



SUPREME COURT OF CANADA

CITATION: R. v. Gagnon, [2006] 1 S.C.R. 621, 2006 SCC 17

DATE: 20060504

DOCKET: 31148

BETWEEN:

Her Majesty The Queen
Appellant
and
Luc Gagnon
Respondent

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps and Fish JJ.

CORAM: Bastarache, LeBel, Deschamps, Fish and Abella JJ.

REASONS FOR JUDGMENT: Bastarache and Abella JJ. (LeBel J. concurring)
(paras. 1 to 25)

DISSENTING REASONS: Deschamps and Fish JJ.
(paras. 26 to 65)

R. v. Gagnon, [2006] 1 S.C.R. 621, 2006 SCC 17

Her Majesty The Queen

Appellant

v.

Luc Gagnon

Respondent

Indexed as: R. v. Gagnon

Neutral citation: 2006 SCC 17.

File No.: 31148.

2006: March 16; 2006: May 4.

Present: Bastarache, LeBel, Deschamps, Fish and Abella JJ.

on appeal from the court of appeal for quebec

Criminal law — Trial — Judgments — Reasons for judgment — Court of Appeal setting aside accused's conviction for sexual assault due to insufficient reasons — Whether trial judge's reasons sufficiently amenable to appellate review.

A young complainant made three declarations which resulted in charges of sexual assault against the accused. At trial, the accused denied all the allegations. Credibility was at the heart of the case and the trial judge did not find the accused's

testimony credible. The accused was convicted, but the majority of the Court of Appeal set aside the conviction and ordered a new trial on the basis that the trial judge's reasons were insufficient as regards her decision to reject the accused's testimony.

Held (Deschamps and Fish JJ. dissenting): The appeal should be allowed and the verdict restored.

Per Bastarache, LeBel and Abella JJ.: When viewed as a whole, the trial judge's reasons were sufficiently amenable to appellate review. The reasons adequately demonstrated the rationale behind the trial judge's findings on credibility and reasonable doubt. Her explanations for doubting the accused's credibility amply justified her finding on this point and her disposition of the case. The Court of Appeal acknowledged that this was not an unreasonable verdict. The test on "sufficiency of reasons" is not an invitation to an appellate court to substitute its perceptions of the trial judge's findings on credibility when there is a reasonable basis for those findings. That is what the majority of the Court of Appeal did in this case when it found the trial judge's reasons to be insufficient despite having admitted that the trial judge's findings on credibility were reasonable and that the verdict was not unreasonable. [22-23]

Per Deschamps and Fish JJ. (dissenting): The trial judge's reasons do not support her decision regarding the credibility of the accused, which is supported neither by the evidence nor even by her own analysis of the evidence. The verdict was unreasonable because, as demonstrated by the Court of Appeal, the reasons the trial judge gave for rejecting the testimony of the accused conflict with the bulk of judicial experience in the assessment of credibility. The basis for concluding that the verdict

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was unreasonable can also lead to the conclusion that there has been an error of law in the case at bar. The reasons did not support the assessment of credibility and were, for the purposes of judicial reasoning, non-existent. This point is related to the inadequacy of the trial judge's reasons, which also constitutes an error of law. The reasons are inadequate in that they do not make it possible to understand by what judicial reasoning the trial judge arrived at her conclusion. In short, there are two possibilities: either her conclusions were based on no judicial reasoning or they were based on other reasons not set out in the judgment and therefore unavailable for review. In either case, the Court of Appeal had to intervene. Regardless of whether the trial judge's decision is characterized as being unreasonable, the judgment is found to be wrong in law or, as the majority of the Court of Appeal concluded, the reasons are considered inadequate, the guilty verdict should be set aside and a new trial ordered. [35] [41] [52-58] [60-63]

Cases Cited

By Bastarache and Abella JJ.

Referred to: *R. v. Khan*, [1990] 2 S.C.R. 531; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Burke*, [1996] 1 S.C.R. 474; *Lavoie v. R.*, [2003] Q.J. No. 1474 (QL); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27; *R. v. R. (D.)*, [1996] 2 S.C.R. 291.

By Deschamps and Fish JJ. (dissenting)

R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. Burke*, [1996] 1 S.C.R. 474; *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Burns*, [1994] 1 S.C.R. 656; *Harper v. The Queen*, [1982] 1 S.C.R. 2; *R. v. Kerr* (2004), 48 M.V.R. (4th) 201, 2004 MBCA 30; *R. v. Buckingham* (2004), 187 O.A.C. 140; *R. v. J.B.* (2004), 200 B.C.A.C. 115, 2004 BCCA 342; *R. v. James* (2005), 193 C.C.C. (3d) 340, 2005 NSCA 22; *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. M. (Y.)* (2004), 71 O.R. (3d) 388.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 686.

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Doyon and Bich JJ.A.), [2005] Q.J. No. 12442 (QL), J.E. 2005-1673, 2005 QCCA 749, setting aside the accused's conviction and ordering a new trial. Appeal allowed, Deschamps and Fish JJ. dissenting.

Henri-Pierre La Brie, Daniel Grégoire and Caroline Fontaine, for the appellant.

Charles André Ashton and Brigitte Martin, for the respondent.

The judgment of Bastarache, LeBel and Abella JJ. was delivered by

1. Background

1 When she was between the ages of two and five, J.L.L. regularly attended a daycare centre owned and operated by Ms. L. The centre was located in Ms. L.'s home. Her husband, Luc Gagnon, helped occasionally with the children when Ms. L. was away or busy.

2 The child made three declarations which resulted in charges against Mr. Gagnon. The declarations were made to the child's grandmother, her mother and a police officer. The substance of these declarations was that Mr. Gagnon had made her [TRANSLATION] "taste where his pipi came from", that "it's white and doesn't taste good" and that she had to "give him pleasure". These formed the basis for charges of sexual assault and of having incited, encouraged or invited a child under 14 years of age to touch a person for a sexual purpose.

3 The versions of the events presented by the child, her mother, grandmother and the police officer, and that presented by the accused, were totally contradictory. The prosecution alleged that the child had been molested several times while the daycare owner was absent, that the child was intelligent, affectionate, not disposed to lying, and had no knowledge of sexual organs or sperm, or of the words to describe them.

4 The defence relied on the testimony of the accused, his wife and his wife's cousin. The accused denied all allegations. He said that he loved children, that the

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child was affectionate with him and that she could in fact describe sexual organs. Credibility was at the heart of the case.

5 Mr. Gagnon was convicted of sexual assault by the trial judge, Paré J.C.Q. (C.Q. Longueuil, No. 505-01-033285-012, February 21, 2002).

6 In the Court of Appeal, a majority allowed the appeal on the basis that the reasons of the trial judge were insufficient, an error of law permitting appellate interference with the verdict ([2005] Q.J. No. 12442 (QL), 2005 QCCA 749).

7 Chamberland J.A. dissented. He concluded, based on the *Khan* criteria of necessity and reliability, that the child's three declarations were admissible (*R. v. Khan*, [1990] 2 S.C.R. 531). The majority agreed with him on this issue, and we see no basis for disturbing this unanimous conclusion.

8 His dispute with the majority arose from his view that the trial judge's reasons for her findings of credibility were sufficient and reasonable, and that she had properly applied the test for assessing reasonable doubt.

9 We are in agreement with the reasons of Chamberland J.A. and, based largely on his reasons, would allow the appeal and restore the conviction.

2. Analysis

10 There is general agreement on the test applicable to a review of a finding of credibility by a trial judge: the appeal court must defer to the conclusions of the trial

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judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). A succinct description of the overall approach appears in *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 4, where this Court stated that “it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can . . . overturn the trial court’s verdict”. With respect to the credibility of witnesses, the same standard applies. In *Lavoie v. R.*, [2003] Q.J. No. 1474 (QL), at para. 37, Nuss J.A. of the Quebec Court of Appeal stated that a trial judge’s assessment of the credibility of witnesses “will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error” (citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

- 11 In this case, the majority in the Court of Appeal expressly declined to find the verdict unreasonable, thereby confirming that the verdict was available on the record. Instead, it based its analysis on a conclusion that the trial judge’s reasons, like those in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, were [TRANSLATION] “insufficient” (para. 91) and that she had therefore committed an error in law. Yet it is clear from its reasons that what was troubling the majority was not the sufficiency of her reasons but the trial judge’s findings of credibility. In particular, the majority disagreed with her conclusions about the credibility of the accused, and, contrary to her findings, appears to have concluded that the evidence of the accused ought to have raised a reasonable doubt. Ignoring both this Court’s dictum in *Burke* and the unique position a trial judge enjoys in being able to see and hear the witnesses, the majority chose instead to substitute its own assessment of credibility for that of the trial judge

by impugning her reasons, saying she did not sufficiently explain why the evidence did not raise a reasonable doubt. We disagree.

12 This appeal raises, yet again, the issue of what constitutes sufficient reasons from a trial judge. This Court’s approach to that question has evolved. In *R. v. Burns*, [1994] 1 S.C.R. 656, this Court held that the failure by a trial judge to expressly indicate that he or she had taken all relevant considerations into account in arriving at a verdict was not a basis for allowing an appeal where the record revealed no error in the appreciation of the evidence or applicable law.

13 Eight years later, in *Sheppard*, a case in which the trial judge’s reasons were virtually non-existent, this Court explained that reasons are required from a trial judge to demonstrate the basis for an acquittal or conviction. Failure to do so is an error of law. Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required.

14 In the companion case of *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, the Court applied *Sheppard* to a case in which some reasons were given but were alleged to be insufficient. The Court reiterated that the test was whether the reasons performed their purpose of allowing an appeal court to review the trial decision. The Court made clear that “[an appellate court’s] lurking doubt about an ‘unsafe’ verdict is not sufficient to justify appellate intervention” (para. 39). With regard to credibility,

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the Court, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291, and *Burke*, stated, at para. 23, that the test of sufficiency remained the same: was there an impediment to appellate review?

15 In the appeal before us, the majority, erroneously in our view, treated this case as if the circumstances were similar to those in *Sheppard*, where there were no reasons. In *Sheppard*, the totality of the trial judge’s reasons consisted of the following statement: “Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged” (para. 2).

16 With respect, the applicable comparison is to *Braich*, and the issue is whether the reasons are sufficiently amenable to appellate review. In our view, they are.

17 The trial judge’s reasons began with a fairly detailed review of the evidence from the child’s grandmother, her mother, the investigating police officer, an acquaintance of the accused, a cousin of the accused’s wife, the accused’s wife Ms. L., and Mr. Gagnon. She also reviewed the video of the child’s conversation with the police. After setting out the relevant law, the trial judge explained her conclusions on credibility, setting out her reasons for finding the declarations of the child to be reliable, and for finding the evidence of the grandmother and mother to be credible, including:

- the child’s statements were spontaneous and were not influenced by her mother or grandmother;

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- the child's three statements were all consistent, and described with great precision and detail the nature of the acts, the author of those acts, and the circumstances in which they were alleged to have been committed;

- Mr. Gagnon acknowledged that the child was not disposed to lie; and

- the sexual acts and the level of detail described are not of a type usually capable of being fabricated by a child of five.

18 She also set out her reasons for not finding the testimony of Mr. Gagnon credible, including:

- Mr. Gagnon's memory as to the number of times that he was left alone with the child was inconsistent over the course of his testimony;

- after a brief recess during his cross-examination, Mr. Gagnon spontaneously explained that his wife's cousin had been present on the one occasion when he changed and washed the child's sweater, a detail he had previously omitted in his testimony and which the trial judge considered to be a [TRANSLATION] "blatant attempt at justification" (C.Q., at paras. 172-73);

- Mr. Gagnon's testimony about whether or when he watches television with the children of the nursery was contradictory; and

- Mr. Gagnon insisted excessively that he did not change diapers or give the children baths, although such tasks are not sexual in nature, which the trial judge

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again characterized as an [TRANSLATION] “attempt at justification” (C.Q., at paras. 168 and 170-71).

Her reasons aptly demonstrate the rationale behind her conclusions on credibility and reasonable doubt.

19 This Court has consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court. Having encouraged these expanded reasons, it would be counterproductive to dissect them minutely in a way that undermines the trial judge’s responsibility for weighing all of the evidence. A trial judge’s language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components. In re-examining the evidence piece by piece, the Court of Appeal in this case confused the need for sufficiency of reasons with the examination of sufficiency of the evidence, the latter being central to the disposition of the case in *Burke, Burns* and *R. (D.)* on which it relied. In our view the reasons were sufficient. In any event, any consideration of the sufficiency of the evidence had to be founded on consideration of all of the evidence and especially the justifications for all findings of credibility, including those referable to the child and witnesses who testified in support of her, not just referable to the accused and those supporting him.

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20 Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

21 This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt.

22 In this case, looking at the trial judge's reasons as a whole, they were sufficient. While yielding a result with which the majority in the Court of Appeal disagreed, the reasons nonetheless adequately demonstrated the rationale behind the trial judge's conclusions on credibility and reasonable doubt. We agree with the analysis of Chamberland J.A. and his conclusion that the trial judge's explanations for doubting the accused's credibility were reasonable and amply justified her conclusion and disposition of the case. As noted by Chamberland J.A., the trial judge properly instructed herself with respect to issues of reasonable doubt and then proceeded to set out a number of instances and statements in the accused's testimony which led her to doubt his credibility, as described above. Most notable among these was the accused's continual insistence on justifying his actions to the point of rendering his version of the evidence improbable.

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23 In *Braich*, at para. 38, Binnie J. wrote: “The insistence on a ‘demonstration’ of a competent weighing of the frailties elevates the alleged insufficiency of reasons to a stand-alone ground of appeal divorced from the functional test, a broad proposition rejected in *Sheppard*.” The requirement for sufficient reasons is not an invitation to an appellate court to substitute its perceptions of what should have been the factual and credibility findings of the trial judge when a reasonable basis for the trial judge’s conclusions exists. This, we believe, is what the majority in the Court of Appeal did in this case when it found the trial judge’s reasons to be insufficient despite having admitted that the findings on credibility by the trial judge were reasonable and could have led to the conclusion she reached.

3. Conclusion

24 It was not open to the Court of Appeal to disagree with the trial judge’s assessment of credibility unless her reasons demonstrated an overriding error in her appreciation of the law or the evidence. In the absence of any such error or insufficiency in the trial judge’s reasons, we would allow the appeal and restore her verdict.

25 We would also dismiss the unusual motion for costs on the basis that no exceptional reasons for awarding costs have been demonstrated.

English version of the reasons delivered by

26 DESCHAMPS AND FISH JJ. (dissenting) — With respect for the contrary opinion of Bastarache and Abella JJ., we would dismiss the appeal.

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As our colleagues point out, the trial judge was correct in stating that [TRANSLATION] “[t]he outcome of the case hinges on the analysis of credibility” (C.Q. Longueuil, No. 505-01-033285-012, February 21, 2002, at para. 156). However, in assessing the respondent’s credibility, the trial judge did not rely on any indicators based on her observation of the respondent when he testified before her. On the contrary, she took care to mention that she was drawing no inferences from the fact that the respondent’s [TRANSLATION] “expression during his testimony did not give the impression that he was being candid”, because this may have been consistent with his normal demeanour (C.Q., at para. 175). On the whole, it can be seen from the judge’s reasons that her assessment of credibility rested instead on four essentially substantive defects that in her view warranted rejecting the respondent’s testimony. These four grounds can be summed up as follows:

- i. According to the trial judge, the respondent’s memory of the times he was allegedly alone with the complainant [TRANSLATION] “fell apart over the course of [his] testimony” (C.Q., at para. 167).
- ii. The trial judge pointed out that the respondent presented himself as a person who loves children unconditionally and cares about their development. For this reason, she explained, the respondent stated that he never let them watch television and would take them outside to play. He subsequently contradicted himself in conceding that he let them watch

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television when they arrived in the morning or before leaving in the evening (C.Q., at paras. 168-69).

- iii. The respondent said that he never attended to the children's hygiene by giving them baths or changing their diapers. However, according to the trial judge, these everyday tasks are not sexual in nature, and [TRANSLATION] "[t]he care so taken to place himself elsewhere while the children were naked is an attempt at justification that taints his credibility" (C.Q., at paras. 168 and 170-71).
- iv. The respondent explained the circumstances in which he had once changed the complainant's sweater after she had soiled it while eating, adding, according to the trial judge, that his spouse's cousin was even there when it happened. The trial judge considered this to be [TRANSLATION] "a blatant attempt at justification" that undermined his credibility (C.Q., at paras. 172-73).

28 Doyon J.A., writing for the majority of the Court of Appeal, [2005] Q.J. No. 12442 (QL), 2005 QCCA 749, considered the trial judge's reasons to be inadequate, relying in support of this conclusion on *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, and *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27. In short, the trial judge had trapped the respondent between a rock and a hard place by finding every explanation he gave to be evidence of his guilt. Yet had the respondent not explained or "justified" himself as he did, his fate would likely have been sealed even more rapidly.

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29 The majority of the Court of Appeal explained the weaknesses of each of
the trial judge’s criticisms as follows.

30 First, in the paragraph in which the trial judge stated that the memory of
the accused [TRANSLATION] “fell apart over the course of [his] testimony” (C.Q., at
para. 167), she was actually discussing *only the testimony of the respondent’s wife*.
There is therefore no explanation for her finding, which does not have an otherwise
clear basis in the record.

31 The opposite is in fact true, as the accused was consistent in testifying that
he had been alone with the complainant three times and with the children six to eight
times. These facts are not contradictory. His subsequent admission that he had been
with the complainant four times [TRANSLATION] “is quite insignificant considering that
these encounters had taken place over a period of more than two years” (C.A., at
paras. 104-7).

32 Second, the accused did not contradict himself by first stating that he did
not let the children watch television before specifying that he did let them watch it in
the morning and in the evening. He explained that he never let them do so *during the*
day, since it was a time for learning activities. When the children arrived early in the
morning, before his wife was ready for them, and in the evening, when the day-care
centre was closed, he let them watch television (C.A., at para. 112). (In fact, the
record shows that the complainant usually arrived at 7:15 a.m., when Ms. L. was
sometimes still in bed, and that the complainant occasionally stayed overnight at the
day-care centre (A.R., at pp. 122-23).)

33 Third, the accused explained that he did not change diapers or bathe the children, because it was not his responsibility (the record shows that the respondent had a full-time job outside the day-care centre during the period to which the charges relate, with the exception of a short period of unemployment in January and February 2000 (R.F., at p. 3, paras. 1.10-1.11)) and because he found changing diapers distasteful. Also, the spouse of his mother, who owned her own day-care centre, had been suspected of sexual abuse. Aware of the risk, the respondent did not want to expose himself to similar problems (C.A., at paras. 110-11).

34 Fourth, again according to the majority of the Court of Appeal, it can be seen from the evidence that his spouse's cousin came to the apartment regularly to do his laundry (C.A., at para. 113). The record shows that these visits were made without warning (A.R., at p. 203). Thus, there is nothing surprising in the statement of the accused that the cousin was present when he changed the complainant's sweater, nor does it support the trial judge's assertion that the statement was a [TRANSLATION] "blatant attempt at justification" (C.A., at para. 115).

35 It is essentially for these reasons that the majority of the Court of Appeal concluded that the trial judge had not given genuine reasons for her decision to reject the testimony of the accused. Like Doyon J.A., we are of the view that the trial judge's finding is supported neither by the evidence nor even by her own analysis of the evidence.

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36 The duty of an appellate court is not limited to ensuring that “the verdict was available on the record” (reasons of the majority, at para. 11). Section 686(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that an appellate court is to intervene where a verdict is unreasonable or cannot be supported by the evidence, where a judgment is wrong in law (unless the curative proviso of s. 686(1)(b)(iii) applies), or where there has been a miscarriage of justice:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

37 According to s. 686(2), the remedy in such cases is to quash the conviction and either direct a verdict of acquittal to be entered or order a new trial, as the case may be:

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

38 It goes without saying that the assessment of the facts is a matter for the trial judge. This rule is applied even more rigorously where credibility is in issue. Nevertheless, the general principles set out in s. 686 of the *Code* retain their full effect: *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131; *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 5; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 24.

39 Beyond the verdict itself, the reasons for the verdict are of the utmost importance to the accused and to the administration of justice. In *Sheppard*, Binnie J. noted the importance of reasons and described as follows the consequences that can ensue when reasons have certain defects:

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered. [Emphasis added; para. 55.]

40 The scope of a trial court's duty to give reasons for its verdict will vary from case to case: *Sheppard*, at para. 55, *inter alia*. In the instant case, the prosecution's evidence was not overwhelming — quite the contrary — and the respondent's account was neither implausible nor manifestly unbelievable. As he was charged with a crime for which the punishment is severe and to which a grave stigma is attached, it should appear from the judge's reasons, in substance at least, why the accused has been convicted.

41 In the case at bar, the trial judge's reasons do not in any way support her decision to reject the testimony of the accused. Regardless of whether, as a result, her

decision is characterized as being unreasonable, the judgment is found to be wrong in law or, as the majority of the Court of Appeal concluded, the reasons are considered inadequate within the meaning of *Sheppard* and *Braich*, we must reach the same conclusion: the guilty verdict entered by the trial judge should be set aside and a new trial ordered, as the Court of Appeal held.

A. Unreasonable Verdict

42 As our colleagues note, the majority of the Court of Appeal dismissed out of hand the possibility that the verdict in the instant case was unreasonable, since it could be supported by a certain interpretation of the evidence (at para. 91).

43 This assertion must, however, be placed in the context of the classic unreasonable verdict test, which was originally developed in *Corbett v. The Queen*, [1975] 2 S.C.R. 275, and was subsequently refined in *R. v. Yebes*, [1987] 2 S.C.R. 168, before being recently restated in *Biniaris*, at para. 36: “[T]he test is ‘whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered’.”

44 In *Corbett*, *Yebes* and *Biniaris*, the accused had been tried by jury. An appellate court may conclude that a *jury*’s verdict is unreasonable only by considering all the circumstances in light of the outcome. As the Court stated in *Biniaris*:

The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury [than is the case with a verdict of a judge sitting alone]. If there are no errors in the charge, as must be assumed,

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there is no way of determining the basis upon which the jury reached its conclusion. . . .

. . . It may be that the jury reached its verdict pursuant to an analytical flaw similar to the errors occasionally incurred in the analysis of trial judges and revealed in their reasons for judgment. Such error would of course not be apparent on the face of the verdict by a jury. But the unreasonableness itself of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury. [paras. 38-39]

45 The unreasonable verdict test has evolved based on its context. The reasonableness of a conviction must be analysed in light of the evidence in the record, since this is the only way to reach a conclusion that a jury has not “act[ed] judicially” (*Biniaris*, at para. 36). However, the tendency has been to say that verdicts that “cannot be supported by the evidence” are also “unreasonable”, seemingly merging the two elements of s. 686(1)(a)(i): “the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence” (emphasis added).

46 Juries do not give reasons for their verdicts, but judges do. A judge’s verdict must be reviewed with this in mind.

47 It is possible for a judge’s decision to be unreasonable even though it is supported by the evidence to a certain extent. This was the case, for example, in *Burke*, at para. 53:

[T]his uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable. Pursuant to s. 686(1)(a)(i), I would quash the conviction. [Emphasis added.]

Contrary to how he dealt with the evidence supporting the other two complaints, Sopinka J. did not find that a properly instructed jury acting judicially could not

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reasonably convict the accused on the third count of indecent assault. However, he found the guilty verdict based on the testimony of the third complainant, K.L., to be unreasonable because of the judge's uncritical — that is, without adequate reasons — reliance on unorthodox evidence.

48 In *R. v. Burns*, [1994] 1 S.C.R. 656, the Court considered that the verdict was not unreasonable simply because “the trial judge’s reasons failed to indicate that he had considered certain frailties in the complainant’s evidence” (p. 664).

49 McLachlin J. (as she then was) noted that the result would necessarily be different should “the trial judge’s reasons demonstrate that he or she has failed to grasp an important point or has chosen to disregard it, leading to the conclusion that the verdict was not one which the trier of fact could reasonably have reached” (p. 665 (emphasis added), commenting on *Harper v. The Queen*, [1982] 1 S.C.R. 2).

50 With respect, we accordingly find that the verdict in the instant case “conflict[s] with the bulk of judicial experience”, in the sense of *Biniaris*:

In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. [para. 40]

51 The purpose of the court’s duty to scrutinize the reasons in this manner is to protect against unwarranted convictions:

It requires not merely asking whether twelve properly instructed jurors, acting judicially, [or, as in the case at bar, whether a judge] could reasonably have come to the same result, but doing so through the lens of

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judicial experience which serves as an additional protection against an unwarranted conviction. [*Biniaris*, at para. 40]

52 In our view, the reasons the trial judge gave for rejecting the testimony of the accused also conflict with the bulk of judicial experience in the assessment of credibility, as the majority of the Court of Appeal has demonstrated.

53 It is clear from the case law that an appellate court may not intervene on the basis that a judge has failed to express him or herself clearly: *R. v. Kerr* (2004), 48 M.V.R. (4th) 201, 2004 MBCA 30 (by way of comparison, see, as to the result, *R. v. Buckingham* (2004), 187 O.A.C. 140, *R. v. J.B.* (2004), 200 B.C.A.C. 115, 2004 BCCA 342, and *R. v. James* (2005), 193 C.C.C. (3d) 340, 2005 NSCA 22). However, we feel that the reasons are the guarantors of the verdict, as to speak, and that in certain cases, such as the one at bar, the two are necessarily inseparable. In such cases, defects in the reasons taint the verdict and make intervention by the appellate court necessary.

B. Error of Law

54 In discussing several examples of unreasonable verdicts, Arbour J. stated in *Biniaris*, at para. 37, that “[t]hese discernable defects are themselves sometimes akin to a separate error of law . . .”. The two concepts do in fact overlap, and the same reasons that led us to conclude above that the verdict was unreasonable can also lead to the conclusion that there has been an error of law in the case at bar.

55 Even if it does not render the verdict unreasonable, a sufficiently serious defect in the trial judge's reasons may constitute an error of law warranting the intervention of an appellate court.

56 For instance, in *R. v. R. (D.)*, [1996] 2 S.C.R. 291, there was no doubt that the complainants had been abused. Conviction was therefore not a conclusion that a trier of fact acting judicially could not reasonably have reached. Nevertheless, Major J. stated, at para. 54, that "the trial judge erred in law by failing to address the confusing evidence, and failing to separate fact from fiction". See also: *R. v. M. (Y.)* (2004), 71 O.R. (3d) 388 (C.A.), at para. 26, in which the failure to address an issue was characterized as an error of law.

57 In the case at bar, there was no omission of the sort seen in *R. (D.)*, since the judge did not fail to mention the problem or analyse it. The omission here was more a functional one than a material one: the reasons did not support the assessment of credibility and were, for the purposes of judicial reasoning, non-existent.

C. Inadequate Reasons

58 In the instant case, the majority of the Court of Appeal based their decision on the *inadequacy* of the trial judge's reasons within the meaning of *Sheppard* and *Braich*.

59 If the majority of the Court of Appeal relied on *Sheppard*, it is because that decision reviewed at length the principles of law that govern in this area. Contrary to what our colleagues seem to suggest at para. 15 of their reasons, the majority of the

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Court of Appeal did not claim that the facts in the case at bar were similar to those in *Sheppard*. Instead, the judges of the Court of Appeal made the following observation:

[TRANSLATION] This is therefore not a case in which the judge failed to give any reasons for her rejection of the accused's testimony. On the contrary, the trial judge gave several reasons. However, and once again with respect, her reasons do not make it possible to understand the line of thought that led her to reject the testimony. [para. 94]

60 If we accept the test from *Sheppard* and *Braich* relating to the *function* of reasons (the test is set out in *Sheppard*, and is described in *Braich*, at para. 31, as “*the test*”), it follows that the trial judge's reasons in the case at bar are inadequate in that they do not make it possible to understand by what judicial reasoning she arrived at her conclusion. In *Braich*, Binnie J. concluded that “[t]he trial judge provided an intelligible pathway through his reasons to his conclusion” (para. 42). The same cannot be said in the case at bar.

61 If a trial judge states that he or she did not believe an accused because the accused did not wear a tie while testifying, the judge is giving a reason in support of the decision to reject the testimony. Even so, it must not be concluded that the trial judge's reasons are adequate simply because, unlike the judge in *Sheppard*, he or she has spelled them out in the decision.

62 In short, the trial judge's reasons do not support her decision regarding credibility. There are two possibilities: either her conclusions did not satisfy the test from *Biniaris* or they were based on other reasons not set out in the judgment and therefore unavailable for review (which is precisely the test for appellate court intervention set out in *Sheppard* and *Braich*).

63 In either case, the Court of Appeal had to intervene.

III

64 Contrary to what our colleagues assert, as we have already mentioned, the Court of Appeal did not substitute its own assessment of the respondent's credibility for the trial judge's assessment. It correctly reviewed the case to determine whether the trial judge's decision on this point warranted its intervention. The majority of the Court of Appeal answered this question, the one on which the case turns, in the affirmative, and in our view its answer was correct.

65 For these reasons, we would dismiss the appeal.

Appeal allowed, DESCHAMPS and FISH JJ. dissenting.

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