

[61] As these cases reveal, the trial judge should consider the circumstances of the trial as a whole when determining whether to appoint *amicus* with an adversarial role. This includes the nature and complexity of the charges (see *Ryan*, at para. 156;

Walker, at para. 64; *Brooks*, at para. 44); whether it is a jury trial or judge alone (see *C.M.L.*, at paras. 76 and 86; *Brooks*, at para. 44); the attributes of the accused, including where they are unrepresented and any concerns about mental health challenges or their ability to cooperate with the court (see *Walker*, at para. 64; *Mastronardi*, at paras. 50-52; *Brooks*, at para. 44; *C.M.L.*); whether assistance is needed to test the Crown's case or advance a meaningful defence (see *Borutski*, at paras. 23, 28 and 31; *Ryan*, at para. 156); and what assistance the Crown and trial judge can provide within their roles (see *C.M.L.*, at para. 80; *Imona-Russel*, at para. 69; *Ryan*, at para. 156).

[62] *Amicus* can legitimately assume a wide range of adversarial functions throughout the proceedings, within the scope of the limits identified above. For example, I accept the submission of the intervener the Criminal Lawyers' Association that *amicus* can help the accused by explaining the strategic choices available to them, along with the potential implications of those decisions (see I.F., at p. 2). And there is no theoretical barrier to prevent *amicus* from testing the strength of the Crown's case through cross-examination, submissions or closing argument (see *Mastronardi*; *Borutski*; *C.M.L.*; *Walker*). As noted above, *amicus* may present an alternative theory or defence arising on the evidence to counter the position of the Crown, provided it does not conflict with any asserted theory or defence of the accused. Other adversarial functions may also be available.

[63] That is not to say a broad adversarial mandate for *amicus* is always necessary, nor that it should be close to routine. The dangers established in *CLAO* led

2023 SCC 20 (CanLII)

this Court to affirm that the power to appoint *amicus* must be reserved for exceptional circumstances. But these dangers do not stand in the way of maintaining public confidence in trial fairness — and as several authorities illustrate, they can be accommodated with an appointment order carefully tailored to the circumstances of a particular case.

2023 SCC 20 (CanLII)

D. *Summary and Best Practices*

[64] In sum, in the vast majority of cases, the responsibilities of the trial judge and the Crown will suffice to ensure trial fairness. Once it is determined that *amicus* is required, the trial judge retains wide discretion to appoint *amicus* with functions that are responsive to the needs of a case. This may include adversarial functions where necessary for trial fairness — for example, to restore balance to a proceeding when an accused chooses to self-represent and puts forward no meaningful defence. In tailoring the scope of the role for the *amicus*, the judge will consider the nature of the role of *amicus* as friend of the court and the circumstances of a case, including how the accused exercises their constitutional rights and what is needed to ensure a fair trial. While there are necessary limits to the adversarial functions that *amicus* can perform, the scope is broad enough to accommodate what is necessary for trial fairness in a particular case.

[65] In considering whether to appoint *amicus*, the judge should canvass the parties for their perspectives about the necessity and scope of an *amicus* appointment. The judge should consider whether an appointment that is limited in duration or scope would suffice. For example, assistance from *amicus* may only be necessary for

cross-examination of certain Crown witnesses or for a particular motion in the proceeding. It would also be helpful to reduce the terms of appointment to writing in a formal order or endorsement, explicitly identifying the nature and scope of the role for the *amicus* and the specific functions that the court requires.

[66] Finally, the trial judge should consider whether the mandate assigned to an *amicus* will make a confidentiality order necessary for the *amicus* to effectively discharge their role. As the intervener the Criminal Trial Lawyers' Association submitted, full and frank conversation between the accused and an *amicus* may depend on a confidentiality order if the *amicus* is charged with advocating for the interests of the defence (see I.F., at p. 7). While solicitor-client privilege would not be available, a confidentiality order would create legal protections for communications between the *amicus* and the accused in discussing their case (see, e.g., *Imona-Russel*, at paras. 64 and 68, explaining how an undertaking by Crown counsel to treat all correspondence between the accused and *amicus* as privileged achieved the confidentiality necessary in that case).

IV. Application

[67] To succeed on this appeal, Mr. Kahsai must show that the *amicus* appointment in his trial created an irregularity so severe that it rendered the trial unfair in fact or in appearance (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 69 and 73). He will establish a miscarriage of justice if the gravity of the irregularity would create such a serious appearance of unfairness it would shake the public confidence in

2023 SCC 20 (CanLII)

the administration of justice (*R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 51, citing *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89). This analysis is conducted from the perspective of a reasonable and objective person, having regard for the circumstances of the trial (*Khan*, at para. 73). It must also acknowledge that while the accused is entitled to a fair trial, they are not entitled to a perfect trial, and "it is inevitable that minor irregularities will occur from time to time" (*Khan*, at para. 72).

2023 SCC 20 (CanLII)

[68] The "miscarriage of justice" standard — already a high bar — is even higher when claimed based on perceived unfairness instead of actual prejudice. When the perceived unfairness of a trial is at issue, "the appearance of unfairness must be pronounced, such that it would be a serious interference with the administration of justice and offend the community's sense of fair play and decency" (*Davey*, at para. 74). Whether a miscarriage of justice arose is a question of law reviewable for correctness (*R. v. Schmaltz*, 2015 ABCA 4, 599 A.R. 76, at para. 13, citing *Schmidt v. The King*, [1945] S.C.R. 438, at p. 439).

[69] Courts have found a miscarriage of justice based on perceived unfairness in a range of circumstances, including where defence counsel shared confidential information with the trial judge, in breach of solicitor-client privilege (*R. v. Olusoga*, 2019 ONCA 565, 377 C.C.C. (3d) 143); where the trial judge showed prejudgment by implying that a defence witness was committing perjury in his testimony (*R. v. Sherry* (1995), 26 O.R. (3d) 782 (C.A.)); where defence counsel did not prepare the accused

to testify (*R. v. Simpson*, 2018 NSCA 25, 419 C.R.R. (2d) 174); and where the accused was forced to proceed without representation, despite their stated wishes and being faultless for their circumstance (*R. v. Al-Enzi*, 2014 ONCA 569, 121 O.R. (3d) 583; *R. v. Pastuch*, 2022 SKCA 109, 419 C.C.C. (3d) 447). As these examples show, the appearance of unfairness must be serious enough to taint the administration of justice to rise to the level of a miscarriage of justice.

2023 SCC 20 (CanLII)

[70] For reasons I will explain, Mr. Kahsai has not discharged his burden in proving a miscarriage of justice.

A. *A Miscarriage of Justice Did Not Arise*

[71] Mr. Kahsai argues that an appearance of unfairness arose from two aspects of the *amicus* appointment in his trial. First, he submits that the *timing* of the appointment created an appearance of unfairness. He contends that the trial judge failed to ensure a fair and balanced proceeding by appointing an *amicus* partway through his trial, which prevented trial *amicus* from adequately preparing for his role. Second, Mr. Kahsai claims that an appearance of unfairness arose from the *scope* of the *amicus* appointment, which was based on the trial judge's misunderstanding of the functions that *amicus* can properly discharge. In particular, he claims it was an error for the trial judge to conclude the trial with no closing argument for the defence, based on the understanding that *CLAO* prevented trial *amicus* from advocating on behalf of the accused.

[72] To the extent that the trial judge restricted functions for trial *amicus* based on the understanding that *CLAO* prevented him from assuming any adversarial functions, that would be an error in principle. As I have described, this Court has never prohibited *amicus* from assuming adversarial functions or delivering a closing address. I agree with Khullar J.A. that it was open to the trial judge to have instructed trial *amicus* to go beyond cross-examination and assume a more partial role. But the appointment of *amicus* is a highly discretionary decision, and the trial judge was under no obligation to appoint *amicus* at a particular time or with a particular mandate. It is not clear whether the trial judge would have mandated a broader adversarial role for *amicus* given the strenuous objections of the accused. In any event, the ultimate issue is whether the nature of the *amicus* appointment, even if its scope were curtailed in error, led to a miscarriage of justice.

[73] There were many troubling aspects to this trial. Not only was Mr. Kahsai unrepresented in a double-murder trial, he could not fully participate in the trial process. When he did participate, he provided no effective cross-examination of Crown witnesses or coherent argument on his own behalf. Although *amicus* was appointed to redress some of the concerns arising from these circumstances, the help provided was limited in its scope. The record shows that trial *amicus* did not have time to fully prepare for his role and that he would have more actively participated if he understood that *amicus* can generally assume an adversarial role. It is particularly troubling that there was no closing argument for the defence. This omission contributed to an impression of imbalance in this adversarial proceeding. It also deprived Mr. Kahsai of

2023 SCC 20 (CanLII)

the benefit of submissions that the *amicus* would have made about the Crown's failure to prove planning and deliberation on one of the two counts of murder. These considerations raise concerns about the appearance of fairness in his trial.

2023 SCC 20 (CanLII)

[74] At the same time, these concerns must be considered in the context of the exceptional situation that confronted the trial judge, who was trying to manage an exceedingly difficult trial. The judge aimed to respect the choice of Mr. Kahsai to represent himself by assisting him and facilitating his participation in the proceeding, as much as possible. It did not become obvious to the trial judge that Mr. Kahsai would not cooperate with the court or advance a meaningful defence until the trial was underway. At that point, the judge enlisted the help of *amicus* to preserve trial fairness and improve the balance in the proceeding. He sought counsel who was already familiar with the case and was available for most of the remaining hearing days to proceed with this jury trial. The trial judge appointed *amicus* with a limited mandate in the context of a trial where the accused repeatedly insisted on representing himself without interference, reflecting a measure of respect for Mr. Kahsai's right to conduct his own defence. This was a highly discretionary decision made in balancing the entire circumstances of the proceeding.

[75] The trial judge took many steps to ensure trial fairness for Mr. Kahsai. The trial judge emphasized repeatedly that the jury was not to consider the erratic and disruptive conduct of the accused. The judge sought to restore some balance in the proceeding by asking trial *amicus* to cross-examine Crown witnesses and recalled

several witnesses to facilitate that exercise. Relying on psychiatric opinions that Mr. Kahsai was fit and disrupting the proceeding deliberately, the trial judge did his best to manage the process while respecting the key decisions the accused had a right to make. The trial judge also provided a thorough jury charge, highlighting limitations in the Crown's case and emphasizing the Crown's burden to prove each element beyond a reasonable doubt.

[76] 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. He refused to cooperate with trial *amicus*, was not interested in discussing strategy, and disclosed no potential defence. In this circumstance, it is hard to see how a different *amicus* appointment would have impacted the fairness or perceived fairness of his trial. While the appellant bears no burden to prove actual prejudice on this appeal, he needs to show that a well-informed and objective person would find an appearance of unfairness so serious that it would shake their confidence in the administration of justice — a high bar.

[77] In my view, a reasonable member of the public, considering the circumstances of the trial as a whole, would not find that a miscarriage of justice occurred. Instead, they would find the trial fairness concerns were sufficiently addressed by the trial judge and the assistance of *amicus*, such that a new trial is not required.

2023 SCC 20 (CanLII)

[78] I would dismiss the appeal.

Appeal dismissed.

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Solicitor for the respondent: Alberta Crown Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Yellowknife.

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2023 SCC 20 (CanLII)

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Solicitors for the intervener the Canadian Civil Liberties Association: McKay Ferg, Calgary.

Solicitors for the intervener the Criminal Lawyers' Association: Kapoor Barristers, Toronto.

2023 SCC 20 (CanLII)