REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. P 108 of 2016

BETWEEN

MACHEL MONTANO

Appellant No. 1

KERNEL ROBERTS

Appellant No. 2

AND

SIAGAL SEWDASS CPL. #12167

Respondent

PANEL:

A. Yorke-Soo Hon, J.A.

M. Mohammed, J.A.

APPEARANCES:

Mr. J. Singh, Mr. L. Williams, Mr. K. Taklalsingh, Mr. V. Lakhan-Joseph, Ms. S. Persad, Ms. A. Rampersad and Mr. C. J. Williams for Appellant No. 1

Mr. K. Scotland, Mr. D. I. Khan, Mrs. A. A. Watkins-Montserin and Mrs. U. Nathai-Lutchman for Appellant No. 2

Mr. G. Busby for the Respondent

DATE OF DELIVERY: 15th December, 2017

JUDGMENT

Joint Judgment Delivered by A. Yorke-Soo Hon, J.A. and M. Mohammed, J.A.

❖ INTRODUCTION[1]

(1) This appeal involves three issues of important and broad significance in Magisterial Court procedure, namely:

(a) The duty of magistrates to give reasons for their decisions;
(b) The sufficiency/adequacy/scope of and the expected minimum contents of those reasons; and
(c) An expansion and refinement of the ***"pragmatic, functional approach"*** (enunciated in **Francis Jones v Sgt. Sheldon David #11730**[2]), of the Court of Appeal in evaluating appeals where there are no reasons furnished by a magistrate.

(2) In addition, at the end of this judgment, we make an important suggestion for magistrates to give brief, substantiating oral reasons at the time of their decision and we set out the potential benefits of doing so. Having regard to the matters involved, we have taken the exceptional step of issuing a joint judgment, a position only adopted in criminal appeals in the decision of this Court in **Aguillera, Ballai, Ballai and Ayow v The State**[3], in recent years[4].

[1] **Judicial Research Counsel – Mr. Pravesh Ramlochan**.
[2] Mag. App. No. 64 of 2014.
[3] Crim. App. Nos. 5, 6, 7, 8 of 2015.
[4] **Stephen Gageler, "Why Write Judgments?" (2013) 36 Sydney L. Rev. 189**: "*He* [Sir Anthony Mason in 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102] *gave* ***two justifications for the practice of delivering joint reasons for judgment. The first was that it best reflects the collective or institutional responsibility of the court for the decision made in a case. The second was that, by consolidating and clarifying the reasons of the court, it provides greater certainty***."

❖ THE CHARGES, FINDINGS AND SENTENCES

(3) Appellant No. 1, Machel Montano (Montano), Appellant No. 2, Kernel Roberts (Roberts), along with Joel Feveck (also called "Zan") (Feveck), were charged with assaulting Brandis Brown thereby occasioning him actual bodily harm on the 26th April, 2007, contrary to **section 30 of the Offences Against the Person Act Chapter 11:08**. Montano and Roberts were both found guilty of the offence and were both fined $3,000.00 and in default, they were to serve six months imprisonment with hard labour. They were both ordered to pay compensation to Brandis Brown in the sum of $3,000.00 and in default, they were to serve six weeks simple imprisonment.

(4) Montano, Roberts, Feveck and Rodney Le Blanc (also called "Benjai") (Le Blanc) were charged with assaulting Russel Pollonais thereby occasioning him actual bodily harm, on the 26th April, 2007, contrary to **section 30 of the Offences Against the Person Act Chapter 11:08**. Montano and Roberts were found guilty of the offence and were both fined $10,000.00 and in default, they were to serve two years imprisonment with hard labour. They were also ordered to pay compensation to Russell Pollonais in the sum of $8,000.00 and in default, they were to serve six weeks simple imprisonment.

(5) Montano was charged with unlawfully assaulting Janelle Lee Chee by beating on the 26th April, 2007, contrary to **section 4 of the Summary Offences Act Chapter 11:02**. He was found guilty by the magistrate and was fined $400.00, and in default, he was to serve three months imprisonment with hard labour. Montano was also ordered to pay compensation to Janelle Lee Chee in the sum of $1,500.00 and in default, he was to serve six weeks simple imprisonment.

(6) Montano was charged with unlawfully assaulting Gerard Bowrin by beating on the 26th April, 2007, contrary to **section 4 of the Summary Offences Act Chapter 11:02**. He was found guilty by the magistrate and was fined $300.00 and in default, he was to serve two months imprisonment with hard labour. Montano was also ordered to pay compensation to Gerard Bowrin in the sum of $1,000.00 and in default, he was to serve six weeks simple imprisonment.

(7) Montano was charged with using obscene language to the annoyance of Melissa Forde, contrary to **section 49 of the Summary Offences Act Chapter 11:02**. Montano was found guilty of this offence but at the time of sentencing, he was reprimanded and discharged by the magistrate, pursuant to section **71(1) (a) of the Summary Courts Act Chapter 4:20**.

The appellants have appealed their convictions.

❖ THE CASE FOR THE RESPONDENT

(8) On the 25th April, 2007, a group of fourteen persons, including the virtual complainants, Russell Pollonais (Pollonais), Brandis Brown (Brown), Janelle Lee Chee (Lee Chee) and Gerard Bowrin (Bowrin), went to a popular nightclub in Port of Spain, the Zen Night Club. Other persons in the group included Helen Ganga (Ganga), Shervon Barrington (Barrington) and Melissa Forde (Forde). The group went to the nightclub in a maxi-taxi which they hired. They arrived at the club at around 11:00 p.m. Sometime later, the appellants, Montano and Roberts, along with other persons, entered the club.

(9) At around 1:52 a.m., Ganga and Bowrin were dancing near one of the bars inside the club while Montano, who was approximately three feet away from them, was dancing with a girl close to the bar area. While dancing, Ganga's drink fell on the floor, causing it to spill. Immediately after, Montano turned to Bowrin and said to him, *"Yuh throw yuh drink on me, yuh <expletive> throw yuh drink on meh boy."* Montano then slapped Bowrin on the left side of his face with his right hand. The club's security personnel proceeded to pull Bowrin away from Montano. Montano then walked up to Bowrin and slapped him again on the left side of his face. A medical report obtained on behalf of Bowrin revealed that he had no detectable injuries. The security personnel then began parting the crowd inside the club. Lee Chee walked up to Montano and said to him, *"Is a child* [referring to Bowrin who was her little cousin], *is no big deal, is just a drink….Why you getting on so? We are fans, is no big deal."* Montano held on to her hand and said to her, *"I know, I know, but I told him to <expletive> leave me alone."* He then started shaking her vigorously and tightened his grip on her hand. This lasted for approximately one minute until they were eventually separated by the club's security personnel. A medical report obtained on behalf of Janelle Lee

Chee revealed that she suffered hematoma to her right hand. The doctor opined that the injury had been inflicted as a result of a hard grasp with moderate force. Lee Chee, Pollonais, Bowrin, Ganga and other persons from their group were then escorted out of the club. Whilst outside, Lee Chee and some of the other girls from her group were quarreling with some of the club's management team. They then proceeded to the sidewalk at the front of the nightclub.

(10) Upon observing what was happening, Forde had a conversation with another person from her group and with one of the club's security personnel. She then went over to Montano and asked him what happened. He told her that Bowrin *"kept <expletive> harassing him"* and when he told him to *"<expletive> leave him alone"*, he did not listen. Montano also said that Bowrin *"kept sticking up underneath him like a little <expletive>."* Forde apologized to Montano for Bowrin's behaviour and he replied, *"I don't want no <expletive> apology."* He also said that, *"he had to dead tonight"*. Montano, who was holding a champagne glass in his hand, then went back to the dance floor. Shortly afterwards, Montano, Roberts, Feveck, Le Blanc and other persons stormed out of the club and went to the sidewalk where Lee Chee and members of her group were. Montano said to them, *"Y'all want a piece of <expletive> me….y'all doh know who I is?"* Montano then started "railing up his hands" and some of the club's security personnel had to restrain him. According to Lee Chee, Roberts was encouraging Montano in his behaviour. Brown then said to Montano, *"Machel, why you do the people dem that boy*?" Montano replied, *"You see any <expletive> thing?"* and then proceeded to hit Brown in his eye with the champagne glass which he was holding. A small scuffle ensued between Brown and the other persons there, which caused Brown to run to the other side of the road. Montano then ran after him, followed by Roberts, Feveck, Le Blanc, other persons who were part of Montano's group and several of the club's security personnel. When they caught up with Brown, they "flung" him onto a car which was parked alongside the road and Montano, Roberts, Feveck and Le Blanc started punching him with their fists. Pollonais, upon realising what was happening to Brown, went across to where he was and pulled him away from the group of men. Brown then ran off in the direction of the maxi-taxi in which they had arrived, which was parked a short distance away. He was followed by Pollonais, Lee Chee, Ganga and other persons from their group. A medical report obtained on behalf of Brown revealed that he suffered a small bruise below his left lower eyelid and on his lower lip.

He also experienced swelling of the left parietal region of his head. The injuries were believed to have been inflicted with a blunt object with mild to moderate force.

(11) Before arriving at the place where the maxi-taxi was parked, Pollonais did a head count of the persons who were present and upon realising that two of the persons from the group were missing, he went back in the direction of the club to find them. While in the vicinity of the intersection of Pembroke and Keate Streets, he saw Montano, Roberts, Feveck and Le Blanc standing there. Pollonais put his hands out and said, *"I doh want nothing with allyuh, I just come for my peeps"* to which Montano replied, *"I don't want to hear anything, <expletive> you."* The men then ran up to him, pushed him further along Keate Street and started beating him. The men surrounded him and using their fists, they started punching him on his head, his shoulders and his back. Feveck had a belt with a gold and silver buckle wrapped around his hand which he used to hit Pollonais. Forde observed that Feveck hit Pollonais on his head with the belt buckle. Pollonais then collapsed on the ground, upon which Montano, Roberts, Feveck and Le Blanc started kicking him. Lee Chee pleaded with bystanders to take a picture or to record what was happening and upon doing so, one of the men in the group said, *"Come boy, leh we go."* Pollonais was found lying on the ground, bleeding from his head. After a while, he got up and sat down and was subsequently taken to the Port of Spain General Hospital in an ambulance. Pollonais spent six days at the hospital. As a result of the beatings, he experienced pain and dizziness and was unable to move. After being discharged from the hospital, Pollonais suffered headaches for the subsequent three months. He was also only able to breathe through his left nostril for approximately five months. Dr. Hosein, who gave evidence at the trial, testified that he examined Pollonais and found that he suffered a scalp laceration behind his left ear and multiple facial bruises. However, a neurological examination revealed that Pollonais' central nervous system was normal. Pollonais was also found to be suffering from alcohol intoxication.

❖ THE CASE FOR APPELLANT NO. 1: MACHEL MONTANO

(12) Montano elected to give evidence and called one witness, Robert Vincent Charles, the General Manager of the Zen Night Club. The case for Montano was one of a denial and an assertion of fabrication of evidence on the part of the material witnesses for the prosecution.

(13) On the 25th April, 2007, Xtatik Ltd., an organization with which Montano was affiliated, had an appreciation function at the Zen Night Club in Port of Spain. Persons who attended the function included Roberts and Feveck. The function ended at around 10:00 p.m. after which Montano and his friends left and went to Roberts' house, "Rainorama" in Diego Martin. Montano, Roberts and Feveck, who were also joined by Le Blanc and other persons, left "Rainorama" at around 12:00 a.m. and went to the Zen Night Club. Upon arriving at around 12:30 a.m., Montano went over to one of the bars inside the club where he had a couple of drinks. While there, Lee Chee, Ganga and another girl from their group came over to him and asked to take a picture with him, to which he agreed. A couple of minutes later, the same girls, together with a male companion, came over to Montano and asked to take another picture with him and he once again agreed to do so.

(14) Shortly afterwards, Ganga went behind Montano and started "wining" or gyrating on his buttocks for approximately thirty seconds. Montano did not respond in kind and stood still while this was happening. Ganga then whispered in his ear, *"Yuh know is me was wining on yuh."* Montano responded, *"Yes"* and Ganga then moved away. Montano also observed a man, whom he came to know as Bowrin, standing approximately two feet away from him. Bowrin kept drifting from side to side, laughing and saying garbled things like *"Rahhhhhhhhh….."* and *"Machel, Jumbie ahhhhh"* in a slurred voice. Bowrin kept walking towards Montano and kept saying similar things to his face, to which Montano simply smiled, nodded his head and stepped away from him.

(15) Montano testified that he saw Ganga dancing with Bowrin, who again came up to him and said, *"Ahhhhhhhhh"*. Montano leaned over to his driver, Marvin and said to him, *"Marvin, we have to keep an eye on this guy."* At that time, Ganga attempted to dance with Montano again, but he moved away from her. She then continued dancing with Bowrin and while they were doing so, they managed to step on Montano's feet a couple of times. This prompted Montano to ask both of them to "give him some space", a request which was ignored. Montano then started dancing with a girl near to where Ganga and Bowrin were dancing. While dancing, Montano felt ice cubes and a liquid substance falling on him and the girl with whom he was dancing. He asked her who threw the drink and she pointed at Bowrin, who was then dancing away from them. Montano walked up to Bowrin in an attempt to ask him a question and upon tapping his shoulder, Bowrin immediately swung around and "lunged" at him. According to Montano, Bowrin was pushing him away with

his hands. Montano responded by pushing him off. Bowrin continued reaching towards Montano's face and was swinging his hands at him and Montano kept hitting his hands away. The club's security personnel then intervened and separated both of them. When this happened, Bowrin and Ganga started arguing and the security personnel escorted both of them, as well as Lee Chee, outside of the club.

(16) A few minutes later, Roberts came up to Montano and said to him, *"Boy, ahm, I think you should leave because some people outside cussing and quarrelling and calling up your name."* Montano, after finishing his drink, said to Roberts, *"Let's go"* and he, along with Feveck, Roberts and two men named Snoop and Bill, walked out of the club. When Montano got outside, he saw the owner of the club, as well as the club's manager. He observed that Lee Chee and approximately six girls from her group were cursing and quarreling with the club's management team. Montano also observed that Bowrin was outside at that time. When Lee Chee, Ganga and another girl from their group saw Montano, they started shouting at him and cursing him. One of the girls from the group also threw a shoe at him. Montano then attempted to defend himself and asked them, *"What it is I do? Why they blaming me?"*

(17) While Montano was standing outside of the club, Brown came up to him and started quarrelling with him and cursing him, saying, *"Machel, wah yuh do them that for? What yuh <expletive> do them that for? Dey ent do yuh nothing."* At that time, Snoop walked past Brown and said, *"Yes boy, yuh ent see him do this"* and he proceeded to throw his drink which was in a disposable cup over his shoulder. Brown then reached over Snoop's shoulders, grabbed his shirt and started dragging him to the other side of the road. A scuffle ensued between some members of the Lee Chee group and members from Montano`s group which caused some of the club's security personnel to intervene. Three of those security officers pushed Montano to the side and said to him, *"Stay here, stay here."* Montano stayed in that position for approximately a minute and was unable to see the scuffle. The security officers eventually released him. Some of the girls from the Lee Chee group, but not including Lee Chee and Ganga, then came behind the security officers and started cursing Montano. The security officers attempted to lead them away. Montano and another man named Tishard were behind the girls and were walking towards the car park. Montano said to the girls, *"Yes go home, go home"* and one of them spat at him and Tishard. The saliva

however only caught Tishard, who raised his hand above his head and said, *"Aye girl"*. A security officer then turned around and grabbed Tishard by his collar. While in the vicinity of the VIP car park, Montano had a conversation with a security officer and informed him that one of the girls from the Lee Chee group was attacking them. Montano then looked over to his right and saw someone, whom he learnt to be Pollonais, falling down in the middle of the road, approximately fifteen feet away from where he was. Montano then left in a car which was driven by Marvin.

(18) Montano gave evidence that he did not use obscene language against anyone that night. He denied slapping Bowrin across his face and hitting Brown with a glass. He also denied attacking Pollonais and said that the only time he saw him that night was when he fell on the ground. Further, according to Montano, he did not have a conversation with Lee Chee after the incident inside the club and did not shake her.

(19) Robert Vincent Charles testified that on the night in question, Montano, Roberts, Feveck, Le Blanc and other persons arrived at the Zen Night Club at around 12:30 a.m. At around 2:00 a.m., he saw the club's security personnel escorting a young man and woman out of the club and that another woman and approximately five men followed them. He recognised them as part of the same group that he had initially refused entry to earlier that night. The man and woman who were escorted out were angry and he heard the woman shout, *"<expletive> Machel, I doh know who he feel he is. I paid good money to go to his concert."* Charles told her to stop using obscenities and to calm down. The group then became aggressive and started using obscene language which was directed at Montano. Approximately ten minutes later, Montano and a man named Snoop exited the club and proceeded to the car park area. Some persons from the Lee Chee group approached them and started cursing Montano, who did not respond. Montano and Snoop were then pulled into a crowd of persons who were outside of the club, in the area at the bottom of the stairs. Three of the club's security officers who were positioned at the bottom of the stairs formed a circle around Montano and took him across the road. While this was happening, a scuffle ensued among some persons but Charles paid no attention to it. He instead contacted the club's security personnel and told them to send more officers to the front door. Charles then accompanied the security officers to the other side of the road. Shortly afterwards, Charles observed Montano and a security officer walking towards the Zen Night Club car park. When Montano arrived at the front of the car park,

Charles noticed that a "huge fight involving as much as fifty persons" was taking place at the lower end of Keate Street. It was dark but there was sufficient light for him to discern persons. He observed several persons who were part of the Lee Chee group. He also saw persons attacking Feveck and Le Blanc. The club`s security officers were trying to break up the fight. At that time, Montano called out to everyone and said, *"Let's leave."* Charles then saw a tall man of brown complexion approaching from lower Keate Street who started firing punches at two men, none of whom were the appellants or their co-defendants. Montano, Roberts, Feveck and Le Blanc then left the club in two separate vehicles.

(20) Charles gave evidence that Montano did not hit or assault anyone as he was surrounded by security officers at all times. After both appellants and their co-defendants left, Charles remained outside the Zen Night Club car park until everything subsided, upon which he instructed the club's security officers to return to their positions. Charles could not recall seeing police officers on the scene on the night in question.

❖ THE REBUTTAL EVIDENCE

(21) Evidence was lead from PC Dufferin Campbell in order to rebut the evidence of Vincent Charles. He testified that after receiving a report at around 3:30 a.m. on the 26th April, 2007, he and other police officers went to the Zen Night Club. Whilst there, he interviewed several persons, including Vince Charles, who approached him and informed him that he was the General Manager of the club. Charles gave him his contact information and told him that "he did not know what happened" but that "his bouncers parted the fracas".

❖ THE CASE FOR APPELLANT NO. 2: KERNEL ROBERTS

(22) Roberts elected to give evidence and his case was one of mistaken identity and fabrication. He testified that on the 25th April, 2007, at around 8:00 p.m., he attended an appreciation function at the Zen Night Club. Montano, Feveck, Le Blanc and three other men, Bill, Tishard and Marvin, also attended the event. He stayed there for approximately two hours before departing for his house

in Diego Martin, "Rainorama". Montano, Feveck, Le Blanc, Bill, Tishard and a man named Snoop accompanied him to his house where they all stayed for two hours. They then left "Rainorama" and proceeded to the Zen Night Club.

(23) They arrived at the club at around 12:30 a.m. and were all hanging out at the bar area. Roberts saw Ganga "taking a wine" on Montano and also observed another woman near Montano. Roberts then left the club at approximately 2:00 a.m. to pick up his girlfriend in Morvant. Shortly afterwards, he returned to the club with his girlfriend but left her in the car park. While entering the club, he saw Ganga and another girl from the Lee Chee group, among a group of people and they were cursing Montano's name. One of the girls from the Lee Chee group removed her footwear and looked at him as if she was going to charge at him. Roberts went into the club where he met the owner and asked him, *"Why don't you make these people leave from in front the club, cursing and getting on like this.*" Roberts went to Montano and explained to him what was happening outside and suggested that they all leave the club. Montano, Roberts and Feveck, together with Snoop, Tishard, Bill and Marvin, all walked out of the club. They were not accompanied by Le Blanc at that time.

(24) When the men got outside, Roberts observed that persons from the Lee Chee group were scattered on the sidewalk in front of the club and on the road. When they saw him and his group, they began using obscenities at them. Roberts left his group and walked to the road where he had a brief conversation with a man whom he learnt to be Pollonais. While conversing with Pollonais, he heard Brown's voice in a raised tone He turned his attention to Brown, who was at that time standing on the sidewalk. Brown approached Montano and gestured at him with his hands. Montano said to Brown, *"But what all yuh have with me."* Snoop was holding a drink and was standing with his back turned to Brown, who then started shouting and complaining about being ejected from the club. Snoop then threw his drink over his shoulder and some of it caught Brown's face. Brown and some other men then grabbed Snoop, pulled him towards the other side of the road and started punching him on his back. The scuffle ended up in front of the bonnet of a car. Approximately four of the club's security officers then came on the scene and attempted to part the fight. Roberts observed that Montano was at that time barricaded by security officers a short distance from where the fight was happening. Bill then tried grabbing onto Snoop, who escaped

his grip and ended up charging into Brown. As a result, Brown was slammed on the bonnet of the car. At that time, Roberts was approximately four feet away from the car. Snoop, Brown, the security officers and some other men then rolled off the car and went onto the sidewalk. At that time, Roberts saw that Montano was crossing the street with the security officers and making his way to the Zen Night Club car park.

(25) Roberts then saw Le Blanc who "appeared out of nowhere". A person he referred to as "Ras" then started hitting Le Blanc with a baton several times on his back and Le Blanc retaliated by firing some punches at him. One of the club's security officers, on seeing what was happening, ran onto the road and "floored" Le Blanc. Roberts then said to "Ras", *"Ras, this is Benjai"* and he stopped what he was doing and walked away. Roberts testified that he then saw Pollonais approaching from Pembroke Street, "jogging in sort of an aggressive manner", with his fists clenched. Roberts, with his arms outstretched, pleaded with Pollonais and said to him, *"Why all yuh doh go home boy?"* Pollonais then charged towards Le Blanc and made contact with his wrist and elbow. Pollonais fell to the ground and some girls from the Lee Chee group went to aid him.

❖ THE PROCEDURAL HISTORY

(26) The following is an account of the history of the matter:

PARTICULARS	DATE
Charges preferred	4th June, 2007
Opening of Prosecution's Case/ Evidence Started Being Adduced	29th May, 2008
Close of Prosecution's Case	8th December, 2009
Submissions of No Case to Answer by Defence Counsel	8th December, 2009
Response to Submissions of No Case to Answer by Prosecuting Counsel	19th July, 2010
Submissions in Reply by Defence Counsel	13th October, 2010

Magistrate's Ruling on Submission of No Case to Answer	8th December, 2010
Opening of Defence Case	10th March, 2011
Close of Defence Case	29th June, 2011
Closing Addresses by the Defence Counsel	24th October, 2011
Closing Address by Prosecuting Counsel	19th March, 2012
Magistrate's Findings and Pleas in Mitigation	10th December, 2012
Sentencing	25th February, 2013

❖ THE FINDINGS OF THE MAGISTRATE

(27) The findings of the magistrate were as follows[5]:

> *"All right. The Court will call 6371-73 of 2007. It was alleged that Mr. Montano, Defendant No. 1, Kernel Roberts, Defendant No. 2, Joel Feveck, Defendant No. 3 and Rhodney Le Blanc Defendant No. 4, on Thursday the 26th April, 2007 at Keate Street assaulted Russell Pollonais thereby injuring him occasioning him actual bodily harm. The decision thus follows; Mr. Montano, the Court finds you guilty of this offence. Mr. Roberts, the Court finds you guilty of this offence. Joel Feveck, the Court finds not guilty. Rhodney Le Blanc not guilty.*
>
> …
>
> *Case No. 6371 of 2007, It is alleged that Marchel Montano, Kernel Roberts and Joel Feveck on Thursday the 26th April, 2007 at Keate Street assaulted Brandis Brown thereby occasioning him actual bodily harm. Mr. Montano, the Court finds you guilty of this offence. Mr. Roberts, the Court also finds you guilty. Joel Feveck the Court finds not guilty…*
>
> …

[5] See the Transcript of the Proceedings dated the 10th December, 2012 at page 2.

> *Case No. 6375 of 2007, on Thursday the 26th of April, 2007 at Zen Night Club you did unlawfully assault Gerard Bowrin by beating him. The Court finds you guilty, Mr. Montano, the Court also finds you guilty of the offence. Complaint No. 6373 of 2007; that on Thursday the 26th of April 2007 you assaulted Janelle Lee Chee by beating. Finally, that on Thursday the 26th of April, 2007 on Keate Street you used obscene language to the annoyance to the persons in the club. The Court finds you guilty of this offence."* (sic)

(28) Sometime after giving her decisions in the matters, the magistrate retired from the bench without providing a written memorandum of her reasons for those decisions. Despite this fact, it appeared that up to the time of the appeals, the magistrate was still available to give her reasons.

(29) At the hearing of these appeals, however, both Mr. Singh and Mr. Scotland advanced arguments to the effect that the magistrate was *functus officio*, having retired from the bench, and as such, she could not legally provide reasons for her decisions in the matter. In addition, it was argued that a lengthy period of time had elapsed from the time that the matter was determined and the notices of appeal filed, to the time that the appeals were listed for hearing, approximately four years. Counsel for the respondent, Mr. Busby, conceded on these points.

❖ GROUND OF APPEAL

(30) The main ground of appeal proffered by Montano and Roberts was that:

> ***A material irregularity and/or illegality occurred within the trial of the appellants when the Learned Magistrate who heard the case delivered her ruling without rendering and/or delivering any reasons for her decision to convict the appellants, in breach of her duties both at statute and at common law.***

❖ SUMMARY OF THE CONCLUSION ON APPEAL

(31) The appeals succeed primarily on two facets of the broad ground of appeal which was multifaceted. These two facets are (a) the magistrate's failure to articulate any credibility findings in respect of the inconsistencies and contradictions in the evidence of the prosecution witnesses that were not entirely peripheral and the inability of this Court to necessarily imply or glean from the Record of Appeal the path of reasoning of the magistrate in dealing with these non-peripheral inconsistencies, and (b) the absence of any reasoning on the part of the magistrate for the rejection of the evidence of the appellants. In arriving at our conclusion, we have considered the decision of this Court in **Francis Jones v Sgt. Sheldon David #11730**[6], several Canadian decisions, including **R v Sheppard**[7], **R v R.E.M.**[8], **R v Vuradin**[9] and **R v Gatzke**[10], decisions from other Commonwealth jurisdictions, such as Australia, New Zealand, Singapore and South Africa, and as well, a decision from Ireland. Strictly speaking, our conclusion on these two issues is dispositive of the appeal. However, out of deference to the industry of counsel on both sides, we shall examine and analyse all of the issues raised in the appeal.

❖ SUBMISSIONS MADE ON BEHALF OF THE APPELLANT MACHEL MONTANO

(32) Counsel for Montano, Mr. Singh, submitted that Montano gave evidence and raised in aid of his case, the issue of his good character. He submitted that in those circumstances, the magistrate was under a duty to take into account his good character in assessing the overall creditworthiness of his testimony and his propensity to commit the acts of violence as alleged. It was further submitted that in order to reasonably and properly come to a conclusion of guilt, the magistrate had to make findings on the credibility of Montano, the witness called on his behalf and the credibility of the prosecution witnesses. However, the magistrate merely announced her decision without any and/or sufficient and/or proper reason for the decision. The magistrate found Montano and Roberts guilty

[6] **Francis Jones** (n. 2).
[7] 2002 SCC 26.
[8] 2008 SCC 51.
[9] 2013 SCC 38.
[10] 2017 BCSC 1911.

on the joint informations but acquitted the other two persons charged. This was despite evidence being led by the prosecution witnesses that all four defendants participated in the acts which formed the basis of the joint complaints.

(33) Mr. Singh argued that in the circumstances of the instant case, based on the issues raised, the magistrate was under a duty to give a reasoned decision as to how she arrived at the conclusions of guilt. He went on to argue that this was what was required by the magistrate both under the common law and by statute. Those reasons ought not to be exhaustive but must be well reasoned and sufficient to demonstrate to a reviewing court that the magistrate was alive to, sensitive to and appreciative of the various evidential challenges in the case. It was submitted that the reasons must also demonstrate a proper application of the relevant legal principles. In support of his arguments, Mr. Singh relied on the decision in **Francis Jones v Sgt. Sheldon David #11730**[11].

(34) According to Mr. Singh, in cases where credibility is a central issue for the proper and reasonable resolution of guilt or innocence, a magistrate must show that he made findings which were reasonable both on the facts and in law. He argued that in the instant case, the magistrate did not demonstrate any reasonably pathway to the decisions which she arrived at. This failure resulted in the following:

(a) The Court of Appeal could not determine how the magistrate resolved the central issue of credibility in the case;

(b) It effectively curtailed, impeded and obstructed the appellant from determining whether the magistrate properly dealt with, considered and resolved the issue of collusion amongst the witnesses, which was a matter which arose during the cross-examination of the prosecution witnesses;

(c) It hampered the right of the appellant to effectively review whether the magistrate properly applied the principles of good character when she dealt with the creditworthiness of the appellant;

[11] **Francis Jones** (n. 2).

(d) The appellant was not in a position to determine whether the magistrate properly applied the relevant law on the issue of self-defence, which was raised in the cases for both the appellant and the respondent;

(e) The appellant was not only unable to assess and evaluate whether the magistrate properly marshalled the evidence in the case but was also unable to determine what weight was ascribed to the various items of contradictory and inconsistent evidence with respect to the prosecution witnesses;

(f) The fundamental principles of fairness and justice demanded that the magistrate provide some reasonable basis to justify why she accepted the evidence as proof beyond reasonable doubt for two accused persons and why she acquitted the other two accused persons;

(g) It amounted to a denial of the appellant to fairly and effectively challenge a finding of serious criminal conduct against him. This was tantamount to a breach of the appellant's constitutional right to the protection of the law and also a denial of his right to procedural fairness in accordance with the rules of natural justice;

(h) It was contrary to judicial policy in that it undermined judicial accountability and eroded public confidence in the judicial system as persons who were the subject of judicial determination had been effectively denied procedural fairness; and

(i) It was contrary to the legitimate expectation of the appellant to such reasons in accordance with section 130(B) of the Summary Courts Act.

(35) Mr. Singh relied on the decision of the Supreme Court of Canada in **R v Sheppard**[12] in support of the proposition that reasons for a judgment are the primary mechanism by which judicial

[12] **Sheppard** (n. 7).

officers account to the parties and to the public for the decisions they render. In that case, Binnie, J. said at paragraph 28:

> *"[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."*

(36) Reliance was also placed on the decision in **R v Dinardo**[13], where it was decided that the inquiry into the sufficiency of a trial judge's reasons should be directed at whether the reasons respond to the live issues in the case.

(37) It was submitted that given the conflicts in the evidence which occurred as a result of Montano testifying, the failure of the magistrate to give reasons as to how she resolved this conflict prior to her finding of guilt left a void in the appellate process which was incurable and insurmountable. Mr. Singh submitted that in light of such a void in the trial process, the only course open to this Court is to quash the conviction and not attempt to place itself in the shoes of the magistrate by embarking on the deciphering of issues of credibility and resolution of fact.

(38) The decision in **R v R.E.M.**[14] was relied on to show the three main functions of the giving of reasons for a judgment, namely, informing the parties affected by the decision why the decision

[13] 2008 SCC 24.
[14] **R.E.M.** (n. 8).

was made, providing public accountability of the judicial decision and permitting effective appellate review.

(39) Mr. Singh submitted that in the absence of reasons, this Court could not be satisfied reasonably or at all that there was a logical connection between the evidence and the law on the one hand and the findings on the other. He submitted that in those circumstances, an error of law had occurred, consequent upon which this Court must reverse the magistrate's decision and quash the convictions.

(40) Mr. Singh also referred to **R v Awatere**[15], a decision of the Court of Appeal of New Zealand where it was said that judicial officers should always do their conscientious best to provide, together with their decisions, reasons which could sensibly be regarded as adequate to the occasion, the failure of which might jeopardise the decision on appeal.

(41) The Australian decision in **Soulemezis v Dudley (Holdings) Pty Ltd**[16], which referred to the decision of Asprey, J.A. in **Pettitt v Dunkley**[17], was also submitted in support of the proposition that a judicial officer, as part of the exercise of his judicial office, ought to state the findings and the reasons for his decision, especially where there are factual and legal issues relevant to the determination of the case. The judicial officer should not leave an appellate tribunal in doubt as to how those various factual and legal issues or principles had been resolved. The failure to give reasons for such a decision could constitute an error of law.

(42) Mr. Singh contended that an issue that would have demanded that reasons be supplied by the magistrate was the inconsistencies in the prosecution's evidence, given the version of the facts set out by those witnesses.

[15] [1982] 1 NZLR 644.
[16] (1987) 10 NSWLR 247.
[17] [1971] 1 NSWLR 376.

❖ SUBMISSIONS MADE ON BEHALF OF THE APPELLANT KERNEL ROBERTS

(43) Counsel for Roberts, Mr. Scotland, submitted that a material irregularity occurred when the magistrate, in breach of her duty under section **130B of the Summary Courts Act Chapter 4:20** and at common law, neglected to provide a memorandum of reasons for her decision. In support of this submission, he relied on the decision in **Francis Jones v Sgt. Sheldon David #11730**[18], which quoted with approval the Privy Council decision in **Flannery and Anor v Halifax Estate Agencies Ltd.**[19], where the court made general comments on the duty to give reasons.

(44) Mr. Scotland submitted that the trial proceedings raised several legal issues which the magistrate was required to analyse and consider and upon deciding upon them, provide reasons for her decision. He submitted that without any reasons provided, it was difficult to say to what extent, if at all, the magistrate addressed her mind to all of the pertinent legal issues raised before her in the case. It was further submitted that the failure of the magistrate to give reasons resulted in prejudice to Roberts in advancing his appeal because there was no basis to support whether the magistrate's discretion was applied judicially.

(45) It was also argued that there were no discernible differences between the evidence which purported to incriminate Roberts and the evidence against his two co-defendants who were acquitted. It was submitted that the pieces of evidence against all four defendants were, in all material ways, identical and therefore, the rejection of such evidence for the two acquitted defendants and acceptance for the two convicted defendants could not be taken as rational. The decision in **Vivian Clarke et al v The State**[20] was relied on in support of this submission.

(46) Mr. Scotland also submitted that the appellants' convictions could not be considered safe in light that their two co-defendants were found not guilty. In this regard, it was submitted that there was no plausible way of explaining how the magistrate arrived at the two inconsistent decisions and this was in tandem with the failure of the magistrate to give reasons for such decisions. It was

[18] **Francis Jones** (n. 2).
[19] [2000] 1 All ER 373.
[20] Cr. App. Nos. 28-30 of 2009.

submitted that there was no evidence to support the conviction which was confirmatory of, or supplementary to the evidence which was rendered questionable by the acquittal. According to Mr. Scotland, the implied rejection by the magistrate of the witnesses' evidence, inherent in a finding of not guilty, could not be explained on any basis which did not involve attributing to those witnesses an intention to deliberately mislead. It was also argued that there was no reasonable basis for believing that the witnesses might have lied in relation to the acquitted defendants but told the truth in relation to the convicted defendants. Mr. Scotland submitted that the two segments of the witnesses' evidence against all four defendants were so closely linked in terms of time, place and subject matter, that it could not be segmented, allowing for a rejection of one segment and an acceptance of the other. It was argued that the acquittal of the appellants' two co-defendants could not be explained on any other basis but that the magistrate doubted the truthfulness and reliability of the prosecution witnesses. It was submitted that as a result of the failure of the magistrate to give reasons on this issue, the convictions must be quashed.

(47) It was submitted that Roberts' good character was raised during the course of the trial and as such, both the propensity and credibility limbs of good character were relevant to him. Mr. Scotland further submitted that given the inconsistent decisions, it could be assumed that the magistrate did not consider the credibility aspect in analysing the evidence of Roberts and for some unexplained reason, used some unidentified pieces of evidence of the appellant to support his guilt. Mr. Scotland noted that the two defendants who were acquitted did not give evidence and therefore credibility considerations would not have been extended to them.

(48) Mr. Scotland argued that in the case at bar, the facts were not straightforward. He argued that there were fundamental legal issues raised by Roberts that the magistrate did not show how they were resolved. Further, there were multiple and varying defences raised by both Roberts and Montano and this Court received no guidance as to how they were dealt with. According to Mr. Scotland, the reasons for the magistrate's decisions were not capable of being ascertained by reference to the evidentiary record.

(49) Mr. Scotland relied on the decision of in **Forbes v Chandrabhan Maharaj**[21] where Lord Clyde said at page 489:

> *"…The question was debated whether failure to provide reasons would necessarily lead to a quashing of the decision or whether in at least some cases the failure would not be fatal. Their lordships do not consider that the present case provides an appropriate occasion to resolve that question. It is sufficient to observe that without the statement of reasons it will usually be impossible to know whether the magistrate has misdirected himself on the law or misunderstood or misapplied the evidence. The absence of reasons at the least enables an appellant to argue from a strong position that there cannot have been a sound reason for the decision in issue.*
>
> *But even if cases may occur where the failure is not fatal, their lordships are satisfied that the Court of Appeal was in error in proceeding to review the record in order, as they put it, 'to see if there is sufficient evidence upon which the magistrate could have come to the decision at which he arrived'. As expressed, that places too low a threshold for the upholding of the conviction. If it is to be construed as seeking to reflect the proper standard for determining an appeal, it takes no account of the very real problems of the conflicts of evidence which existed in the case and the critical matters of credibility which required to be decided in it. The Court of Appeal stated that the decision showed that the magistrate rejected the issue of alibi. But that does not necessarily follow from the decision. As they themselves point out, the fact that the petitioner was not at home when the cannabis was said to have been discovered does not prevent him from qualifying under the statutory provisions as being in possession of the drug. In the absence of reasons in the present case it may be unsafe to draw conclusions merely from the decision itself and it may be dangerous to speculate on what may or may not have been the factual conclusions which the magistrate drew from the conflicting evidence before him. It is in the light of these circumstances in the present case that their lordships decided to grant special leave, to allow the appeal and quash the conviction."*

[21] [1998] 52 WIR 487.

❖ SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(50) Mr. Busby, counsel on behalf of the Respondent, submitted that the issues which arose in this case during the trial were not legally complex, that the offences were simple ones and that the facts were straightforward. In support of this submission, he relied on the decision in **Cedeno v Logan**[22]**.** In that case, the appellant was convicted of simple larceny and ordered to serve two years imprisonment. On appeal, the court upheld the conviction but increased the sentence to five years. In that case, the magistrate had retired and never fulfilled his statutory obligation of providing reasons for his decision. The court had in its possession the notes of evidence and the submissions made to the magistrate. There was only one eyewitness called, whose credibility was challenged. In giving the judgment of the court, Lord Hobhouse found that there was only one real issue at the trial, that of identification, and critical to that issue was the reliability of the sole eyewitness. Lord Hobhouse said at page 91:

> *"Here there was no complexity of issues. The basis of the magistrate's decision was clear. The relevant law was covered in the submissions made to the magistrate and was not in dispute. The decision of the magistrate was the decision to be expected upon the evidence.*
>
> *The other way of putting the point on the absence of reasons is that it shows a serious departure from due process and that the appeal ought to have been allowed on that basis. The starting point for the evaluation of this argument is that the statute does not require the magistrate to give these reasons at the time of the trial. The duty to give and the right to have the written reasons arises only when a notice of appeal is given. The requirement of the statutory reasons is not for the trial nor even for the purpose of deciding whether or not to appeal. It is for the purpose of the appeal hearing. The absence of these reasons does not vitiate the trial which has already taken place. The question is whether it invalidates the appeal and has the practical effect of requiring the Court of Appeal to decide the appeal in favour of the defendant so that he is not deprived of his right of appeal. The criticism here of the magistrate is not for anything he failed to do at the trial but of a later independent failure which, it is submitted, compromised the appeal.*
>
> *There are two related answers to this submission. First, as a matter of fact, the appeal patently was not prejudiced by the absence of the statutory reasons. The basis of the magistrate's decision was clear. The one substantive ground of appeal could be properly evaluated and decided. None of those present even referred to*

[22] [2001] 1 WLR 86.

> *the absence of the reasons, let alone complained of their absence. The argument is unpersuasive on the facts. Secondly, the authorities, while emphasising the importance of the giving of reasons as part of due process, also make clear that whether or not the "unreasoned" decision should without more be set aside depends upon the circumstances of the particular case.*
> …
> *It would be wrong to leave this topic without pointing out that it would be quite possible that a magistrate might die or become disabled between the time that he decided a case and the time when he was required to give the statutory reasons. Would it be a rational construction of the statute to say that in such a situation all his decisions should be set aside regardless of whether or not there was any real ground of appeal merely because he was now unable to give the statutory reasons?"*

(51) Mr. Busby submitted that the case of **Cedeno v Logan**[23] was similar to the present case. He submitted that as in **Cedeno v Logan**, the relevant law was covered in the submissions made to the magistrate and was not in dispute. Similarly, there was only one issue in the instant appeal, that is, the fabrication of evidence. Further, critical to this issue was the credibility of the witnesses. The only distinguishing feature in the present case is that there were several eyewitnesses, unlike in **Cedeno v Logan** where there was only one eyewitness.

(52) Mr. Busby submitted that the magistrate was well assisted on the law and on the facts both by written and oral submissions made by all counsel in the case. In those submissions, no complex issue of law or fact were raised before the magistrate. Mr. Busby further submitted that an examination of the evidentiary record showed that the case turned principally on questions of fact. He submitted that the prosecution's case was strong and free from material discrepancies that went to the core of the case. Mr. Busby argued that none of the inconsistencies raised by the appellants were on matters of substance that affected the core of the offences. He contended that in any event, it was trite law that a tribunal of fact did not have to decide on every single point raised, but only on such matters as would have enabled him to say whether the charges were proved.

(53) In response to the appellants' argument that there were no discernible differences between the evidence that purported to incriminate Montano and Roberts and the evidence against their two

[23] Ibid.

co-defendants who were acquitted, Mr. Busby submitted that having regard to the identification evidence in respect of Feveck and Le Blanc, there was a plausible way to explain how the magistrate arrived at the different decisions. Mr. Busby submitted that the magistrate was simply not satisfied beyond reasonable doubt that Feveck and Le Blanc were correctly identified by Lee Chee and Forde. He submitted that there were no such problems with the evidence against Montano and Roberts.

(54) Mr. Busby argued that both appellants gave evidence that they were of good character and were entitled to both limbs of the good character direction. He submitted that the magistrate was reminded of this fact during the prosecution's closing submissions.

(55) Mr. Busby relied on the decision in **R v Hunter and Others**[24] where Lady Justice Hallett VP said at paragraph 67:

> *"[67] Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend."*

(56) Lady Justice Hallett VP went on to say at paragraph 70:

> *"[70] It is clear to us that the good character principles have therefore been extended too far and convictions have been quashed in circumstances we find surprising..."*

(57) It was submitted that a magistrate is a trained judicial officer and should not be compared to an "average juror". It was further submitted that if the "average juror" could appreciate, without direction, that a defendant with no previous convictions is more likely to be telling the truth and is less likely to commit an offence of the kind charged, then even more so a very experienced magistrate, as was in the present case. Mr. Busby submitted that not only was the case for the prosecution strong, involving several eyewitnesses, but it was also free from material discrepancies and inherent improbabilities.

[24] [2016] 2 All ER 1021.

❖ THE LAW ON THE GIVING OF REASONS BY A JUDICIAL OFFICER – A MAGISTRATE

The Duty to Give Reasons:

(58) This is an area of the law which has undergone considerable development and refinement in this jurisdiction and in other Commonwealth jurisdictions. We therefore consider it necessary to set out in some detail the evolving and nuanced positions, as exemplified by several decisions.

(59) This is an aspect of the law which has also become the subject of an increasing number of magisterial appeals. With this in mind, we have intentionally conducted a thorough review of the case law on the duty to give reasons and the scope of and the required minimum content of those reasons in order that magistrates may have comprehensive guidance. In the future, it should be unnecessary for other courts to traverse the area in such detail. Reliance on this judgment and the decision in **Francis Jones v Sgt. Sheldon David #11730**[25] should suffice.

(60) There exists, at common law, a duty for magistrates to furnish reasons for their decision where an appeal has been lodged in relation to that decision[26]. That common law duty of magistrates to provide reasons for their decision where an appeal has been lodged became a statutory duty by virtue of the 1986 amendment to the **Summary Courts Act**. **Section 130B of the Summary Courts Act** provides that a magistrate has a duty to provide reasons for a decision within sixty days of an appellant giving notice of appeal.

(61) This Court in **Francis Jones v Sgt. Sheldon David #11730** cited with approval the decision in **Flannery and Anor v Halifax Estate Agencies Ltd.**[27] where Henry L.J. said at pages 377-378:

"***We make the following general comments on the duty to give reasons.***

[25] **Francis Jones** (n. 2).
[26] **Aqui v Pooran Maharaj (1983) 34 WIR 282.**
[27] **Flannery** (n. 19).

(1) ***The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties-- especially the losing party--should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex p Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.***

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. ***Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.***

(3) ***The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter.*** *Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.*

(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). ***The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.****"* [emphasis added]

(62) In the present case, the magistrate did not give reasons for her decision to convict Montano and Roberts and acquit Feveck and Le Blanc. However, in the decision in **Francis Jones v Sgt.**

Sheldon David #11730[28], in which this Court explicitly adopted the approach in **R v Sheppard**[29], it was said at paragraphs 38-39:

> *"[38] In our opinion,* ***the absence of written reasons by the Magistrate does not automatically generate an iron-clad, free standing ground of appeal.*** *The appellant must show that the absence of reasons has caused prejudice to the exercise of his legal right to an appeal. In very exceptional cases the absence of written reasons may generate a free standing ground of appeal where, for example, because of the absence of those reasons, counsel is unable to even formulate a meaningful appellate challenge.*
>
> *[39]* ***The approach to be adopted by the Court of Appeal is a pragmatic, functional one. This approach is context driven and it involves an examination of the evidentiary record, the specific issues raised and any brief oral reasons given by the Magistrate. If the case is (a) factually, a straight forward one; (b) legally, not a complex case; and (c) if the reasons for the magistrate's decision are capable of being ascertained by reference to the record of evidence, then the absence of written reasons may be less likely to deprive the Court of Appeal of its ability to perform the appellate function****..."* [emphasis added]

(63) In the decision of the Supreme Court of Appeal of South Africa in **Mashigo and Rakolota v The State**[30], the appellants were convicted of rape and were sentenced to life imprisonment. Aggrieved by this judgment, they both appealed to the North Gauteng High Court. Two Acting Judges heard the appeal and at the time of their decision, no reasons were given but merely a statement of their conclusion.

(64) On this issue, Bosielo JA observed at paragraphs 38-39:

> *[38] On 5 July 2010,* ***they delivered a judgment dismissing this appeal. Regrettably, this is no judgment at all. It is merely an order which is paraded as a judgment. It is cryptic and comprises five lines only. Contrary to established and salutary judicial tradition, it neither deals with the facts nor the law. Even more disconcerting is the absence of reasons for the decision.*** *The entire 'judgment' reads as follows:*

[28] **Francis Jones** (n. 2).
[29] **Sheppard** (n.7).
[30] [2015] ZASCA 65.

'We once again thank the advocates for the heads and the argument of each counsel in this regard. After having carefully considered this case, I have no doubt that there is no reason to interfere with the judgment of the magistrate on conviction and neither on sentence. Therefore I am of opinion that the appeal should be dismissed.'

[39] ***Dealing with a failure by a judicial officer to give reasons for his or her decision, this Court held as follows in S v Mokela 2012 (1) SACR 431 (SCA) paras 12 and 13:***

'I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person…….

See also Botes & another v Nedbank Ltd 1983 (3) SA 27 (A) at 28*.*

"Regarding the duty of judicial officers to give reasons for their decisions, it is instructive to have regard to what the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE, the former Chief Justice of the High Court of Australia, stated in the 1993 (67A) Australian Law Journal 494 *where he said at 494:*

"The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view…" ". [emphasis added]

(65) The decision in **Strategic Liquor Services v Mvumbi, T NO and Others**[31] involved an appeal against a judgment of the Labour Court. There was a failure of the Labour Court to supply written reasons for its decision. The Constitutional Court of South Africa commented on the duty to give reasons and said at paragraph 15:

> *"[15] It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.* ***In Botes and Another v Nedbank Ltd, Corbett JA pointed out that "a reasoned judgment may well discourage an appeal by the loser":***
>
> > ***"The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did."*** *"* [emphasis added]

(66) In **Thong Ah Fat v Public Prosecutor**[32]**,** a decision of the Court of Appeal of Singapore, the appellant was charged and convicted of the offence of importing controlled drugs into Singapore without authorization. On appeal, the court found that the trial judge's findings were "problematic" and that his reasoning was "unclear". The Court went on to set out the scope of the judicial duty to give reasoned decisions. VK Rajah, J.A. said at paragraphs 31-33:

> *"[31] At this juncture, we would caution against equating the duty to give reasons with a duty to issue a written judgment or provide oral grounds of decision in every case.* ***Where a judge hears a large number of cases during a sitting (for example, a sentencing court making routine sentencing decisions based on benchmark sentences) it would be impractical and unrealistic to expect him or her to issue written judgments or even give oral grounds of decision for every case that is dealt with. In addition, we would echo Kirby P's pertinent reminder in Waterson that under the pressure of today's court lists, there is no time for fastidious precision in the drafting of reasons. He quite rightly cautioned against treating a judgment "as if its language had been honed in countless hours of reflection and revision", emphasising that a "practical standard must***

[31] [2009] ZACC 17.
[32] [2011] SGCA 65.

be adopted" *[emphasis added]. Similarly, Nygh J in In the Marriage Of: John Christopher Towns Appellant/Husband and Deborah Jane Towns Respondent/Wife [1990] FamCA 129 stated that (at [18]):*

> *[the Full Court of the Family Court of Australia] has, on numerous occasions, displayed a considerable amount of latitude towards judges at first instance being mindful that they are often sitting in busy lists and have to deliver their judgments on an extemporary basis which may not make it possible for them to express themselves with the directness and clarity that an appellate tribunal and litigants might wish.*

[32] ***Additionally, there are exceptions to this duty to provide reasons. Thus, in certain instances, a judge may not be in error when he fails to state reasons. In Sun Alliance Insurance Ltd v Massoud [1989] VR 8 ("Sun Alliance"), Gray J pragmatically stated that (at 19):***

> ***'The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision … In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference.'***

The same was stated in Brittingham v Williams [1932] VLR 237 at 239 and Public Service Board of NSW at 566. But this approach must be confined to very clear cases and in relation to specific and straightforward factual or legal issues. Otherwise, the exceptions would seriously undermine the duty to give reasons.

[33] ***We also note that the duty has been held not to apply to certain matters of lesser significance. For example, there are some types of interlocutory applications, mainly those with a procedural focus, which a judge can properly make an order without giving reasons****: see Capital and Suburban Properties Ltd v Swycher and Others [1976] 1 Ch 319 at 325–326 (per Buckley LJ) and Knight and Another v Clifton and Others [1971] 1 Ch 700 at 721. Buckley LJ had in mind instances where the judge is asked to exercise his discretion on relatively insignificant questions, such as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural*

step, or possibly whether relief by way of injunction should be granted or refused…[33]*"* [emphasis added]

The Sufficiency/Adequacy/Scope of Reasons – The Required Minimum Content:

(67) In the decision of the Supreme Court of Canada in **Hill v Hamilton-Wentworth Regional Police Services Board**[34], one of the grounds of appeal advanced was that the reasons of the trial judge were inadequate. On this issue, the Court said at paragraphs 100-101:

> *"[100] The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.*
>
> ***[101] In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important 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"****, as was the case in the decision below: Sheppard, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": Sheppard, at para. 26."* [emphasis added]

(68) In **R v Dinardo**[35], the defence rested on the overall lack of credibility and reliability of the complainant's testimony, as well as on the accused's testimony denying her allegations. On this issue, Charron J. said at paragraph 2:

> *"[2]…the trial judge erred in law by failing to explain how he resolved the significant issues of credibility concerning the complainant's testimony,*

[33] See also **Kadeem Bain and Tony Newbold v Regina Kadeem Bain and Tony Newbold v Regina SCCr App. Nos. 263 and 311 of 2014**.
[34] 2007 SCC 41.
[35] **Dinardo** (n. 13).

particularly in light of Mr. Dinardo's evidence at trial. While a trial judge is presumed to know the law, I conclude that in the context of the evidence and the issues in this case, the trial judge's reasons are insufficient to allow for meaningful appellate review on the question of credibility."

(69) At paragraphs 23 and 27, Charron J. said:

> *"[23] In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.* ***In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.***
> …
> …
> …
> …
> *[27]* ***Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (Sheppard, at para. 55). Here, the complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal."*** [emphasis added]

(70) Charron J. went on to say at paragraphs 29, 31 and 32:

> *"[29] It cannot be said that the complainant's testimony wavered only on the trivial details of the allegations. Her testimony wavered on the central issue at trial: that is, whether Mr. Dinardo committed the acts for which he was charged, or whether the story was invented. I disagree with the majority of the Court of Appeal that …"the defence evidence related to peripheral aspects of the case" (para. 32).* ***The defence rested on the overall lack of credibility and reliability of the complainant's testimony and, of course, on Mr. Dinardo's own testimony denying her allegations. In this context, it was incumbent upon the trial judge***

to explain, even in succinct terms, how he resolved these difficulties to reach a verdict beyond a reasonable doubt.

*[31] …**the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue**…At trial, two of the witnesses testified that the complainant could be untruthful and manipulative. While it was open to the trial judge to conclude that he was convinced beyond a reasonable doubt of the guilt of the accused, it was not open to him to do so without explaining how he reconciled the complainant's inconsistent testimony, particularly in light of the accused's own evidence denying her allegations.*

*[32] **This Court emphasized in Sheppard that no error will be found where the basis for the trial judge's conclusion is "apparent from the record, even without being articulated" (para. 55). 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)."* [emphasis added]

(71) In **R v R.E.M.**[36], a decision of the Supreme Court of Canada, the appellant was convicted on three counts of sexual assault. The Court of Appeal set aside the convictions on two of the three counts upon finding that the trial judge's reasons were deficient. McLachlin C.J., at paragraph 11, set out the functions of reasons for a judgment:

*"[11] **The authorities establish that reasons for judgment in a criminal trial serve three main functions:***

*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*

[36] **R.E.M** (n. 8).

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: M. Liston, "'Alert, alive and sensitive': Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law", in D. Dyzenhaus, ed., The Unity of Public Law (2004), 113, at p. 121. 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."*

(72) McLachlin C.J. said at paragraph 41:

"[41] ***The contextual approach to assessing the sufficiency of reasons*** *recognizes that the trial process, including the trial judge's reasons, is a dynamic process, in which the evidence, counsel and the judge play different but imbricated roles. Whether the trial judge's reasons for judgment are sufficient must be judged in the full context of how the trial has unfolded.* ***The question is whether the reasons, viewed in light of the record and counsel's submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand, and the verdict on the other.****"* [emphasis added]

(73) In the decision in **R v Vuradin**[37], also from the Supreme Court of Canada, one of the issues that arose in the appeal was whether the trial judge's reasons for judgment were sufficient. In deciding on this issue, Karakatsanis J. said at paragraphs 10-13:

> *"[10]* ***An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review"****: R. v. Dinardo, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25.*
>
> *[11] Here, the key issue at trial was credibility. Credibility determinations by a trial judge attract a high degree of deference. In Dinardo, Charron J. explained:*
>
> > ***Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error*** *(see R. v. Braich, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in R. v. Gagnon, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt" . . . . [para. 26].*
>
> *[12]* ***Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": R.E.M., at para. 16. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did"*** *(para. 17).*
>
> *[13] In R.E.M., this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable*

[37] **Vuradin** (n. 9).

inference that the accused's denial failed to raise a reasonable doubt (see para. 66)" [emphasis added]

(74) In the decision in **Sagl v Chubb Insurance Company of Canada**[38], the home of Sagl was destroyed by fire. She claimed against her insurer, Chubb Insurance Company of Canada, among others, for the losses she sustained as a result of the conflagration. Chubb denied coverage on the basis that the fire was the result of arson in which Sagl participated and that she had intentionally made material misrepresentations to them, both in her initial application for coverage and in presenting her claim under the policy. One of the issues that arose in the matter was whether the judge, in his reasons, erred by not dealing with the challenges to Sagl's credibility.

(75) In giving the judgment of the Court, Epstein J.A. said at paragraphs 95-97:

"[95] The Supreme Court of Canada explained the meaning of adequacy of reasons in the criminal context in R. v. Sheppard, [2002] 1 S.C.R. 869. Recently, that court affirmed the framework for assessing whether the trial judge's reasons are so inadequate that they warrant appellate intervention in R.E.M. and in R. v. H.S.B (2008), 235 C.C.C. (3d) 312 (S.C.C.), and in the civil context, in F.H. v. McDougall (2008), 297 D.L.R (4th) 193 (S.C.C.).6 The adequacy of a trial judge's reasons must be judged according to whether they achieve their intended purposes. As explained in F.H. v. McDougall, at para. 98, a trial judge's reasons serve the following main functions:

(i) to justify and explain the result;
(ii) to tell the losing party why he or she lost;
(iii) to provide for informed consideration of the grounds of appeal; and
(iv) to satisfy the public that justice has been done.

[96] Reasons also help to ensure fair and accurate decision making by focusing the judge's attention on the key issues and helping to ensure that important points of law or fact are not overlooked: see R.E.M. at para. 12.

[97] As the Supreme Court of Canada stated in H.S.B, at para. 8: "The task for the appellate court is simply to ensure that, read in the context of the entire record, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court." An appellate court "is not given the power to

[38] 2009 ONCA 388.

intervene simply because it thinks the trial court did a poor job of expressing itself": see F.H. v. McDougall at para. 99, quoting Sheppard at para. 26."

(76) At paragraphs 99-100, Epstein J.A. went on to say:

> *"[99]* ***In my view, the trial judge fell into error by failing to explain how he reconciled the obvious problems associated with Sagl's credibility and reliability… As noted in Sheppard, at para. 46, where "the path taken by the trial judge through confused or conflicting evidence is not at all apparent,…the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal".***
>
> *[100]* ***This is the situation here; the unarticulated basis of the trial judge's conclusions, if any, concerning Sagl's reliability, credibility… is certainly not apparent from the record… In short, the trial judge's reasons fail to satisfy the second purpose articulated in F.H. v. McDougall; that is, they fail to explain why the trial judge accepted Sagl's evidence … in the light of the myriad problems with her credibility and reliability. This amounts to reversible error, and in my view, taken alone is a sufficient reason to order a new trial.****"* [emphasis added]

(77) In the decision of the Supreme Court of British Columbia in **R v Gatzke**[39], a matter which dealt with the offence of uttering of threats to cause death or serious injury to T.M., the trial judge summarized the evidence of T.M. and the appellant. He concluded that T.M.'s evidence, standing alone, would not be sufficient to found a conviction, because of the antagonism between her and the appellant and his daughter. The learned trial judge did not analyse the appellant's evidence in any way apart from briefly summarizing it.

(78) In **R v Gatzke**, one of the three grounds of appeal advanced was that the trial judge did not provide sufficient reasons for appellate review of his assessment of the evidence of the appellant, in support of which the appellant cited the decision in **R v Vuradin**[40]. The appellant also relied on the decision in **R v Gharabaghi**[41] in which Arnold-Bailey J. said that, *"There is an enhanced duty*

[39] **Gatzke** (n. 10).
[40] Vuradin (n. 9).
[41] 2005 BCSC 1641.

to give reasons in cases where the sole issue is credibility, and in particular, a trial judge must explain a finding of credibility against the accused."

(79) In response, the Crown submitted that inadequate reasons of a trial judge would rarely justify appellate intervention and that the path leading to the conviction in the case was readily discernible. The Crown submitted that a trial judge's failure to state explicitly why he rejected the evidence of the appellant was not a fatal error so long as the path to conviction was clear, such as where the accused's evidence was self-evidently incredible or unreliable.

(80) In determining the appeal, Associate Chief Justice Cullen said at paragraphs 61-62:

> *[61]* ***In my view, the trial judge's failure to provide any explanation for rejecting the appellant's evidence, and indeed in failing to even expressly communicate that he did reject the appellant's evidence is, in the evidentiary context of the present case, a reversible error.***
>
> *[62]* ***This is not a case where the appellant's evidence was a bare denial in the face of the evidence of two independent eyewitnesses. Nor is it a case where the appellant's evidence was "self-evidently incredible or unreliable".*** [emphasis added]

(81) At paragraphs 67 and 68, Associate Chief Justice Cullen said:

> *[67] In R. v. Y.M. (2004), 71 O.R. (3d) 388 (C.A.) at para. 23, Justice Laskin for the Court commented on the issue of inadequate reasons in the application of W.(D.), referring to R. v. Sheppard, 2002 SCC 26:*
>
> > *23. Sheppard warns against conclusory reasons, that is, conclusions without explanations for them. However, as desirable as it is to give reasoned reasons, a failure to do so does not automatically amount to reversible error. In Sheppard, Binnie J. explained that inadequate reasons do not confer "a free-standing right of appeal" or "entitlement to appellate intervention" (para. 53). Instead, he adopted a functional approach. The adequacy of the judge's reasons must be assessed against the rationales for giving them. In some cases inadequate reasons do not preclude meaningful appellate review or prevent an accused from knowing why he or she was convicted. For instance, the accused's evidence may*

> *obviously incredible, or the prosecution's evidence may be overwhelming and unchallenged, and thus the basis of the conviction may be clear from the record…*
>
> *[68]* ***As I noted earlier, this is not a case where the basis of the appellant's conviction is clear from the record. There are contradictory accounts of the events and some of the factors affecting the credibility or reliability of the complainant have relevance to Mr. Chartrand. In that context, the judge's failure to do more than provide a brief summary of the appellant's evidence without any analysis or comment does not meet the needs set out in Sheppard – to explain to the accused why he was convicted, and to make appellate review of the decision meaningful.****"* [emphasis added]

(82) In **The People (at the Suit of the Director of Public Prosecutions) v Michael McKevitt**[42], a decision of the Supreme Court of Ireland, one of the issues raised on appeal was the inadequacy of reasons with respect to the credibility findings of one of the prosecution witnesses. In that context, Justice Geoghegan observed:

> *"****In fairness to the appellant, the main thrust of the attack on the credibility findings by the Special Criminal Court is the alleged inadequacy of reasons given for the belief and the omission expressly to deal with each of the credibility points against Mr. Rupert raised by the appellant at the trial. Strictly speaking these issues are not included in the three headings of appeal listed by Kearns J.***
>
> ***However, I find this criticism equally unjustified. It has never been the law that a trial court must trawl through every credibility point raised against a key witness and explain why it has rejected it in its judgment.*** *Under the jurisprudence of the European Court of Human Rights, there would be a requirement for a judge who has listened to two opposing points of view in the same area to explain his reasons in a general way as to why he favoured one rather than the other. This could be especially so in a field of specialist expertise.* ***But that is a long way from saying that every credibility point against a key witness must be expressly touched on and commented upon and dealt with in a judgment.****"* [emphasis added]

[42] [2008] IESC 51.

(83) In the Australian decision in **Hunter v Transport Accident Commission and Avalanche**[43], one of the issues that arose on appeal was whether the trial judge's reasons for her decision were sufficient. In giving the decision of the court, Nettle JA said at paragraph 21:

> *"[21]…**while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those finding are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.** It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. **If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law."*** [emphasis added]

(84) Nettle J.A. went on to say at paragraph 28:

> *"[28]…The requirement to refer to the evidence upon which findings are based is a requirement to analyse the evidence and to explain why some parts of it do and others do not lead to the ultimate conclusion. And that analysis must be recorded in the reasons. **In general, and in this case in particular, the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is about as good as useless."*** [emphasis added]

[43] (2005) VSCA 1.

(85) The reasoning in **Hunter v Transport Accident Commission and Avalanche**[44] was applied in the subsequent decision of the Supreme Court of Victoria in **Franklin v Ubaldi Foods Pty Ltd**[45], where Ashley J.A., in considering whether the reasons of the judge were adequate to disclose his path of reasoning, said at paragraph 38:

> *"[38] I hope that I do not underestimate the difficulty that confronts a County Court judge who is faced with resolving applications such as this, one after the other, upon inadequately exposed material. I accept that in such circumstances reasons for decision may lack the precision which could be expected if the judge had the luxury – some would say it is most often the necessity – of hearing witnesses viva voce, and then having time for reflection; and yet that such reasons may be adjudged adequate.* ***But one thing is clear. Reasons must be such as reveal – although in a particular case it may be by necessary inference - the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.****"* [emphasis added]

(86) The position in this jurisdiction with respect to the duty of magistrates to give reasons for their decisions can be summarised in the following terms:

(a) There is a clear statutory duty on a magistrate to furnish a statement of the reasons for his decision when a notice of appeal has been lodged (see **section 130B of the Summary Courts Act**);

(b) In the absence of written reasons, sufficient oral reasons will often be adequate;

(c) Consistent with the statutory provisions and best practice, the magistrate should explain in sufficient detail the process of analysis which led to evidence being accepted, evidence being rejected and also explain how the relevant principles of law and evidence were duly taken into account and applied;

[44] Ibid.
[45] [2005] VSCA 317.

(d) In the absence of written reasons and with only very brief oral reasons which do not contain any analysis, but rather only a statement of the conclusion, this will not be inevitably fatal to the conviction. It will enable an appellant to argue from a strong position that there could not have been a sound reason for the decision in issue. However, as explained in the decision of this Court in **Francis Jones v Sgt. Sheldon David #11730**[46], the approach to be adopted is that the absence of reasons will not automatically generate an iron-clad, free standing ground of appeal. The approach, which is also used in other jurisdictions, (see Canada, Australia and Singapore) is a pragmatic, functional one which involves examining essentially three issues:

(i) Whether the case is factually difficult or straightforward;

(ii) Whether the law is simple or complex; and

(iii) Whether the reasons for the magistrate's decision are capable of being ascertained by reference to the record of evidence;

(e) From the cases referred to above at paragraphs 49-50 and 61-85, it can be discerned that starting with the Judicial Committee of the Privy Council, there was a movement away from the slightly more restrictive position in **Forbes v Chandrabhan Maharaj**[47] (1998) to a somewhat more flexible approach in **Cedeno v Logan**[48] (2001);

(f) In any event, in **Forbes v Chandrabhan Maharaj**, the Privy Council observed that that case did not provide an appropriate occasion to resolve the broader question involved, which was whether a failure to provide reasons would necessarily lead to a quashing of the decision or whether in at least some cases, the failure would not be fatal. As well, the decision in **Forbes v Chandrabhan Maharaj** turned very much on the particular way in which the Court of Appeal sought to address the issue and the manner in which that approach was framed by

[46] **Francis Jones** (n. 2).
[47] **Forbes** (n. 21).
[48] **Cedeno** (n. 22).

the Court of Appeal, which the Privy Council observed as imposing too low a threshold for the upholding of the conviction;

(g) In Canada, the seminal decision in **R v Sheppard**[49] (2002) solidified a pragmatic, functional approach, since then adopted in many cases in that jurisdiction, including **Hill v Hamilton-Wentworth Regional Police Services Board**[50] (2007); **R v R.E.M.**[51] (2008); **R v Vuradin**[52] (2013) and **R v Gatzke**[53] (2017). In the Singaporean case of **Thong Ah Fat v Public Prosecutor**[54] it was pointed out that a failure to give reasons may not be fatal where the case is a simple one and where the case involves matters of lesser significance, for example, some types of interlocutory applications. In the Australian decision in **Hunter v Transport Accident Commission**[55] it was suggested, *inter alia*, that although the extent of the reasons required was dependent on the circumstances in each case, they should: (i) show how the substantial points raised by the parties on either side was grappled with, (ii) include findings on material questions of fact and refer to the relevant evidence upon which those findings were based, and (iii) provide a logical explanation of the process of reasoning that lead the judicial officer to the ultimate conclusion. In **Franklin v Ubaldi Foods Pty Ltd**[56], the court said that reasons should reveal, although in a particular case it may be by necessary inference, the path of reasoning which leads to the ultimate conclusion. Finally, in this jurisdiction, the absence of reasons in the past might have almost inevitably have led to the quashing of a conviction but this Court frontally grappled with the issue of the giving of reasons in **Francis Jones v Sgt. Sheldon David #11730**[57], and adopted the approach expounded in the Canadian decision in **R v Sheppard**;

[49] **Sheppard** (n. 7).
[50] **Hill** (n. 34).
[51] **R.E.M.** (n. 8).
[52] **Vuradin** (n. 9).
[53] **Gatzke** (n. 10).
[54] **Thong Ah Fat** (n. 32).
[55] **Hunter v Transport Accident Commission and Avalanche** (n. 43).
[56] **Franklin** (n. 45)
[57] **Francis Jones** (n.2).

(h) The approach therefore has clearly not been one that has been static and frozen in time, but rather one that is fluid and evolving, consistent with the need to balance two critical concerns and considerations: (i) the obviously sound and compelling policy concerns requiring the articulation of reasons for a decision and (ii) the opposing consideration, that the absence of reasons will have an impact that can never be generalized and that is always exquisitely case and issue sensitive and dependent. Integral to this second consideration is that where issues of law and of fact are uncomplicated and where the case is not affected by material contradictions in need of unravelling, there will on occasion be sufficient information on the record to be able to discern or to necessarily imply the basis of the magistrate's conclusion;

(i) The approach that has evolved and as elaborated upon in **Francis Jones v Sgt. Sheldon David #11730**[58] might appear, on the face of it, to be in opposition to and in tension with the position in **Forbes v Chandrabhan Maharaj**[59]. However, when the issues in **Forbes v Chandrabhan Maharaj** are properly examined and for the reasons stated in (f) above, there is in reality no incongruity; and

(j) Where the sole or primary issue in a case is one of credibility and non-peripheral issues are in need of resolution and the evidence of the defendant is not ***self-evidently incredible or unreliable***, the complete absence of reasoning and analysis or ***"conclusory reasons"*** as they are termed in Canada, will sometimes operate as an impediment to the appellant's ability to advance meaningful grounds of appeal and to the ability of this Court to conduct an effective review.

[58] Ibid.
[59] **Forbes** (n. 21).

❖ ANALYSIS, REASONING AND APPLICATION

(87) In adopting the pragmatic, functional approach as enunciated **Francis Jones v Sgt. Sheldon David #11730**[60], further supported by the decisions in **R v R.E.M.**[61] and **R v Vuradin**[62], we proceed to examine the evidentiary record and the specific issues raised, since there were no reasons given by the Magistrate. We are not reviewing the evidentiary record so as to see whether there was sufficient evidence upon which the magistrate could have come to the decision at which she arrived as in the decision in **Forbes v Chandrabhan Maharaj**[63]. Instead, we are engaging in a perusal of the evidentiary record to determine:

(i) The nature of the evidence and whether it was complicated or straightforward;
(ii) Whether the legal and evidentiary issues raised were simple or complex ones;
(iii) Whether the magistrate was properly guided by counsel on these issues through comprehensive submissions and arguments; and
(iv) Whether the reasons for the magistrate's decision were capable of being ascertained by reference to the evidentiary record.

[A] THE INCONSISTENCIES AND CONTRADICTIONS IN THE EVIDENCE OF THE PROSECUTION WITNESSES

Submissions made to the Magistrate:

Machel Montano:

(88) Counsel for Montano in the court below, Ms. Seetahal, provided the magistrate with a table of inconsistencies and conflicting evidence of the prosecution witnesses. She also went through in

[60] **Francis Jones** (n. 2).
[61] **R.E.M.** (n. 8).
[62] **Vuradin** (n. 9).
[63] **Forbes** (n. 21).

great detail, the inconsistencies in the prosecution's case, which she found were irreconcilable to the extent that the magistrate could not be convinced beyond reasonable doubt that Montano had committed the offences charged. Ms. Seetahal went on to say:

> *"It is not the business of this Court to find that, well, is it possible that somehow what these differences witnesses say, could be meshed together. That is not, with due respect, what this Court has to be about. This Court has to look for an entirely higher standard than that.* ***And this Court must ask itself, am I convinced that these witnesses are speaking the truth? And from the evidence before you all of them can't be speaking the truth. And as I have already or previously alluded, Your Worship, there are different versions. And even if Your Worship, was to say, for instance, I accept the Janelle version, I reject what Gerard, Russel and Helen said about from the time of the altercation to the time they were taken out of the club. I feel that she was shaken. Then Your Worship, you have other conflicts within her own testimony in relation to, for example, the beatings, the questions as to whether she was in the taxi and you compare that with Helen and so on to reconcile. So there is no one pure version, at all, in the Prosecution's case****…**
>
> …***Defendant No. 1 was in that box for that long period of time. And I challenge anyone to point to any inconsistency of any material nature. I haven't even found one of an immaterial nature or something that is not significant in relation to the facts and issues****….the Defence has nothing to prove.* ***And the Defence's evidence is convincing and compelling****…. **And for those reasons, looking at the Defence's case, alone the Court, in my view, ought to find that the Prosecution's case, none of these matters are made up; and I already said why the Prosecution case should be rejected.***
>
> …***the Defence's case stands unchallenged …insofar as inconsistencies. It remains strong, cogent, and compelling.*****"**[64] (sic) [emphasis added]

[64] See the Transcript of the Proceedings dated the 24th October, 2011, at page 35, lines 48-49 to page 36, lines –1-49 - Closing address of Ms. Seetahal

Kernel Roberts:

(89) Counsel for Roberts, Mr. Scotland, after recapping the evidence on both sides, as well as the inconsistencies raised in the evidence of the prosecution witnesses, said:

> *"What I do wish to say, is that…* ***there are irreconcilable versions of the events that have led to these charges. And in a case of irreconcilable differences, we ask Your Worship to bear in mind the burden.*** *And the burden rests throughout with the Prosecution, and that burden the Prosecution attempts to discharge by their witnesses.* ***For the purposes of these submissions as it relates to the inconsistencies on the Prosecution's case,*** **[we]** ***rely on the thorough and meticulous submissions of learned Senior*** **[Counsel Ms. Seetahal].***"*[65] (sic) [emphasis added]

Joel Feveck (also called "Zan"):

(90) Counsel for Feveck, Mr. Williams, in his closing address, said:

> *"Lastly, the State can make no argument as to the silence of Mr. Feveck. It is his right and does not detract from the fact that it is the State's job to prove his guilt beyond a reasonable doubt.* ***If, as in this case, we contend that due to the inconsistencies and the unreliable nature of the State's witnesses the State has not come to proof then Mr. Feveck need not testify because the State has not proffered evidence that warrants an answer...***
>
> ***In closing, we contend that the witnesses for the State have not given clear, cogent and compelling evidence which proves beyond a reasonable doubt that Mr. Feveck was involved in an assault on the person of Mr. Pollonais and Mr. Brown. All of the witnesses differ on material points and the two who claim to have seen Mr. Feveck: Ms. Forde named another person as the assailant never calling Feveck's/Zan's name till in Court and Ms. Lee Chee sees an incident in direct contravention to the person to whom it happened and his testimony.****"*[66] [emphasis added]

[65] See the Transcript of the Proceedings dated the 25th October, 2011, at page 3, lines 8-18 – Closing address of Mr. Scotland.

[66] See the Written Closing Address of Mr. L. Williams on behalf of Joel Feveck at Tab 10 of the Written Arguments Filed on behalf of the Respondent.

Rodney Le Blanc (also called "Benjai"):

(91) In his closing address, counsel for Le Blanc, Mr. Persad, said:

> "*…Accordingly,* ***you are therefore required to look at the evidence, look for inconsistencies, and inconsistencies may be between one witness and another, it can be with a witness and his earlier testimony.*** *And you are essentially embarking upon an exercise that causes you to analyse, to a great extent, the credibility of the witnesses and not only that, the weight to which this Court will give, because it is only through that process the Court can come to a proper conclusion on where the truth lies, and in terms of each defendant, particularly, Defendant No. 4, whether he is innocent or guilty. So I rely on Hernandez v Brooks for the proposition, essentially, that the Court's role at this stage is much wider and you have that basis, far wider than the prima facie case.*
>
> *… for the last few years, the Court of Appeal has been at pains to outline what is expected of magistrates in their reasons, because for a number of years, what would happen is a conviction or a particular order would be made by a Court and an appeal would be lodged before the Court of Appeal, and the Court of Appeal would now look at the reasons and what came out of the Court of Appeal was they need to give guidance. What is expected in their analytical process of dealing with determining innocence or guilt, and one of the cases that came out of it, was a case called Sylvan v Ragoonath from many years back. It's a very old case, but it's cited in the decision of Malco v Gordon…In the case of Sylvan v Ragoonath… This is an age old principle, Your Worship, and it really breaks out what it is the magistrate must be addressing when she comes to analyse the evidence. This was an assault case, I thought it might be of use, but I really rely on the principles of law. It says, '****For a magistrate not to state what his findings are on the way any material issues in a case is to ignore the requirement, that he transmit to the court what his reasons were for the decision which he arrived. We cannot too strongly insist that the reasons should show an awareness of the salient issues, an assessment of material evidence and an appreciation on the relevant law.****
>
> …
>
> …
>
> *Now, at the end of the day we submit that the only way that it is open to this Court to find Mr. Le Blanc guilty of this charge is on the basis that the Court is satisfied*

beyond reasonable doubt that the Defendant assaulted Russell Pollonais, as the Prosecution alleged. ***It would come as no surprise that we take the view that when one looks at the evidence of Ms. Janelle Lee Chee, the quality of this evidence is so poor that there is more than adequate room for reasonable doubt when one comes to determine whether one can be sure of her evidence.****"*[67] (sic) [emphasis added]

(92) Mr. Persad went on to say:

"……***You look at the evidence of the defence witnesses. Evidence of both defendants, Mr. Montano, Mr. Roberts, you weigh, you look at them, you look at the way they gave their evidence, the cogency. Our position is certainly … that when one looks at their evidence, they were cogent and compelling****…"*[68] [emphasis added]

Submissions made on behalf of the Prosecution:

(93) Mr. Busby, counsel for the prosecution, in his closing address, said:

"…In all of their submissions, counsel for the defence have relied on contradictions, prime inconsistent statements and omission, to suggest that the Court, cannot be sure beyond reasonable doubt. ***The Prosecution respectfully submits however, that when looked at, in their proper light, none of the admitted, and I admit, there are contradictions, prime inconsistent statements and omissions, are of such a nature, as to lead to reasonable doubt, and it is therefore open to this Court, to convict on the evidence led in this case.****"*[69] (sic) [emphasis added]

[67] See the Transcript of the Proceedings dated the 27th October, 2011, at page 4, lines 9-23 and lines 27-50, page 5, lines 1-2 and page 8, lines 3-12 - Closing address of Mr. Persad.
[68] See the Transcript of the Proceedings dated the 27th October, 2011, at page 21, lines 28-33 - Closing address of Mr. Persad.
[69] See the Transcript of the Proceedings dated the 19th March, 2012 at page 11, lines 28-37 - Closing address of Mr. Busby.

(94) In addressing the magistrate on the contradictions and inconsistencies in relation to the evidence of the prosecution witnesses, Mr. Busby referred to the summation in **The State v Ronald John**[70], which was approved by the Privy Council, and the directions on the three pertinent questions that must be asked in assessing the materiality of a contradiction or inconsistency

(95) Mr. Busby also went through in great detail the table of inconsistencies and conflicting evidence in relation to the prosecution witnesses, which was filed by Ms. Seetahal. The following are some extracts from his submissions:

> *"So, Ma'am, from Janelle Lee Chee first we had, whether the witness was a fan? And I don't even want to stay longer than to say, in my respectful view,* ***Ma'am, as far as the offences go in this case, this is a minor issue. And it's not one that should seriously engage Her Worship in her decision. And Her Worship will recall from the very same summation*** **[in The State v Ronald John]***, **it is not necessary to decide all issues in the case. Only those that you need to determine what your decision will be.***[71]
>
> …
> *Conflicts in evidence of Helen Ganga and Gerard Bowrin: But, all Helen Ganga and Gerard Bowrin talked about is the dancing and the slap. Helen says …slap, slap – back to back. Gerard says, slap – hold by bouncers – slap...* ***The major issue is who slapped whom and the number of slaps. And that, two witnesses give evidence that is not in perfect cohesion. Sometimes Ma'am – that is indicative of dishonesty and sometimes it's indicative of the exact opposite, honesty; that unless we're reciting the alphabet or counting, to ten no two people give precisely the same description of events.***[72]
>
> …
> *What happened after the drinks spilled? ... Helen says, "We moved to say sorry." Gerard says, "I never went and say any sorry."* ***Ma'am in the facts on this case you think that is important? If you do, please, consider this a major issue. Consider the reason, whether it's an honest mistake, and if they are trying to deceive you and consider if there's any explanation, if it makes good sense. But,***

[70] Cr. No. 54/2005.
[71] See the Transcript of the Proceedings dated the 2nd April, 2012 at pages 57, lines 19-27– Closing address of Mr. Busby.
[72] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 61, lines 44-49 to page 62, lines 1-8 - Closing address of Mr. Busby.

Ma'am if it is a minor issue and there's no attempt to deceive you, then you can disregard it.[73]

…

Ma'am, here we have, "How was Gerard slapped?"… So, we're talking about here, the witnesses' ability to perceive what is going on with people other than themselves while being removed by the bouncers. ***So they gave different descriptions of what the bouncers were doing to other people. Ma'am, let's use our common sense anybody being forcedly removed, unless the other people being removed, it's your child, your wife, your husband, you don't really pay attention to what going on with them, 'cause you're concerned with what's going on with you.***[74]

…

Whether [Brandis Brown] *was beaten by Machel on the car – A whole long line of cross-examination about whether or not he used the verb 'beat' in his statement. We don't know what other verbs that he may have used. But all we can say is that he didn't use the word, "beat.*[75]

…

The conflicts between Brandis [Brown] *and others – walking off. That Brandis disagrees with Russell Pollonais. 'Cause Russell say, "I went in and pulled him off the car, I saved him from the blow out." … Brandis said clearly; "I was being beaten, I didn't have a clue what was going on. All I was doing was brakesin and all I know was, I end up off the bonnet on …Keate Street. I start to walk down Pembroke Street, ah call meh friend on the phone to talk." …Brandis Browne was only willing to give evidence about things that happened to him. So when he was asked, "Did X drink this, did Y do that?" He was like "I don't know I can't say."*[76]

…

In great detail Browne continued his testimony saying … "I was being punched all over my body. I really can't say how long I was being punched, for. It was about a minute. I am not sure what happened next, but I end up getting on the other side. Ah get pushed on the left side and I end up sliding off the right side and ah saw Russell there and ah walk away from the crowd." ***So if it is true as***

[73] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 62, lines 28-37 - Closing address of Mr. Busby.
[74] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 62, lines 38-49 to page 63, lines 1-2 - Closing address of Mr. Busby.
[75] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 65, lines 3-7 - Closing address of Mr. Busby.
[76] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 65, lines 15-30 - Closing address of Mr. Busby.

suggested that these witnesses have come to concoct this story, one might expect Brandis to say, "Russell come and pulled me off the bonnet…[77]

…

Specific conflicts between Brandis and Janelle. Well, like I said, Brandis' evidence with respect to his assault and that is the only thing he gives in common with Janelle, is just that No. 1 was part of this group of people that were beating him. What is raised here? ***That Janelle said that he was flung across the road. Yes, okay. Janelle's evidence on that part is quite frankly incredible. Does that mean that all of Janelle's evidence falls by the wayside? In my respectful submissions, certainly not****. But that of course is a matter for Her Worship…"Did the bouncers hit Brandis Brown?" But Brandis said, he don't know – She* [Janelle Lee Chee] *says, the bouncers did…."Brandis say no." "After having said earlier, "I doh really know who was beating me. Ten or eleven people I can't identify." Is this an attempt? …* ***What is the deception? Janelle want to say the bouncers hit Brandis, because she*** **[saw]** ***the bouncers hit Brandis. And Brandis the man self say, "No." Any of the bouncers in this dock here? So what's the purpose of that deception? Is that a major or minor issue Ma'am? It's minor."***[78] (sic) [emphasis added]

Analysis and Reasoning:

(96) We begin our analysis of the arguments in this regard by reminding ourselves of the circumscribed role of a Court of Appeal, which never has the inestimable advantage of direct observation of witnesses but rather only a paper record of the proceedings. In the decision in **Wayne Rodriquez v Thomas Nimblett Police Sgt. #7340**[79], Archie, J.A. (as he then was) said at paragraph 13:

"*[13]****Where a finding of fact is based on an assessment of truthfulness of a witness, it is axiomatic that an Appellate Court ought not to overturn it unless the magistrate has so clearly misconstrued the evidence, or palpably failed to consider the weight and the significance of the relevant circumstances as established or disproved on the evidence.*** *Where inferences are drawn from primary findings of fact, the Appellate Court may more readily intervene but*

[77] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 65, line 38 to page 66, line 12 - Closing address of Mr. Busby.
[78] See the Transcript of the Proceedings dated the 2nd April, 2012 at page 66, lines 18-40 - Closing address of Mr. Busby.
[79] Mag. App. No. 308 of 2003.

should not substitute its own view if the conclusion reached by the fact finder is reasonably supported by the evidence." [emphasis added]

(97) In submissions of no case to answer made by counsel for Montano, Roberts and their co-defendants, the evidence of the prosecution witnesses were discussed and several inconsistencies and contradictions were raised.

(98) After hearing the submissions of no case to answer, the magistrate said:

> *"All right, now having carefully considered the evidence and submissions made by counsel, the respective counsels, on behalf of their clients, and in response to those submissions, the Court finds that there is a case to answer against all four Defendants, they are called upon to answer the charges."*[80] (sic)

(99) A review of the evidentiary record shows that the present case turned principally on issues of fact. At the stage of the submission of no case to answer, the magistrate was well assisted on the law and the facts by written and oral submissions made by counsel for Montano, Roberts and their co-defendants. There is nothing to suggest that the magistrate, with her requisite knowledge and experience, further assisted by counsel on these issues, did not properly deal with the submissions of no case to answer.

(100) Several inconsistencies were highlighted by counsel for the defendants/appellants in the court below, some of which include:

- **Whether Ganga stepped on Montano's foot.**

Helen Ganga[81]:

Q: You do not know if you mashed his foot?
A: I did not mash his foot.

[80] See the Transcript of the Proceedings dated December 8th, 2010 at page 1, lines 19-24.
[81] See the Transcript of the Proceedings dated June 5th, 2008 at page 73, lines 41-45 and page 74, lines 20-25 – Cross-examination by Ms. Seetahal.

Q: You did not mash his foot, you are conscious of that?
A: Yes
…
Q: But given the close proximity you were to the defendant, some two feet away, Ms. Ganga, you will accept that it is possible that when you all were moving around you could have trod on his feet?
A: It's possible.

- **Whether Ganga and Bowrin were facing each other whilst dancing.**

Helen Ganga[82]:

Q: So you and Gerard were dancing, how were you dancing? Could you describe how you all were dancing?
A: Not very close but we were holding each other and dancing.
Q: Okay. Now you said "you were holding each other", were you facing each other?
A: Yes we were.

Gerard Bowrin[83]:

Q: How were you dancing, that's what I want to know.
A: Well I was behind her.
Q: Yes.
A: Taking a flex
…
Q: …How close were you to her, explain that to us, just briefly?
A: Well I was holding her waist.
Q: Right, yes.
A: And we didn't gyrate, but we were close to each other dancing.

- **What occurred after Ganga's drink spilled on Montano?**

Helen Ganga[84]:

Q: …The drink fell on the floor, what happened next, that you know about for sure?
A: Okay, it spilled on the floor and apparently Mr. Montano got wet.

[82] See the Transcript of the Proceedings dated June 5th, 2008 at page 16, lines 25-31 – Examination in Chief.
[83] See the Transcript of the Proceedings dated December 4th, 2008 at page 7, lines 22-36 – Examination in Chief.
[84] See the Transcript of the Proceedings dated June 5th, 2008 at page 18, lines 5-14 – Examination in Chief.

Q: What happened next?
A: We moved across to him to say sorry.
Q: Who is the "we" who moved across to him to say sorry?
A: Gerard and I.

Gerard Bowrin[85]:

Q: And then you said, "After this drink spilled that is when the incident happened." Describe the incident that happened, after the drink fell?
A: Well, I heard Machel saying, "Yuh throw yuh drink on me, yuh f-ing throw yuh drink on meh boy."
…
Q: Now, when you say "f-ing", did he use "f-ing", was that the word he used?
A: No, he used the word, "f-ing", but he used the explicit word.
Q: He used the what?
A: Explicit word.
Q: The explicit word, and could you just use the explicit word, just this once so that we would know what it is?
…
*A: He say, "F***ing".*

Helen Ganga[86]:

Q: …What happened next?
A: I just saw the bouncers from the club, they held on to us and put us straight out of the club.

Helen Ganga[87]**:**

Q: And they forcibly removed you all by holding on to your arms?
A: Yes.
Q: And that would be you?
A: Yes.
Q: Gerard?
A: Yes.
Q: And Janelle?
A: Yes.

[85] See the Transcript of the Proceedings dated December 4th, 2008 at page 8, lines 13-32 - Examination-in-chief.

[86] See the Transcript of the Proceedings dated June 5th, 2008 at page 19, lines 43-46 - Examination-in-chief.

[87] See the Transcript of the Proceedings dated June 9th, 2008 at page 6, lines 14-22 - Cross-examination by Ms. Seetahal.

Janelle Lee Chee[88]**:**

Q: After you spoke to your sister, what if anything happened?
A: The crowd parted right where I was and the bouncers just started moving everyone and we got pushed further to that could have been the left.
…
Q: …Yes, so the bouncers caused you and your group to be moved to the left, you said?
A: Initially, yes.
Q: …Did you notice, at that time, what became of No. 1 Defendant?
A: Ah, he was pushed, also to the left, and he – in a way that he became- he was standing in front of me, but someone was - hands was almost separating, is just how the crowd was parted, he end up in the same side where I was, and in front of me again.
Q: What next happened?
A: I spoke to him for a while, I explained that, you know, is a child, is no big deal is just a drink…
Q: Who are you referring to, "a child."
A: Gerard…
Q: …Did you say anything else to him?
A: Yeah. I asked him, "Why you getting on so, you know? We are fans, is no big deal."
Q: How was he getting on?
A: Ah, at first he was calm and somehow or the other, he held my hands, and he's like "I know, I know, but I told him to f-ing leave me alone" or something like that, and then, he got really erratic after that.
…
Q: At first you said he was calm, but did that change?
…
A: Yeah, he kept, almost repeating that he said to f-ing leave him alone, and started shaking me like this, "vigorously", I guess, would be the word.
Q: What happened next?
A: The bouncer who was nearby separated us again, when they saw the commotion, and …
Q: Yes?
…
A: And this time, we were pushed out of the dance floor, into the lobby area?
Q: …Did you remain in that lobby area?
A: No, not for long, we had to leave the club, so….

[88] See the Transcript of the Proceedings dated May 29th, 2008 at pages 46, lines 30-34, page 49, lines 27-36, page 50, lines 8-24, page 51, lines 19-25, page 52, lines 45-47, page 53, lines 9-11, 32-34 - Examination-in-chief.

- **Whether Ganga and Bowrin went over to apologize to Montano after the drink was spilled.**

Helen Ganga[89]**:**

Q: What happened next?
A: We moved across to say sorry.
Q: Who is the "we" who moved across to him to say sorry?
A: Gerard and I.

Gerard Bowrin[90]:

Q: After the drink fell, you remained where you were and then you say Machel Montano came over, is that what happened? Yes.
A: Yes, ma'am.
…
Q: He approached you, he was behind you, you said?
A: Yes ma'am.
Q: And then you turned around?
A: Yes, ma'am.
Q: So, it would not be true to say, that after the drink fell, you and Helen went across to Machel to say sorry?
A: No, ma'am.
Q: That did not happen?
A: Not, that, I know of no.
Q: Well it's you I am talking about, you know?
A: Well I don't know if she went to apologize.
Q: You.
A: Me, I didn't went to apologize.
….
Q: Instead what you are saying is that Machel came over to you and spoke with you?
A: Yes, ma'am.

- **Whether there was pushing and shoving between Bowrin and Montano.**

Helen Ganga[91]:

Q: When you got to him, what did you do?

[89] See the Transcript of the Proceedings dated June 5th, 2008 at page 18, lines 5-14– Examination in Chief.

[90] See the Transcript of the Proceedings dated December 4th, 2008 at page 63, lines 14-46 - Cross-examination by Ms. Seetahal.

[91] See the Transcript of the Proceedings dated June 5th, 2008 at page 18, lines 21-26 – Examination-in-chief.

A: We said, "sorry". I said, "sorry", Gerard said "sorry".
Q: Yes, what happened next?
A: And he pushed us off, he cursed us and he pushed us off.

Gerard Bowrin[92]:

Q: So it would not be true to say, let me get this clear, that there was pushing and shoving between you and Machel that night?
A: No ma'am.

- **How was Bowrin slapped by Montano?**

Helen Ganga[93]:

Q: Yes, and after you and Gerard said, "We are just telling you, "sorry." What happened next?
A: As soon as we turned around to leave and Gerard looked back…
Q: Yes?
A: …Mr. Montano slapped him twice across his face.

Gerard Bowrin[94]:

Q: Yes, and when he said this-these words, what did you do?
A: I turned around.
Q: Yes, and anything else happened?
A: Yeah, he slapped me.
Q: Where did he slap you?
A: On the side of my face.
Q: Which side?
A: Left.
…
Q: And after he slapped you with his right hand, what happened next?
A: The bouncers in Club Zen pulled me away from Machel Montano.
…
Q: And what happened after he pulled you, the bouncer that is?
A: Machel Montano came again, and hit me another slap.

[92] See the Transcript of the Proceedings dated December 4th, 2008 at page 57, lines 24-27 – Cross-Examination by Ms. Seetahal.
[93] See the Transcript of the Proceedings dated June 5th, 2008 at page 19, lines 8-14 – Examination-in-chief.
[94] See the Transcript of the Proceedings dated December 4th, 2008 at page 8, lines 40-47, page 9, lines 1, 46-47 and page 10, lines 1-2, 24-27 - Examination-in-chief.

- **Whether Brown was hit by Montano with a glass.**

Brandis Brown[95]:

Q: So, when you were in that position and Defendant No. 1 was where he was, did anything happened?
A: Yeah, I asked him, "whey yuh slap the young boy for?"
….
Q: And did Defendant No. 1 reply to your question?
A: Yeah.
Q: What did he say?
A: He shouted, "You was f-ing dey" and he start to approach meh….
…
Q: ….After he started to approach you, what happened next?
A: He hit meh in meh face, in meh eye.
…
Q: Which eye did he hit you in?
A: Left eye.
Q: With what did he hit you in your left eye?
A: The glass, a glass he was drinking with.

Brandis Brown[96]:

Q: And to the media [In the statement to the police] *on the 27th you said you were hit with champagne glass?*
A: Yes.
Q: You gave the statements to the police the very day of the incident, the 26th?
A: Yes.
Q: And in that statement you said "Machel then approached me and hit me with something he had in his hand'?
A: I told the police it was a glass you know.
…
Q: … In your statement to the police…
A: Yes.
Q: You never mentioned – there is nothing included about a glass, that you were hit with a glass?
A: Okay.
Q: I am asking you, do you know that?
A: Yes.

[95] See the Transcript of the Proceedings dated September 4th, 2008 at page 18, lines 4-39 – Examination-in-chief.
[96] See the Transcript of the Proceedings dated September 4th, 2008 at page 37, lines 4-13, 29-37 – Cross-examination by Ms. Seetahal.

Brandis Brown[97]:

Q: …In your statement to the police you said this that "Machel approached me and hit me with something he had in his hands I cannot remember,' okay?
A: Yes.

- **Whether Brown was assaulted by Montano on a car.**

Brandis Brown[98]:

Q: Now, when you were on the bonnet like that, as you have told us, was anything happening?
A: Yeah, well the group converged and start to beat up on meh on the bonnet.
Q: Now, you said the group converged, which group is this that you are talking about?
A: The same group that came out of the nightclub with Machel Montano, him including.

Brandis Brown[99]:

Q: …you told the police that your statement that they read to you was correct?
A: Yeah.
Q: And you said it was true?
A: Yes.
…
Q: And you said he beat you after hitting you – why didn't you say, now, and you have also said about he beat you in the car?
A: Yes.
Q: Was there anything that prevented your telling the police this, that day, when you gave that statement?
A: No, I told it to them.
Q: You told the police officer that, but it's not in your statement?
A: No, it's not there.
Q: And you said that that statement was correct?
A: Yes.
Q: So, you are saying then… that the police left out thing that you told them?
A: They left out some of the details.
…
Q: They left out that you said Machel beat you with a group of men, after he hit you, that is what you are saying?
A: Ah guess so yes.

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[97] See the Transcript of the Proceedings dated September 4th, 2008 at page 47, lines 24-28 – Cross-examination by Ms. Seetahal.
[98] See the Transcript of the Proceedings dated September 4th, 2008 at page 21, lines 28-35 - Examination-in-chief.
[99] See the Transcript of the Proceedings dated September 4th, 2008 at page 48, lines 19-23 and page 49, lines 9-33 - Cross-examination by Ms. Seetahal.

Q: You are saying that?
A: Yes.

- **How did Brown escape from the altercation?**

Brandis Brown[100]:

Q: Now, after the minute now, what happened next, you were being punched on the car for the minute, what happened next?
A: Ah not sure but, I end up getting out on the other side, ah get pushed on the left side, and ah end up sliding off the right side, and then ah saw Russell there and ah walk away from the crowd.
…
A: Ah got off the bonnet…
A: And then ah saw Russell and then he end up holding meh up and we walk down the street.

Russell Pollonais[101]:

Q: Could you see where on his [Brandis Brown's] *body they were beating him?*
A: They were beating him from the waist up, more on his chest and face.
Q: And what did you do? Upon seeing that, did you do anything?
A: Well, I ran across to pull Brandis away from them.
Q: And were you able to pull Brandis away from them?
A: I pushed in between Machel Montano and his friends, and Brandis, and I covered Brandis with my body, and dragged him off the bonnet of the car, onto the road.

- **Whether Brown was assaulted by the bouncers.**

Brandis Brown[102]:

Q: Right, it's correct to say that none of the bouncers ever hit you, correct?
A: Yeah, that is correct.

[100] See the Transcript of the Proceedings dated September 4th, 2008 at page 22, lines 32-38 and page 23, lines 2-8 - Examination-in-chief.
[101] See the Transcript of the Proceedings dated June 17th, 2008 at page 27, lines 9-22 – Examination-in-chief.
[102] See the Transcript of the Proceedings dated September 4th, 2008 at page 68, lines 33-35 – Cross-examination by Mr. Williams.

Janelle Lee Chee[103]**:**

Q: "They were all punching him." The person whom they were punching, do you know that person's name?
A: At that time? No. Now, soon after, I found out it was Brandis.
…
Q: The bouncers?
A: Yes.

Janelle Lee Chee[104]:

Q: The bouncers, did you see them strike Brandis?
A: Some of them.
Q: These are the ones in black, or the outside ones in yellow?
A: Mostly the ones in black. Those in yellow – some of those in yellow, were trying to – to get in to break things apart.

- **Whether Pollonais was assaulted by Montano.**

Russell Pollonais[105]:

Q: Yes, after you said, you are not looking for any trouble, did anything else happen?
A: He said, "I don't want to hear anything, f- you."
Q: Could you recall who said that…
A: Machel Montano.
Q: And what happened next, after he said these words?
A: Well, as he said those words, he and his friends charged towards me.
…
Q: Yes, and after you saw the Defendant No. 1 and his group in front of you, when you raised your head up?
A: At this point, he swung at me.
Q: And who is the he?
A: Machel Montano.
Q: When you say he swung at you, swung at you with what?
A: With his fists.

[103] See the Transcript of the Proceedings dated May 29th, 2008 at page 63, lines 35-47 - Examination-in-chief.
[104] See the Transcript of the Proceedings dated May 29th, 2008 at page 66, lines 31-38 - Examination-in-chief.
[105] See the Transcript of the Proceedings dated June 17th, 2008 at page 32, lines 15-25 and page 34, lines 24-32 - Examination-in-chief.

Russell Pollonais[106]:

Q: The 27th of April was the day you gave a statement to the police first, in this matter?
A: Yes.
Q: Right. And when you gave that statement, the statement was read over to you, Mr. Pollonais?
A: Yes.
…
Q: And was it correct, you said it was correct?
A: Yes…
…
Q: Now nowhere in that statement that you gave to the police, Mr. Pollonais, did you ever say that Machel Montano, Defendant No. 1, beat you? Do you agree with me, or you don't agree with me?
A: I agree with you.
Q: You did not say that?
A: I did not say that he beat me.

Russell Pollonais[107]:

Q: Okay, and that …statement was true?
A: Yes.

- **Who returned to the maxi-taxi?**

Helen Ganga[108]**:**

A: When I heard that statement, as I said, I crossed the street with Gerard, I started walking with him, with some of the others. We were trying to get back to the maxi.

Helen Ganga[109]**:**

Q: Who was walking with you at that time, to get back to the maxi?
A: At that time it was just Gerard and I, whilst the others, they were just trying to gather everybody else.

[106] See the Transcript of the Proceedings dated June 17th, 2008 at page 54, lines 10-33 - Cross-examination by Ms. Seetahal.
[107] See the Transcript of the Proceedings dated July 2nd, 2008 at page 7, lines 15-16 – Cross-examination by Ms. Seetahal.
[108] See the Transcript of the Proceedings dated June 5th, 2008 at page 24, lines 2-5 - Examination-In-Chief.
[109] See the Transcript of the Proceedings dated June 5th, 2008 at page 24, lines 9-13 - Examination-In-Chief.

Analysis and Reasoning:

(101) We are of the view that none of the inconsistencies and contradictions that arose on the prosecution's case were on material issues.

(102) A number of inconsistencies and contradictions highlighted above concerned purely peripheral issues, for example:

(i) Whether Ganga and Bowrin were facing each other whilst dancing;
(ii) How did Brown escape from the altercation; and
(iii) Who returned to the maxi-taxi.

(103) There were also inconsistencies and contradictions dealing with issues that were neither peripheral nor core, examples of which include:

(i) What occurred after Ganga's drink spilled on Montano;
(ii) How was Bowrin slapped by Montano;
(iii) Whether Brown was assaulted by Montano on a car;
(iv) Whether Pollonais was assaulted by Montano; and
(v) Whether Brown was assaulted by the bouncers.

(104) There were quite a few inconsistencies and contradictions falling under this second category, identified in paragraph 103 above, that is, on issues that were neither peripheral nor core, and as such, cumulatively, they cannot be described as ***de minimis***. As a result of their combined effect, this Court, in order to properly carry out its function, needed to have the benefit of reasons to see how the magistrate dealt with these inconsistencies and contradictions which ***might*** have had the potential of affecting the credibility and reliability of the prosecution witnesses.

[B] THE ABSENCE OF REASONS FOR THE REJECTION OF THE EVIDENCE OF THE APPELLANTS

The Law:

(105) In the decision in **R. v. Gharabaghi**[110], Arnold-Bailey J. allowed an appeal from conviction on the basis that the trial judge failed to give adequate reasons. In coming to her conclusion, the Learned Judge said at paragraph 67:

> *"[67] The trial judge did not engage in an analysis of the credibility or reliability of the testimony of the appellant. Similar to the decision in V.K., the trial judge in this case said that the appellant's testimony "does not make sense or ring true," but did not explain this finding any further.* ***His reasons are similar to those which were overturned in D.(S.), in which the trial judge analyzed the complainant's evidence in detail and explained why she accepted it, but did not similarly explain why she did not believe the appellant, and why his evidence did not leave her with a reasonable doubt. In my opinion, the trial judge committed the same error in this case. His analysis of the appellant's testimony does not sufficiently explain why it did not raise a reasonable doubt, and nor does it meet the appellant's entitlement to reasons that explain the finding of credibility against him and his consequent conviction.****"* [emphasis added]

(106) Similarly, in **R v Gatzke**[111], the Court held that the failure of the trial judge to provide an explanation for rejecting the appellant's evidence, in the evidentiary context of that case, constituted a reversible error. This was especially important since the appellant's evidence in that case was, according to the Court, ***"not self-evidently incredible or unreliable"***.

(107) In **Hunter v Transport Accident Commission and Avalanche**[112], the Court held that insofar as a judicial officer may have rejected evidence or other material upon which a party relied, he should refer to that evidence or material and explain why it was rejected.

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[110] **Gharabhagi** (n. 41).
[111] **Gatzke** (n. 10).
[112] **Hunter v Transport Accident Commission** (n. 43).

Analysis and Reasoning:

(108) It is impossible from the evidentiary record to necessarily imply or to glean why the magistrate disbelieved or was doubtful about the evidence of the appellants. With regard to the evidence of the appellants, while it was no doubt quite open to the magistrate to reject it for a variety of reasons, the evidence in this case cannot be properly characterised as being, for the limited purpose of appellate review, ***"self-evidently incredible or unreliable"***: see **R v Gatzke**[113]. All the magistrate said was that she found the appellants Montano and Roberts guilty of the offences against them and that she found their co-defendants, Feveck and Le Blanc, not-guilty of the offences against them: see paragraph 27 above.

(109) The submissions proffered by Mr. Busby are alluring but ultimately, we cannot accept them for the following reasons:

(i) The case turned principally on issues of credibility;

(ii) Some of the inconsistencies and contradictions on the prosecution's case cannot be clearly classified as being on purely peripheral issues;

(iii) In respect of that category of inconsistencies and contradictions, ***the magistrate failed to articulate any credibility findings*** relating to those issues or to provide any discernible path of reasoning permitting this Court to determine whether her conclusion was supportable by relevant and reliable evidence;

(iv) It is ***impossible from the evidentiary record to necessarily imply or to glean the path of reasoning*** of the magistrate in dealing with the issue of the non-peripheral contradictions/inconsistencies on the prosecution's case;

[113] **Gatzke** (n. 10).

(v) In **R v Dinardo**[114], Charron J. explained that where a case turns largely on determinations of credibility, and there is a failure on the part of the judicial officer to articulate how those credibility issues were resolved, this may constitute a reversible error: see also **Sagl v. Chubb Insurance Company of Canada**[115] and **R v Gatzke**[116]; and

(vi) The magistrate, in essence, without any analysis, however brief, failed to explain why the evidence of the two appellants was rejected and how the issue of the non-peripheral inconsistencies/contradictions was addressed. The *"conclusory reasons"* therefore did not meet the important purposes set out in **R v Sheppard**[117], of justifying and explaining the result of the convictions and of telling the losing parties why they lost.

(110) We find merit in the submissions made on behalf of the appellants on these issues. It is principally the convergence of these two factors, namely (i) the magistrate's failure to articulate any credibility findings in respect of the inconsistencies and contradictions in the evidence of the prosecution witnesses that were not entirely peripheral and (ii) the absence of any reasoning on the part of the magistrate for the rejection of the evidence of the appellants, which have lead us to our decision.

(111) It can be facile to overlook the central problem in this appeal. In fairness to the magistrate, she might well have intended to produce written reasons in the fullness of time before events intervened. On the other hand, the matter before her occupied a substantial period of time, approximately five years, from the time that evidence started being adduced to the determination of the matter, and the magistrate had the benefit of extensive submissions. Yet, after all of this, the pronouncement of her decision was entirely unaccompanied by even the briefest of oral reasons which might have shone some light on her analysis of the substantial issues in dispute, in particular, the two which we have identified above. A few lines of explanation in the giving of the

[114] **Dinardo** (n. 13).
[115] **Sagl** (n. 38).
[116] **Gatzke** (n. 10).
[117] **Sheppard** (n. 7).

oral decision might have had the potential to make a difference. With that in mind, we have made some suggestions at the end of this judgment, at paragraphs 153-159, which we respectfully urge magistrates to follow.

[C] THE COMPLEXITY OF THE CASE

Law, Analysis and Reasoning:

(112) In the case at bar, Montano was charged with the offences of common assault, assault occasioning bodily harm and using obscene language to the annoyance of persons while Roberts was charged with the offences of assault occasioning bodily harm. These offences are relatively simple ones, the law on which is fairly uncomplicated. A review of the record of appeal showed that the issues presented in the case were mostly factual, as opposed to being legal in nature.

(113) Further, although the case involved a joint enterprise, it was not a complicated one, for example, where there was a principal participant in the commission of the offence or where one of the participants went beyond the scope of what was planned or intended. This case involved four persons joining in to commit a single crime in circumstances where they were, in effect, joint principals. This type of joint enterprise liability is the most basic variety and has been referred to by some as "the plain vanilla version of joint enterprise". The phrase was used by Lord Bingham in **R v Rahman and Others**[118] at paragraph 9 by his citation of what Lord Hoffman said in **Brown v The State**[119] at paragraph 8, that is:

> *"[8]The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in*

[118] [2008] UKHL 45.
[119] [2003] UKPC 10.

carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability…"

(114) With respect to the visual identification of the appellants, we note the following in respect of each appellant:

Machel Montano:

(115) The evidence implicating Montano in the assault of Pollonais came from the eye witness testimony of Lee Chee, Pollonais and Forde, while the evidence implicating him in the assault of Brown came from the eye witness testimony of Lee Chee, Brown and Pollonais. Both Bowrin and Ganga gave evidence implicating Montano in the assault of Bowrin. With respect to the assault of Lee Chee, she was the sole witness who gave evidence against Montano. Further, in respect of the charge of using obscene language to the annoyance of Forde, the evidence came from Forde herself.

(116) In our view, the identification/recognition of Montano was not an issue in the case as he gave evidence that he was present at the place where the incident occurred on the night in question and that he had interactions with the named individuals. Further, Montano, being an actor, singer/songwriter and producer, has had a career spanning more than thirty years and is known both locally and internationally for his music and performances.

Kernel Roberts:

(117) The evidence implicating Roberts in the assault of Pollonais came from the eye witness testimony of both Lee Chee and Forde while Lee Chee alone gave evidence that he was involved in the assault of Brown.

(118) We find that the identification of Roberts was not an issue in this case. It is noteworthy that Roberts was positively identified by Lee Chee, Forde and Pollonais at an identification parade comprised

of persons who were selected by his attorney-at-law. Only Barrington was unable to identify Roberts at the identification parade. Roberts also gave evidence that he was present at the place where the incident occurred on the night in question. Roberts is also involved in the local music industry and is a known singer/songwriter and producer.

(119) For the reasons explained above, the present case was not a legally complicated one with respect to the issues of identification/recognition, joint enterprise and the types of offences charged. The case only appears to be legally complex from a superficial observation of it. However, consistent with what was argued before the magistrate, that each defendant must be treated separately, we find that when the case for each of the four defendants was considered independently, the cases were legally straight-forward.

(120) Factually however, the case cannot be characterized as being uncomplicated. Apart from the two issues identified at paragraph 110 above, this Court needed to have the benefit of the magistrate`s reasons to see which evidence she accepted and which she rejected, especially since on the facts of the case, there were different prosecution witnesses who implicated different defendants in respect of different charges. The magistrate thus needed to demonstrate an appreciation of this differentiation. The absence of reasons in this regard adds to the difficulty which this Court faces in performing an effective appellate review function.

[D] GOOD CHARACTER

Submissions made to the Magistrate:

(121) In his closing address, Mr. Busby set out the law on good character as follows:

> *"It is very important for the Court to note that Defendants Nos. 1 and 2 both gave evidence and are men of good character in that they have no previous convictions and are the recipients of several awards in their field of endeavour. In these circumstances, they are entitled to the benefit of a good character direction, which is relevant in the following way:*

> *'Good character is not a defence to the charges but it is relevant to your consideration of the case in two ways.* ***First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept what he told you. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is not alleged against him." – Judicial Studies Board of the United Kingdom Crown Court Bench Book March 2010 at page 164.***
>
> *The position with Defendants Nos. 3 and 4 is somewhat different in that neither of them have chosen to give evidence. They are, however, both men of good character in that they have no previous convictions. In these circumstances, they are entitled to the benefit of a good character direction which is relevant in the following way:*
>
> *'The fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him.' - Judicial Studies Board of the United Kingdom Crown Court Bench Book (March 2010 at page 164)."* [120] [emphasis added]

The Law:

(122) In **Jeffrey Nelson v Cpl. Singh**[121], Mendonca J.A., after referring to the principles enunciated by Lord Carswell in **Teeluck and Another v The State**[122], said at paragraph 34:

> *"[34]* ***Of course the Privy Council was there dealing with the question of good character in the context of a direction to a jury. Where the appeal is from a Magistrate the position is no different. Where the defendant is of good character, the Magistrate must give consideration to it and show, in his reasons, an awareness and appreciation of the issue, the relevant law and evidence, and that he considered it*** *(Sylvan v Ragoonath and Ors (1966) 11 WIR 33, 36). In Magisterial Appeal No. 3081 of 2003 Rodriguez v Nimbett, the Court of Appeal quashed a conviction on the basis, inter alia, that the Magistrate failed to show*

[120] See Part 1 of the Closing Address of the Prosecution dated the 19th March, 2012 at Tab 4 of the Written Arguments Filed on behalf of the Respondent; see also the Transcript of the Proceedings dated the 19th March, 2012 at page 13, lines 10-50 and page 14, lines 1-36.
[121] Mag. App. No. 55 of 2005.
[122] [2005] UKPC 14.

that he considered the question of the accused's good character." [emphasis added]

(123) The issue of a magistrate's failure to consider a good character direction was addressed in the decision of this Court in **Wayne Rodriguez v. Thomas Nimblett Police Sgt. #7340**[123]. On this issue, Archie, J.A. (as he then was) said at paragraph 18:

> *"[18] It is now generally accepted that a defendant's previous good character is relevant to an assessment both of his general credibility, or truthfulness and of the likelihood of him committing the offence/s charged (i.e. propensity). It is not a defence, nor is the prosecution required at any stage to disprove the defendant's good character in order to secure a conviction. It is merely a factor to be taken into consideration. There is always a first time before the Court for every criminal. The challenge is in deciding what weight should be afforded to the evidence of good character and, where it was not considered, to decide whether a conviction which is otherwise reasonably sustainable on the evidence should be allowed to stand.*

(124) At paragraph 23, Archie J.A. said:

> *"[23] As a general rule, where there is evidence of good character, magistrates ought to remind themselves of that in reaching their decisions, and to accord to it such weight as they deem to be appropriate. That consideration should be specifically reflected in their written reasons as part of their duty to give and to transmit to the Appellate Court all of their findings on the material issues in the case and the reasons upon which they are based: Sylvan v Ragoonath & Ors. (1966) 11 W.I.R. 33."*

Analysis and Reasoning:

(125) Montano and Roberts, both being men of absolute good character, would have been entitled to have their good character taken into account by the magistrate, both in respect of credibility and propensity. In our opinion however, there is no reason to assume that the magistrate did not have the good character of both Montano and Roberts in mind when she reviewed the evidence in the

[123] **Wayne Rodriguez** (n. 79).

case and arrived at her decision to convict them. The magistrate was explicitly addressed on the legal relevance of the good character of Montano and Roberts, which emerged in their evidence. In the closing submissions by prosecuting counsel, he indicated to the magistrate the need to consider both the credibility and propensity limbs of good character in relation to Montano and Roberts.

[E] INCONSISTENT DECISIONS

Submissions made to the Magistrate:

(126) In his closing address, Mr. Persad submitted that:

> *"...Because the charge against my client involves an allegation in which he was jointly charged with three other persons,* ***it is important that this Court does not lose sight of the fact that as a matter of law, the Court is, in analysing the case against Mr. Le Blanc, required to consider the case against each defendant separately. And where the evidence is different – that the verdict need not be the same*** *and I refer to Archbold 2007 edition…paragraph 4-377… 'the jury should be directed to give separate consideration to each count' and they cite several cases, Fisher, Lovsee and Peterson…"*[124] [emphasis added]

(127) Mr. Busby, in his closing address, said:

> *"Where there are multiple Defendants and several charges, the tribunal of fact must consider the case as set out in the Hong Kong Bench Book Specimen Directions in Jury Trials, December 2009:*
>
> *'****<u>Two or more defendants and one count</u>***
>
> ***You must consider the case against and for each defendant separately. [The evidence concerning each defendant is different and therefore your verdicts need not be the same].***

[124] See the Transcript of the Proceedings dated the 27th October, 2011, at page 5, lines 18-36 - Closing address of Mr. Persad.

<u>One defendant and two or more counts</u>

You must consider the case against and for the defendant on each count separately. [The evidence concerning each count is different and therefore your verdicts need not be the same].

<u>Two or more defendants and two or more counts</u>

You must consider each count separately and the case against and for each defendant separately on each count. [The evidence concerning each count and each defendant is different and therefore your verdicts need not be the same]."[125] [emphasis added]

The Law:

(128) In the decision in **<u>R v McKechnie</u>**[126], the English Court of Appeal noted that:

> *"Not every inconsistency between verdicts justifies interference by this Court. The principle well established in a number of cases is that where there is such an inconsistency the Court of Appeal will only intervene to quash a conviction where the appellant establishes that no reasonable jury could properly have reached the verdicts that they did: see R v Drury (1971) 56 CrAppR 104 and R v Durante* [*1972*] *1 WLR 1612, 1617."*

(129) The Court in **<u>R v Durante</u>**[127] approved the following statements of Devlin J. (as he then was) in the unreported case of **<u>R v Stone</u>**[128]:

> *"When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly on him. He must satisfy the court that the two verdicts cannot stand together,*

[125] See Part 2 of the Closing Address of the Prosecution dated the 19th March, 2012 at Tab 5 of the Written Arguments Filed on behalf of the Respondent.
[126] (1992) 94 Cr. App. R. 51.
[127] [1972] 1 WLR 1612.
[128] (Unreported), December 13, 1954, CCA.

meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they were an unreasonable jury or, that they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is on the defence to establish that."

(130) In **Vivian Clarke et al v The State**[129], Weekes J.A., at paragraph 31, referred to the decision in **R v Aldred and Another**[130] where Ebsworth J. noted that, "*there may be all sorts of valid reasons why the jury may be convinced by a witness on one count but not another."* Weekes J.A. went on to say at paragraph 31:

> *"[31] …Equally, there may be a number of valid reasons why a jury may be convinced by a witness with respect to his evidence about one accused but not another. A jury provides no reasons for its decision and an appellate court is not at liberty to speculate but once it can ascribe logic and reason to the differing decisions, the jury's verdict cannot be said to be inconsistent."*

(131) In the Canadian decision in **R v Pittiman**[131], the accused was jointly charged with two co-accused of sexual assault against a fourteen year old virtual complainant. Following a trial by jury, the accused was convicted and his co-accused acquitted. He appealed his conviction on the basis that the verdicts were inconsistent. On this issue, Weiler J.A. said at paragraph 17:

> *"[17]....**where several accused are jointly charged with the same single offence, it is not possible to characterise inconsistent verdicts against co-accused as unreasonable unless the evidence against both is identical…** The fact that one accused was convicted while other co-accused were acquitted on similar evidence does not mean that the person convicted is entitled to an acquittal. **In cases involving multiple co-accused charged with the same count, the Crown's case may be significantly stronger against one accused than another, the evidence may indicate that one accused played a more dominant role, or, in cases where the accused testify, the jury may assess the demeanor of one accused differently, any of which would provide a basis on which to distinguish the culpability of the accused."*** [emphasis added]

[129] **Vivian Clarke** (n. 20).
[130] (1995) Crim L.R. 160.
[131] (2005) 198 CCC (3d) 308.

(132) On appeal to the Supreme Court of Canada[132], Charron, J. said at paragraph 9:

> *"[9] The reasonableness of a verdict in the case of multiple accused charged with the same offence will require a consideration of much the same factors. For example, the jury may accept the complainant's testimony as credible in respect of one accused, but reject the complaint against another.* ***The overall strength of the evidence relating to each accused may not be the same, leaving the jury with a reasonable doubt on the guilt of one, but not of the other. Of necessity, the case of multiple accused will also raise different considerations. For example, when considering a single accused who is charged with multiple offences, there is little to be gained by asking whether the evidence is the same. The evidence, by definition, will be different for each offence. Conversely, whether the evidence is the same will be the primary focus when considering inconsistent verdicts as between multiple accused charged with the same offence****."* [emphasis added]

(133) The decision of this Court in **Minnot et al v The State**[133] is also instructive. In that case, the appellants appealed against their convictions for possession of marijuana for the purpose of trafficking. The principal ground of appeal was that their convictions were inconsistent with the acquittal of a co-accused in the same circumstances. The Court opined that a conviction cannot be safe if it depends solely on evidence from a source which the jury has demonstrated by its acquittal of the same accused on another count (or of another accused on the same charge), it regards as unreliable. At page 362, de la Bastide C.J. (as he then was) set out six principles in dealing with the question of inconsistent verdicts, which he suggested were guidelines, but which were by no means exhaustive. These principles were stated as follows:

> *"(i) The Court of Appeal should be extremely slow to quash a conviction on the ground that it is supported by evidence from a source which must have been regarded by the jury as unreliable having regard to a Not Guilty verdict which they returned against the same accused on another count or against a co- accused on the same charge. If there is any plausible way at all of explaining how a reasonable jury might have reached the two verdicts, the Court of Appeal will not quash the conviction.*

[132] R v Pittiman [2006] 1 SCR 381.
[133] (2001) 62 WIR 347.

(ii) If there is any evidence to support the conviction which is confirmatory of, or supplementary to, the evidence which has been rendered questionable by the acquittal, this is sufficient to justify different verdicts and the conviction will be upheld.

(iii) If the implied rejection by a jury of a witness's evidence inherent in a verdict of acquittal can be explained on any basis which does not involve attributing to that witness an intention deliberately to mislead, eg faulty recollection, mistake, confusion, etc, a conviction based on other evidence from the same witness will not necessarily be regarded as unsafe.

(iv) Even if an acquittal connotes lack of confidence by the jury in the truthfulness of a witness, a conviction based on the unsupported and challenged evidence of that witness may nonetheless be upheld if from the evidence there is available some reasonable basis for believing that the witness may have lied in relation to the charge that failed, but told the truth in relation to the charge that succeeded.
(v) In determining whether it was reasonable for a jury to have accepted one segment or aspect of a witness's evidence while rejecting another segment or aspect of his evidence, it is material to consider how closely linked in terms of time, place and subject matter are the two segments or aspects of his evidence.

(vi) If an acquittal cannot be explained on any other basis but that the jury doubted the truthfulness of a witness, a conviction which depends on the jury having accepted that same witness as a witness of truth, cannot in the absence of some explanation of the jury's differing assessment of that witness' credibility, stand."

Analysis and Reasoning:

(134) It can be gleaned from the authorities referred to above that the similarity of the evidence is of great importance and critical to grounding an appeal based on inconsistent decisions. As such, we find it crucial to examine the similarities and differences between the cases for Montano and Roberts and their two co-defendants who were acquitted.

Machel Montano:

(135) Several witnesses, including Lee Chee, Pollonais and Forde gave evidence of Montano's involvement in the assault of Pollonais while Lee Chee, Brown and Pollonais testified against him with respect to the allegation of assault against Brown. Bowrin and Ganga both gave evidence implicating Montano in the assault of Bowrin. As to the offence alleging assault against Lee Chee, she gave evidence against Montano while Forde testified that he used obscene language to her annoyance.

(136) The case for Montano as set out both in his evidence and from the cross-examination of the prosecution witnesses was one of denial and fabrication. Counsel for Montano in the court below suggested that the evidence against him was concocted by the witnesses as they were upset about being ejected from the nightclub[134].

Kernel Roberts:

(137) Lee Chee and Forde gave evidence alleging that Roberts was a participant in the assault of Pollonais while Lee Chee alone gave evidence that he was involved in the assault of Brown. Roberts was positively identified by Lee Chee, Forde and Pollonais at an identification parade comprised of persons who were selected by his attorney-at-law. Only Barrington was unable to identify Roberts at the identification parade.

(138) The case for Roberts was one of denial and mistaken identity[135]. It was suggested to Lee Chee that as a result of her being "peeved", she concocted the evidence against Roberts.

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[134] See the Transcript of the Proceedings dated the 2nd July, 2008, at page 45, lines 22-44 and page 52, lines 15-17 - Cross-examination of Russell Pollonais by Ms. Seetahal; See the Transcript of the Proceedings dated the 13th August, 2008, at page 81, lines 18-24 - Cross-examination of Janelle Lee Chee by Ms. Seetahal; See the Transcript of the Proceedings dated the 24th October, 2008, at page 22, lines 24-33 - Cross-examination of Melissa Forde by Ms. Seetahal.

[135] See the Transcript of the Proceedings dated the 17th December, 2008, at page 4, lines 31-46 and page 13, lines 11-17 - Cross-examination of Janelle Lee Chee by Mr. Scotland.

Joel Feveck a/c Zan:

(139) As against Le Blanc, the evidence implicating him in the assault of Pollonais came from the eye witness testimony of Lee Chee and Forde. Both of these witnesses identified him by way of confrontation. Pollonais and Barrington did not point out Feveck during the confrontation.

(140) Before that night, Lee Chee said that she had only seen "Zan" "maybe two or three times" on television and in the media. She had never seen him "live". She also said that he was wearing sunglasses in the club on the night in question.

(141) Forde never mentioned the name "Zan" in the two statements which she gave to the police. She did however mention the name "Benjai" in her statements. In giving evidence, she explained that when she said the name "Benjai", the person she was referring to was in fact "Zan". When she went to the confrontation, she pointed out Feveck as the "Benjai" that she had referred to in her statements.

(142) The case for Feveck was one of mistaken identity[136].

Rodney Le Blanc a/c Benjai:

(143) As against Le Blanc, the evidence implicating him in the assault of Pollonais came solely from the eye witness testimony of Lee Chee. Pollonais, Barrington and Forde were unable to point him out at the confrontation.

(144) Before that night, Lee Chee had only seen "Benjai" "just like once or twice" on television and in the media. She had never seen him "live". Also, she said that she remembered his face because he "looked like someone who worked with her at Belgrove's." Lee Chee however, never mentioned "Benjai" by name or description in the statement which she gave to the police.

[136] See the Transcript of the Proceedings dated the 15th December, 2008, at page 35, lines 11-17 - Cross-examination of Janelle Lee Chee by Mr. Williams.

(145) The case for Le Blanc was also one of mistaken identity[137].

(146) The evidence for and against Feveck and Le Blanc was therefore not the same as that for and against Montano and Roberts. The magistrate, being the primary fact finder could therefore reasonably draw a distinction between the case for the appellants and the other co-accused so as to result in varying decisions. We therefore respectfully disagree with the submissions of Mr. Singh and Mr. Scotland in this regard, that the evidence against all four defendants was in all material ways identical and therefore the rejection of such evidence for two defendants and acceptance for the two convicted defendants could not be taken as rational. In our view, there is a reasonable, plausible explanation for the different decisions of the magistrate on the identification evidence. We are of the opinion that the decision to convict, decision to acquit and the overall factual findings were unexceptionable.

(147) It is noteworthy that an unequivocal inference can be drawn that the magistrate exercised fidelity to the legal submissions advanced before her and to the relevant principles of law and that she considered the cases for each defendant separately. This is reflected in her decision to acquit Feveck and Le Blanc and to convict the appellants.

❖ CONCLUSION AND APPLICATION

(148) We endorse the approach of the Canadian Courts in **R v Sheppard**[138], **R v R.E.M.**[139], **R v Vuradin**[140] and **R v Gatzke**[141], as well as the approach of the Australian Courts in **Hunter v Transport Accident Commission and Avalanche**[142] and **Franklin v Ubaldi Foods Pty Ltd**[143]. Ultimately, appellate courts considering the sufficiency of reasons should read them as a whole,

[137] See the Transcript of the Proceedings dated the 15th December, 2008, at page 47, lines 5-12 - Cross-examination of Janelle Lee Chee by Mr. Persad.
[138] **Sheppard** (n. 7).
[139] **R.E.M.** (n. 8).
[140] **Vuradin** (n. 9).
[141] **Gatzke** (n. 10).
[142] **Hunter v Transport Accident Commission and Avalanche** (n. 43).
[143] **Franklin** (n. 45).

in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered.

(149) The core question in determining whether the absence of the magistrate's reasons for her decision was fatal to the convictions was whether the magistrate's decision could be gleaned from the evidentiary record. We have closely reviewed the record of appeal. We find that the case is legally straightforward. Factually however, it was not uncomplicated. We are of the opinion that this Court required to see the magistrate`s reasons with respect to (i) the inconsistencies and contradictions in the evidence of the prosecution witnesses which were neither peripheral nor core, some of which were identified at paragraph 103 above, (ii) the rejection of the appellants' evidence, which was not self-evidently incredible or unreliable, and (iii) how she dealt with the respective accounts of the witnesses in respect of the defendants whom they implicated.

(150) On the issue concerning the inconsistencies and contradictions in the evidence of the prosecution witnesses of the category which we have identified, we are unable to see how the magistrate addressed her mind to them. It was necessary for the magistrate to explain, in adequate detail without any need to be overelaborate, how she determined the credibility issues in respect of the prosecution witnesses in arriving at her decision to convict the appellants. It was also necessary for the magistrate to briefly explain why she rejected the evidence of the appellants and which evidence of the prosecution witnesses she accepted as implicating the appellants. The absence of written and/or oral reasons in this regard has therefore prejudiced the appellants in advancing their appeal and has deprived this Court of its ability to perform its appellate review function.

(151) The ground of appeal is meritorious principally on the issues relating to the failure of the magistrate to address the inconsistencies and contradictions in the evidence of the prosecution witnesses and her failure to explain why she rejected the evidence of the appellants.

(152) At this juncture, we think it crucial to reiterate, in its entirety, what this Court said in the decision in **Francis Jones v Sgt. Sheldon David #11730**[144] at paragraph 30:

> *"**[30]** Reference was made to the case of Flannery in the **2010 Barbados Court of Appeal decision in Lovell v Rayside Construction Limited**. That case was one which involved a complaint of a refusal to carry out a lawful order and insolence, within the context of employment law. The magistrate had found that the appellant's disobedience and insolence to the respondent's general manager had justified his summary dismissal. The evidence in the matter for the respondent had consisted of testimony from the general manager and one other employee. The appellant also gave evidence. The magistrate had given a brief oral ruling where he only restated the facts and provided a bare decision. It was submitted that it was an error of law for a judge to fail to give any or any adequate reasons for his decision.* ***Mason J.A., in giving the judgment of the court of appeal, acknowledged the importance of the common law and statutory duty to give reasons. Mason J.A. proceeded to refer to relevant authorities which identified, in our view, the minimum content for reasons:***
>
> ***a. Reasons need not be elaborate and deal with each and every argument presented by counsel but they must be in sufficient detail to show the parties, and if need be the court of appeal, the principles and the basis upon which the magistrate had acted, namely, why one party had succeeded and not the other;***
>
> ***b. The judge must summarize the testimony of the witnesses and in so doing identify and record those issues which were critical to the decision;***
>
> ***c. They must show the manner in which the magistrate resolved those issues. This is so even if the critical issue was one of fact and he has preferred the evidence of one witness over that of another;***
>
> ***d. The magistrate must give the explanation for that preference and it must be apparent from the judgment;***
>
> ***e. The magistrate may in those circumstances refer to a specific piece of evidence or to a submission which he has accepted or rejected.16***
>
> ***We wish to state with emphasis that magistrates in Trinidad and Tobago should keep these guidelines uppermost in mind when providing their reasons."*** [emphasis added]

[144] **Francis Jones** (n. 2).

(153) We recognize that the statutory duty to give a statement of reasons for a decision arises only when a Notice of Appeal is filed in the matter. We are not unmindful that the workload of the Magistracy is tremendous. We are also aware that in this jurisdiction, there is sometimes a delay in the forwarding of the notices of appeal to magistrates, who by then may have been transferred to another Magisterial District and consumed with another heavy list of matters or who may have since retired or resigned. In addition, by the time the magistrate receives the Notice of Appeal, a considerable amount of time may sometimes have elapsed since the determination of the matter, making the nuances of the matter less fresh in the mind of the magistrate. This may, at times, lead in a few cases, to a tendency towards the giving of formulaic or "boilerplate" statements of written reasons, which may be given after an extensive period of time from the rendering of the decision. It is apposite at this point to respectfully recommend that urgent mechanisms be put in place to ensure the expeditious delivery of notices of appeal to magistrates.

(154) We wish to respectfully suggest to magistrates that it may be a prudent practice, in order to avoid any future problems, to include at the time of the giving of the decision **ORALLY**, brief substantiating reasons for the decision. We note that to their credit, some magistrates have already adopted this approach, appropriately fleshing out their reasons at the time of the oral decision. In some cases, those oral reasons have been quite sufficient by themselves and magistrates have subsequently adopted them in their written memorandum of reasons.

(155) Including this information **at the time of the giving of the oral decision** would carry with it the following potential benefits:

(i) At the critical juncture of the decision, if substantiating reasons are given, prima facie, this would tend to fulfill all of the rationales for the giving of reasons in criminal matters, enumerated in **R v Sheppard**[145] and **R v R.E.M.**[146];

(ii) It would assist in focusing the mind of the magistrate on the relevant issues in the case;

[145] **Sheppard** (n. 7).
[146] **R.E.M.** (n. 8).

(iii) The "losing party" would know why they "lost"- if evidence is rejected, the reasons for this would be immediately known; if the case is found not to have been proven to the requisite standard, the reasons for this would also be immediately known;

(iv) If the furnishing of a written memorandum of reasons is eventually required, the magistrate would have the benefit of the contemporaneous oral reasons; and

(v) It would enable appellants, on the proper advice of their counsel (where applicable), to determine whether an appeal on purely factual issues is viable. This is important given the very narrow window of time stipulated for the lodging of an appeal. It is also important given the extremely high bar for the setting aside of the factual findings of a magistrate and the very circumscribed role of the Court of Appeal in this regard. The provision of reasons at the time of the oral decision should assist somewhat in enabling counsel (where applicable) to give appropriate and more fulsome advice to their clients so that precious resources of time and of money are not expended in the pursuit of what are professionally assessed to be, obviously futile appeals: see **Strategic Liquor Services v Mvumbi, T NO and Others**[147] at paragraph 65 above.

(156) The giving of brief, substantiating reasons **at the time of the giving of the oral decision** would of course take a little more time and effort on the part of the magistrate but ultimately, the benefits to the individual litigants and to the system of justice as a whole would be well worth the effort.

(157) A magistrate, though obliged to give reasons, is however not required to address every submission that was advanced during the course of the trial as well as all of the evidence in the case. The object of the giving of reasons is not to show ***how*** the magistrate arrived at his or her conclusion, in a "*watch me think*" fashion. It is rather to show ***why*** the magistrate made that decision: see paragraph 17 of the decision in **R v R.E.M.**[148]. As long as the reasons show how the magistrate

[147] **Strategic Liquor Services** (n. 31).
[148] **R.E.M.** (n. 8).

grappled with the ***substance of the legal and factual issues*** upon which the decision turned, they will normally be sufficient: see paragraph 64 of the decision in **R v R.E.M.**. The magistrate is not required to journey through every "hill and valley" of all the credibility issues that arose in the case but rather, he must demonstrate that his mind was applied to the more material issues that might have impacted on the credibility of the witnesses: see **The People (at the Suit of the Director of Public Prosecutions) v Michael McKevitt**[149] at paragraph 82 above. There can be and there is no standardised, "magic formula" for the giving of reasons. What must be kept uppermost in the mind of the magistrate is the required "minimum content" of those reasons, as explained in the preceding paragraphs.

(158) It cannot be over-emphasised that although undesirable, the following will not automatically generate an iron-clad ground of appeal: (i) the complete absence of reasons, (ii) the paucity of reasons, (iii) any falling short in analysis in the reasons, or (iv) the lack of clarity and fullness of expression in those reasons. Every appeal will have to be evaluated upon its own peculiar set of issues of law and of fact and what might jeopardise an appeal in one case would not necessarily do so in another. That is the essence of the ***"pragmatic, functional approach"*** which this Court adopted in **Francis Jones v Sgt. Sheldon David #11730**[150].

(159) It is to be reiterated that the above suggestions, **for the purpose of oral reasons**, need only be in succinct terms, sufficient to demonstrate that the magistrate was alive to the material legal and evidential issues in the case and that the magistrate grappled with them. If the oral reasons bear this out, then together with the record of the evidence and any submissions advanced before the magistrate, ***but in the absence of any subsequent written memorandum of reasons***, an appellant should generally have sufficient material by which to formulate a meaningful appellate challenge and the Court of Appeal would be able to effectively conduct the appellate review process.

[149] **Michael McKevitt** (n. 42).
[150] **Francis Jones** (n. 2).

❖ DISPOSITION

(160) The appeals are allowed and the convictions and sentences are set aside.

❖ RETRIAL

(161) With the magistrate's orders having been set aside, we turn now to consider whether it is appropriate to order a re-trial of this matter.

We invite the submissions of counsel on both sides on this issue.

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A. Yorke – Soo Hon, J.A.

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M. Mohammed, J.A.