

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* W.H., 2013 SCC 22, [2013] 2 S.C.R. 180 | **Date:** 20130419  **Docket:** 34522 |

Between:

Her Majesty The Queen

Appellant

and

W.H.

Respondent

**Coram:** McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 49) | Cromwell J. (McLachlin C.J. and LeBel, Fish, Rothstein, Moldaver and Karakatsanis JJ. concurring) |

R. *v.* W.H., 2013 SCC 22, [2013] 2 S.C.R. 180

Her Majesty The Queen Appellant

v.

W.H. Respondent

**Indexed as:** R. ***v.*** W.H.

2013 SCC 22

File No.: 34522.

2013:  January 21; 2013:  April 19.

Present: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for newfoundland and labrador

*Criminal law — Appeals — Unreasonable verdict — Role of appellate court when assessing reasonableness of verdict based on jury’s assessment of witness credibility — Jury finding accused guilty of sexual assault — Court of Appeal concluding that verdict unreasonable and entering acquittal — Whether Court of Appeal applied proper legal test — Whether verdict unreasonable — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(a)(i).*

A jury found the accused guilty of sexual assault of his niece which occurred when she was between the ages of 12 and 14. At trial, the complainant had testified about several sexual incidents involving the accused. The accused had testified in his own defence and denied any sexual activity with the complainant. On appeal, the Court of Appeal was troubled by a number of inconsistencies in the complainant’s testimony and previous statements. However, it noted that nothing appeared from the transcript which should have caused a juror to question the accused’s truthfulness. In light of those factors, the court was of the view that no experienced judge sitting alone would have been able to provide adequate reasons for the guilty verdict. The Court of Appeal concluded that the verdict was unreasonable, set it aside and entered an acquittal.

Held: The appeal should be allowed and the conviction restored.

A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not reasonably have rendered. Appellate review of a jury’s verdict of guilt must be conducted within two well‑established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a “13th juror” or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record. On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required to review, analyse and, within the limits of appellate disadvantage, weigh the evidence and consider through the lens of judicial experience, whether judicial fact‑finding precludes the conclusion reached by the jury. Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury’s conclusion conflicts with the bulk of judicial experience.

The traditional test for unreasonable verdict applies to cases such as this one in which the verdict is based on an assessment of witness credibility. In applying the test, the court of appeal must show great deference to the trier of fact’s assessment of witness credibility given the advantage it has in seeing and hearing the witnesses’ evidence. This applies with particular force to verdicts reached by juries. It is for the jury to decide, notwithstanding difficulties with a witness’s evidence, how much, if any, of the testimony it accepts. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motive for concoction; accordingly, the jury is entitled to decide how much weight it gives to such factors. The reviewing court must be deferential to the collective good judgment and common sense of the jury. While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact‑finding role of the jury. Trial by jury must not become trial by appellate court on the written record.

The Court of Appeal in this case applied the wrong legal test and, in carrying out its review of the jury’s verdict, failed to give sufficient deference to the jury’s assessment of witness credibility. The test to be applied by courts of appeal in reviewing guilty verdicts for unreasonableness does not involve the reviewing court attempting to put itself in the place of an imaginary trial judge and on a review of the written record asking whether that imaginary judge could have articulated legally adequate reasons for conviction. The Court of Appeal’s adoption of this new test resulted in its failure to take a sufficiently deferential approach to the findings of the jury viewed, as they must be, in the context of the whole of the evidence.

**Cases Cited**

**Referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. S.J.M.*, 2009 ONCA 244, 247 O.A.C. 178; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. C. (R.)*, [1993] 2 S.C.R. 226, rev’g (1992), 49 Q.A.C. 37; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. W. (D.)*, [1991] 1 S.C.R. 742.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 675(1)(*a*), 686(1)(*a*).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Wells, Barry and White JJ.A.), 2011 NLCA 59, 312 Nfld. & P.E.I.R. 12, 278 C.C.C. (3d) 237, 89 C.R. (6th) 181, 971 A.P.R. 12, [2011] N.J. No. 330 (QL), 2011 CarswellNfld 319, setting aside the accused’s conviction for sexual assault and entering an acquittal.  Appeal allowed and conviction restored.

Frances J. Knickle, for the appellant.

Peter E. Ralph, Q.C., and Michael Crystal, for the respondent.

The judgment of the Court was delivered by

Cromwell J. —

I. Overview and Issue

1. A jury found the respondent guilty of sexual assault, but the Court of Appeal concluded that the jury’s finding was unreasonable, set it aside and entered an acquittal. The Crown appeals, arguing that the Court of Appeal wrongly substituted its assessment of witness credibility for that of the jury. The appeal therefore raises the issue of an appellate court’s role when it assesses the reasonableness of a jury’s guilty verdict based on the jury’s assessment of witness credibility.
2. Of course, a jury’s guilty verdict based on the jury’s assessment of witness credibility is not immune from appellate review for reasonableness. However, the reviewing court must treat the verdict with great deference. The court must ask itself whether the jury’s verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury. Here, the Court of Appeal did not follow this approach. It asked itself instead whether an experienced trial judge could give adequate reasons to explain the finding of guilt and, having answered that question in the negative, found the verdict unreasonable. In my respectful view, the Court of Appeal applied the wrong legal test and reached the wrong conclusion.
3. I would allow the appeal and restore the conviction entered at trial.

II. Facts and Proceedings

A. *Overview of the Facts*

1. The respondent was charged with sexual assault of and sexual interference with his niece when she was between the ages of 12 and 14. The jury found the respondent guilty. The trial judge entered a conviction for sexual assault but stayed the sexual interference count because it was based on the same factual and legal foundation: see *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. S.J.M.*, 2009 ONCA 244, 247 O.A.C. 178. The background as it emerged at trial is this.
2. The complainant’s parents separated when she was nine years old. Her mother moved to Ontario while she continued to live with her father in a small town in Newfoundland and Labrador. Their home was next door to the respondent and his wife, who is her father’s sister. When her father was away for work, the respondent and his wife were responsible for her care and even when her father was home, they would regularly all have supper together.
3. The complainant testified that she was prompted to disclose the respondent’s conduct towards her by an incident in June 2008. She had missed the school bus and asked the respondent to drive her to school. During the drive, the respondent began to talk to her about sex and said, “all you have to do is say the word and I’ll make love to you”: A.R., vol. II, at p. 47. Later that day or the next day, the complainant called her mother in Ontario and told her about this incident. She then flew to Ontario to be with her mother. Her mother took her to a doctor who made a referral to child protection authorities which in turn led to police involvement. In late July, her mother accompanied her to the Port Elgin police station to make an initial videotaped statement in which she described one incident.
4. At trial, the respondent also testified about an incident in June. He agreed to drive the complainant to school after she missed her bus. He testified that he spoke to her about being careful not to become pregnant, a conversation he said was prompted by MSN blog messages she had written using his computer and the respondent’s concern about the sexual nature of the messages and her use of alcohol. According to the respondent, the complainant did not want to talk about it and when she got out of the car, told him it was none of his business and slammed the car door. The respondent did not tell his wife or the complainant’s father about his concerns or about the door-slamming incident.
5. RCMP officers in Newfoundland became involved in the investigation in late July 2008. RCMP Constable Paul Hierlihy reviewed the initial videotaped statement from Ontario but was not satisfied with the way the interview had been conducted. He therefore arranged for RCMP Constable Lisa Norman, who had received training in interviewing child victims of sexual abuse, to re-interview the complainant in Ontario.
6. Cst. Norman testified that the complainant’s initial statement to Port Elgin police was conducted in the police station, with four persons present (the interviewing male police officer, a social worker, the complainant and her mother). In Cst. Norman’s experience, interviewing an alleged child victim of sexual assault in the presence of her mother is not always helpful because it is not a topic that children are comfortable talking about. She saw no need for the presence of a social worker and noted that “sometimes it helps talking to a female” officer: A.R., vol. I, at p. 196. She agreed with Cst. Hierlihy’s assessment that the original statement was vague and had a lot of “I don’t remembers” and, in her view, there was not a good rapport between the interviewing officer and the complainant who appeared not to have been comfortable at that time.
7. In November 2008, Cst. Norman conducted her interview one-on-one with the complainant in a private hotel conference room, in order to avoid the police station which is sometimes “intimidating”: A.R., vol. I, at p. 197. During this interview, the complainant described more incidents than she had in her initial statement. When Cst. Norman asked her about this, the complainant told her that she had not felt comfortable with the male officer and that she had not wanted to talk about it in front of her mother.
8. At trial, the complainant testified about several sexual incidents involving the respondent. Her evidence was that one incident occurred in the respondent’s car, when he placed his hand between the complainant’s legs and touched her vagina; another in the computer room in the respondent’s home when he placed his hand on her left breast over her clothing; and another in the kitchen of the respondent’s home while the respondent’s wife was present in the room when the respondent touched the complainant’s breast over her clothing. The complainant also referred to an occasion on which the respondent had asked her if she was mad at him, and said, “You know I love you and I wouldn’t do anything to you like that”: A.R., vol. II, at p. 45. But she could not remember why he had said that.
9. The respondent testified in his own defence and denied any sexual activity with the complainant. The respondent’s wife echoed the respondent’s testimony. The respondent’s brother and nephew testified that the complainant was quite affectionate towards the respondent, that she seemed comfortable when she was around him and, generally, that the respondent and the complainant seemed to enjoy a good relationship.

B. *The Trial Judge’s Instructions to the Jury*

1. The parties agree that the trial judge’s instructions to the jury were error-free. She gave the usual instructions with respect to credibility and truthfulness generally, including the direction that the jury could believe or disbelieve all or parts of anything a witness said in the witness box. She specifically addressed the young age of the victim and instructed the jury that they could consider this factor along with lapse of time in dealing with minor discrepancies in the complainant’s testimony. She however specified that lying under oath was serious and could taint the entire testimony of a witness. The trial judge stressed the fact that this case was about credibility and noted that there was no other direct evidence supporting the complainant’s allegations. She gave a thorough summary of the evidence of the complainant and the respondent and clearly drew the jury’s attention to the inconsistencies between the complainant’s testimony and that of other witnesses and her own previous statements.
2. The trial judge directed the jury that it was “essential that the credibility and reliability of [the complainant’s] evidence be tested in the light of all the other evidence”: A.R., vol. I, at p. 69. She reviewed in detail the position of the defence that the complainant was not telling the truth, referring to several points at which her recollections were not consistent. The trial judge also noted that the defence theory was that the complainant lied because she wanted her mother to return to Newfoundland so that they could live together. She also reviewed in detail the position of the Crown, noting that the motive to lie alleged by the defence was never put to the complainant directly and further that her evidence was that she could have left Newfoundland to live with her mother at any time.
3. The jury returned a verdict of guilty on both counts.

C. *The Judgment of the Court of Appeal, 2011 NLCA 59, 312 Nfld. & P.E.I.R. 12 (per Barry J.A., Wells and White JJ.A. Concurring)*

1. The Court of Appeal concluded that the jury’s verdict was unreasonable, set it aside and acquitted the respondent. The court stated that in conducting a review for unreasonableness, “the appellate court draws its own inference from the evidence admitted at trial as to the reasoning process of the jury and determines whether this could have been logical or rational in light of the verdict being reviewed. . . . If no reasonable process of analysis by a judge could justify conviction in the circumstances of the case, an appellate court will be justified in concluding a jury must not have acted judicially in convicting”: paras. 47 and 52.
2. After reviewing the record, the court concluded that the verdict was unreasonable because “[a]n experienced judge sitting alone, with the evidence presented in this case, would not be able to provide adequate reasons to explain how he or she could be convinced beyond a reasonable doubt of the accused’s guilt in light of the credibility concerns arising from the unexplained inconsistencies and improbabilities arising from the complainant’s testimony and statements”: para. 75.
3. The Court of Appeal was troubled by a number of inconsistencies in the complainant’s testimony and statements, even taking into account “all explanations given by her for those inconsistencies”: para. 64.
4. First, the Court of Appeal was concerned by inconsistencies regarding the number and nature of the incidents between the complainant’s trial evidence and her initial disclosure. The complainant described only a single and different incident to her mother, father and to the male police officer when she first came forward. As noted earlier, when the complainant later spoke to a female police officer, she described more incidents as she did at trial. The court noted that the complainant said that she felt more comfortable speaking alone to the female RCMP constable and wanted to avoid the embarrassment of speaking in the presence of her mother. However, the court reasoned that “[d]iscomfort and embarrassment may help explain omitted incidents [but] they do not adequately explain her express denial that any other incidents had occurred”: para. 66. The court was also concerned that the complainant “contradicted herself somewhat in her explanation in that at the preliminary inquiry she had said her memory had improved between the first and second police interviews while at trial she said she had deliberately decided not to discuss all incidents”: para. 66.
5. A second matter referred to by the Court of Appeal as creating a “serious concern about [the complainant’s] truthfulness overall” (para. 67) was this: the complainant told the male police officer at the initial interview that the only incident happened in the respondent’s home and nowhere else. But she testified at trial that the most serious incident happened in the respondent’s vehicle. She explained this inconsistency by saying that she felt discomfort speaking to a male police officer in her mother’s presence. With regard to the complainant’s explanation of this inconsistency, the Court of Appeal indicated that “discomfort would go somewhat towards explaining omissions but does not adequately explain her express denial of other locations”: para. 67.
6. A further point which troubled the Court of Appeal was the fact that in her initial statement to the male police officer, the complainant had said that the respondent had been alone in the house when she had been assaulted, while she later said that the respondent’s wife had been present on one occasion in the same room and that the respondent’s wife and the complainant’s father had been present on another occasion in a different room but within hearing range. This unexplained discrepancy left the Court of Appeal with “an additional question regarding her credibility”: para. 68.
7. The Court of Appeal also found that various inconsistencies regarding the complainant’s nervousness about being alone around the respondent raised “significant concerns about her credibility”: para. 71. These included: the complainant’s father’s denial of the complainant’s testimony that she had told him she did not want to go to her uncle’s home; the complainant’s willingness to continue having interactions with the respondent even after the incidents; and the fact that the complainant declared at the preliminary inquiry that she was not afraid to be alone with her uncle in his car yet she had told police in a prior statement that she was “frightened to death” to drive alone with him: para. 70.
8. In the Court of Appeal’s view, the complainant’s inability to give any detail regarding the nature of the other incident which she vaguely recalled added “some slight additional doubt regarding her credibility”: para. 73.
9. The Court of Appeal concluded that by virtue of these “unexplained inconsistencies and improbabilities alone, the credibility of the complainant was damaged to the extent that it is questionable whether a jury acting judicially could reasonably have convicted”: para. 74. The court noted that in addition, a jury acting judicially has to consider the complainant’s testimony in the context of the respondent’s denial of all her allegations. In the court’s view, “[n]othing appears from the transcript which should have caused a juror to question his truthfulness”: para. 74. In light of the complainant’s testimony and the apparently plausible denial of the accused, the court was of the view that no experienced judge sitting alone would have been able to provide adequate reasons for the guilty verdict. The Court of Appeal concluded that the jury could not have been acting judicially in reaching a guilty verdict and that the verdict was therefore unreasonable.

III. Analysis

A. *The Scope of Review for “Unreasonableness” of a Jury Verdict: Basic Principles*

1. A person convicted of an indictable offence has broad avenues of appeal. There is a right of appeal on any question of law alone and an appeal by leave of the court on questions of fact or mixed law and fact or on “any ground of appeal . . . that appears to the court of appeal to be a sufficient ground of appeal”: *Criminal Code*, R.S.C. 1985, c. C-46, s. 675(1)(*a*). However, as broad as the access to appellate review is, a court of appeal may only overturn a conviction on three grounds: that the verdict is unreasonable or cannot be supported by the evidence, that there was an error of law at trial or that there was a miscarriage of justice: s. 686(1)(*a*) of the *Code*. This appeal concerns only the first of these grounds (s. 686(1)(*a*)(i)).
2. A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not reasonably have rendered: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36. While the same test was traditionally applied to verdicts by both juries and trial judges, the more recent jurisprudence from the Court has expanded somewhat the scope of review for unreasonableness in the case of verdicts reached by trial judges: *R. v.* *Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3. This development recognizes a practical distinction between reasonableness review of a trial judge’s verdict and of a jury verdict: judges, unlike juries, give reasons for their findings which the appellate court may review and consider as part of its reasonableness analysis. However, this expanded reasonableness review of verdicts entered by trial judges does *not* apply to reasonableness review of a jury verdict.
3. Appellate review of a jury’s verdict of guilt must be conducted within two well-established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a “13th juror” or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.
4. On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required “to review, analyse and, within the limits of appellate disadvantage, weigh the evidence” (*Biniaris*,at para. 36) and consider through the lens of judicial experience, whether “judicial fact-findingprecludes the conclusion reached by the jury”: para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury’s conclusion conflicts with the bulk of judicial experience:  *Biniaris*, at para. 40.
5. While it is not possible to catalogue exhaustively the sorts of cases in which accumulated judicial experience may suggest that a jury’s verdict is unreasonable, a number of examples may be offered. Circumstances in which a special caution to the jury is necessary about a certain witness or a certain type of evidence are reflective of accumulated judicial experience and may well factor into an appellate court’s review for reasonableness.  Some examples include the evidence of jailhouse informants and accomplices, and eyewitness identification evidence. Other circumstances that generally do not require, as a matter of law, any particular warning to the jury may nonetheless, in light of accumulated judicial experience, contribute to a conclusion of an unreasonable verdict, for example the risks of accepting bizarre allegations of a sexual nature and the risk of prejudice in relation to psychiatric defences: *Biniaris*,at para. 41. What all of these examples have in common is that accumulated judicial experience has demonstrated that they constitute an explicit and precise circumstance that creates a risk of an unjust conviction.

B. *Unreasonable Verdicts and Credibility Assessment*

1. The traditional test for unreasonable verdict applies to cases such as this one in which the verdict is based on an assessment of witness credibility. This was affirmed, in the context of a judge-alone trial, in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131. However, in applying the test, the court of appeal must show great deference to the trier of fact’s assessment of witness credibility given the advantage it has in seeing and hearing the witnesses’ evidence: *W. (R.)*, at p. 131.
2. This point was underlined in *R. v. C. (R.)*, [1993] 2 S.C.R. 226, also a judge-alone case, in which the Court approved the dissenting reasons of Rothman J.A. in the Court of Appeal: (1992), 49 Q.A.C. 37. Rothman J.A. noted, at para. 16:

Credibility is, of course, a question of fact and it cannot be determined by fixed rules. Ultimately, it is a matter that must be left to the common sense of the trier of fact . . . .

1. This counsel of caution applies with particular force to verdicts reached by juries. In *R. v. François*, [1994] 2 S.C.R. 827, McLachlin J. (as she then was) reiterated that the general rule enunciated in *Yebes* “also applies to cases where the objection to the conviction is based on credibility — where it is suggested that testimony which the jury must have believed to render its verdict is so incredible that a verdict founded upon it must be unreasonable”: pp. 835-36. There are a number of points in *François* that are particularly relevant to this case:

1. It is for the jury to decide, notwithstanding difficulties with a witness’s evidence, how much, if any, of the testimony it accepts. As McLachlin J. put it, at p. 836:

More problematic is a challenge to credibility based on the witness’s alleged lack of truthfulness and sincerity, the problem posed in this appeal. The reasoning here is that the witness may not have been telling the truth for a variety of reasons, whether because of inconsistencies in the witness’s stories at different times, because certain facts may have been suggested to her, or because she may have had reason to concoct her accusations. In the end, the jury must decide whether, despite such factors, it believes the witness’s story, in whole or in part.

2. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motives for concoction. As McLachlin J. said in *François*, at pp. 836-37:

[Credibility] turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The latter domain is the “advantage” possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable: *R. v. W. (R.)*, *supra*. [Emphasis added.]

3. The jury is entitled to decide how much weight to give to factors such as inconsistency and motive to concoct. Particularly where the complainant offers an explanation for inconsistencies, the jury may reasonably conclude that those inconsistencies lose “their power to raise a reasonable doubt with respect to the accused’s guilt”: *François*, at p. 839. Again in *François*, at p. 837, the Court said this:

In considering the reasonableness of the jury’s verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness’s evidence in its entirety. Or the jury may accept the witness’s explanations for the apparent inconsistencies and the witness’s denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness’s evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury’s verdict is unreasonable. A verdict of guilty based on such evidence may very well be both reasonable and lawful. [Emphasis added.]

4. To sum up, the reviewing court must be deferential to the collective good judgment and common sense of the jury. As stated in *François*, “the court of appeal reviewing for unreasonableness must keep in mind . . . that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share”: p. 837.

1. *R. v. Burke*, [1996] 1 S.C.R. 474, and *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, while judge-alone cases, further underline the great deference which must be shown by the appellate court to the trial court’s assessment of credibility. In the latter case, Deschamps J., for the majority, reiterated the applicable principle as follows:

Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court’s assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they “cannot be supported on any reasonable view of the evidence” (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). [Emphasis added; para. 10.]

1. Perhaps the most useful articulations of the test for present purposes are those found in *Biniaris* and *Burke*. In the former case, Arbour J. put it this way: “. . . the unreasonableness . . . of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury”: para. 39 (emphasis added). In the latter, Sopinka J. concluded that a verdict based on credibility assessment is unreasonable if “the trial court’s assessments of credibility cannot be supported on anyreasonable view of the evidence”: para. 7 (emphasis added). While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record.

C. *Application to the Facts of This Case*

1. In my respectful view, the Court of Appeal in this case applied the wrong legal test and, in carrying out its review of the jury’s verdict, failed to give sufficient deference to the jury’s assessment of witness credibility.
2. To turn first to the legal test, the Court of Appeal fashioned a new approach to its task by drawing on the law relating to the sufficiency of a trial judge’s reasons for conviction. Noting that in a judge-alone trial the trial judge must provide reasons which are responsive to the case’s live issues and the parties’ key arguments, the Court of Appeal then stated:

A court of appeal, in reviewing the reasonableness of a jury’s decision, must consider what would be entailed in the process of analysis by a judge to merit the conclusion that the judge acted judicially. If no reasonable process of analysis by a judge could justify conviction in the circumstances of the case, an appellate court will be justified in concluding a jury must not have acted judicially in convicting. [para. 52]

1. Respectfully, this test is wrong in law and in principle.
2. As outlined earlier, the test to be applied by courts of appeal in reviewing guilty verdicts for unreasonableness is clear and well settled. It does not involve the reviewing court attempting to put itself in the place of an imaginary trial judge and on a review of the written record asking whether that imaginary judge could have articulated legally adequate reasons for conviction. Not only is this approach contrary to binding authority, it is also, as I see it, fundamentally flawed.
3. One of the main drivers of the great deference paid to the jury’s findings of credibility is that the jurors were present at the trial and saw and heard the evidence as it unfolded. The jury’s reasoning as to what evidence it accepted and what evidence it did not accept may well be tied directly to factors flowing from that advantage. Moreover, the jurisprudence on the sufficiency of reasons recognizes that it is often difficult if not impossible to articulate with precision the various factors that influence an ultimate judgment about a witness’s credibility. As McLachlin C.J. noted in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 48-49, referring with approval to the reasons of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621:

. . . it may be difficult for a trial judge “to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events” . . . .

. . . the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. . . . In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

1. The Court of Appeal’s test, respectfully, fails to give any weight to these considerations. It is premised on trying, on the basis only of the written record, to fashion an explanation for the jury’s decision. But that exercise ignores both the inherent difficulty of the exercise and the main basis for deference to the jury’s assessment of witness credibility. The advantage of having heard and seen the evidence, while afforded to the jury, is not afforded to the appellate court in trying to reconstruct its reasoning on the basis of the written record.
2. As the Court stated in *François*, where it is suggested that a witness is not telling the truth because of inconsistencies, because facts may have been suggested to him or her by others or because he or she may have reason to concoct the accusations, the jury must in the end decide whether it believes the witness’s story in whole or in part. “Th[e] determination turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal”: pp. 836-37.
3. The Court of Appeal’s adoption of this new test resulted in its failure to take a sufficiently deferential approach to the findings of the jury viewed, as they must be, in the context of the whole of the evidence.
4. The Court of Appeal’s treatment of the complainant’s statement to the Port Elgin police will serve as a first example. Of great concern to the Court of Appeal was the inconsistency between the complainant’s initial statement and her subsequent statements and testimonies. Four of the five inconsistencies which the Court of Appeal found to raise serious questions about the complainant’s credibility are grounded in whole or in substantial part in that initial statement: the inconsistencies regarding the number and nature of incidents, the location, who was present and whether the complainant was nervous about being alone with the respondent. It seems to me, however, that there are two problems with the Court of Appeal’s approach.
5. The first is that the court overlooked potentially significant parts of the evidence about why that initial statement was not satisfactory. While the court noted that the RCMP was not satisfied with how the first interview had been conducted, it did not refer to the trial evidence about why that was the case. As I outlined earlier, the trial evidence raised a number of specific concerns about the way the first interview had been conducted: the potentially intimidating police station setting, the use of a male interviewing officer, the number of persons present, the presence of the complainant’s mother, the lack of rapport between the interviewing officer and the complainant and the complainant’s discomfort during the interview. It would not have been unreasonable for the jury, on the basis of this evidence, to decide to attach little value to the initial statement by virtue of the conditions under which it was taken. If the jury reached that conclusion it would of course give little weight to any inconsistencies between that initial statement and the complainant’s later statements and testimonies.
6. The second difficulty, in my respectful view, is that the Court of Appeal, in discounting the complainant’s explanation for these inconsistencies, engaged in speculative reasoning that has no basis in judicial experience. The court referred to the complainant’s explanation that she had been uncomfortable speaking to the male police officer and embarrassed to discuss these matters in her mother’s presence. The court reasoned, however, that while discomfort and embarrassment may help explain omitted incidents, “they do not adequately explain her express denial that any other incidents had occurred”: para. 66. Similarly, with respect to the location of one of the incidents, the court again concluded that while discomfort in the initial interview would go somewhat towards explaining omissions, it “does not adequately explain her express denial of other locations”: para. 67.
7. Respectfully, I am not aware of any basis in fact or judicial experience supporting the view that a witness’s discomfort and embarrassment during an interview may explain some types of inconsistencies but not others. Rather, in my view, it was open to the jury to accept the complainant’s explanation in whole or in part.
8. The Court of Appeal also wrongly substituted its views for those of the jury in other respects. The court simply re-applied, on the basis of its review of the written record, the test in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, for assessing reasonable doubt in light of the respondent’s testimony. It found the respondent’s denial to be plausible because there was nothing in the transcript to cause it to be questioned and because the prosecutor could point to nothing remarkable about the respondent’s demeanour. Respectfully, this reasoning ignores the disadvantages of an appellate court in relation to these sorts of findings and undermines the jury’s unique position and special role in assessing witness credibility.
9. Respectfully, the Court of Appeal, while rightly conscious of its responsibility to conduct a thorough review of the record, erred by applying the wrong legal test in carrying out that review. It further erred by failing to take a sufficiently deferential stance in relation to the credibility findings made by the jury.

IV. Disposition

1. I would allow the appeal and reinstate the conviction entered at trial.

*Appeal allowed and conviction restored.*

Solicitor for the appellant:  Attorney General of Newfoundland and Labrador, St. John’s.

Solicitors for the respondent:  Simmonds & Partners Defence, St. John’s; Crystal Cyr Barristers, Ottawa.