

R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26

Her Majesty The Queen

Appellant

v.

Colin Sheppard

Respondent

Indexed as: R. v. Sheppard

Neutral citation: 2002 SCC 26.

File No.: 27439.

2001: June 21; 2002: March 21.

Present: Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for newfoundland

Criminal law — Trial — Judgments — Duty of trial judge to give reasons in criminal case — Appellate review — Proposed approach — Functional test.

Criminal law — Trial — Judgments — Duty of trial judge to give reasons — Court of Appeal setting aside accused's conviction for possession of stolen property and ordering new trial because trial decision unintelligible and incapable of proper appellate review — Whether trial judge erred in law in failing to deliver meaningful reasons for his decision — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(a).

The accused, a carpenter with no criminal record, separated from his girlfriend. Their relationship had been stormy and the separation was not amicable. He had been renovating his house and, two days after the separation, his ex-girlfriend told the police that he had confessed to her to stealing two windows from a local supplier. The supplier confirmed that two windows were missing from a truck parked across the road from his shop, which was used for storage. Employees and passers-by had access to the area and there had been no indication of forced entry. The accused was charged with possession of stolen property. At trial, the ex-girlfriend's evidence was the only evidence connecting him to the missing windows. She testified that he stole them "to use in his house", but there was no evidence that a search had been made of his premises. No stolen windows were found in the accused's possession or elsewhere. The accused testified and asserted his innocence. Despite the weaknesses of the Crown's evidence, he was convicted. The trial judge addressed none of the troublesome issues in the case but said only: "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." A majority of the Court of Appeal characterized the trial reasons as "boiler plate". The conviction was set aside and a new trial ordered based on the absence of adequate reasons.

Held: The appeal should be dismissed. The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.

The requirement of reasons is tied to their purpose and the purpose varies with the context. The present state of the law on the duty of a trial judge to give

reasons, in the context of appellate intervention in a criminal case, can be summarized in the following propositions:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.
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.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial. Such an error of law at the trial level, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

In the circumstances of this case, the majority of the Court of Appeal correctly concluded that the reasoning of the trial judge was unintelligible and therefore incapable of proper judicial scrutiny on appeal. There were significant inconsistencies or conflicts in the evidence. The trial judge's reasons were so "generic" as to be no reasons at all. The absence of reasons prevented the Court of Appeal from properly reviewing the correctness of the unknown, unexpressed pathway taken by the trial judge in reaching his conclusion and from properly assessing whether he had properly addressed the principal issues in the case. The trial judge's failure to deliver meaningful reasons for his decision was an error of law within the meaning of s. 686(1)(a)(ii) of the *Criminal Code*.

Cases Cited

Referred to: *R. v. Barrett*, [1995] 1 S.C.R. 752, rev'g (1993), 82 C.C.C. (3d) 266; *Coleman v. Dunlop Ltd.*, [1998] P.I.Q.R. 398; *Flannery v. Halifax Estate Agencies Ltd.*, [2000] 1 All E.R. 373; *Pettitt v. Dunkley*, [1971] 1 N.S.W.L.R. 376; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347; *R. v. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49; *R. v. Hache* (1999), 25 C.R. (5th) 127; *R. v. Graves* (2000), 189 N.S.R. (2d) 281, 2000 NSCA 150; *R. v. Gostick* (1999), 137 C.C.C. (3d) 53; *Macdonald v. The Queen*, [1977] 2 S.C.R. 665; *Harper v. The Queen*, [1982] 1 S.C.R. 2; *R. v. Burns*, [1994] 1 S.C.R.

656; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *R. v. Yebe*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. McMaster*, [1996] 1 S.C.R. 740; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86; *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. G. (G.)* (1995), 97 C.C.C. (3d) 362; *R. v. Braich*, [2001] 1 S.C.R. 000, 2002 SCC 27; *R. v. Gun Ying*, [1930] 3 D.L.R. 925; *R. v. McCullough*, [1970] 1 C.C.C. 366; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Richardson* (1992), 74 C.C.C. (3d) 15; *R. v. Dankyi* (1993), 86 C.C.C. (3d) 368; *R. v. Anagnostopoulos* (1993), 20 C.R. (4th) 98; *R. v. Davis* (1995), 98 C.C.C. (3d) 98.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 276.2(3) [ad. 1992, c. 38, s. 2], 278.8(1) [ad. 1997, c. 30, s. 1], 495, 686(1)(a) [am. 1991, c. 43, s. 9 (Sch., item 8)], 686(1)(b)(iii) [am. c. 27 (1st. Supp.), s. 145; am. 1991, c. 43, s. 9 (Sch., item 8)], 686(2), 726.2 [ad. 1995, c. 22, s. 6].

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APPEAL from a judgment of the Newfoundland Court of Appeal (1999), 138 C.C.C. (3d) 254, 178 Nfld. & P.E.I.R. 1, [1999] N.J. No. 229 (QL), setting aside the accused’s conviction and ordering a new trial. Appeal dismissed.

Harold J. Porter, for the appellant.

Richard S. Rogers, for the respondent.

The judgment of the Court was rendered by

1 BINNIE J. – In this case, the Newfoundland Court of Appeal overturned the conviction of the respondent because the trial judge failed to deliver reasons in circumstances which “crie[d] out for some explanatory analysis”. Put another way, the trial judge can be said to have erred in law in failing to provide an explanation of his decision that was sufficiently intelligible to permit appellate review. I agree with this conclusion and would therefore reject the Crown’s appeal.

2 Twenty-four-year-old Colin Sheppard, an unemployed carpenter from Spaniard’s Bay, Newfoundland and Labrador, was charged with possession of stolen property, being two casement windows with a value of \$429. No stolen windows were ever found in his possession. The case against Mr. Sheppard rested entirely on an

accusation by his estranged girlfriend who took her story to the police two days after the termination of their tempestuous relationship saying that “she would get him”. He testified in his own defence. He was convicted by a provincial court judge after a summary trial and fined \$1,000 and ordered to “repay” the cost of two windows to a local builder’s supply yard. He still does not understand the basis of his conviction and neither do we. The sum total of the trial judge’s reasons consists 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.

3 Defence counsel says that he was able to sum up his argument in two or three minutes (46 lines of transcript) and Crown counsel rather more succinctly (15 lines of transcript) and questions why less should be expected of a trial judge.

4 The appellant Crown contends that “[i]t has been a settled principle of Canadian law that a trial judge does **not** have to give reasons” (factum, at para. 13 (emphasis in original)). This proposition is so excessively broad as to be erroneous. It is true that there is no *general* duty, viewed in the abstract and divorced from the circumstances of the particular case, to provide reasons “when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances” (*R. v. Barrett*, [1995] 1 S.C.R. 752, at p. 753). An appeal lies from the judgment, not the reasons for judgment. Nevertheless, reasons fulfill an important function in the trial process and, as will be seen, where that function goes unperformed, the judgment itself may be vulnerable to be reversed on appeal.

5 At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. The question before us is how this broad principle of governance translates into specific rules of appellate review.

I. Facts

6 The respondent lived with the informant, Ms. Sandra Noseworthy, for about a year and a half in a relationship that, at least during its latter stages, can best be described as stormy. He, for example, alleged that at one time she had thrown a beer glass at him and, at another time, had slashed at his knees with a hammer. On one occasion, he said, he went to the RCMP “with my face busted open” and was advised, he says, “to get out of the relationship”. The separation was not amicable, at least as described by the respondent:

So I got my friend Martin to come up with me and when I got up there she [Ms. Noseworthy] was kicking the . . . trying to kick the door in on my shed. And I unlocked it and let her get her chair and Christmas stuff and ah, she give me a couple of punches in the face again then and threw a rock at me trying to beat the window out of my house and ah, beat the back window out of me truck, and ah, threw a stick and hit me in the face with it. Just kept on going on and on like.

The respondent says that when he decided to go his own way, she threatened him saying, “I hope you live your life in misery. If I have anything to do with it, you will.” At trial she testified that “Maybe I did say it. Maybe I did.”

7 During their year and a half together the respondent, then unemployed, had been renovating a house. Two days after the break-up, Ms. Noseworthy went to the police to inform them that the respondent had a month or so previously confessed to stealing two windows from a local building supplies dealer. Her description of the allegedly stolen goods, in its entirety, was “vinyl windows, two-pane. They were the . . . they rolled out, one side”. The local building supplies dealer was contacted. Despite the lapse of time since the alleged theft, he was unaware of it. He then checked his inventory and confirmed that two 40 x 36 inch vinyl windows were missing from a truck parked across the road from his shop, which was used for storage. At the date the windows went missing, which is unknown, the truck contained 30 to 40 windows plus other building supplies, and was not kept under lock and key. He testified that employees and passers-by had access to the area, and there had been no indication of forced entry. Ms. Noseworthy testified that the respondent stole the windows “to use them in his house”, but in fact there was no evidence that the house had been searched or that “stolen” windows were incorporated in the structure or were otherwise located on the respondent’s property or, indeed, elsewhere.

8 Other than the evidence of Ms. Sandra Noseworthy, there was no evidence connecting the respondent with the missing windows. Ms. Noseworthy acknowledged that there were no identifying stickers on the windows when she saw them. She said the respondent had admitted to her that he had scraped them off and burned them.

9 All of this was vigorously denied by the respondent, who was 24 years old and had no criminal record, nor had he ever been charged with a criminal offence.

II. Judicial History

A) *Newfoundland Provincial Court*

10 As stated, Judge Barnable’s judgment in its entirety was as follows:

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.

B) *Court of Appeal of Newfoundland* (1999), 138 C.C.C. (3d) 254

1. O’Neill J.A.

11 O’Neill J.A. held that the trial judge should have indicated that he was alive to the issues of the accused’s denial, the lack of corroborative evidence, the informant’s reasons to be vindictive and her alleged threats, that the goods had not been recovered and that there was no evidence as to when the windows had been taken. He held that in the absence of sufficient reasons, the Court of Appeal could not carry out its appellate function. He set aside the verdict under s. 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“unreasonable verdict”) and ordered a new trial.

2. Green J.A., concurring in the result

12 Green J.A. held that “a failure to intervene in this case would amount to an affirmation of the use of boilerplate language in trial judgments as a means of insulating such judgments from appellate review” (p. 268). To dismiss the appeal, he thought, would encourage trial judges to deliberately structure judgments to frustrate

appellate review or to mask a lazy or inadequate analysis. There was nothing here for an appellate court to scrutinize. The argument that busy trial judges should not be required in every case to provide detailed reasons did not justify giving no reasons in all cases, especially those where common sense would expect controversial aspects to be discussed and analyzed. He questioned whether the trial judge had considered whether someone else could have taken the windows and whether this raised a reasonable doubt, or the motives of the informant to lie, or whether there was still reasonable doubt even if he did not believe the accused. Failure to address these matters demonstrated that the trial judge either had failed to grasp important points or had chosen to disregard them. The verdict was unreasonable.

3. Cameron J.A., dissenting

13 Cameron J.A. held that a review of the evidence did not support a finding that the verdict was unreasonable or unsupported by evidence. The case turned on credibility. In her opinion, if the complainant's version of events was accepted, then there was evidence upon which a conviction could reasonably be entered. In her view, it is not an error of law to fail to give reasons. The evidence was not complicated or confused nor was there any uncertainty in the law. In the absence of a general duty to give reasons, she saw nothing in this case that demanded that reasons be given or that suggested there was a misapprehension of a legal principle.

III. Relevant Statutory Provisions

14 *Criminal Code*, R.S.C. 1985, c. C-46

Powers of the Court of Appeal

686. (1) [Powers] 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;

(b) may dismiss the appeal where

...

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or

...

(2) [Order to be made] 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.

IV. Analysis

15 Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for

their adjudication are transparent and accessible to the public and to the appellate courts.

16 In some common law jurisdictions, including England and Australia, the courts have adopted a general, albeit qualified, requirement in both civil and criminal cases to give reasons subject to significant exceptions: see generally H.L. Ho, “The judicial duty to give reasons” (2000), 20 *Legal Stud.* 42; *Coleman v. Dunlop Ltd.*, [1998] P.I.Q.R. 398 (Eng. C.A.), at p. 403; and *Flannery v. Halifax Estate Agencies Ltd.*, [2000] 1 All E.R. 373 (C.A.). It is not clear, however, the extent to which a reasonable result based on a solid evidentiary record will nevertheless be reversed and sent back for retrial because the reasons for the decision are considered inadequate, confusing, or poorly expressed. In most of the reported cases, the deficiency in the reasons created significant problems of substance for the appellate court.

17 In Australia, it has been said by one state appellate court that it is as much a judicial duty “to give reasons in an appropriate case as there is otherwise a duty to act judicially, such as to hear arguments of counsel and hear evidence and admit relevant evidence of a witness”: *Pettitt v. Dunkley*, [1971] 1 N.S.W.L.R. 376 (C.A.), at pp. 387-88. The issue is not only to define the “appropriate case” but to define circumstances in which failure to provide adequate reasons will constitute grounds for an acquittal or a new trial.

18 In Canadian administrative law, this Court held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43, that:

... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the

advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

19 There are, of course, significant differences between the criminal courts and administrative tribunals. Each adjudicative setting drives its own requirements. If the context is different, the rules may not necessarily be the same. These reasons are directed to the criminal justice context.

20 Even in the criminal law context, Parliament has intervened to require the giving of reasons in specific circumstances. Section 276.2(3) of the *Criminal Code* requires trial judges to give reasons for their determination of the admissibility of a complainant's prior sexual history. All the factors affecting the decision must be referred to as well as the manner in which the proposed evidence is considered to be relevant. In the same way, s. 278.8(1) states that trial judges *shall* provide reasons for ordering or refusing to order the production of certain records that contain personal private information. Section 726.2 provides that when imposing a sentence the court *shall* state the reasons for it. The only discernable purpose for these provisions is to facilitate appellate review of the correctness of the conviction or acquittal or sentence. It would be strange to impose a more rigorous standard of judicial articulation on an evidentiary ruling or sentence than on the conviction whose correctness is equally before the appellate court for review.

21 The task is not so much to extol the virtues of giving full reasons, which no one doubts, but to isolate those situations where deficiencies in the trial reasons will justify appellate intervention and either an acquittal or a new trial.

22 There is a general sense in which a duty to give reasons may be said to be owed to the public rather than to the parties to a specific proceeding. Through reasoned decisions, members of the general public become aware of rules of conduct applicable to their future activities. An awareness of the reasons for a rule often helps define its scope for those trying to comply with it. The development of the common law proceeds largely by reasoned analogy from established precedents to new situations. Few would argue, however, that failure to discharge this jurisprudential function necessarily gives rise to appellate intervention. New trials are ordered to address the potential need for correction of the outcome of a particular case. Poor reasons may coincide with a just result. Serious remedies such as a new trial require serious justification.

23 On a more specific level, within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented (*R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at p. 356; *R. v. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49 (Man. C.A.), at pp. 53-56 and 61-63; *R. v. Hache* (1999), 25 C.R. (5th) 127 (N.S.C.A.), at pp. 135-39; *R. v. Graves* (2000), 189 N.S.R. (2d) 281, 2000 NSCA 150, at paras. 19-23; *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 (Ont. C.A.), at pp. 67-68). The absence of reasons, however, does not necessarily indicate an absence of such concentration. We are speaking here of the *articulation* of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former.

A) *Functional Test*

24 In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

25 The issue before us presupposes that the decision has been appealed. In that context the purpose, in my view, is to preserve and enhance meaningful appellate review of the correctness of the decision (which embraces both errors of law and palpable overriding errors of fact). If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the *Criminal Code*. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice.

26 The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.

27 Reasons for decision may be examined in other contexts for other purposes. The Canadian Judicial Council, for example, regularly reviews reasons for judgment in response to complaints. Its criteria will be apt for its purpose and will obviously differ from the criteria applicable in the appellate context: see, e.g., Canadian Judicial Council, *Report to the Canadian Judicial Council of the Inquiry Committee [in the case of Donald Marshall Jr.] Established Pursuant to Subsection 63(1) of the Judges*

Act at the Request of the Attorney General of Nova Scotia (August 1990). My focus in this case, to reiterate, is appellate intervention in a criminal case.

28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

29 I believe this rather pragmatic approach is signalled, if not always explicitly, in earlier decisions of this Court. A convenient starting point is the judgment of Laskin C.J. in *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. In the course of dealing with an appeal from a court martial, he expressed concern that imposing a general duty on judges to give reasons, especially in the busy criminal courts, would risk ending up with "a ritual formula" (p. 672) that would be of no real assistance to the parties or to a reviewing court. Nevertheless, he said, at p. 673:

It does not follow, however, that failure of a trial judge to give reasons, not challengeable *per se* as an error of law, will be equally unchallengeable if, having regard to the record, there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict. [Emphasis added.]

30 Laskin C.J. was not addressing a case where silence alone was said to be the error. He insisted on a “rational basis” in the record to justify appellate intervention.

31 The point was picked up and elaborated by Estey J. in *Harper v. The Queen*, [1982] 1 S.C.R. 2, a case involving the conviction of a police officer for assault of an individual in the course of an arrest. The appeal was based on an alleged error of law (p. 23). The Court was confronted with skeletal reasons in the context of an unsatisfactory record and concluded that the trial judge had “fatally overlooked” (p. 16) relevant defence evidence. Estey J. said, at p. 14:

Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede. [Emphasis added.]

If the trial judge provides some reasons, and therein demonstrates that he or she has failed to grasp an important point or has disregarded it, then as McLachlin J. (as she then was) pointed out in *R. v. Burns*, [1994] 1 S.C.R. 656, this may also lead “to the conclusion that the verdict was not one which the trier of fact could reasonably have reached” (p. 665).

32 The more problematic situation is where the trial judge renders a decision and gives either no reasons or, as in this case, “generic” reasons that could apply with

equal facility to almost any criminal case. The complaint is not that the reasoning is defective but that it is unknown or unclear. In this respect, McLachlin J. stated as follows on behalf of the full Court in *Burns*, *supra*, at p. 664:

Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points [citations omitted]. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.

This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. [Emphasis added.]

33 The appellant relies on this statement as establishing a simple rule that trial judges are under no duty to give reasons, but it seems to me, on the contrary, that this Court *did* expect trial judges to state more than the result. McLachlin J. anticipated at least “their conclusions” on the main issues (though perhaps not “collateral” issues) at least “in brief compass”. Further, as pointed out by O’Neill J.A. in the court below, the observations in *Burns* were substantially qualified by the use of the words “all”, “general”, “merely”, “all aspects”, “in itself”, “every aspect”, “in brief compass”, and “collateral aspects”. What was said in *Burns*, it seems to me, was that the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.

(i) Allegation of “Unreasonable Verdict” Cases

34 It is important to note that *Burns* was a case in which the accused alleged an unreasonable verdict under s. 686(1)(a)(i) of the *Criminal Code*. The door was not shut to consideration of the absence of reasons, in an appropriate case, as an error of law under s. 686(1)(a)(ii) or a miscarriage of justice under s. 686(1)(a)(iii). In an appeal founded on s. 686(1)(a)(i), the Court is engaged in a review of the facts: *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 915. The test for an “unreasonable verdict” is whether “the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered”: *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282; *R. v. Yebe*s, [1987] 2 S.C.R. 168, at p. 185; and *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 36. The test is equally applicable to a judge sitting at trial without a jury: *Biniaris*, at para. 37. In such a case, while a “Court must re-examine and to some extent reweigh and consider the effect of the evidence” (*Yebe*s, at p. 186), the verdict itself is the error complained of. The absence or inadequacy of reasons, while potentially supportive of a conclusion of unreasonable verdict, is not the mischief aimed at by the remedy.

35 *Barrett, supra*, confirmed the correctness of the view that the *dicta* in *Burns* was not intended as an appellate invitation to trial judges to insulate their decisions from judicial review by saying as little as possible about the reasons for their judgment. That case involved allegations of police brutality which led to a four-day *voir dire* to determine the admissibility of the statements made by the accused after his arrest. The accused had sustained physical injuries while in custody and there was no evidence of a fight with other inmates. The trial judge issued no reasons for admitting

the statement other than letting it be known through his staff that his ruling was based on a finding of credibility. Arbour J.A., as she then was, ruled that:

Reasons must be given for findings of facts made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent.

(*R. v. Barrett* (1993), 82 C.C.C. (3d) 266 (Ont. C.A.), at p. 287)

36 In brief oral reasons this Court reversed, stating at p. 753:

While it is clearly preferable to give reasons and although there may be some cases where reasons may be necessary, by itself, the absence of reasons of a trial judge cannot be a ground for appellate review when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances. [Emphasis added.]

37 This statement did not bless the absence of reasons. It said only that appellate review in such cases would not be available where the disputed finding is otherwise supportable on the evidence (i.e., the verdict is not unreasonable), or where the basis of the finding is apparent from the circumstances. The Court concluded, on the facts of *Barrett*, that these conditions were met. On this basis it disagreed with the Ontario Court of Appeal.

38 It should be added that even where the allegation is unreasonable verdict, the absence of adequate reasons may, in some circumstances, contribute to appellate intervention. This is shown by *R. v. Burke*, [1996] 1 S.C.R. 474, which involved the conviction of a former Christian Brother at the Mount Cashel Orphanage in St. John's, Newfoundland and Labrador, on multiple counts of indecent assault and assault causing bodily harm. In respect of one count, the Crown relied on the evidence of the witness L., who identified the accused from a photograph, but was not asked to identify

him during the trial. The Crown offered no explanation for this omission. Sopinka J. reviewed the weaknesses of the identification evidence and concluded at para. 53:

The trial judge made no comment on the frailty of the identification evidence other than the general statement that she found L.'s evidence credible and accepted it. No reference is made to the fact that the appellant was not identified in court and that no explanation for failure to ask L. to do so was given. No reference is made to the erroneous identification made by T. using the photograph of the appellant. Given the unsatisfactory nature of L.'s evidence in general, this uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable. Pursuant to s. 686(1)(a)(i), I would quash the conviction.

The absence of an explanation by the trial judge contributed to the Court's conclusion that "this is one of those rare instances where the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence" (para. 7). Sopinka J. said that the power to overturn "unreasonable verdicts" was intended "as an additional and salutary safeguard against the conviction of the innocent" (para. 6). The omissions of the trial judge would not be permitted to preclude the making of that appellate determination. I fully agree with that proposition.

(ii) Allegation of "Error of Law" Cases

39 More recently, the Court has explored circumstances where, short of finding a verdict to be unreasonable, the trial judge's failure to articulate reasons in relation to a key issue in circumstances which require explanation could be characterized as an error of law, giving rise to a new trial (rather than, as is the case with an unreasonable verdict, an acquittal).

40 In *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27, Lamer C.J. referenced the earlier statements made in *Burns* and *Barrett* and stated that he did not

interpret these cases as holding that there will never be an obligation on trial judges to write reasons:

. . . I wish to address briefly the issue of a trial judge's obligation to write reasons in criminal cases since this case involved a trial before a judge sitting without a jury. The issue was recently considered in this Court in the cases of [*Burns*] and [*Barrett*]. I do not interpret these cases as suggesting that there is no obligation on trial judges to write reasons. Indeed, in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, I held at p. 806 that:

Of course, courts should normally disclose in their judgment the basis for their decisions and, when relevant, the evidence it has decided to rely upon. However, if a court chooses not to do so, it may well, in some circumstances though surely not in all, have failed in its adjudicative duties. . . . [Emphasis added.]

. . .

I am of the view that in cases where the law is well settled and the disposition turns on an application of the law to the particular facts of the case, it will be difficult for an appellant to argue that the failure to provide reasons requires appellate intervention. . . .

. . .

However, in a case where it appears that the law is unsettled, it would be wise for a trial judge to write reasons setting out the legal principles upon which the conviction is based so that an error may be more easily identified, if error there be. In the case at bar, there is no doubt that at the time of the appellants' trial in October of 1993, the law of intoxication was in a very unsettled and unsatisfactory state. . . . If the trial judge had not provided reasons in this case, we would not have been in a position to know whether he had applied the *MacAskill* approach as he in fact had done. [Emphasis added.]

McMaster thus adverted to the reasoned nature of "adjudicative duties" in the context of the need to preserve meaningful appellate review. While Lamer C.J. spoke in terms of it being "wise" rather than obligatory to deal with "unsettled" points of law, the important point is that if the trial judge's reasons had not treated the point in legal controversy, he was of the opinion that the appellate court "would not have been in a position" to assess the correctness of the result. Prejudice would flow from the

deficiency. The delivery of inadequate trial reasons which cause or contribute to a deprivation of the meaningful exercise of a party's right to have the correctness of the trial decision reviewed by an appellate court is, I think, an error of law.

41 More explicit recognition of the principle that a failure to give reasons in circumstances not amounting to unreasonable verdict may constitute an error of law came with *R. v. R. (D.)*, [1996] 2 S.C.R. 291. The appellants in that case were charged with numerous counts of sexual and physical abuse against three children. The alleged assaults took place between 1983 and 1989. The “birth” parents and the mother’s lover were convicted of three counts of sexual assault and assault causing bodily harm. The children not only testified at trial to sexual and physical abuse, but spoke of babies who had been killed ritually and buried in the back garden, lengthy hospital stays for which no record could be found, and the eating of blood, urine and “pooh”. It emerged that some of these references were childhood code, e.g. “urine” was apple juice and “pooh” was pork and beans. It was in this context that Major J., writing for the majority on this point, stated, at para. 54:

It is my view that the trial judge erred in law by failing to address the confusing evidence, and failing to separate fact from fiction. [Emphasis added.]

After referring to the passages in *Burns* previously mentioned, Major J. went on to state, at para. 55:

The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions.

42 This, I think, is clear support for the proposition that, *for purposes of appellate review*, the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability. Major J. continues, at para. 55:

Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere.

This statement affirms that deficiency in reasons, by itself, is not a stand-alone ground of appeal. Major J. concludes, at para. 55:

Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial. [Emphasis added.]

43 As stated at para. 58 of his reasons, Major J. considered *R. (D.)* to raise in an unusual aspect “the presumption of innocence and the requirement of proof beyond a reasonable doubt”. The deficiency in the trial reasons precluded the appellate court from being satisfied that these fundamental principles had been properly applied. It is thus not every case of “confused and contradictory evidence” that will convert deficiency of reasons into an error of law for purposes of s. 686(1)(a)(ii). The error of law arises in that context because *in the opinion of the appellate court*, the deficiency precludes meaningful appellate review of the correctness of the decision. That threshold is not confined to cases of “bizarre” evidence.

44 The “error of law” approach was adopted by Sopinka J. in *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30. The accused was charged with the murder of an

elderly man. The victim was found at his home, having died from five blows to the head with a blunt object. A brief investigation led police officers to the accused's trailer where he was arrested without a warrant after they observed him wearing a blood-stained t-shirt. One of the issues faced by this Court was whether the police had reasonable and probable grounds for the arrest. At trial, the arresting officer testified that he did not believe he had reasonable grounds to arrest the accused when he entered the trailer. Rather, he formed this belief only after he was inside and observed the blood-stained shirt. Sopinka J., for the majority, concluded that the trial judge committed an error of law when he failed to explain his rejection of the policeman's admission that he had himself lacked the grounds to arrest the accused prior to entering the trailer (at para. 31):

In order to conclude that, objectively speaking, reasonable and probable grounds for arrest existed, one must conclude that the officer on the scene was unreasonable in reaching a different conclusion. The trial judge, however, did not explain his dismissal of the officer's evidence in this respect. In my view, such a failure to clarify the basis for his finding that the objective test was satisfied constituted an error of law. [Emphasis added.]

45 The judge's silence bore on a critically important point. The police officer's admission was the equivalent of admitting that the arrest was not in accordance with s. 495 of the *Code*. Thus, by failing to explain why he had rejected the police officer's testimony, the trial judge arrived at a conclusion that was not intelligible from the record and the correctness of which could not be evaluated by the reviewing court. The basis of the finding, to quote *Barrett, supra*, at para. 1, was not "apparent from the circumstances".

46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the

record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict *properly* scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

(iii) Miscarriage of Justice

47

I would certainly not foreclose the possibility that the absence or inadequacy of reasons could contribute to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*. Inadequate trial reasons may cause or contribute to an appellate conclusion that the trial judge failed to appreciate important evidence, but the failure might not be based on a misapprehension of some legal principle, and the court therefore may hesitate to characterize it as an error of law: *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 295. In such cases, resort may be had to s. 686(1)(a)(iii): *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 17; *Fanjoy*

v. *The Queen*, [1985] 2 S.C.R. 233; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at pp. 220-21; *R. v. G. (G.)* (1995), 97 C.C.C. (3d) 362 (Ont. C.A.), at p. 380. The present case, in my view, is more properly dealt with as an error of law under s. 686(1)(a)(ii).

B) *The Floodgate Argument*

48 Lurking beneath the Crown’s argument is perhaps the concern that already burdened trial judges will become overburdened, and appeal courts will be swamped with a wave of new cases based on allegations of non-existent or inadequate reasons. I do not think this is so.

49 Canada has the advantage of professional judges at all levels and for the most part they regard it as a mark of professionalism to give at least an adequate, and usually a more than adequate, explanation of their decisions.

50 It will be up to the appeal courts themselves to determine whether the deficiencies in the trial reasons, taken together with the trial record as a whole, preclude meaningful appellate review. If that is their conclusion, they *should* have the power to intervene. Section 686(1)(a)(ii), which may lead to a new trial, is a more proportionate response to such a situation than is an acquittal based on s. 686(1)(a)(i) (“unreasonable verdict”) which addresses a situation where the verdict itself is the error. In the present case, the verdict itself was not necessarily an error, but the Court of Appeal felt unable to subject the correctness of the conviction to proper appellate scrutiny because of “boilerplate” reasons. This engaged its authority under s. 686(1)(a)(ii) of the *Criminal Code* (“error of law”). Given the high standards set by trial judges in this country, I would expect situations to be rare where the verdict is not

unreasonable but the right of appeal is nevertheless frustrated by a poor or non-existent set of reasons.

51 Moreover, for those who fear overburdening already burdened trial judges, the presumption that judges know the law and deal properly with the facts presupposes that whatever time is required to adjudicate the issues has in fact been taken. While, as suggested above, the act of formulating reasons may further focus and concentrate the judge's mind, and demands an additional effort of self-expression, the requirement of reasons as such is directed only to having the trial judge articulate the thinking process that it is presumed has already occurred in a fashion sufficient to satisfy the demand of appellate review.

52 Where the factual basis of the decision is intelligible to the appellate court for purposes of reviewing its correctness, it would rarely if ever be open to an appellant to argue "intelligibility to the parties" as an independent ground for reversal. It will generally be sufficient for purposes of judicial accountability if the appellate court, having decided that it understands from the whole record (including the allegedly deficient reasons) the factual and legal basis for the trial decision, then communicates that understanding to the accused in its own reasons.

C) Proponents of a More Extensive Duty to Give Reasons

53 I have stressed the necessary connection in the appellate context between the failure to provide proper reasons and frustration of rights of appeal. Some judicial commentators have taken recent cases in this Court and elsewhere as authority for a more general duty to give reasons: see, e.g., "Do Trial Judges Have a Duty to Give Reasons for Convicting?" (1999), 25 C.R. (5th) 150, by Justice Gerard Mitchell of the

Prince Edward Island Court of Appeal, at p. 156; Judge Ian MacDonnell of the Ontario Provincial Court, “Reasons for Judgment and Fundamental Justice”, in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (1996), 151, at pp. 158-59; and R. J. Allen and G. T. G. Seniuk, “Two Puzzles of Juridical Proof” (1997), 76 *Can. Bar Rev.* 65, at pp. 69-80. See also: D. Stuart, *Charter Justice in Canadian Criminal Law* (3rd ed. 2001), at p. 187; and G. Cournoyer, Annotation to *R. v. Biniaris* (2000), 32 C.R. (5th) 1, at p. 6. To the extent these commentators are saying that giving reasons is part of the job of a professional judge and accountability for the exercise of judicial power demands no less, I agree with them. To the extent they go further and say that the inadequacy of reasons provides a free-standing right of appeal and in itself confers entitlement to appellate intervention, I part company. The requirement of reasons, in whatever context it is raised, should be given a functional and purposeful interpretation.

54 Other observers criticize the rationale for the present rules, including the presumption that “judges are presumed to know the law with which they work day in and day out” (*Burns, supra*, at p. 664). A review of some reported cases appears in D. M. Tanovich, “Testing the Presumption That Trial Judges Know the Law: The Case of *W. (D.)*” (2001), 43 C.R. (5th) 298. Such attacks, in my view, take insufficient account of the differences between presumptions of law (which this is) and presumptions of fact. The presumption here simply reflects the burden on the appellant to demonstrate errors in the trial decision or to show frustration of appellate review of the correctness of that decision. This is entirely consistent with the normal operation of the adversarial process on appeal. Nothing more is intended. The appellant is not required to “rebut” the presumption of general competence. A judge who knows the law may still make mistakes in a particular case.

D) *A Proposed Approach*

55 My reading of the cases suggests that the present state of the law on the duty of a trial judge to give reasons, viewed in the context of appellate intervention in a criminal case, can be summarized in the following propositions, which are intended to be helpful rather than exhaustive:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

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.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the

presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

E) Application of These Principles to the Facts

56 The majority judgments of the Newfoundland Court of Appeal found the trial decision unintelligible and therefore incapable of proper judicial scrutiny on appeal. I agree with this conclusion.

(i) Intelligibility to the Parties and Counsel

57 A distinction may be drawn for these purposes between a situation of no reasons and an allegation of inadequate reasons.

58 In the present case the trial judge stated his conclusion (guilt) essentially without reasons. In the companion appeal in *R. v. Braich*, [2002] 1 S.C.R. 000, 2002 SCC 27, the trial judge gave 17 pages of oral reasons, but the accused individuals argued that the reasons overlooked important issues and should be considered inadequate. The two types of situation raise somewhat different problems.

59 In this case, the trial judge says he “reminded himself” of various things including the burden on the Crown and the credibility of witnesses, but we are no wiser as to how his reasoning proceeded from there. The respondent was convicted of possession of stolen goods. It was central to Ms. Noseworthy’s evidence that the “stolen” windows were to be incorporated into the respondent’s house, but there was no evidence that a search had been made of his premises. The allegedly stolen property was never found in his possession. The respondent flatly asserted his innocence.

60 The trial judge’s reasons were so “generic” as to be no reasons at all. Speaking of the Crown’s attempt to excuse the “boilerplate” reasons by the busy nature of Judge Barnable’s courtroom, Green J.A. commented (at. pp. 269-70):

Reasons also relate to the fairness of the trial process. Particularly in a difficult case where hard choices have to be made, they may provide a modicum of comfort, especially to the losing party, that the process operated fairly, in the sense that the judge properly considered the relevant issues, applied the appropriate principles and addressed the key points of evidence and argument submitted.

. . .

It is cold comfort, I would suggest, to an accused seeking an explanation for being convicted in a case where there was a realistic chance of success, to be told he is not entitled to an explanation because judges are “too busy”.

I agree, provided it is kept in mind that in the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it.

61 Given the weaknesses of the Crown's evidence in this case, even the most basic notion of judicial accountability for the imposition of a criminal record would include accountability to the accused (respondent) as well as to an appellate court: *R. v. Gun Ying*, [1930] 3 D.L.R. 925 (Ont. S.C., App. Div.); *R. v. McCullough*, [1970] 1 C.C.C. 366 (Ont. C.A.).

62 The respondent's expressed bewilderment about the trial judge's pathway through the evidence to his decision is not contrived. The majority of the Newfoundland Court of Appeal shared the bewilderment, as do I.

63 The next question is whether this failure of clarity, transparency and accessibility to the legal reasoning prevented appellate review of the correctness of the decision.

(ii) Meaningful Appellate Review

64 The majority of the Newfoundland Court of Appeal found the absence of reasons prevented them from properly reviewing the correctness of the unknown pathway taken by the trial judge in reaching his conclusion, but which remained unexpressed.

65 Their problem, clearly, was their inability to assess whether the principles of *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 757, had been applied, namely, whether the trial judge had addressed his mind, as he was required to do, to the possibility that despite having rejected the evidence of the respondent, there might nevertheless, given the peculiar gaps in the Crown's evidence in this case, be a reasonable doubt as to the proof of guilt. The ultimate issue was not whether he believed Ms. Noseworthy or the

respondent, or part or all of what they each had to say. The issue at the end of the trial was not credibility but reasonable doubt.

66 Where a party has a right of appeal, the law presupposes that the exercise of that right is to be meaningful. This obvious proposition is widely supported in the cases. In *R. v. Richardson* (1992), 74 C.C.C. (3d) 15 (Ont. C.A.), for example, the accused was convicted of two counts of sexual assault. On appeal, in an argument that to some extent anticipates the present case, the accused submitted that the trial judge had concentrated solely on the credibility of the complainant and ignored the totality of evidence, particularly the evidence of five other witnesses that corroborated his version of events. In allowing the appeal, Carthy J.A., with whom Finlayson J.A. concurred, stated at p. 23:

There is no need that the reasons of a trial judge be as meticulous in attention to detail as a charge to a jury. In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result. Nevertheless, if an accused is to be afforded a right of appeal it must not be an illusory right. An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might otherwise have brought about an acquittal, then a reviewing court simply cannot make an assessment, and justice is not afforded to the appellant.

67 To the same effect, see *R. v. Dankyi* (1993), 86 C.C.C. (3d) 368 (Que. C.A.); *R. v. Anagnostopoulos* (1993), 20 C.R. (4th) 98 (Nfld. S.C., App. Div.); *R. v. Davis* (1995), 98 C.C.C. (3d) 98 (Alta. C.A.); and *Hache, supra*. In each of these cases, the lack of reasons prevented the reviewing court from effectively addressing important grounds of appeal.

V. Conclusion

68 Cameron J.A., in dissent, protested that “if Ms. Noseworthy’s version of events is accepted by the trier of fact there is evidence upon which a trier of fact could reasonably convict” (para. 85). I agree that this case does not amount to an “unreasonable verdict” within the meaning of s. 686(1)(a)(i) of the *Criminal Code*. That conclusion, however, did not exhaust the powers of the Court of Appeal. In my opinion, the failure of the trial judge to deliver meaningful reasons for his decision in this case was an error of law within the meaning of s. 686(1)(a)(ii) of the *Criminal Code*. The Crown has not sought to save the conviction under the proviso in s. 686(1)(b)(iii), and rightly so.

VI. Disposition

69 The appeal is dismissed. Whether or not to hold a new trial is in the discretion of the Attorney General of Newfoundland and Labrador.

Appeal dismissed.

Solicitor for the appellant: The Department of Justice, St. John’s, Newfoundland.

Solicitors for the respondent: Williams, Roebottom, McKay and Marshall, St. John’s, Newfoundland.