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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

HASSAN RKEIN,  
  
Appellant.

NO. 31

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20 Eagle Street  
Albany, New York  
March 27, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 31, The People of  
2 the State of New York v. Hassan Rkein.

3 Counsel?

4 MS. JARAMILLO: With this court's permission, I'd  
5 like to reserve two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may.

7 MS. JARAMILLO: Thank you. May it please the  
8 court, Mandy Jaramillo with the Office of the Appellate  
9 Defender for Hassan Rkein.

10 This court has long held that the justification  
11 defense should be given the broadest possible scope. And  
12 the trial court here erred when it refused to instruct the  
13 jury on ordinary force justification where Mr. Rkein struck  
14 back against an unarmed complainant - - -

15 JUDGE STEIN: Under the circumstances of this  
16 case, how could - - - explain to me how you think a jury  
17 could conclude that the defendant used a dangerous  
18 instrument but not deadly physical force?

19 MS. JARAMILLO: Well, Your Honor, the issue here,  
20 if I may go back just one step, is that where there is a  
21 reasonable - - - any reasonable view of the evidence that  
22 the defendant could be justified in his return use of  
23 force, then that question needs to go to the jury.

24 JUDGE STEIN: But haven't - - - haven't we  
25 clearly said that you can't use deadly force except in



1 response to deadly force?

2 MS. JARAMILLO: Well, here the defendant was  
3 charged with a dangerous instrument. And this court has  
4 held in several cases, including People v. McManus, that  
5 the elements of the crime are not linked to - - - to the  
6 elements of - - - of the defense. And - - -

7 JUDGE STEIN: That may be true. But - - - but -  
8 - - under those circumstance. But my - - - I'm trying to  
9 get out here, under our long-held statute as - - - as you,  
10 I think, agree, is whether there's a reasonable view of the  
11 evidence, right, that - - - that this - - - this force was  
12 justified.

13 Here, if the jury finds that defendant used a  
14 dangerous instrument, how can - - - how can they not find  
15 that he used deadly physical force?

16 MS. JARAMILLO: Well, here the jury was not given  
17 all of the information. They were not given a holistic  
18 view of the evidence, by not getting the justification  
19 defense. And the jury here showed interest in - - - in  
20 having that defense, by - - -

21 JUDGE GARCIA: Counsel, isn't that answer - - -  
22 isn't that answer, you get it - - - you show that it's  
23 warranted by giving it? I mean, you have to show facts - -  
24 - some reasonable view of the evidence - - - I think Judge  
25 Stein is asking - - - that would warrant giving that. And



1 - - -

2 MS. JARAMILLO: But - - -

3 JUDGE GARCIA: - - - that's a call for the court.

4 And I think an answer that says well, if you give  
5 it, then they have all the information in front of them,  
6 kind of gets around the initial question of what view of  
7 the evidence here, particularly in light of the fact that  
8 the incident is on videotape, would justify - - - would  
9 warrant this defense going to the jury here?

10 MS. JARAMILLO: Yes, and I agree with that. And  
11 there is a reasonable view of the evidence here that - - -  
12 that the justification defense was warranted and should  
13 have been given to the jury.

14 We have a case where the - - - the jury was well-  
15 equipped to look at all of - - - of the evidence here. And  
16 they did have the video of the bar fight. They saw that -  
17 - - that Mr. Rkein was standing at the bar, that he was  
18 shoved in the face by Mr. Riaz, who was by all accounts, a  
19 large man with - - - who was quite muscular.

20 The jury learned later on through testimony that  
21 he was actually a professional personal trainer, and he  
22 shoved - - -

23 JUDGE STEIN: But did the defendant know that at  
24 the - - - was there any evidence at trial that the  
25 defendant knew about that?



1 MS. JARAMILLO: There - - - no. There was no  
2 evidence that the - - - that the defendant knew that he was  
3 a personal trainer, but there certainly was evidence of his  
4 size and of his build. And Mr. Riaz shoved Mr. Rkein in  
5 the face with such force that he sort of, you know, moved  
6 back against the bar. His hat fell off. And the - - -

7 JUDGE STEIN: So are - - -

8 MS. JARAMILLO: - - - video shows - - -

9 JUDGE STEIN: - - - are you saying that there was  
10 a reasonable view of the evidence that he was entitled to  
11 an ordinary force charge or - - -

12 MS. JARAMILLO: Yes, Your Honor.

13 JUDGE STEIN: That's what you're saying?

14 MS. JARAMILLO: Yes.

15 JUDGE STEIN: Okay. So but how do we get to the  
16 fact that he used ordinary force to - - - to a reasonable  
17 view of the evidence that that's what he used? And don't  
18 you - - - I think - - - I think Judge Garcia and I are sort  
19 of saying the same thing. Don't you have to have that  
20 before the court is required to charge that?

21 MS. JARAMILLO: Yes, that's true. But I - - - I  
22 think the issue is that because he was alleged to have used  
23 a dangerous instrument, that the court here - - - the trial  
24 court found that he therefore - - - you know, there was  
25 this sort of per se exception to this court's rule that he



1 should not get the justification charge. But this court  
2 has held clearly that that - - -

3 JUDGE RIVERA: Yeah, but I think - - - I think  
4 the point is dancing around what occurred. So it's how  
5 you're going to classify, and whether or not the judge gets  
6 to do it or the jury gets to do it, taking a glass mug and  
7 throwing it in a bar fight at someone's head.

8 MS. JARAMILLO: Right, and - - -

9 JUDGE RIVERA: And I think that's what you've got  
10 to address, that particular fact.

11 MS. JARAMILLO: That's correct. And it's a very  
12 fact-intensive inquiry that the jury was equipped to  
13 handle. They were equipped to first determine, you know,  
14 that - - - that Mr. Rkein was not the initial aggressor,  
15 whether Mr. Rkein reasonably believed he needed to strike  
16 back with that glass, and then whether that use of force  
17 was proportional.

18 And there was a reasonable view of the evidence,  
19 because of the complainant's size, the fact that this was  
20 sort of a surprise attack, and there - - - also on the  
21 video, because it's timed and it's very clear - - - you can  
22 see that from the time that Mr. Rkein sort of steadies  
23 himself and gets back up against the bar where he's sort of  
24 stable, there are exactly two seconds before he grabs a  
25 pint glass and - - - and throws it on - - -



1 JUDGE WILSON: I wonder - - -

2 MS. JARAMILLO: - - - Mr. Riaz.

3 JUDGE WILSON: - - - I wonder why he's under any  
4 threat of anything at that moment, Mr. Rkein. Because what  
5 I think the video shows - - - and correct me if you think  
6 I'm wrong or if there's testimony that says something  
7 different or the video is incorrect - - - that a woman who  
8 was about five feet tall steps in between them, spreads her  
9 hands like this (indicating) to separate the two of them,  
10 and Mr. Riaz, the initial aggressor, as you call him, had  
11 his hands at his side, was not doing anything threatening,  
12 was simply standing there.

13 What was the threat that Mr. Rkein was at that  
14 required him to use any force?

15 MS. JARAMILLO: Well, the jury, in viewing the  
16 video, could see that Mr. - - - there was no sound in the  
17 video, but they could see that Mr. Riaz did have his hands  
18 somewhat down by his side, but he was tense. He was - - -  
19 his mouth was moving. He was staring - - - that stare  
20 never - - - never sort of ended between him and Mr. Rkein.  
21 This was an ongoing sort of issue that had not just relaxed  
22 or subsided in the - - - in the way that the testimony came  
23 out.

24 So in watching the video it's clear that - - -  
25 that Mr. Riaz - - - or I'm - - - yes, Mr. Riaz began



1 something and that that hadn't just ended as soon as the  
2 woman stood up.

3 And her testimony, actually, is that she stood up  
4 because she was afraid, in part, that her friend would get  
5 in trouble and I think was trying to keep him from - - -

6 JUDGE RIVERA: But - - - but part of the - - -

7 MS. JARAMILLO: - - - going further.

8 JUDGE RIVERA: - - - point is she's not afraid to  
9 get between them.

10 MS. JARAMILLO: Well, and - - - and that was a  
11 choice that she made. But in looking at the video, it's  
12 clear that Mr. Riaz has not relaxed, so to speak. I mean,  
13 he's - - - you know, he's tense; he seems to be yelling - -  
14 -

15 JUDGE FAHEY: Well - - -

16 MS. JARAMILLO: - - - and - - - and there's - - -

17 JUDGE FAHEY: Can I ask a - - - it seems like you  
18 have two arguments. The first is - - - is the legal  
19 argument, which is was there a conflation between a  
20 dangerous instrument and deadly physical force? And  
21 secondly, if there was deadly physi - - - physical force,  
22 was it deadly physical force as a matter of law, or was it  
23 a question of fact? Would you agree with that?

24 MS. JARAMILLO: I - - - I do, Your Honor.

25 JUDGE FAHEY: Okay. So let - - - let's leave the



1 conflation question aside for a second. How - - - I guess  
2 it seems to me like we're - - - you're asking us to reweigh  
3 the facts that the court weighed in deciding this as a  
4 matter of law; is that right?

5 MS. JARAMILLO: Well, the - - - let me make sure  
6 I understand your question.

7 JUDGE FAHEY: Okay.

8 MS. JARAMILLO: But the court here did not  
9 actually look to see if there was a reasonable view of the  
10 evidence - - -

11 JUDGE FAHEY: Um-hum.

12 MS. JARAMILLO: - - - and - - - and then pass  
13 that question on to the jury. What the court did instead  
14 is rely on the sort of categorical language stating under  
15 New York law, the defendant is not entitled to a  
16 justification charge where the uncontroverted evidence is  
17 that he used the dangerous instrument, and then named that,  
18 saying the pint glass in this case, and therefore can't get  
19 the justification charge. So - - -

20 JUDGE STEIN: But regardless of whether that was  
21 correct and there is, in fact, some per se rule, here as  
22 you say, it's fact intensive, it's case-by-case. And I  
23 keep trying to get you back to this case; all right?

24 And in - - - the charge is assault with a deadly  
25 weapon. Okay? So if the jury finds that he - - - that it



1 wasn't assault with a deadly weapon, then that - - - that's  
2 it, it's over. Okay? And if the court - - - if the jury  
3 finds that there - - - that he - - - that there was assault  
4 with a deadly weapon, then we know, I think, under the  
5 circumstances of this case, that it must have been deadly  
6 physical force.

7 Maybe not every case that's going to happen,  
8 because of differences between the definitions, but in this  
9 case, can you tell me how, if the jury found that he used a  
10 deadly weapon, that it was not deadly physical force?

11 MS. JARAMILLO: Well, if the jury had been - - -  
12 and I see that my time is up; I'd like to continue - - - if  
13 the jury had been given the justification defense, the jury  
14 would have then been able to determine - - - and they may  
15 not have necessarily first determined whether or not the  
16 glass was a dangerous instrument. The jury may have looked  
17 at the situation, the - - - the circumstances that we've  
18 discussed here, and the facts in this case, and determined  
19 that Mr. Rkein was justified in his return use of force.

20 It's the use of force that's either ordinary or  
21 deadly, which should not be attached to the object itself.  
22 If the jury had deter - - - determined that he was  
23 justified, that would be the end of the inquiry. There is  
24 no crime - - -

25 JUDGE FAHEY: Yeah, but - - -



1 MS. JARAMILLO: - - - and there's no point in - -  
2 -

3 JUDGE FAHEY: - - - see - - - see, your legal  
4 argument, for you to be successful here, you have to say  
5 that both - - - that - - - that the glass wasn't a  
6 dangerous instrument, that deadly physical force is a  
7 question of fact for the jury, therefore it's reversible  
8 error by fail - - - for failure to charge, and he gets a  
9 new trial. That's the goal here, right?

10 And that requires that we look at the facts and  
11 reweigh them. And that's the difficulty I'm having in the  
12 weighing of the facts, because the - - - the use of the  
13 glass in and of itself, glass isn't always a dangerous  
14 instrument, but there's a fair amount of case law that the  
15 use of a bottle in various circumstances constitutes a  
16 dangerous instrument.

17 And if it's not being used in reaction to someone  
18 else using it, then it moves into the category of the type  
19 of force your using. And as a matter of law, it seems  
20 you're stuck with deadly physical force.

21 And even if though - - - the court might have  
22 misstated what New York law is in terms of - - - it doesn't  
23 mean he was wrong in this case.

24 MS. JARAMILLO: Well, Your Honor, there are cases  
25 in the Third and Fourth Department that - - - that actually



1 hold the other way, because - - -

2 JUDGE FAHEY: I - - - I think you're right - - -

3 MS. JARAMILLO: - - - there was - - -

4 JUDGE FAHEY: - - - about that.

5 MS. JARAMILLO: - - - with - - - with the People  
6 - - -

7 JUDGE FAHEY: There's no question you're right  
8 about that.

9 MS. JARAMILLO: - - - v. Powell, there was a  
10 glass used. People v. Griffith and People v. - - - I  
11 believe it was - - - Jones.

12 CHIEF JUDGE DIFIORE: Counsel, did the defendant  
13 request a down charge to assault second on the injury to  
14 the head arguing that the glass was not a dangerous  
15 instrument?

16 MS. JARAMILLO: No, the - - - the defendant  
17 requested just the ordinary force justification charge.  
18 There - - - there was - - -

19 CHIEF JUDGE DIFIORE: No request for a down  
20 charge?

21 MS. JARAMILLO: No.

22 CHIEF JUDGE DIFIORE: From the assault second to  
23 the assault three arguing or attempting to argue that the  
24 glass was not a dangerous instrument?

25 MS. JARAMILLO: No, he did not.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MS. JARAMILLO: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. WOLKOWITZ: Good afternoon, Your Honors. My  
5 name is Jared Wolkowitz, and I represent the People of the  
6 State of New York in this appeal.

7 We would ask that this court affirm the trial  
8 court and the Appellate Division's ruling, which stated,  
9 under the facts of this particular case, there was no  
10 reasonable view of the evidence that the defendant was  
11 warranted a justification charge.

12 And that is correct, if you look at the record  
13 here. First, the defendant - - - there was no reasonable  
14 view of the evidence that the defendant used any other  
15 force besides deadly physical force. He took a bottle - -  
16 - sorry a glass - - -

17 JUDGE STEIN: Is - - - is - - -

18 MR. WOLKOWITZ: - - - but - - -

19 JUDGE STEIN: - - - is a pint glass deadly  
20 physical force as a matter of law?

21 MR. WOLKOWITZ: I don't think we need to reach  
22 that issue in this particular case, because the jury - - -  
23 one of the things that we talk about - - - the jury reached  
24 that issue. The jury found that it was deadly physical  
25 force when the jury received the definition and made a



1 finding that under the circumstances in which it was used,  
2 it was readily capable of causing serious physical injury  
3 or death.

4 The jury made that finding. So whether it's a  
5 matter of law or not is almost irrelevant in the sense that  
6 in this particular case, the jury made that finding.

7 Secondly, what I would say is there was no  
8 reasonable view of the evidence that when defendant used  
9 this dangerous instrument and was confronted with the  
10 physical - - - with the - - - with any force whatsoever, it  
11 was deadly physical force that he was confronted with.

12 And the legislature has carefully laid out in - -  
13 - a justification scheme in which you could only respond to  
14 deadly - - - you could only use deadly physical force if  
15 you are about to be threatened or facing deadly physical  
16 force.

17 This defendant obviously was not. As Judge  
18 Wilson was talking about, as you were talking about, his  
19 hands are - - - were at his side. He was - - - the defend  
20 - - - there was somebody separating between them. The  
21 defendant was the one who turned around, picked up a pint  
22 glass, and then hit him over the head. He was not facing,  
23 at that particular moment, really any force, as Justice - -  
24 - as Judge Wilson was pointing out, or let alone deadly  
25 physical force.



1 JUDGE RIVERA: To clarify, did he throw it or  
2 actually hold it in his hand and hit him on the head with  
3 it?

4 MR. WOLKOWITZ: I don't think the record is  
5 actually clear, but to me it really - - - it's almost  
6 beside the point, because when you're a foot away, whether  
7 you actually make the contact with the hand or you throw it  
8 so hard that it hits, whether it shatters on the ground or  
9 whether it shatters on the floor or on his head, it's  
10 obviously you're using it with that type of force from that  
11 distance. So whether it actually is projectile by throwing  
12 or by smashing it over the head, seems, in this particular  
13 circumstance, not to be an important point.

14 JUDGE WILSON: And I take it you would not agree  
15 that the manner in which it is used encompasses self-  
16 defense?

17 MR. WOLKOWITZ: I'm not sure I understand what  
18 you - - -

19 JUDGE WILSON: Sure. That is, when we say - - -  
20 whether you consider something a dangerous instrument, it  
21 takes into account the manner in which it is used.

22 MR. WOLKOWITZ: Correct.

23 JUDGE WILSON: You're thinking of things like the  
24 force, that sort of thing, but not I was using it in self-  
25 defense, and that should figure into whether we consider it



1 a dangerous instrument.

2 MR. WOLKOWITZ: Well, a dangerous instrument and  
3 deadly physical force, there are definitions. In this  
4 particular case, under these circumstances - - - I think  
5 this is what Judge Stein was alluding to - - - match each  
6 other.

7 So a - - - in this particular circumstance, the  
8 defendant could not get - - - and that's all the trial  
9 court was saying - - - in this circumstance, the defendant  
10 could not get a dangerous - - - a justification for  
11 ordinary force, because once they made that finding, then a  
12 justification charge would have run afoul of this state's  
13 justification system. And because the justification law  
14 itself states you have to use dead - - - as I said before,  
15 deadly physical force confronting with deadly physical  
16 force.

17 And I do want to get to McManus.

18 JUDGE STEIN: Can the ever be deadly phy - - -  
19 can - - - can a person be facing deadly physical force and  
20 be entitled to use deadly physical force when the other  
21 person is unarmed? Is that possible?

22 MR. WOLKOWITZ: Yes. Absolutely.

23 JUDGE STEIN: Okay. Right.

24 MR. WOLKOWITZ: Like, for instance, I can - - - I  
25 thought of an example. If I was in a room with Mike Tyson





1 or Wladimir Klitschko, the heavyweight champions of the  
2 world, and they're the only ones by the door, and they say  
3 I'm going to kill you, and he doesn't know I have a gun, I  
4 think I would be entitled to a justification charge in that  
5 particular instance, even though he's - - - he's not - - -

6 JUDGE STEIN: Armed.

7 MS. JARAMILLO: - - - armed at that particular  
8 point.

9 JUDGE STEIN: Is that - - - is that a question  
10 for the jury?

11 MR. WOLKOWITZ: Yes. That question - - - in that  
12 particular circumstance - - - well, no. I'm sorry. Let me  
13 take that back.

14 That question, I think there - - - there would be  
15 a reasonable view of the evidence, provided - - - and I'm  
16 assuming because there - - - he's a well-known figure, that  
17 the victim knew who this person was, that that would then  
18 be something that the legal guardian - - - the judge, who  
19 is our legal guardian, would be able to shepherd in the  
20 sense that the jury would get that.

21 JUDGE FEINMAN: If he'd been wearing a T-shirt  
22 saying, you know, I'm a train - - - personal trainer at  
23 Equinox Gym, or wherever he is, would that change it?

24 MR. WOLKOWITZ: But Judge Stein - - -

25 JUDGE GARCIA: Maybe he does spinning.



1 MR. WOLKOWITZ: - - - no, but Judge Stein's  
2 question, though - - - and I want to go back - - - is could  
3 you get a deadly physical force justification defense. And  
4 the answer would be yes. But they didn't ask for one here.  
5 And the question is, is - - - and that's where I think  
6 there's - - - there's this big gap in analysis between the  
7 defense and what we're arguing.

8 McManus only stood for the proposition that you  
9 don't get a justification defense - - - that you - - - that  
10 - - - McManus was - - - was an intentional murder and a - -  
11 - and a reckless - - - depraved murder. And what happened  
12 in McManus was the judge said - - - and I'm - - - I'm going  
13 to quote McManus, because I think it's - - - the judge said  
14 specifically, "In order for you to have justification, you  
15 must have intent."

16 And the court said, no. "It follows that there's  
17 no basis for limiting the application of the defense of  
18 justification," meaning the entity itself, Article 35, "in  
19 any particular mens rea, of any particular crime involving  
20 the use of force. Indeed, the legislature has clearly not  
21 done so."

22 So if there was a reasonable view of the  
23 evidence, nobody is saying here that this defendant could  
24 not have gotten a deadly physical force justification  
25 charge, if asked, and if the evidence was there. It



1 wasn't.

2 JUDGE FAHEY: Well, let me ask you if the inverse  
3 is true. If - - - can - - - can a dangerous instrument be  
4 used without deadly physical force?

5 MR. WOLKOWITZ: Yes, but there would be - - - in  
6 this particular case, the defendant would be acquitted.  
7 And that's the mis - - - that's the analysis in Powell - -  
8 -

9 JUDGE FAHEY: Um-hum.

10 MR. WOLKOWITZ: - - - that if there - - - if - -  
11 - and we say in the brief, we - - - we think - - -

12 JUDGE FAHEY: No, I'm familiar with Powell.  
13 Yeah.

14 MR. WOLKOWITZ: Right. In Powell, they say,  
15 "Likewise, the nature of the force" - - - I'm sorry. "In  
16 our view, whether defendant employed ordinary force in the  
17 use of a cup to defend himself should have been an issue  
18 for the jury as well." Of course - - -

19 JUDGE FAHEY: So in a circumstance where you used  
20 a dangerous instrument, but it was - - - but it was used  
21 with ordinary physical force, then you would get the  
22 charge?

23 MR. WOLKOWITZ: You would - - - I mean, I can't  
24 think of every example, and that's why we're - - -

25 JUDGE FAHEY: I grant you it's rare, but it seems



1 there are circumstances and we have cases that show that.

2 MR. WOLKOWITZ: Right. I mean, I think the - - -  
3 the point being - - - and we say this in - - - I think the  
4 point is it would be very rare. I can't - - -

5 JUDGE FAHEY: So - - - so - - -

6 MR. WOLKOWITZ: - - - I can't personally think of  
7 one - - -

8 JUDGE FAHEY: - - - so but to answer my question,  
9 you would get the charge, then?

10 MR. WOLKOWITZ: If - - - I can't think of a  
11 circumstance, but if you can think of a circumstances, or  
12 that's why we're not advocating a per se rule - - - we're  
13 not saying make this a per se rule and we're not saying  
14 don't ever get this charge.

15 JUDGE FAHEY: I see.

16 MR. WOLKOWITZ: We're just saying that the judge  
17 is allowed to recognize this definitional overlap and not  
18 make the jury do this inquiry twice by charging ordinary  
19 force.

20 JUDGE FAHEY: I see. Thank you.

21 MR. WOLKOWITZ: And that's - - - that is  
22 essentially our argument.

23 And we think that the case law in McManus  
24 justifies that. And the only thing I would al - - - also  
25 say, just to finish up on the McManus point, was this court



1 specifically held in McManus that, "indeed" - - - just  
2 finishing - - - "the mens rea of any particular crime  
3 involving use of force, indeed, the legislature has clearly  
4 not done so," restrict the defense, meaning in - - -  
5 because of intent, in terms of reckless or jus - - - or  
6 intentional, you get a justification defense.

7 But her, the legislature has limited the scope  
8 because ordinary force cannot be used to confront - - - you  
9 cannot use deadly physical force to confront ordinary  
10 physical force.

11 JUDGE RIVERA: Can I just go back - - -

12 MR. WOLKOWITZ: Sure.

13 JUDGE RIVERA: - - - I may have misunderstood  
14 something you said.

15 I - - - I thought I heard you say in response to  
16 Judge Fahey that a jury could find that there's use of a  
17 dangerous instrument, but that it's not deadly physical  
18 force.

19 MR. WOLKOWITZ: If I said that, then no - - -

20 JUDGE RIVERA: And I don't think you meant that,  
21 right? I didn't think you meant that.

22 MR. WOLKOWITZ: I did not say that. I didn't  
23 think I said that.

24 JUDGE RIVERA: I may have misunderstood you.

25 MR. WOLKOWITZ: Right. What I - - - what I was



1           trying to say was - - - to Judge Fahey was - - -

2                   JUDGE RIVERA: That they could attempt to use a  
3           deadly - - -

4                   MR. WOLKOWITZ: Right.

5                   JUDGE RIVERA: - - - instrument - - -

6                   MR. WOLKOWITZ: And I can't think of every - - -  
7           I'm not smart enough to - - -

8                   JUDGE RIVERA: - - - right, it's about that  
9           force?

10                  MR. WOLKOWITZ: - - - think of every example in  
11           the world where the - - - that it could be possible.

12                  JUDGE RIVERA: No, my point is that the overlap  
13           is at the use not at the attempted to use, right?

14                  MR. WOLKOWITZ: The overlap is definitely at the  
15           use, yes.

16                  JUDGE RIVERA: Or threatened to use, because  
17           deadly force is the actual use?

18                  MR. WOLKOWITZ: Absolutely, yes.

19                  JUDGE RIVERA: So what we focus on, is on the  
20           use?

21                  MR. WOLKOWITZ: In this particular case, yes.  
22           The use. The overlap is absolutely there. And my point to  
23           Justice - - - Judge Fahey, if I could continue because my  
24           time - - - was that if they didn't find the use in this  
25           particular case, he would have been acquitted. That was -



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. WOLKOWITZ: - - -- that was my point. Thank you very much.

CHIEF JUDGE DIFIORE: Counsel?

JUDGE RIVERA: Now, why are the People wrong about that, that the overlap here is on the use?

MS. JARAMILLO: Well, Your Honor, it - - - the prosecution is arguing that - - - that they're not arguing for a per se rule and then also stating that they - - - that they can't come up with an example of - - - of when you could get the ordinary force justification charge. But they don't need to come up with an example.

There are many ca - - - examples in the case law, including in People v. Powell, which cites directly to McManus - - -

JUDGE RIVERA: Okay. But I'm saying here. I'm sort of in Judge Stein's camp on that. Tell me here how you do that?

MS. JARAMILLO: Well, here, the - - - there are other cases showing that the use of a glass under a very fact-intensive situation, could be ordinary physical force in return.

Here the jury could see the photos of - - - of Mr. Riaz's injuries, which was a minor abrasion to the head



1           - - - the photos are in the record as well. They could see  
2           the video where this is clearly a very quick-paced bar  
3           fight. And they could have determined that - - - that Mr.  
4           Rkein's return use of force, by picking something up off of  
5           the bar, was justified in this case and that it was  
6           justified as ordinary physical force. The - - -

7                         JUDGE WILSON: It seems to me you're saying one  
8           of two things or maybe both of them; I'm not sure. And  
9           maybe there's something that I'm not thinking of. But one  
10          possibility is: had the court charged - - - given the  
11          justification charge you wanted, the jury's result on the  
12          crime might have been different. You may be saying that,  
13          and if so, I want to know why you think that.

14                        Or the other you might be saying is that doesn't  
15          actually matter, because the law requires giving of the  
16          justification charge and independent consideration of the  
17          two, even if there is an overlap, maybe even identical  
18          overlap between the two. I'm not sure if you're saying one  
19          or both of those.

20                        MS. JARAMILLO: Yes, I - - - I'm certainly saying  
21          the latter, Your Honor, based on this court's precedent in  
22          - - - in McManus, that because there's this dangerous  
23          instrument element in the crime, that does not mean that  
24          they should not also get the ordinary force justification  
25          charge here, where there is a reasonable view of the





1 evidence that he was justified in his return force.

2 The way that the jury could have come to a  
3 different determination and the - - - this idea that  
4 because they - - - they convicted him on a dangerous  
5 instrument element is somehow like a - - - a failsafe, is -  
6 - - is not correct, because we give juries all of the  
7 information and they may not interpret it - - -

8 JUDGE STEIN: So are you - - -

9 MS. JARAMILLO: - - - in the - - -

10 JUDGE STEIN: - - - suggesting that any time that  
11 there's a - - - a conflict in which someone uses some force  
12 in response to some other force, in every case, the jury is  
13 entitled to a justification instruction?

14 MS. JARAMILLO: No, Your Honor. And there's - -  
15 -

16 JUDGE STEIN: All right. So - - -

17 MS. JARAMILLO: - - - certainly - - - there's - -  
18 -

19 JUDGE STEIN: - - - how - - - where - - - where  
20 would you draw the line, without - - - you know - - -

21 MS. JARAMILLO: Sure. I mean, I think a good  
22 example would be looking at the First Department's case in  
23 People v. Garcia. In that case there was an unarmed  
24 initial aggressor, and the defendant came back with the  
25 claw side of a hammer. In a case like that - - - and there



1 was significant injuries in that case. In a case like  
2 that, you're getting closer to something - - -

3 JUDGE STEIN: Well, but are you saying that the  
4 injuries are - - - so the effect of the use of it is what  
5 happens? Because it seems to me that - - - let's - - -  
6 let's take something that we all agree is a dangerous  
7 weapon, and that's a gun.

8 MS. JARAMILLO: Sure.

9 JUDGE STEIN: Okay? And you shoot a gun and it  
10 grazes - - - it just goes right - - - and there's no  
11 serious injuries, but nobody would question the fact that  
12 that was the use of a dangerous instrument, right? So - -  
13 -

14 MS. JARAMILLO: That's right. And - - -

15 JUDGE STEIN: So - - - okay.

16 MS. JARAMILLO: - - - that's - - - that's, you  
17 know - - - statutorily, that's a - - - that's a deadly  
18 weapon as a matter of law.

19 JUDGE STEIN: Right, but - - -

20 MS. JARAMILLO: But if we're looking at a  
21 dangerous instrument, so more in this gray area, I think,  
22 you know, the - - - it is the nature - - -

23 JUDGE STEIN: What I'm getting at, it's not the -  
24 - - it's not the injuries that result, it's how it's used,  
25 right?



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MS. JARAMILLO: Correct.

JUDGE STEIN: Okay. I just wanted to clear that  
up.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. JARAMILLO: Okay. Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Hassan Rkein, No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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