SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Bizimana*, 2025 NSSC 316

Date: 20251002
Docket: Hfx No. 542659
Registry: Halifax

Between:

Telesphore Bizimana

v.

His Majesty the King

DECISION ON SUMMARY CONVICTION APPEAL

Judge: The Honourable Justice Joshua Arnold

Heard: September 5, 2025, in Halifax, Nova Scotia

Decision: October 2, 2025

Counsel: Stanley MacDonald, K.C., for Telesphore Bizimana (Appellant)
Christopher Cheverie, for the Crown (Respondent)

Overview

[1] Telesphore Bizimana appeals his conviction for failing or refusing to comply with a demand for a breath sample and requests a new trial. He says the trial judge failed to provide adequate reasons for her ruling that he did not provide a reasonable excuse. For the reasons that follow I allow the appeal and order a new trial.

Facts

[2] On February 13 and 14, 2025, Mr. Bizimana proceeded to trial on charges of impaired driving, failing or refusing to comply with a demand for a breath sample, and dangerous driving. The refusal related to a demand to provide a breath sample into a roadside screening device. The events in question occurred while at the roadside. During the course of the trial Constable Fallon Clarke testified to the following:

- When trying to blow, Mr. Bizimana produced "a high flow rate" and/or "was blowing too hard";
- Mr. Bizimana told the police during the testing that he believed he was blowing properly and was agreeable to providing a breath sample;
- Mr. Bizimana wanted to use his mobile phone, or have the police use their mobile phones, to video record his efforts at blowing into the roadside screening device;
- She left Mr. Bizimana with Constable Ziman in order to retrieve more tubes from her police vehicle to allow Mr. Bizimana to have more opportunities to blow into the machine. However, by the time she returned Constable Ziman had placed Mr. Bizimana under arrest for refusal;
- On these points, Constable Clarke testified:

> …Mr. Bizimana begins to argue in English saying you know I ... I am doing what I'm told. And then he starts trying to give his phone saying, oh, he wants us to record him. And we said, no, no we don't do that. And trying to like hand back the phone to him. And he's ... he's adamant that we record him that he's doing the proper things that he should be doing, he's you know listening to the instructions, he's taking the instructions seriously. And I'm ... at that point I'm trying to like look I just need you to provide a proper sample. I'm trying to tell him you know I need you to blow. And he's

ignoring me and he's trying to ... he's arguing with myself and Constable Ziman like I'm doing what I'm being told you know and at that point we just go you know what never mind. You're not listening anymore. You're under arrest for refusal.

…

Q. So then after the third test you'd agree with me that Mr. Bizimana said the same thing. He was quite adamant that he wasn't doing anything wrong, correct?

A. Yeah.

Q. Okay. And then you provided a sample into the device and it came up with a result.

A. Yeah.

Q. And then you went to sample number four and again Mr. Bizimana is saying I'm doing what you're asking me to, right?

A. Yeah, yeah.

Q. And I think the way that you had characterized it earlier was that you know he was arguing that this was being ... that he was doing what he was supposed to.

A. Uh, huh.

Q. Yes?

A. Yeah.

Q. And I think if I'm not mistaken, Sergeant Stevens was now on site.

A. I believe he was there, yeah.

Q. With you, Constable Ziman and Mr. Bizimana, right?

A. Yeah, he's just floating somewhere in the background as far as I remember. He wasn't ...

Q. Let me just have a look here. So what I see in the report at page six is, "I returned to my police vehicle briefly to deposit the used breath tubes and obtain fresh ones before making my way back to Constable Ziman and Sergeant Greg Stevens who had joined us at Telesphore's vehicle."

A. Yeah.

Q. Do you see that?

A. Yeah, I see that.

Q. Do you want ... do you want to look at that?

A. No, no, I've got it here.

Q. Okay. So Sergeant Stevens is at the vehicle, right?

A. Yeah, he's standing there, yeah.

Q. Yeah, okay. So as I understand it you went away after test number five to get some fresh tubes because you had anticipated at least that there may be more attempts.

A. Yeah.

Q. And I'm going to read to you from page six of your report and I'd like you to perhaps put it ... have it in front of you.

A. Go for it.

Q. This is at the very ... the very ... so I just read to you, "I returned to my police vehicle briefly." Do you see that top paragraph?

A. Yeah.

Q. So the next paragraph. And ... and in context this is when you're coming back with new tubes because you think there may be more samples, right?

A. Uh, huh, yeah.

Q. Okay. "When I returned Constable Ziman was telling Telesphore he was going to be arrested for refusal as providing a sample was not difficult and indicated that I had shown him how to provide a sample."

A. Uh, huh.

Q. Telesphore then began to state that he wanted officers to begin recording on his phone, which officer declined and despite me stating that I wished for him to attempt to provide a sample again, he ignored me and continued to say that he wanted to be recorded.

A. Yeah.

Q. So by the time you had gotten back with these other tubes it looks as if Constable Ziman had already decided that Mr. Bizimana was going to be arrested. Is that fair?

A. I don't know if he had or not. I didn't ask him. But he was just telling Telesphore like this is not a difficult process and if this continued you're going to be arrested.

Q. And ... but it didn't continue. No further options were given, correct

A. He was given the option to provide another sample but he continued to argue with us and he ... and every time I tried to help hold the device up and say, hey, look just give me another sample he was like, no, no, no, I want you to record me, I want you to record me.

Q. Well, was he saying no, no, no, or was he saying I want you to record me because when I look at the report I didn't ever see the word "no" in here

A. He was saying I want you to record me, yeah.

Q. Yeah. So okay just to be clear on it.

A. Yeah, yeah, no, that's fair.

Q. Because at no point did Mr. Bizimana ever say no. He ... he ... what happened was he was saying I want you to record me, right?

A. Yeah, yeah.

Q. And he was being argumentative about that in fairness to you.

A. Absolutely, yeah.

Q. He was being very insistent on that. And you and Constable Ziman and ... were telling him we're not going to record you.

A. Yeah.

Q. Right? So did you have a cell phone with you?

A. Like my cell phone?

Q. Or access to a cell phone. You would have had a cell phone with you I would think.

A. I have ... yeah, I carry my personal around with me.

Q. Okay. And you carry a personal when you're working?

A. Yeah.

Q. Okay. Do you also have work phone?

A. At that time we didn't, no.

Q. Okay. But that ... that phone that you had had a recording capability, right?

A. Yeah.

Q. And you'd agree with me that there was no policy reason as to why you couldn't record Mr. Bizimana, right?

A. As for ... so as far as I know with regards to HRP policy we're not to use our personal phones to record anything. We're not to take pictures, we're not to do anything. It's ... it's just a communication device in case we need to call dispatch.

Q. Okay. There were two other officers with you, right?

A. Yeah.

Q. Someone could have recorded Mr. Bizimana, right?

A. They're not going to.

Q. Yeah ...

A. I can guaran ...

Q. ... they're not going to I know that.

A. No, they're not going to. They may very well. You'd have to ask them that but every one of us has a phone.

Q. Yeah.

A. And they do have recording ... proper ... properties but like I said we're ... you'd never find a police officer that's going take out their phone and start recording.

Q. Oh, I don't know about that. But anyway I can't give evidence.

A. Yeah, that's fair.

Q. And you'd agree with me that body cams are really starting to roll out at this point.

A. Yes, they are.

Q. Okay. And if you'd had a body cam all of this would have been recorded, right?

A. Entirely true.

[3] Constable Shaun Ziman testified to the following:

- Contrary to what Constable Clarke alleged about Mr. Bizimana blowing "too hard", Constable Ziman said that Mr. Bizimana " was "providing an insufficient sample for analysis", was "blowing all over the place", was "making bubble sounds coming out of his mouth", was "not making a tight seal", and/or was blowing a "raspberry";
- Mr. Bizimana was arguing with the police as to whether he was following their instructions and told the police that he wanted to use his mobile phone record himself, or have the police use his or their own mobile phones to record him taking the breath test;
- On these points, Constable Ziman stated:

> …And then at that point he took out his phone, asked that we start recording him, saying that he wasn't refusing and then we told him that if you don't provide a sample you will be charged with refusal. You need to provide, listen to the instructions that we're giving you. So we gave him the instructions again and then I think before that he'd asked to record, like taken his phone like out and just put it on the car advising that we're not going to record you.
>
> …

Q. Now ... (coughing) excuse me. At some point in this process, Mr. Bizimana tried to provide samples. I believe you indicated in your notes after his ... after the fourth attempt he asked you to record what was happening, right?

A. Correct.

Q. And in fact he took out his phone, right?

A. Correct.

Q. And you took it from him.

A. Right.

Q. And you put it on his vehicle was it?

A. Yes.

Q. Okay. And you'd agree with me that after each failed attempt Mr. Bizimana said to you that he was following your instructions, right?

A. That's what he said. That's not what he was doing.

Q. And you'd agree that when he said that he wanted to be recorded that you refused to do that, right?

A. Right.

Q. Did you have a phone?

A. I do, yes.

Q. Yeah. Did you have a phone at the time?

A. I believe so, yeah.

Q. Did it have a recording capability?

A. It does.

Q. It does. Is there ... and you'd agree with me that in that process that's taking place between you, Constable Clarke, and Mr. Bizimana, you would have had the ability to record on your phone, right?

A. The ability, yes.

Q. Yes. And you'd agree with me that that would be a safety concern, correct?

A. I would disagree with that.

Q. You'd disagree with that.

A. Yes.

Q. So to take out your phone and to hold it while it's being recorded while it's recording, how would that be a safety concern?

A. I would have my phone and I wouldn't have access from this hand to be able to access my tools in case something would have happened.

Q. So you're saying that you wouldn't be able to drop your phone and access whatever tools you had.

A. It's a delay.

Q. Delay, I see. By how much? A second?

A. I don't know. That's why we don't do it.

Q. Pardon me?

A. I said I don't know, that's why we don't do it.

Q. Well, that's not a policy, correct?

A. It's not a policy to record, no.

Q. No. It's not a policy to record but it's not a policy not to record, right?

A. Correct.

Q. Have you taken photographs at any ... at a scene with your police phone?

A. I believe I have.

…

Q. And is the Halifax Regional Police in the process now of rolling out body cams?

A. I believe so, yeah.

Q. Okay. And you'd agree with me that body cams have been used by the RCMP for several months now?

A. Yeah.

[4] Mr. Bizimana did not testify at the trial. At the conclusion of the evidence, the Crown advised that it was not seeking a conviction on impaired driving and dangerous driving, but was seeking a conviction for failing or refusing to comply with a demand for a breath sample.

[5] During submissions, defence counsel dealt with Mr. Bizimana's legal arguments in sequence, that is, he first dealt with the issue of whether or not the Crown had proven the essential elements of the offences - whether the breath demand was valid and/or whether there was an unequivocal refusal or non-compliance.

[6] Defence counsel then made submissions regarding whether Mr. Bizimana had proven that he had a reasonable excuse for not providing a valid breath sample due to the behaviour of the police allegedly creating an atmosphere of oppression by refusing to allow him to video record his efforts at blowing into the device. Defence counsel stated:

MR. MacDONALD: So I mean there was a failure to provide. There was no ... no suitable sample was provided. So I am going to make an alternative argument with respect to the filming and it's based on a decision from the Newfoundland Court of Appeal of *R. v. Dawson*. A copy for my friend. So reasonable excuse has been interpreted in many ways. Most of the cases I submit have been with respect to medical evidence. The *Dawson* decision is interesting because that was a case where a suspended police officer who thought that the police had it out for him got stopped by the police. And he ... they made a demand and he refused the demand because he felt that they were out to get him. And actually went in front of a jury. I'm not sure how. There must have been ... I guess they may have agreed to proceed indictably, I don't know.

THE COURT: He felt the Crown was out to get him too so ...

MR. MacDONALD: Pardon me?

THE COURT: The Crown was out to get him too so it proceeded by indictment.

MR. MacDONALD: Yeah. So ... so they went in front of a jury. He got acquitted on the basis that he said I have a reasonable excuse because I believe that I was not being treated fairly by the police. In any event, the facts are not particularly important.

What I would ask Your Honour to do is turn to paragraph (9) which talks about reasonable excuse. So paragraph (9): the Crown submits that *R. v. Foran* enunciated what type of police behaviour is capable of grounding reasonable excuse. In that case the accused cited her treatment by police officers as one reason for refusal to provide a sample through a breathalyzer demand. In considering on appeal whether the officer's conduct could amount to a reasonable excuse Bogart stated: However, in any event it is my view that the authorities ... of the authorities that unless the conduct of the police shows malice or threatens some unfairness or illegality, police abuse falling short of an infringement of a right granted by the *Canadian Charter of Rights and Freedoms* does not in and of itself give an accused a reason to refuse to take the test. And it's the next part that's important, I submit. It appears that there must be a nexus between the police conduct and the refusal creating an apprehension that the test would not be fairly and appropriately administered.

And then goes on to cite Wright in *R. v. Miller*, where he said, or she said: The case before me if there was credible evidence that the police officer had shown malice to the person whose breath was to be tested or if he had threatened some unfairness or illegality that would clearly support a reasonable excuse for failing or refusing to comply with the demand. So a reasonable excuse can be a situation where there is a nexus between police conduct and creating an apprehension that the test would not be fairly and appropriately administered.

So what I am arguing here, Your Honour, is that it's clear from the evidence of Constable Clarke and Constable Ziman that Mr. Bizimana on every occasion after the first test was completed on test two three, four and five, said look I'm doing

what you're asking me to do. I'm ... to the point where they were arguing near the end of it or at the end of it. That's coupled ... so my friend will say well Mr. Bizimana was faking later on. He faked you know how he was behaving at the police station or whatever. But we know from Constable Clarke that when he would put a breath sample in that came out as high flow then the instrument would go beep, beep, beep, like that. And it was then that he pulled

away. So I submit that him pulling away from the instrument was not because he was trying to defeat the instrument itself. The sound itself could very well have caused that.

Now I recognize that this is a situation where reasonable excuse has to be established on a balance of probabilities but we have all the evidence here, I submit, that amounts to a reasonable excuse for someone who is arguing forcefully that he is doing his best to comply. And all he's asking is that it be recorded. And I know that my friend will argue that well they have no obligation to record him. Well, they may not. They may not be obliged to record him but it's a whether [sic] ... not whether or not they're obligated to. It's whether or not failing to or refusing to created a situation where Mr. Bizimana reasonably apprehended unfairness in the process. And recognize as well that this wasn't a situation where after the fifth try Mr. Bizimana said no, I'm not doing this any further. In fact, Constable Clarke said she had gone to the car to get additional straws thinking that there may be more samples. But when she came he was arguing forcefully and they just said okay, that's it, we're done here. Mr. Bizimana clearly apprehended unfairness in the proceeds because why in the world would a person who is faking ask them to film it because presumably then it would just be a film of him faking it.

So I have to say, Your Honour, this is the first time that I've made this kind of argument but I haven't been presented with these kinds of circumstances where it's like I asked the officers, you know body cam is rolling out all around ... all across Canada. And what in the world would be the problem with filming what's happening to ... or ameliorate the issue that is being raised. Constable Ziman said well it's a safety issue because I'm holding onto my phone. And I don't want to be too blunt about it but that just seemed like hogwash. You can drop a phone as fast as you can you know take a gun out or whatever. That that's ... I submit that just didn't add up and there were other officers and we know from Constable Clarke's evidence that the Sergeant was on sight as well. There were three of them there. So in the circumstances we have a situation where clearly objectively speaking there is evidence that Mr. Bizimana wanted to provide samples, he continued to try to provide samples. They said he said ... this is ... I want you to film me and they refused. And I submit that's a reasonable excused (sic) if we ever get to that. Of course we'd never get to reasonable excuse if it's an invalid demand.

So unless Your Honour has any questions, those are my submissions.

[As appears in original.]

[7] The Honourable Judge Elizabeth Buckle reserved her decision and the parties returned for the verdict on April 1, 2025. In her decision, the trial judge mainly dealt with the issues of whether the breath demand was lawful, whether Constable Clarke had the subjective grounds to make the breath demand, and whether the delay between grounds being formed and the test being administered was too long such that the immediacy requirement in the *Criminal Code* section was violated. The trial judge found that the Crown had proven its case beyond a reasonable doubt.

[8] The only references to the "reasonable excuse" defence in the trial judge's decision were:

> [18] The defence does not argue that the French demand made by Constable Zieman was faulty in substance. The defence also does not dispute that Mr. Bizimana failed to comply with it. By that, I mean that the defence concedes that Mr. Bizimana knew a demand had been made, failed to comply with that demand and he does not offer a reasonable excuse.
>
> …
>
> [28] In conclusion, I am satisfied that the delay was exceptional and unusual, so the immediacy requirement was not violated and the demand was lawful. Mr. Bizimana knew there was a demand and failed to comply with it. He does not argue that he had a reasonable excuse. So I find him guilty of count two.

[9] Mr. Bizimana was convicted of failing or refusing to comply with a demand for a breath sample.

Standard of Review

[10] There is no dispute about the standard of review on a summary conviction appeal of a criminal conviction. In *R. v. Sheppard,* 2002 SCC 26, Binnie J., for the court, said:

> 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.

Legislation

[11] Sections 320.15, 320.27 and 320.28 of the *Criminal Code* state:

> **Failure or refusal to comply with demand**
>
> **320.15 (1)** Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28.
>
> …
>
> **Testing for presence of alcohol or drug**
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> **320.27 (1)** If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug:
>
> > …
> >
> > **(b)** to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose…
> >
> > …
>
> **Mandatory alcohol screening**
>
> **(2)** If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.
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> **Samples of breath or blood — alcohol**
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> **320.28 (1)** If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any

degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,

> **(a)** require the person to provide, as soon as practicable,
>
> > **(i)** the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument…[and]
>
> **(b)** require the person to accompany the peace officer for the purpose of taking samples of that person's breath or blood.

Evaluation and samples of blood — drugs

(2) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by a drug or by a combination of alcohol and a drug, or has committed an offence under paragraph 320.14(1)(c) or (d) or subsection 320.14(4), the peace officer may, by demand, made as soon as practicable, require the person to comply with the requirements of either or both of paragraphs (a) and (b):

> **(a)** to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose…

Samples of breath — alcohol

(3) An evaluating officer who has reasonable grounds to suspect that a person has alcohol in their body may, if a demand was not made under subsection (1), by demand made as soon as practicable, require the person to provide, as soon as practicable, the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument.

Sufficiency of reasons

[12] Mr. Bizimana says that the trial judge's reasons were wholly deficient in relation to the issue of reasonable excuse. In *Sheppard*, Binnie J. set out the standard for appellate review where insufficient reasons are alleged:

> 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.

…

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.
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> 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.
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> 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.

[13] In *R. v. R.E.M.,* 2008 SCC 51, McLachlin C.J., for the court, revisited the test for adequate reasons:

> [11] The authorities establish that reasons for judgment in a criminal trial serve three main functions:
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> 1. Reasons tell the parties affected by the decision why the decision was made. As Lord Denning remarked, on the desirability of giving reasons, "by so doing, [the judge] gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account": *The Road to Justice* (1955), at p. 29. In this way, they attend to the dignity interest of the accused, an interest at the heart of post-World War II jurisprudence... No less important is the function of explaining to the Crown and to the victims of crime why a conviction was or was not entered.
>
> 2. Reasons provide public accountability of the judicial decision; justice is not only done, but is seen to be done. Thus, it has been said that the main object of a judgment "is not only to do but to seem to do justice": Lord Macmillan, "The Writing of Judgments" (1948), 26 *Can. Bar Rev.* 491, at p. 491.
>
> 3. Reasons permit effective appellate review. A clear articulation of the factual findings facilitates the correction of errors and enables appeal courts to discern the inferences drawn, while at the same time inhibiting appeal courts from making factual determinations "from the lifeless transcript of evidence, with the increased risk of factual error": M. Taggart, "Should Canadian judges be legally required to give reasoned decisions in civil cases" (1983), 33 *U.T.L.J.* 1, at p. 7. Likewise, appellate review for an error of law will be greatly aided where the trial judge has articulated her understanding of the legal principles governing the outcome of the

> case. Moreover, parties and lawyers rely on reasons in order to decide whether an appeal is warranted and, if so, on what grounds.
>
> …
>
> [37] As we have seen, the cases confirm that a trial judge's reasons should not be viewed on a stand-alone, self-contained basis. The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated *in the context of the record, the issues and the submissions of counsel at trial*. The question is whether, viewing the reasons in their entire context, the foundations for the trial judge's conclusions — the "why" for the verdict — are discernable. If so, the functions of reasons for judgment are met. The parties know the basis for the decision. The public knows what has been decided and why. And the appellate court can judge whether the trial judge took a wrong turn and erred. The authorities are constant on this point.

[14] In *R. v. Preston*, 2022 NSCA 66, Derrick J.A. discussed how an appellate court should address a claim of insufficient reasons:

> [65] The Supreme Court of Canada has repeatedly emphasized that an allegation of insufficient reasons is to be reviewed on appeal using a functional and contextual approach. Reasons must be assessed with reference to the trial record. They must be factually and legally sufficient, explaining what the trial judge decided and why, and enabling a meaningful exercise of the right of appeal. As indicated in *G.F.*, the Supreme Court expects adherence to the principles that structure appellate review of reasons:
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> > **76** Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is findings of credibility that are challenged.

[15] These principles were recently restated in *R. v. Sheppard*, 2025 SCC 29, at paras. 44-48.

[16] The Crown says that by taking a practical and functional approach to the evidence, arguments made at trial, and the trial judge's decision, it is obvious that the facts could never support a reasonable excuse defence, and therefore the trial judge's cursory reasons on that issue are adequate. I do not agree with the Crown. In relation to a trial judge failing to consider an issue critical to an accused's defence, in *R. v. Bannon*, 2025 ONSC 3475, Gareau J. stated:

> [37] In the case at bar, the learned trial judge's reasons do not refer at all to the issue of self-defence despite the fact that this was the primary issue at trial as indicated in the submissions made to the court by both defence and Crown counsel after the evidence was heard. The reasons of the trial judge do not refer to the case law on self-defence or refer to the air of reality test or indicate or even mention the burden of proof shifting to the Crown after the air of reality test was met by the accused. There is absolutely no mention in the judge's reasons of section 34 of the *Criminal Code* or any mention whether this section of the *Code* was considered by the court or applied by the court. That section sets out factors that the court "shall consider" by virtue of the wording of section 34 in assessing self-defence. The trial judge does not mention that section in her reasons and therefore a court on review is left in a state of uncertainty as to whether the trial judge applied section 34 of the *Criminal Code* in arriving at the conclusion that the appellant was guilty.
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> [41] The appellate court on review is incapable of considering whether the trial judge was correct or in error on the issue of self-defence because this is not explained in her reasons for judgment. An appellate court cannot determine whether or not self-defence would have been established because the issue of self-defence is not covered off in the reasons of the trial judge. Without an answer to the questions as to whether the trial judge considered the issue of self-defence and, if so, why she concluded as she did on that issue, appellate review is incapable of being done and as a result the trial judge's reasons are insufficient. The credibility findings made by the trial judge does not alleviate or render unnecessary consideration and analysis of the defence of self-defence raised by the appellant. The fact that the trial judge found the appellant to be the "aggressor" does not close the self-defence argument or eliminate the need for a consideration and analysis on the issue of self-defence.

[17] Similarly, in *R. v. Palcon*, 2025 ABCA 153, the unanimous court stated:

> [11] Regrettably, the presence of the passenger in the vehicle for an undetermined period prior to the arrival of the police as an alternative explanation for the firearm was treated briefly, with contradictory and conclusory reasons. We are mindful of the admonition by the Supreme Court of Canada in *GF* to take a practical and functional approach to the examination of reasons, considering the totality of the record as noted above. We are also mindful of the caution expressed by the Supreme Court of Canada in *R v Dinardo,* 2008 SCC 24 at para 32:
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> > If the trial judge's reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record. This exercise is not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge. Where the trial judge's reasoning is not apparent from the reasons

> or the record, as in the instant case, the appeal court ought not to substitute its own analysis for that of the trial judge (*Sheppard*, at paras. 52 and 55).
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> [12] However, the alternative theory presented by the passenger's presence in the vehicle was a central aspect of the defence advanced by the appellant. While the trial judge noted the presence of the passenger at the outset of his reasons, in his analysis and conclusions he stated:
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> > There is no evidence that the vehicle was occupied or driven by anyone other than the accused.
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> [13] As a result of this unexplained contradiction, we are unable to determine the trial judge's reasoning path regarding the passenger's presence, if any, in relation to whether the Crown had established the appellant's possession of the firearm.

[18] Additionally, the Crown says by taking a practical and functional approach to the evidence, arguments made at trial, and the trial judge's decision, the trial judge's reasons were clear in that "he does not offer a reasonable excuse" could be interpreted to mean that she simply found on the evidence that there was no reasonable excuse. Of course, judges are presumed to know the law. And the trial judge in the present case is a very experienced and knowledgeable criminal jurist. Judges do not need to write *ad nauseum* about every issue. Therefore, it is *possible* that had the trial judge ended her comments about reasonable excuse at "he does not offer a reasonable excuse", then there would have been some traction for the Crown's suggestion that *what she really meant* was that there was no reasonable excuse on the evidence. However, the trial judge clarified any possible ambiguity when she concluded her decision by stating "He does not argue that he had a reasonable excuse." Her words are clear. Certainly Mr. Bizimana argued at trial that he had a reasonable excuse. Precisely what happened that resulted in the trial judge stating that Mr. Bizimana "does not argue that he had a reasonable excuse" is not at all clear.

[19] In applying the three-part test in *R.E.M.*, the trial judge's reasons, on the issue of reasonable excuse, did not:

1) Tell the parties why the decision to reject the reasonable excuse defence was made;
2) Provide public accountability of the judicial decision;
3) Permit effective appellate review.

[20] The Crown says that the trial judge's decision was not so flawed as to warrant appellate intervention, and relies on *Sheppard* (2002), where Binnie J. stated:

> 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.
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> 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.
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> 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.
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> 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.
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> 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.

[21] The decision in the present case does not clearly explain why the trial judge did not find that reasonable excuse was proven by Mr. Bizimana on a balance of probabilities. The deficiencies in her reasons on this discrete issue foreclose meaningful appellate review. This is not a situation where I think the court should intervene simply because I think the trial judge did a poor job of expressing herself. Quite the contrary. The trial judge clearly articulated her reasons in her usual fashion on the issues she expressly addressed. However, there was a complete void in her reasons regarding the issue of reasonable excuse.

[22] In my opinion an assessment of whether a reasonable excuse defence was actually made out at trial goes beyond the scope of appellate review in the present case. Such a determination required the trial judge to assess the credibility of the police witnesses in the context of the situation described at the roadside, and determine whether a reasonable excuse was proven on a balance of probabilities. I am not suggesting that this required voluminous reasons, but it needed to be expressly addressed in the context of this trial.

Curative Proviso

[23] Section 686(1)(b)(iii) of the *Criminal Code* states:

> **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
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> …
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> **(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…

[24] The Crown says that even if the trial judge's reasons were deficient, this court can assess the evidence by way of the transcript and make a determination explaining why the trial judge *must have* rejected Mr. Bizimana's reasonable excuse argument:

> [38] Should this Honourable Court conclude that the lack of discussion on the point of reasonable excuse in the Trial Judge's reasons is a deficiency in terms of explanation, the Crown would submit that a new trial is not required. The error of law, should one be found, is properly remedied by an explanation by the appeal court.
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> [39] The Court in *Sheppard,* in its summary of the state of the law on the duty to give reasons, stated at paragraph 55:
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> > [55] [...] 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(l)(b)(iii) proviso.
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> Should an error of law be found in the sufficiency of reasons, the appeal court must consider whether it is able to offer an explanation itself, remedying the error and negating the need for a new trial.
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> [40] The Respondent Crown respectfully submits that this Honourable Court is in a position to be able to explain why the Appellant's alternative argument was rejected by the Trial Judge, given the above submissions regarding the merits of that argument. The reasonable excuse defence was raised without any foundation in evidence, and counsel provided non-binding caselaw which was inapplicable to the case at bar in support of the proposition. Therefore, the Trial Judge concluded that the Appellant did not offer a reasonable excuse.

[25] In the present case, I do not agree with the Crown that applying the *curative proviso* would be appropriate. It is not clear that the trial judge ever considered Mr. Bizimana's reasonable excuse argument in any meaningful way, and if she did not meaningfully consider it, then she could not have properly rejected it. There was some evidentiary foundation supporting the reasonable excuse argument. There was an air of reality to at least consider whether Mr. Bizimana had a reasonable excuse given the contradictions between the evidence of Constable

Clarke and Constable Ziman regarding Mr. Bizimana's efforts to blow. Constable Clarke was obtaining tubes to allow Mr. Bizimana to try blowing again when he was arrested by Constable Ziman. Both officers agreed that Mr. Bizimana asked to either let him video record his own efforts to blow, or for the police to record his efforts to blow. Bodycams were in use with the RCMP and on the horizon for HRP, Mr. Bizimana had a phone that would allow him to make a video recording, and the police had phones that would allow them to make video recordings. Yet, the police refused to allow any video recording. Defence counsel provided a case, *R. v. Dawson* (1995), 140 Nfld & P.E.I.R. 176 (Nfld. C.A.) in support of his submissions that the police created an atmosphere of oppression whereby Mr. Bizimana, feeling like he was not being dealt with fairly, *might* have had a reasonable excuse for refusing.

[26] The Crown has not satisfied me that as a matter of law there could be no reasonable excuse in these circumstances. Because there was an air of reality to Mr. Bizimana's reasonable excuse argument, it would not be appropriate for this court to make determinations of credibility regarding the Crown witnesses, to apply those and other evidentiary findings to the constellation of facts presented at trial, and to determine whether a reasonable excuse was proven on a balance of probabilities. It would be better left to a trial judge who can make such an assessment in the normal course of the trial process.

Conclusion

[27] The trial judge's reasons were essentially void regarding the issue of whether Mr. Bizimana had raised a reasonable excuse. Her reasoning path for dismissing that issue does not meet the standard as set out in *Sheppard* and *R.E.M.* The matter should be remitted to provincial court before a different judge for re-trial on the single charge of failing or refusing to comply with a demand for a breath sample.

Arnold, J.