

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* J.M.H., 2011 SCC 45, [2011] 3 S.C.R. 197 | **Date:** 20111006  **Docket:** 33667 |

**Between:**

**J.M.H.**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Director of Public Prosecutions**

Intervener

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 41) | Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring) |

R. *v.* J.M.H., 2011 SCC 45, [2011] 3 S.C.R. 197

J.M.H. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions *Intervener*

**Indexed as: R. *v.* J.M.H.**

2011 SCC 45

File No.: 33667.

2011:  May 19; 2011:  October 6.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

*Criminal law — Appeals — Powers of Court of Appeal — Evidence — Assessment — Accused charged with two counts of sexual assault — Complainant not disclosing events at time of occurrences but posting poem on line — Trial judge acquitting accused — Court of Appeal overturning acquittals and ordering new trial — Whether trial judge failed to consider evidence as a whole thereby committing error of law — Whether trial judge’s allegedly flawed assessment of evidence constitutes error of law allowing appellate review of acquittal — Criminal Code, R.S.C. 1985, c. C‑46, s. 676(1)(a).*

H was acquitted at trial of two counts of sexual assault on his 17-year‑old cousin. A alleged that on two occasions in 2006, H had non‑consensual sexual intercourse with her while she was sleeping with him in his bed. A testified that she told H to “stop” both times but that he eventually had intercourse with her. On both occasions, she spent the rest of the night with H in his bed. A did not tell anyone about the occurrences but posted a poem online very soon after the first incident as “an outlet”, and this led to the incidents coming to light. At trial, H denied any sexual contact with A. The trial judge had “absolutely no doubt” that sexual intercourse had taken place between H and A but was not satisfied that A was sexually assaulted without her consent. The Court of appeal concluded that the trial judge erred in law in mishandling the evidence by taking a “piecemeal” approach incompatible with his obligation to consider the cumulative effect of all relevant evidence.

*Held*: The appeal should be allowed and the acquittals restored.

While it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge’s reasons here did not disclose any such error. The Court of Appeal misapprehended the record when it faulted the judge for not referring to A’s testimony on the issue of consent, as he did so on at least three occasions. Moreover, the trial judge did not have to “reject” A’s evidence in order to be left with a reasonable doubt arising from the whole of the evidence. In fact, he gave extensive reasons as to why he was left with a reasonable doubt on consent. There was also no basis for concluding that the trial judge used small excerpts from the poem out of context. He quoted the poem as a whole and then drew attention to language that raised concerns in his mind. Finally, the Court of Appeal erred in concluding that a couple of brief excerpts from the poem had “tipped” the balance in favour of acquittal.  The trial judge’s concerns regarding consent were based on the evidence of the relationship between H and A, the testimony of A’s sister about how many times she had been in H’s bed, and the fact that A had returned both times to the same bed in which she had been violated. The judge’s references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking account of all the circumstances of the case in reaching his conclusion.

The Crown’s right of appeal from an acquittal of an indictable offence is limited to “any ground of appeal that involves a question of law alone”. The jurisprudence currently recognizes at least four types of cases in which alleged mishandling of the evidence may constitute an error of law alone giving rise to a Crown appeal of an acquittal; this may not be an exhaustive list. First, it is an error of law to make a finding of fact for which there is no evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Second, the legal effect of findings of fact or of undisputed facts may raise a question of law. Third, an assessment of the evidence based on a wrong legal principle is an error of law. Fourth, the trial judge’s failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law, but this error will be found to have been committed only if the reasons demonstrate that this was not done. The trial judge’s reasonable doubt did not have to be based on the evidence; it could arise from the absence of evidence or a simple failure of the evidence to persuade him to the requisite level of beyond reasonable doubt. It is only where that reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

**Cases Cited**

**Considered:** *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Morin*, [1988] 2 S.C.R. 345; **referred to:**  *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *Wild v. The Queen*, [1971] S.C.R. 101.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 676(1)(*a*).

**Authors Cited**

Canadian Judicial Council. Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence, February 2004 (online: http://www.cjc‑ccm.gc.ca/english/lawyers\_en.asp?selMenu=lawyers\_NCJI‑Jury‑Instruction‑Final‑2004‑02\_en.asp#\_Toc290368699).

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Rouleau and Watt JJ.A.), 2009 ONCA 834, 256 O.A.C. 246, 99 O.R. (3d) 761, 249 C.C.C. (3d) 140, 72 C.R. (6th) 154, [2009] O.J. No. 4963 (QL), 2009 CarswellOnt 7362, setting aside the accused’s acquittals entered by Stong J., [2009] O.J. No. 6377 (QL), 2009 CarswellOnt 8844, and ordering a new trial. Appeal allowed.

*Christopher D. Hicks* and *Misha Feldmann*, for the appellant.

*Christine Bartlett‑Hughes*, for the respondent.

*James D. Sutton* and *Ann Marie Simmons*, for the intervener.

The judgment of the Court was delivered by

Cromwell J. —

I. Introduction

1. The appellant was acquitted at trial of two counts of sexual assault on his 17-year-old cousin. The Court of Appeal set aside the acquittals and ordered a new trial on the basis that the trial judge had erred in law by failing to consider all of the evidence in reaching his conclusion. The appellant’s appeal to this Court raises both narrow and broader questions. The narrow question is whether the trial judge, in fact, failed to consider the whole of the evidence as the Court of Appeal concluded that he had; the broader question is under what circumstances a trial judge’s alleged mishandling of the evidence gives rise to an error of law alone which justifies appellate intervention on a Crown appeal from an acquittal. Turning first to the narrow question, the trial judge, in my respectful view, did not make the error identified by the Court of Appeal. I would therefore allow the appeal and restore the acquittals entered at trial. However, it will be helpful to address the parties’ and intervener’s submissions on the broader issue concerning when, in a Crown appeal of an acquittal, alleged shortcomings in a trial judge’s assessment of the evidence constitute an error of law alone justifying appellate intervention.

II. Overview of Facts and Proceedings

1. The complainant alleged that on two occasions the appellant had non-consensual sexual intercourse with her while she was sleeping with him in his bed. She was 17 at the time of both incidents; he was 22 at the time of the first and 23 at the time of the second. The trial judge found that the two incidents described by the complainant had occurred. The main issue, in his view, was whether the sexual activity had been proved to be without the complainant’s consent ([2009] O.J. No. 6377 (QL)).
2. The judge found that the appellant had “adopted a lifestyle” that included regular parties at his home and providing young women — including the complainant and her 15-year-old sister — with alcohol (para. 27).
3. The first incident described by the complainant occurred in February 2006. The complainant and appellant were socializing in his apartment, including drinking alcohol that he had provided. The complainant’s younger sister as well as the appellant’s roommate and another friend were also present, but the friend left before the others went to sleep. At the end of the evening, the complainant’s sister went to sleep on the couch, the roommate went to sleep in his room and the appellant and complainant went to sleep in the appellant’s bed. The complainant testified her sleeping in the appellant’s bed had not been discussed beforehand.
4. The complainant testified that in the early hours of the morning, the appellant moved closer to her and began grabbing and touching her. She testified that she said “stop” but that he eventually had unprotected intercourse with her. She got up, cleaned herself off, walked around the house and returned to bed with the appellant, although she did not sleep. Later in the morning, she got up, woke up her sister and they left. She did not mention the incident, and her sister testified that nothing seemed amiss. The complainant’s sister, however, testified that when she woke up on this occasion, the complainant was in the appellant’s bedroom. When questioned about this apparent inconsistency between her evidence and that of the complainant, her sister responded that she could be confusing it with a different time when they were at the appellant’s house.
5. The second incident reported by the complainant occurred in May 2006. She again found herself at the appellant’s apartment, after they both had participated in a long day of moving. She testified that she did not know how she ended up staying the night again. This time, they were alone. After watching movies, they retired to his bed. Once again, she testified that he began touching and kissing her, and that she said “no” before they had unprotected intercourse. Afterwards, she was “too on edge” to leave the apartment, despite having a car, so she returned to the same bed and went to sleep. She left the next day and did not tell anyone about the occurrence.
6. The complainant posted a poem online. The judge found that it had been written very soon after the February 2006 incident “as an outlet” (para. 29). Her sister saw the poem on the Internet and the incidents came to light when she began to discuss it with the complainant. The complainant filed a police report, and the appellant was charged with two counts of sexual assault. At trial, the appellant testified and denied any sexual contact with the complainant.
7. The trial judge acquitted the appellant on both counts. After summarizing virtually all of the evidence the trial judge found that he had “absolutely no doubt” (para. 26) that sexual intercourse had taken place between the appellant and complainant; he specifically rejected the appellant’s denials in this regard (para. 36).
8. However, the trial judge acknowledged that he also had to be convinced beyond a reasonable doubt that the sexual activity had occurred without the complainant’s consent. He noted some “concerns” in this regard. He referred to the sister’s evidence that she might have been confused between the times that she saw the complainant in the appellant’s bed. The judge said that this caused him to wonder how many times the complainant had ended up in the appellant’s bed. He asked himself “why did [the complainant] insist in going back to the same bed that she had been violated in?” (para. 34). The judge then noted that he suspected “very strongly” that the complainant was confused and that she “wrestled” with going into the accused’s bedroom. He returned to the fact that “[s]he said she went to the bed on her own and it wasn’t even discussed. Why?” (para. 35).
9. The trial judge referred to the poem the complainant had written, entitled “Black Dark”, and quoted it in its entirety in his oral reasons. As noted, he accepted both that it was written very shortly after the February incident, and that it had been written as an outlet. He then stated, “[w]hen I read [the complainant’s] description of the incidents on February 11th, concerns are raised” (para. 31). He noted that the words “bittersweet” and “regret” which she had used in the poem were “[h]ardly the words that describe a rape” (para. 33). The trial judge then concluded that “[i]n all of the circumstances of this case, notwithstanding that I do not believe the accused, notwithstanding that I am satisfied that sexual intercourse did occur on both of these occasions, I cannot be satisfied that [the complainant] was sexually assaulted without her consent” (para. 36).
10. The Crown appealed successfully to the Court of Appeal, which set aside the acquittals and ordered a new trial on both counts of the indictment (2009 ONCA 834, 256 O.A.C. 246). The court concluded that the trial judge erred in law in his approach to the evidence. Specifically, it found that he failed to consider some lines of the poem in the context of the others, and that he failed to consider the poem in the context of the complainant’s testimony on consent. This, according to Watt J.A., was a “piecemeal” approach which was incompatible with the trial judge’s obligations to consider the cumulative effect of all relevant evidence (para. 64) and constituted an error of law as set out in this Court’s decision in *R. v. B. (G.)*, [1990] 2 S.C.R. 57.
11. The appellant argues that the trial judge did not approach the evidence in a “piecemeal” fashion. The appellant further argues that even if the trial judge did err as the Court of Appeal suggested, the Court of Appeal was without jurisdiction to entertain a Crown appeal because any error was an error of fact and not an error of law alone as is required by s. 676(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. The respondent Crown argues that, as held by the Court of Appeal, the trial judge did err in law by considering the evidence in a piecemeal fashion.

III. Issues

1. There are two issues:

1. Did the trial judge fail to consider the evidence as a whole?

2. Under what circumstances does a trial judge’s allegedly flawed assessment of the evidence constitute an error of law and thereby allow appellate review of an acquittal?

IV. Analysis

A. *Did the Trial Judge Fail to Consider the Evidence as a Whole?*

1. As noted, the Court of Appeal found that the trial judge had failed to put particular passages in the complainant’s poem in the context of the poem as a whole and of her sworn testimony. The court stated that

[t]he trial judge had accepted [the complainant’s] evidence that sexual intercourse had taken place, but never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned. [para. 62]

. . .

. . . His piecemeal approach to isolated words in the poem was incompatible with his obligation to consider the poem as a whole, and together with the rest of the evidence on the issue. [para. 64]

While acknowledging that the trial judge considered other aspects of the complainant’s conduct in his discussion of the consent/non-consent issue, the Court of Appeal concluded that “it was the isolated passages in the poem . . . that tilted the balance in favour of acquittal” (para. 70). The Court of Appeal also expressed concern that the trial judge had wrongly used the poem written in relation to the first incident in his consideration of the second.

1. Respectfully, I cannot accept this characterization of the trial judge’s decision for four reasons.
2. First, the Court of Appeal erred when it stated that “[t]he reasons of the trial judge make *no* reference to the sworn testimony of [the complainant] given at trial” (para. 56 (emphasis in original)) and that he “had . . . never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned” (para. 62). In fact, the first eight pages of the transcription of the trial judge’s oral reasons summarize the complainant’s evidence, and her testimony that she did not consent is specifically referred to. The trial judge noted that, in connection with the February incident, the complainant had pushed the appellant away saying “stop” and that she pulled away, at no time consenting to the contact. In relation to the May incident, the trial judge noted that she had said “no” and pushed him away when the appellant started coming closer to her and kissing her, and that she testified that she had never consented to the incidents.
3. Respectfully, the Court of Appeal misapprehended the record when it faulted the judge for not referring to the complainant’s evidence about the fact that she did not consent to the sexual activity. The trial judge referred to her evidence that she had not consented on at least three occasions in his reasons (paras. 7, 11 and 15).
4. Second, the Court of Appeal’s statement that the trial judge gave no reasons for rejecting the complainant’s evidence is problematic for two reasons: the trial judge did not have to “reject” the complainant’s evidence in order to be left with a reasonable doubt arising from the whole of the evidence, and the trial judge, as we shall see, gave extensive reasons as to why he was left with a reasonable doubt on the issue of consent.
5. Third, there is no basis in the trial judge’s reasons to conclude, as did the Court of Appeal, that he used small excerpts from the poem out of context. The judge quoted the poem as a whole and then drew attention to language that raised concerns in his mind, in the context of the rest of the evidence which he had heard.
6. Finally, the Court of Appeal erred in concluding that it was a couple of brief excerpts from the poem that had “tilted” the balance in favour of acquittal and that the judge had improperly considered the poem in relation to the second incident. Respectfully, these conclusions are not based on a fair reading of the trial judge’s reasons.
7. The trial judge noted that he had to be satisfied beyond a reasonable doubt that the incidents occurred without the complainant’s consent. He expressed his concern, based on the evidence of the relationship between the accused and the complainant and on the testimony of the complainant’s sister, about how many times the complainant had been at the accused’s home and ended up in his bed. He noted that the relationship between the appellant and the complainant was “strong but perverse” (para. 30). After referring to an excerpt from the poem and expressing concern arising from the complainant’s use of the word “regret” in relation to the first incident, the trial judge asked “why did she insist in going back to the same bed that she had been violated in?” (para. 34). This comment, of course, had nothing to do with the language of the poem but was based on the other evidence that he had heard in relation to both incidents.
8. After referring to some further language in the poem — “First taste So bittersweet” — the judge said that he suspected very strongly when he read the poem that the complainant had been confused and that she had wrestled with going into that room. He then referred to her evidence about how she had gone to the bed on her own without discussion; the trial judge asked “[w]hy?” He then concluded that “[i]n all of the circumstances of this case” he could not be satisfied that the complainant had not consented to the sexual activity. In short, the judge’s references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking into account all of the circumstances of the case in reaching his conclusion.
9. Respectfully, the Court of Appeal erred in its conclusion that the trial judge had taken a “piecemeal” approach to the evidence, and that his use of the poem had been out of context and had “tilted the balance” in his decision to acquit. Further, I do not agree that “[t]he trial judge appears to have used the poem about the events of February 11, 2006, to support his finding on the consent/non-consent issue in connection with the allegation of May 20, 2006” (para. 63). As set out above, a fair reading of the trial judge’s reasons discloses that he had reasonable doubt based on his consideration of all the evidence.

B. *Under What Circumstances Do Alleged Shortcomings in a Trial Judge’s Assessment of the Evidence Constitute an Error of Law and Thereby Allow Appellate Review of an Acquittal?*

1. The Crown’s right of appeal from an acquittal of an indictable offence is limited to “any ground of appeal that involves a question of law alone”: *Criminal Code*, s. 676(1)(*a*). This limited right of appeal engages the vexed question of what constitutes, for jurisdictional purposes, an error of law alone. This appeal raises once again the issue of when the trial judge’s alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal. The jurisprudence currently recognizes four such situations. While this may not be an exhaustive list, it will be helpful to review these four situations briefly.

(1) It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence — However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule

1. It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence. Juries are properly so instructed and told that they may accept some, all or none of a witness’s evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence (online).
2. The principle that it is an error of law to make a finding of fact for which there is no supporting evidence does not, in general, apply to a decision to acquit based on a reasonable doubt. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:

A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. . . . [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

1. The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: “. . . as a matter of law, the concept of ‘unreasonable acquittal’ is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.”

(2) The Legal Effect of Findings of Fact or of Undisputed Facts Raises a Question of Law

1. *R. v. Morin*, [1992] 3 S.C.R. 286, lists this as one category of cases in which the trial judge’s assessment of the evidence may give rise to an error of law. As Sopinka J. put it, at p. 294:

If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.

In short, the appellate court can simply apply the trial judge’s findings of fact to the proper legal principles; the trial judge’s error, if there is one, may safely be traced to a question of law rather than to any question about how to weigh the evidence.

(3) An Assessment of the Evidence Based on a Wrong Legal Principle Is an Error of Law

1. This is another category mentioned in *Morin*. In that case, Sopinka J. stated at p. 295, “Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle.” In *B. (G*.*)*, Wilson J. added important cautionary words concerning this basis for appellate intervention:

. . . it will be more difficult in an appeal from an acquittal to establish with certainty that the error committed by the trial judge raised a question of law alone because of the burden of proof on the Crown in all criminal prosecutions and the increased importance of examining critically all evidence that may raise a reasonable doubt. [p. 75]

1. This proposition was said by Lamer J. (as he then was) in *Schuldt* to constitute the proper basis for the Court’s decision in *Wild v. The Queen*,[1971] S.C.R. 101. In *Schuldt*, at p. 610, it was affirmed that except in the rare cases in which a statutory provision places an onus upon the accused, it can sometimes be said as a matter of law that there is no evidence on which the court can convict, but never that there is no evidence on which it can acquit as there is always the rebuttable presumption of innocence. This approach was also adopted in *B. (G.)* by Wilson J., at pp. 69-70, and the point was further underlined in the concurring reasons of McLachlin J. (as she then was), at p. 79, where she wrote: “In the absence of . . . misdirection the law is clear that doubts about the reasonableness of the trial judge’s assessment of the evidence [in the context of a Crown appeal of an acquittal] do not constitute questions of law alone . . . .”

(4) The Trial Judge’s Failure to Consider All of the Evidence in Relation to the Ultimate Issue of Guilt or Innocence Is an Error of Law

1. This was Sopinka J.’s last category in *Morin* (pp. 295-96). The underlying legal principle is set out in another decision called *R. v. Morin*, [1988] 2 S.C.R. 345. The principle is that it is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt; the evidence must be looked at as a whole: see, e.g., *B. (G.)*, at pp. 75-77 and 79. However, Sopinka J. sounded an important warning about how this error may be identified. It is a misapplicationof the *Morin* principle to apply it whenever a trial judge fails to deal with eachpiece of evidence or record each piece of evidence and his or her assessment of it. As noted in *Morin* (1992), at p. 296, “A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect.” This was the basis of intervention relied on by the Court of Appeal, but as noted earlier, a fair reading of the trial judge’s reasons does not support this finding of legal error.
2. A trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed. As Binnie J. pointed out in *Walker*, “Reasons are sufficient if they are responsive to the case’s live issues and the parties’ key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue” (para. 20). *Walker* also clearly holds that the adequacy of a trial judge’s reasons is informed by the limited grounds for Crown rights of appeal from acquittals (paras. 2 and 22). As Binnie J. succinctly put it, “Caution must be taken to avoid seizing on perceived deficiencies in a trial judge’s reasons for acquittal to create a ground of ‘unreasonable acquittal’ which is not open to the court under the provisions of the *Criminal Code*” (para. 2).
3. Having reviewed four types of cases in which an alleged mishandling of the evidence may constitute an error of law alone, I return to the appellant’s submissions. He argues that on a Crown appeal from an acquittal, where the error of law is alleged to be a defect in the trial judge’s assessment of the evidence, a reviewable error arises only where four conditions are met: (a) an error of law has been committed; (b) the misapprehension of the evidence is not properly characterized as either an unreasonable verdict or a miscarriage of justice; (c) the Crown can show with a high degree of certainty that the error affected the verdict; and (d) there has been a shift in a legal burden to the accused. For reasons I will develop, I cannot accept this submission.
4. The appellant’s first condition — that an error of law has been committed — simply restates the question. The question is under what circumstances may an alleged mishandling of the evidence by the trial judge constitute an error of law alone giving the Crown a right of appeal from an acquittal. I have reviewed four types of situations, which may not be an exhaustive list, in which this may be the case.
5. The appellant’s second condition, relating to whether the alleged misapprehension of the evidence is “not properly characterized” as an unreasonable verdict or a miscarriage of justice, is not a helpful way of approaching the issue. Unreasonable verdict and miscarriage of justice are bases for appellate intervention in the case of conviction appeals; reference to them does not help identify errors of law alone for the purposes of Crown appeals from acquittals.
6. The appellant’s third condition, that the Crown can show a high degree of certainty that the error affected the verdict, similarly does not assist in identifying a question of law alone. This condition relates not to whether an error is one of law, but to when, in the presence of an error of law, appellate intervention is justified.
7. The appellant’s fourth point is that a trial judge’s treatment of the evidence can never constitute an error of law for the purposes of permitting a Crown appeal unless there has been a shifting of the burden of proof. He bases this position on a statement by Lamer J. in *Schuldt*, at p. 604:

. . . a finding of fact that is made in the absence of any supportive evidence is an error of law. I must say, however, that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.

1. The appellant contends that the Court’s decision in *Wild* should now be considered to have been wrongly decided.
2. Respectfully, I do not accept either of these submissions. As I explained earlier, the principle set out in *Schuldt* (and many other cases) is that a reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt. The Court has twice, in *Schuldt* and *B. (G.)*, explained the proper basis of the decision in *Wild*. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

C. *Application to This Case*

1. As noted, while it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge’s reasons in this case do not, in my view, disclose any such error.

V. Disposition

1. I would allow the appeal and restore the acquittals entered at trial.

*Appeal allowed.*

Solicitors for the appellant:  Hicks Adams, Toronto.

Solicitor for the respondent:  Attorney General of Ontario, Toronto.

Solicitor for the intervener:  Public Prosecution Service of Canada, Gatineau.