

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Buzizi, 2013 SCC 27, [2013] 2 S.C.R. 248 | **Date:** 20130510  **Docket:** 34899 |

Between:

Didier Buzizi

Appellant

and

Her Majesty The Queen

Respondent

**Official English Translation**

**Coram:** LeBel, Fish, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 18)  **Dissenting reasons:**  (paras. 19 to 67) | Fish J. (Moldaver and Karakatsanis JJ. concurring)  Wagner J. (LeBel J. concurring) |

R. *v.* Buzizi, 2013 SCC 27, [2013] 2 S.C.R. 248

Didier Buzizi Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.* Buzizi**

2013 SCC 27

File No.: 34899.

2013:  March 27; 2013:  May 10.

Present: LeBel, Fish, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Criminal law — Defences — Provocation — Accused convicted of second degree murder — Whether defence of provocation should have been put to jury — Whether objective and subjective elements of defence of provocation were established, thereby lending air of reality to this defence.*

A jury found the accused guilty of second degree murder. In the middle of the night, he had intervened in an altercation that ended in the victim’s death. The evidence in the record showed that the accused was under the influence of “many emotions” when he acted: he was angry, mad, upset, “out of it”, scared, afraid, worried, trying to protect himself and reacting emotionally. At trial, the judge refused three requests by the defence that he put to the jury the defence of provocation raised by the accused. The Court of Appeal, in a majority judgment, affirmed that decision and dismissed the appeal. All three justices in the Court of Appeal agreed that the evidence was sufficient in respect of the objective element. Only the dissenting judge, however, considered the evidence to be equally capable of supporting the subjective element.

*Held* (LeBel and Wagner JJ. dissenting): The appeal should be allowed. The verdict of guilty should be set aside and a new trial ordered.

*Per* Fish, Moldaver and Karakatsanis JJ.: To the extent that the evidence adduced before him was reasonably capable of supporting the inferences necessary to make out the defence, the trial judge was bound to put the defence of provocation to the jury. The air of reality test is not intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The relevant question is whether the record contains a sufficient factual foundation for a properly instructed jury to give effect to the defence. In this case, a careful reading of the deposition of the accused ― in light of the evidence as a whole ― sufficiently supports the inferences necessary for the defence of provocation to apply. It was open to a properly instructed jury to resolve the question whether the accused had acted on the sudden and before there was time for his passion to cool within the meaning of s. 232(2) of the *Criminal Code*. Furthermore, the trial judge is not at all in the best position to determine whether a defence has an air of reality, since that is a question of law.

*Per* LeBel and Wagner JJ. (dissenting): The trial judge must put to the jury only those defences that have an air of reality and are capable of being accepted by the jury. There is no minimal air of reality test in Canadian law. A defence either has an air of reality or does not have one. To determine whether a defence meets the air of reality test, the trial judge must consider the totality of the evidence in the record. The defence of provocation has two elements: an objective element that presupposes the existence of a wrongful act or an insult that is sufficient to deprive an ordinary person of the power of self‑control, and a subjective element that requires evidence establishing that the accused acted in response to the provocation, on the sudden and before there was time for his or her passion to cool. In this case, neither the objective element nor the subjective element of the defence of provocation met the air of reality test.

Regarding the objective element, the evidence established that when the accused stabbed the victim, he had come to his cousin’s defence and had helped push the victim back in circumstances such that the defence of provocation could no longer be relied on. The willing participation of the accused in the fight made it foreseeable that the victim would react as he did, and the accused could not claim that his acts were a response to a sudden, unexpected, spontaneous and unforeseeable situation.

As for the subjective element, there is no credible evidence in the record that the accused committed the murder in response to an act of provocation by the victim before his passion had cooled. On the contrary, the accused testified that he had acted knowingly, with full knowledge of what he was doing, to defend himself out of fear that the victim might recover his weapon and attack him. The only defence raised by the accused that had an air of reality in light of the evidence was self‑defence.

Even if the test of correctness is applied to the trial judge’s decision, an appellate court must bear in mind that the trial judge, who saw and heard the witnesses, is in the best position to determine whether the evidence that is capable of supporting the necessary inferences is credible.

**Cases Cited**

By Fish J.

**Referred to:** *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Gill*, 2009 ONCA 124, 241 C.C.C. (3d) 1; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3.

By Wagner J. (dissenting)

*R. v. Pintar* (1996), 110 C.C.C. (3d) 402; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *The Queen v. Tripodi*, [1955] S.C.R. 438; *Olbey v. The Queen*, [1980] 1 S.C.R. 1008; *R. v. Gill*, 2009 ONCA 124, 241 C.C.C. (3d) 1; *R. v. Faid*, [1983] 1 S.C.R. 265.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 232(1), (2).

APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Doyon and Bich JJ.A.), 2012 QCCA 906, SOQUIJ AZ‑50856642, [2012] J.Q. no 4541 (QL), 2012 CarswellQue 4824, affirming the accused’s conviction for second degree murder. Appeal allowed, LeBel and Wagner JJ. dissenting.

*Clemente Monterosso* and *Sonia Mastro Matteo*, for the appellant.

*Thierry Nadon* and *Mario Longpré*, for the respondent.

English version of the judgment of Fish, Moldaver and Karakatsanis JJ. delivered by

Fish J. —

I

1. At the conclusion of his trial by judge and jury in the Superior Court, District of Montreal, the appellant, Didier Buzizi, was convicted of second degree murder.
2. The Quebec Court of Appeal, in a majority judgment, dismissed his appeal.
3. This is an appeal, as of right, against the judgment of the Court of Appeal.

II

1. The sole issue before us is whether the trial judge erred in law in refusing three requests by the defence that he put to the jury the defence of provocation raised by Mr. Buzizi.
2. The two majority judges answered this question in the negative; Bich J.A., dissenting on this issue, answered in the affirmative.
3. With respect for those who are of a different view, I agree with Justice Bich.

III

1. The defence of provocation comprises an objective element and a subjective element (*R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 23).
2. To the extent that the evidence adduced before him was “reasonably capable of supporting the inferences necessary to make out the defence” (*Tran*, at para. 41), the trial judge was bound to put Mr. Buzizi’s defence of provocation to the jury.
3. All three justices in the Court of Appeal agreed that the evidence was sufficient in respect of the objective element (2012 QCCA 906 (CanLII)). Only Justice Bich, however, considered the evidence to be equally capable of supporting the subjective element.
4. I think it is useful to reproduce her reasons on this point in their entirety:

[translation] To the extent that the victim’s conduct, as described by the appellant, meets, as Doyon J.A. explains, the requirements of the objective element of the defence of provocation, in my view the present circumstances also meet the requirements of the subjective element. It appears to me that we are dealing here with a very particular situation in which self‑defence (in this case, under s. 34(2) *Cr.C.*) and provocation are intertwined: the victim’s aggressive act was capable of causing a reaction which could conceivably arise in the context of either self‑defence or provocation.

Assuming that it is believed, the appellant’s testimony as I understand it does not foreclose this dual theory, which has a sufficient (albeit minimal) air of reality to it, and I think it would be dangerous to parse his statements at this stage in order to determine whether his act stemmed from fear or uncontrollable anger, whether or not he had time to reflect, and whether or not he acted “on the sudden and before there was time for his passion to cool” (s. 232(2) *Cr.C.*). The trial judge should have put the defence of provocation to the jury and, after proper instruction, left the jury the task of deciding on the facts.

In my opinion, this error warrants the ordering of a new trial.  It cannot, in my view, be assumed ― as that would amount to usurping the function of the jury ― that had the jury been properly instructed on the defence of provocation, it would not have accepted that defence and would have arrived at the same verdict, rather than finding the appellant guilty of manslaughter. In other words, it cannot be said with any certainty that the jury, tasked with evaluating the evidence based on a legal framework comprising a charge of second degree murder, a defence of self‑defence and a defence of provocation (potentially carrying with it a verdict of manslaughter), would have arrived at the same verdict it rendered in a framework from which the defence of provocation had been excluded. [Footnote omitted; paras. 104‑6.]

1. It is difficult to distinguish the instant case from *R. v. Gill*, 2009 ONCA 124, 241 C.C.C. (3d) 1, in which the Ontario Court of Appeal held:

. . . in this case, the trial judge’s decision that there was no air of reality to the defence of provocation appears to be premised on two factors: first, the appellant’s evidence disavowing anger as the trigger for his actions, and second, a finding that there was no evidence of the appellant acting in the heat of passion or as a result of a loss of self control.

We agree that there will be some cases in which the appellant’s disavowal of one of the elements of a defence will preclude the availability of the defence based on the air of reality threshold. However, this is not one of those cases. In challenging the appellant’s evidence that he was afraid at the time he stabbed Mr. Garavellos, the Crown suggested, both in cross‑examination and in his closing address to the jury, that the appellant’s true emotion was anger. If the jury rejected the appellant’s evidence that he was afraid, there was evidence capable of supporting an inference that he was angry. [paras. 18‑19]

1. Moreover, it is far from clear that Mr. Buzizi disavowed any of the essential elements of the defence of provocation. Even if certain excerpts from his testimony might leave the impression that he did, I am satisfied that a careful reading of his deposition ― in light of the evidence as a whole ― sufficiently supports the inferences necessary for his defence of provocation to apply.
2. Finally, unlike *Gill*, it is common ground in this case that the appellant was under the influence of [translation] “many emotions” (A.R., at p. 1864) when he acted. Moreover, the majority in the Court of Appeal recognized that [translation] “[t]he appellant was angry, mad, upset, ‘out of it’, scared, afraid, worried, trying to protect himself, reacting emotionally, according to the various expressions used” in the evidence in the record (para. 41). The only disputed question is whether he “acted . . . on the sudden and before there was time for his passion to cool” within the meaning of s. 232(2) of the *Criminal Code*, R.S.C. 1985, c. C‑46. I agree with Bich J.A. that it was open to a properly instructed jury to resolve this dispute in the appellant’s favour.

IV

1. With respect, I have three brief observations concerning the reasons of Justice Wagner.
2. First, my colleague finds that an appellate court must defer to the trial judge in determining whether a defence has an air of reality. As my colleague acknowledges, however, the applicable standard of review in this regard is *correctness.*  It follows, in my view, that the trial judge is not at all in the “best position” to determine whether a defence has an air of reality, since that is a question of law: “. . . the interpretation of a legal standard (the elements of the defence) and the determination of whether there is an air of reality to a defence constitute questions of law, reviewable on a standard of correctness” (*Tran*, at para. 40).
3. In addition, and again with respect, I find that my colleague errs — as did the trial judge — in his application of the “air of reality” test. As the Court held in *Cinous*, “the air of reality test [is not] intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day” (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 54). Rather, the relevant question is whether the record contains a sufficient factual foundation for a properly instructed jury to give effect to the defence.
4. Finally, my colleague’s assessment of the evidence is both incomplete and flawed. For example, he does not consider at all the evidence of an eyewitness, Diane Rudakenga, that the appellant was [translation] “like . . . out of it . . . like in a trance” (A.R., at p. 1464).

V

1. For these reasons, I would allow the appeal, set aside the jury’s verdict of guilty and order a new trial.

English version of the reasons of LeBel and Wagner JJ. delivered by

1. Wagner J. (dissenting) — I have read the reasons of my colleague Fish J., who adopts the brief reasons of the dissenting judge in the Court of Appeal. With respect, I am of the view that they are wrong. The reasons for my conclusion follow.
2. The only issue to be resolved is whether the appellant’s defence of provocation met the air of reality test and should have been put to the jury.

I. Facts

1. Before addressing this issue, I must briefly review the principal facts.
2. Doyon J.A. provided a good overview of the general context in his reasons for the Court of Appeal’s decision (2012 QCCA 906 (CanLII)):

[translation] In the middle of the night, several members of the group moved on to another restaurant/bar, on Ontario Street. Around 5:00 a.m., they were asked to leave the premises. Some of them gathered in the alley behind the bar. A verbal altercation broke out between the victim and Pierre Mumpereze, also known as “Peter”, the appellant’s cousin. A man named Rassem Chamaa intervened, but not for long, as things went no further. He saw the two men who had been arguing head toward Ontario Street. A few minutes later there was another altercation, in which the appellant was involved, that ended in the death of Mr. Rushemeza. The appellant would be found guilty of second degree murder and sentenced to imprisonment without eligibility for parole for at least 12 years. [para. 10]

1. Although the different accounts of what happened are contradictory in some regards, they are consistent as they relate to the essential elements.
2. There are some facts that are worth noting. From a fair distance away, the appellant saw that his cousin was involved in a fight with the victim, and he decided to run to where his cousin was and to intervene by pushing the victim back in order to get his cousin out of harm’s way. He then noticed that his cousin was seriously wounded in the throat and that the victim was brandishing an exacto knife, using it to threaten the members of the group the appellant was with.
3. After pushing the victim, who was trying to defend himself by threatening his assailants with his knife, the appellant saw the victim drop his knife. Fearing for his life should the victim pick his weapon up, the appellant then used his own knife, the blade of which was 20 centimetres long, to stab the victim several times.
4. According to the Crown’s theory, the appellant intentionally caused the victim’s death to take revenge for what the victim had done to his cousin. According to the appellant, he stabbed the victim in response to an act of provocation. Doyon J.A. explained the defence’s theory as follows:

[translation] The appellant argued before the jury that he had had no choice. Reacting emotionally and being “out of it”, to avoid being a victim himself, he had to defend himself by stabbing Mr. Rushemeza with his knife before Mr. Rushemeza had time to pick his own weapon up. He struck without really knowing what part of the body he had hit or how many times he had stabbed him. He never intended to wound the victim seriously while being reckless as to whether death ensued. He was afraid for his life after seeing his cousin stabbed in the throat by an aggressive person who was armed and was bigger than him, and who was threatening him. He acted as he did in self‑defence, to save his life, without there being time for his passion to cool. [para. 32]

1. At the end of the pre‑charge conference, the appellant suggested that the trial judge put both self‑defence and provocation to the jury as defences.
2. The trial judge, Champagne J., citing, *inter alia*, the comments made by my colleague Moldaver J. in *R. v. Pintar* (1996), 110 C.C.C. (3d) 402 (Ont. C.A.), stated:

[translation] So, after considering the view expressed by my colleague Moldaver J.A. in *Pintar* and briefly reviewing the evidence produced by Mr. Buzizi before the triers of fact, I found it unlikely that Mr. Buzizi could not have intended to kill the victim; this is because he had in his possession a 30‑centimetre‑long knife that he plunged at least twice into the victim’s back to a depth of 18 centimetres while the victim was bent over.

I also took into account from the testimony of the accused that he was scared and highly emotional, that he was afraid, that the guy, that is to say, the victim, was a big, burly man, that his life was in danger, that his cousin’s throat had been cut and that he himself had been attacked.

As a result, I conclude that the only defence I should put to the jury is the one provided for in s. 34(2) of the Criminal Code of Canada. [A.R., at pp. 2182‑83]

II. Analysis

1. I agree with the view expressed by my colleague Fish J. in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 10, on the dangers of putting theoretically incompatible defences to a jury:

. . . the particular defences in issue here — automatism and self‑defence — are, as the Crown suggested on the hearing of this appeal, incompatible in theory, though perhaps not always in practice. That is because self‑defence implies deliberate conduct that is at odds with the fundamental premise of automatism, a state of dissociative, involuntary conduct.

1. Furthermore, the following comments made by LeBel J. in his dissenting reasons in that case reflected the concerns voiced by Fish J. (at para. 25):

In the instant case, counsel for the accused presented a defence of automatism, with all its strengths and weaknesses, to the court of assize. At the beginning of the trial, counsel had indicated that he also intended to argue self‑defence, but he said no more about this. The trial judge nevertheless put that defence to the jury on his own initiative. He decided to do so even though, as Nuss J.A. found, the available evidence did not lend even an “air of reality” to some of the principal elements of that very particular defence. Moreover, the judge undeniably misdirected the jurors regarding the defence. All he did, in essence, was tell them that they had to acquit the accused if they believed her. He said nothing about the subjective and objective aspects of the defence. Self‑defence was thus submitted to the jurors, without the necessary factual basis and after inadequate instructions had been given, together with the defence of automatism.

1. In circumstances such as these, a trial judge who must decide whether to put defences to a jury that appear at first glance to be incompatible must exercise caution and make sure that each of them has the common denominator of every successful defence — an air of reality — that will ultimately make it possible to determine which defences are available to the accused.
2. It will be helpful to reiterate the reasons why defences that do not meet the air of reality test should be excluded. The cardinal rule was explained in *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 50:

The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. This venerable rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict. [Emphasis added.]

A. *Defence of Provocation*

1. The defence of provocation has two elements. The first, an objective element, presupposes the existence of a wrongful act or an insult that is sufficient to deprive an ordinary person of the power of self‑control. The second, a subjective element, requires evidence establishing that the accused acted in response to the provocation, on the sudden and before there was time for his or her passion to cool.
2. In the case at bar, I am of the opinion that neither the objective element nor the subjective element of the defence of provocation met the air of reality test.

(1) Objective Element

1. In Canadian criminal law, s. 232(1) of the *Criminal Code*, R.S.C. 1985, c. C‑46, provides that accused persons may reduce their criminal liability if they reacted to wrongful acts or insults that were serious enough to cause them to lose the power of self‑control. However, such an act or words must also be unjust, unexpected and sudden.
2. This Court has commented in the past on the distinction between acts resulting from provocation and acts motivated purely by revenge: *The Queen v. Tripodi*, [1955] S.C.R. 438.
3. The evidence related to the elements of the defence of provocation must be sufficient for a properly instructed jury acting reasonably to accept the defence if it believes the evidence to be true.
4. Is the evidence sufficient in the case at bar?
5. The evidence adduced at trial established that when the appellant stabbed the victim, he had come to his cousin’s defence and had helped push the victim back in circumstances such that the defence of provocation can no longer be relied on.
6. The appellant himself admitted in his testimony that he had seen from a distance that his cousin was fighting with the victim, and that he had decided to intervene in the fight to come to his cousin’s aid by pushing the victim back.
7. Indeed, the appellant acknowledged that he had knowingly decided to intervene in his cousin’s fight:

[translation]

Q. Okay. And when you pushed him, Maxime Rushemeza, after that, did you say to him, “Listen, I don’t want to fight”?

A. I didn’t have . . .

Q. “Stop . . .”

A. . . . time to . . . .

Q. “Stop it. I don’t want to fight with you.” Did you tell him that?

A. Well, I didn’t have time, really, because when I went up to him, really, and I pushed him and got Peter behind me, that’s when I realized Peter had been cut. I turned my head and said nothing. He just said to me, “You want a piece of this?” He undoubtedly thought I wanted to attack him and take him on, two on one. But I didn’t have time to say anything to him. [A.R., at pp. 1956‑57]

1. In the circumstances, the appellant’s willing participation in the street brawl made it foreseeable that the victim would then brandish his weapon (the exacto knife); the appellant could not therefore claim to have been taken by surprise in this context.
2. In my opinion, the trial judge had to assess all the circumstances of the appellant’s acts when he stabbed the victim in order to determine whether there was any credible evidence, and, if there was, the judge had to take the evidence that was most favourable to the appellant into account.
3. In this case, the evidence does not support a conclusion that the appellant’s acts were a response to a sudden, unexpected, spontaneous and unforeseeable situation.
4. As I mentioned above, the trial judge must identify evidence capable of showing that the objective element and the subjective element of the defence of provocation have an air of reality.
5. Even if it were assumed that the evidence supported the objective element, which I cannot find to be the case, it is my view that an analysis of the subjective element resolves the issue of whether the defence of provocation has an air of reality in this case.

(2) Subjective Element

1. I agree with the trial judge and the majority of the Court of Appeal that the only defence raised by the appellant that had an air of reality in light of the evidence was self‑defence, since there is no credible evidence in the record that the appellant committed the murder in response to an act of provocation by the victim before his passion had cooled. On the contrary, the appellant testified that he had acted knowingly, with full knowledge of what he was doing, to defend himself out of fear that the victim might recover his weapon and attack him. He said:

[translation]

1. Then, while I was protecting my face, I felt his body touch mine. That’s when he dropped his weapon, his . . . his exacto knife. That’s when I noticed that it was an exacto knife. But at the same time, my first thought was to not let him pick it up. Because he tried to pick it up. When he tried to pick it up, that’s when I grabbed him by his sweater. I was able to take my knife. Then I stabbed him. [Emphasis added; A.R., at p. 1805.]
2. The appellant’s own statements made it impossible for the trial judge to find that the defence of provocation had an air of reality.
3. The appellant said the following in cross‑examination:

[translation]

Q. . . . Was the state of shock, if I understand your answer, is it that you were mad?

A. Huh, mad . . . the thing is, I didn’t really have time to get mad. I had time instead to . . . look, I didn’t even have time to do anything really. I turned toward him, and he just said: “You want a piece of this?” Then he started slashing at me with his knife.

Q. I may be annoying here. If I am, I apologize, but . . .

A. No problem.

Q. . . . the shock, if I understand how you’ve defined it for us . . .

A. Uh‑huh.

Q. . . . it’s that you were mad . . .

A. Yes.

Q. . . . about what’d happened to your cousin?

A. No. Of course I was. I was mad, because all kinds of feelings were mixed together. But at the same time, I was scared more than anything else. Because, like I told you, I’m only human. Also, there was a guy who was a lot bigger than me, and looked a lot older than me, who was attacking me, and who’d even attacked my cousin before me. So all that in me . . . what was in front of me, it still looked pretty clear to me that my life was in danger. [A.R., at pp. 1858‑59]

1. Later in his cross‑examination, the appellant added the following:

[translation]

A. No. He attacked me.

Q. Yes. I understand. But if we assume he attacked you, okay? After that, you continued the fight with him? You didn’t back off, is that right?

A. Well, as I explained to you, I didn’t actually think of backing off, because it happened so fast, first of all. And second, he dropped it. And in my mind, there was no doubt he was gonna pick it up, but not to put it back in his pocket and say, “Okay, let’s stop.” He was gonna pick it up eventually to attack me.

Q. Okay. So, if I understand your testimony, despite everything you did, despite the fact that you stabbed him several times, despite the fact that you attacked and then retreated, you’re telling the Court that you never agreed to fight? Is that what you’re . . .

A. I . . .

Q. . . . saying?

A. . . . never said that. At one point, yes, I can tell you I had to defend myself. So when you defend yourself, in a way, you’re consenting to fight. But at some point, since he had his weapon . . . he had his knife . . . his exacto knife in his hands, and I had my knife in my hands. But that doesn’t mean that, because I had my knife in my hands, that I felt any safer.

Q. That’s not my question.

A. Okay.

Q. My question is this: Did you agree at that time to fight with him?

. . .

A. . . . it’s sure that I ran to get there. So . . .

Q. Uh‑huh.

A. . . . I saw where the two individuals were, given that I was not part of the altercation. But once I was in the alter . . . altercation, it’s sure that at some point, I couldn’t see the little details of things that were around me.

Q. When you in fact began . . . you saw it begin, this altercation, did you at any time see Peter Mumpereze stab Maxime Rushemeza?

A. No. [Emphasis added; A.R., at pp. 1957‑59 and 1974.]

1. Earlier, the appellant had said the following:

[translation]

Q. . . . the way you defined it, its effect was that you didn’t know what you were doing?

A. Sure I knew what I was doing, in the sense that . . . look, I saw what was going on. But . . .

Q. Uh‑huh.

A. . . . at the same time, I . . . I didn’t have time to figure anything out, like. I . . . it happened really fast, and it happened in a situation that was dangerous not only for me, but it could have been anybody.

Q. Okay. So if I understand correctly, your state of shock did not cause you to lose control? You knew what you were doing, Mr. Buzizi, according to your answer. [Emphasis added; A.R., at p. 1860.]

1. In this case, I agree with the trial judge and the majority of the Court of Appeal that the appellant knew what he was doing when he stabbed the victim before the victim could pick up his weapon. He interfered, carrying a knife, in a fight he had seen from a certain distance without even knowing what his cousin’s situation was. This was not a sudden, impulsive act in response to an act of provocation by the victim.
2. I adopt Doyon J.A.’s comments on this aspect of the case (at paras. 44‑45):

[translation] While saying that he was angry, the appellant also insisted that he was afraid. He gave no indication whatsoever that he had lost his self‑control during the incident.

Provocation and self‑defence are not necessarily mutually exclusive or incompatible in every case. However, there are situations in which, by the admission of the accused persons themselves, there is no evidence of an impulsive reaction before they were able to control their passion. In my view, this is one such case. This conclusion could be avoided only by ignoring the appellant’s explanations and assessing the evidence on the basis of the objective standard alone, which is clearly inappropriate. We cannot project ourselves into the appellant’s mind and consider the evidence on the basis of our own hypothetical reactions. The trial judge must consider the evidence, not his or her opinion on what might have happened. And that is what he did. [Emphasis added.]

1. In this case, the appellant’s conduct — as revealed by the evidence — was compatible only with self‑defence, a defence the jury clearly rejected. This Court dealt with a similar situation in *Olbey v. The Queen*, [1980] 1 S.C.R. 1008:

It will be recalled that the appellant did not raise the defence of provocation at trial but relied on self‑defence. It may be observed here that at no time did the appellant say that he had been provoked into violent action by the words and conduct of the deceased. In fact, his description of events goes far to negate any suggestion of provocation. His evidence reveals an attack, described clearly and with some detail, to which he reacted, not on the sudden, but by defending himself. When, according to his evidence, he saw the deceased put his hand inside his sweater, he considered that the deceased was reaching for a gun and, in fear of his life, he shot and killed him. This describes a calculated and rational series of defensive acts, not a sudden reaction in the heat of passion. [p. 1022]

1. The reasons of my colleague Fish J. are based essentially on a parallel he draws with *R. v. Gill*, 2009 ONCA 124, 241 C.C.C. (3d) 1. With respect, I find that the conclusions reached in that case were based on a specific set of facts, which means that any comparison would be shaky in the circumstances.
2. In my opinion, the principles laid down by this Court in *Olbey* and in *R. v. Faid*, [1983] 1 S.C.R. 265, should prevail. In *Faid*, the Court made the following comments:

There can be no doubt that a reasonable jury acting judicially could find a blow to the head or a knife attack to be a wrongful act or insult of the nature and effect set forth in s. 215(3). Provocation no doubt existed here but that is not the end of the inquiry. The critical question to be answered in this case was whether there was any evidence that Faid was provoked. Was there any evidence of passion or that he “acted upon” the provocation on the sudden and before there was time for his passion to cool? We have only his evidence on the point and nowhere in that evidence does one find any suggestion that as a result of the blows or other conduct of Wilson he was enraged, or that his passions were inflamed, or that he killed in heat of blood. [Emphasis added; p. 278.]

1. It is clear that the appellant in the case at bar was aware of everything he did. He had the opportunity to come to his senses, if he had in fact taken leave of them. Noticing that the victim had momentarily dropped his weapon, the appellant deliberately stabbed him to keep him from picking it up again.
2. To determine whether a defence meets the air of reality test, the trial judge must consider *the totality* of the evidence in the record and assume the evidence relied on by the accused to be true (*Cinous*, at para. 53). I agree with Doyon J.A. that the trial judge was correct to assess the evidence not solely on an objective basis, but taking the appellant’s point of view and the explanations he gave into account in light of all his testimony.
3. Both the appellant and other eyewitnesses maintained that he had acted in a context in which he was experiencing a number of different emotions.
4. Nevertheless, the strong emotions experienced by the appellant, whether they resulted from anger or from fear, were not necessarily contingent upon the existence of a state of provocation. As a result, the fact that he experienced them is not on its own sufficient to prove that he was provoked. The appellant’s emotional state must be understood in the context of a drunken street brawl that took place early in the morning.
5. This aspect of the case was correctly assessed by Doyon J.A., who wrote the following for the majority of the Court of Appeal (at paras. 50‑52):

[translation] The appellant was in shock. That is understandable, but it is not enough. Any person in the same situation would be in shock. The question to ask is instead: Did the provocation cause him to act on the sudden and before there was time for his passion to cool? The answer to this question is no.

The loss of control of which he spoke related primarily to the situation, over which he had no control, and not to his emotions or to his passion that had allegedly been inflamed. On the contrary, he said that he knew what he was doing and that he had to stab the victim before the victim picked his weapon up. The limited time to think is typical of self‑defence, and all this evidence provides ample justification for the trial judge’s decision.

In short, there is an allegation of self‑defence here that precludes any defence of provocation.

B. *Privileged Position of the Trial Judge in Applying the Air of Reality Test*

1. The important role of the trial judge should be borne in mind. The judge must decide whether there is evidence capable of supporting a defence raised by the accused. This is not an arbitrary exercise, as the judge must carefully review the record in order to identify evidence that, if believed by a properly instructed jury, could lead the jury to accept the defence’s theory.
2. It would of course be possible for the trial judge to put to the jury all the defences raised by the accused, even the most frivolous ones, in the hope that the jury, in its wisdom, would disregard those that could not stand. But that is not the judge’s role. The judge must put to the jury only those defences that have an air of reality and are capable of being accepted by the jury. This Court made this point in *Cinous* (at paras. 82‑83):

We conclude that the authorities after *Pappajohn* continue to support a two‑pronged question for determining whether there is an evidential foundation warranting that a defence be put to a jury. The question remains whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused. This is the current state of the law, uniformly applicable to all defences.

. . . There is no authority for a threshold that could be satisfied by pointing to evidence that is incapable of reasonably supporting the inferences necessary to acquit an accused. Before putting a defence to a jury, it is the trial judge’s duty to ask not just whether there is evidence in some general sense, but whether there is evidence that is reasonably capable of supporting an acquittal. This requires an assessment of whether the evidence relied upon is reasonably capable of supporting the inferences required for the defence to succeed. [Emphasis in original.]

1. In her dissenting reasons in the Court of Appeal — which my colleague endorses — Bich J.A. referred to the air of reality as a minimal one to justify her decision to order a new trial. There is no minimal air of reality test in Canadian law. A defence either has an air of reality or does not have one. Using a qualifier such as “minimal” here would seem instead to indicate a serious doubt or a certain unease regarding the sufficiency of the evidence supporting the appellant’s defence of provocation.
2. In light of this unease related to the weakness of the evidence, even if the test of correctness is applied to the trial judge’s decision, an appellate court must bear in mind that the trial judge, who saw and heard the witnesses, is in the best position to determine whether the evidence that is capable of supporting the necessary inferences is credible. This is especially true in a case such as the one at bar in which it is considered necessary to mention that the air of reality of the defence is minimal.

III. Conclusion

1. Since there was no evidence that would be reasonably capable of supporting the objective and the subjective elements of the defence of provocation, that defence did not meet the air of reality test, and a properly instructed jury could not have accepted it. The trial judge therefore did not err in refusing to put the defence of provocation to the jury. The Court of Appeal was right to dismiss the appeal.
2. For these reasons, I would dismiss the appeal and affirm the conviction.

*Appeal allowed,* LeBel *and* Wagner JJ. *dissenting.*

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