

JEI WEEK 2024

GENERAL PRINCIPLES OF JUDGMENT WRITING IN CRIMINAL CASES

**Turks & Caicos Islands
(September 16 – 20)**



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WHO ARE WE WRITING FOR?

- Privy Council?
- Court of Appeal?
- Parties?
- Public?



DUTY OF JUDGE TO GIVE REASONS

- Judges are mandated to give reasons
- Section 62(3) of Criminal Procedure Ordinance:

“Court shall give judgment which state reasons for conviction at the time of conviction or as soon as is reasonably practicable thereafter.”



PURPOSE OF REASONS



Reasons tell the parties
affected why the
decision was made



Reasons provide public
accountability of
judicial decisions



Reasons permit
effective appellate
review

See R v R.E.M 2008 SCC 51



ESSENTIAL ELEMENTS OF A GOOD JUDGMENT

- Clarity and precision
- Intelligible and logical reasoning
- Avoid complex sentences, strange/difficult words
- Avoid use of personal experience
- Findings and directions must be clear and specific
- Should be cohesive, not bogged down in mindless recitation of the evidence and not caught up in minutiae.
- Should not contain rambling dissertations on the law, but should be sharp, precise, clear and cohesive, with a sufficient level of detail.



APPROACH TO WRITING

Argument by argument?

Ground of appeal by ground of appeal?

Issue driven?

Mix and match?



STRUCTURAL FORMAT

Although every judge will have his/her own style of writing there are essential requirements which ought to be followed.

STRUCTURAL FORMAT

The basic format should seek to:

- a) Summarise both cases, in broad terms.
- b) Set out the substantive criminal law.
- c) Identify the issues which are not in dispute.
- d) Identify the issues which are in dispute.
- e) Apply, as necessary, care and caution warnings.
- f) State how factual issues in dispute have been resolved, with clear, succinct, substantiating reasons.
- g) Apply facts, as found, to the relevant law.
- h) Deliver verdict.

WHAT SHOULD BE INCLUDED?



Anything that influenced the decision



Information which bears on the issues



Anything about which a reviewing court might be curious

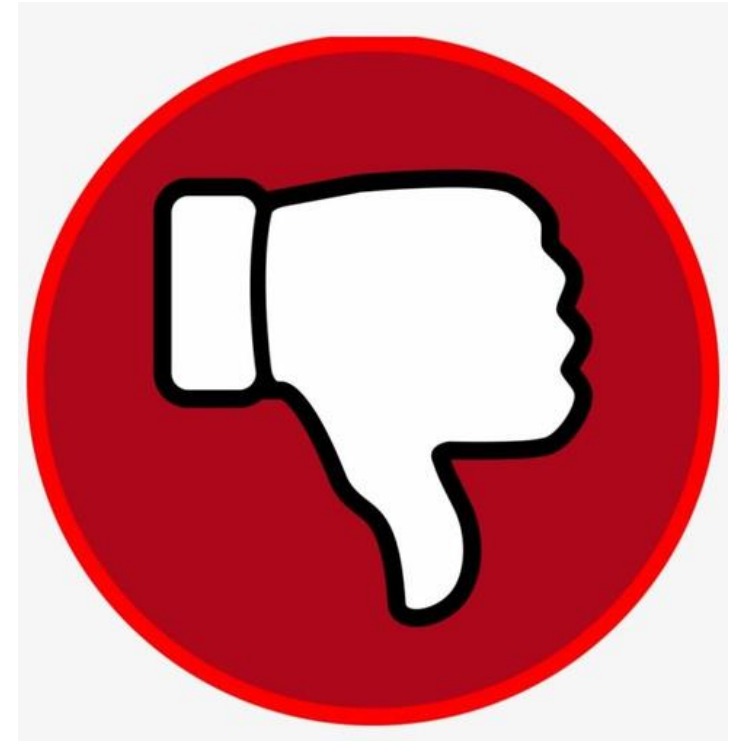
WHAT SHOULD BE EXCLUDED?

Everything else

Particularly information that has no bearing on the issues

Repeated information

Phrases that could be reduced or eliminated



APPROACH TO EVIDENCE

WHAT IS REQUIRED?

1. Not every failure to resolve a dispute will render the reasons inadequate
2. Reasons must show parties and the Appeal Court the basis on which the Judge reached the decision
3. Reasons must identify applicable principles of law and findings of fact
4. More required than statement of the principles of law that the judge has applied and the findings of fact that the judge has made.
5. Rather, there must be exposed, the reasoning process linking them and justifying the latter and, ultimately, the verdict that is reached.

APPROACH TO EVIDENCE

WHAT IS REQUIRED?

General factors which the Judge must take into account:

1. Onus of proof and burden of proof
2. Standard of proof
3. Presumption of innocence
4. Reverse burden (if arises)
5. Inferences
6. Co-defendant (separate considerations)
7. Expert evidence
8. Determine facts according to evidence logically and rationally
9. Duty to determine reliability of witnesses
10. Verdict options
11. Audio/video link – cross examination
12. Unravel factual complexity

“When there is a good reason to quote an entire passage from a statute or precedent, precede the quoted material with a summary in your own words or an indication of what inference you expect the reader to draw from it. In this way, if your readers skip the quoted material, they will still have the benefit of your summary or analysis.”

SENTENCE CONSTRUCTION

- ❑ Another common problem is poorly structured sentences.
- ❑ Long sentences can be more than a hundred words long and perfectly readable if it is properly structured. And a sentence of four or five words can be unintelligible if it is poorly structured or laden with jargon.
- ❑ Divide suspicious long sentences into smaller ones.

THE USE OF LEGALESE

- ❑ Judges should avoid technical, foreign, or legalistic words that could easily be replaced by ordinary English.

IMPORTANT POINTS TO REMEMBER

- Be precise and to the point.
- Be coherent.
- Use footnotes where necessary to avoid clutter
- Avoid quoting a long list of authorities which make the same point. Use the landmark decisions and make reference to the others in footnotes.
- Only details relevant to the analysis should be included. Omit unnecessary facts.

CONTENT OF REASONS

Identify	Identify crucial issues
Summarise	Summarise crucial arguments
Explain	Explain how these arguments were dealt with
Explain	Explain how and why the issues were resolved
Provide	Provide rational and considered basis for conclusion reached
Avoid	Avoid conclusionary credibility preference

R v Connell [1985] 2 NZLR 233



TO WHAT EXTENT MUST YOU DELVE INTO CREDIBILITY ASSESSMENT IN YOUR REASONS?

- The assessment of credibility is an essential aspect of fact-finding in judicial decision making.
- It is important to demonstrate in your reasons how credibility was assessed and the test(s) employed in arriving at your conclusion.
- The Court of Appeal, in discharging its function of review, must have regard to the factual and credibility findings made by the trial court with all the advantages it had during a trial.



TO WHAT EXTENT MUST YOU DELVE INTO CREDIBILITY ASSESSMENT IN YOUR REASONS?

The tools for credibility evaluation include,

- Consistency of the witness's evidence with what is agreed or clearly shown by other evidence to have occurred.
- The internal consistency of the witness's evidence.
- The plausibility of the account.
- The credit of the witness in relation to matters not germane to the litigation.
- The demeanor of the witness.

HOW TO APPROACH CIRCUMSTANTIAL EVIDENCE IN YOUR REASONS

- The judge sitting alone must examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.
- Do not speculate.
- Must be only conclusion beyond reasonable doubt.
- If there are other conclusions of equal weight then prosecution has failed to prove its case.

**REASONS
SHOULD
CONTAIN THE
WARNINGS AND
APPLICABLE
PRINCIPLES OF
LAW RELIED
UPON**

Richards v R 2001 CILR 496 (Cayman Islands) per Rowe JA at para [32],

- **When a trial judge sitting alone has advised himself to the applicable principles of law, and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did in order to demonstrate that he has acted with the requisite degree of caution in mind and has therefore heeded his own warning. No specific form of words is necessary for this demonstration. What is necessary is that the Judge's mind upon the matter should be clearly revealed.**

THE EXTENT TO WHICH REGARD MUST BE HAD TO TURNBULL WARNINGS IN THE REASONS

Judge must warn himself of dangers of acting on uncorroborated evidence of visual identification

An honest witness may be mistaken

Actual and potential weaknesses in ID evidence and they were reconciled

Recognition evidence



Barrington Taylor v R. 2013 JMCA 35

**REASONS MUST
INCLUDE
JUSTIFICATION
FOR GIVING
EITHER A
MODERATE OR
A STRONG CARE
AND CAUTION
WARNING**

The need to consider giving a discretionary warning of the type described in **R v Makanjuola; R v Easton [1995] 1 WLR 1348** arises whenever the need for special caution before acting on certain evidence becomes apparent. The judge has a wide discretion when formulating directions on care warnings. The strength and terms of any such direction will depend on the circumstances of the individual case. If the judge deems a moderate care and caution warning necessary, it may be prudent to include in the reasons why a stronger warning was not considered. Such a warning is not automatically warranted if the witness is a complainant of a sexual offence. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable.

THE EXTENT TO WHICH REFERENCES TO WARNINGS SHOULD BE REFERRED TO IN REASONS –CARE AND CAUTION WARNING

Fleming v The Queen (1998) 197 CLR 250 at 263

- ❑ The requirement to take a warning into account necessitates that the judge expressly refer to the warning in his or her reasons for judgment.

REASONS MUST INCLUDE, WHERE NECESSARY, AN ACCOMPLICE WARNING AND AN ASSESSMENT OF THE CREDIBILITY

The assessment of the credibility of an accomplice witness involves a more stringent level of scrutiny than that of a witness with an interest to serve and thus a more robust warning must be given.

For an example of an accomplice warning, see:

- ❑ *Chapter 12 of the Trinidad and Tobago Criminal Bench Book*
- ❑ *Chapter 4.23.1 of the Victorian Criminal Charge Book*

SEXUAL OFFENCES AND STEREOTYPING

In trials for sexual offences, judges sitting alone should be mindful of the stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct and, in appropriate cases, demonstrate in their reasons that they have appropriately directed themselves on those matters.

Subject matters for stereotyping include [but are not limited to] the following:

- The complainant wore provocative clothing; therefore he/she must have wanted sex;
- The complainant got drunk in male company; therefore he/she must have been prepared for sex;
- An attractive male does not need to have sex without consent;
- A complainant in a relationship with the alleged attacker is likely to have consented;
- Rape takes place between strangers;
- Rape does not take place without physical resistance from the victim;
- If it is rape there must be injuries;
- A person who has been sexually assaulted reports it as soon as possible;
- A person who has been sexually assaulted remembers events consistently

- See page 274 of the Trinidad and Tobago Criminal Bench Book

REASONS SHOULD INCLUDE GOOD CHARACTER DIRECTIONS AND DEMONSTRATE HOW THEY WERE FACTORED INTO ACCOUNT

- No area of law has grown in complexity in the last 2 decades or so than the issue of good character.
- All of the relevant principles on good character were compendiously reviewed in the decision in *R v Hunter and Ors* [2015] EWCA Crim 631 (also *Vye* [1993] 1 WLR 471 and *R v Aziz* [1996] AC 41)
- The judge sitting alone, in appropriate cases, must take into consideration the accused's good character where it arises.



PROVOCATION WHERE THE ACCUSED IS A PERSON OF GOOD CHARACTER

- ❑ Where the accused is a person of good character, the judge must direct himself that as a man of good character, the accused might have been unlikely to indulge in very serious violence without first being provoked.

Bimal Roy Paria v The State 2004 Crim. L. R. 228

BAD CHARACTER -THE EVIDENCE MUST BE SUFFICIENTLY PROBATIVE TO JUSTIFY ITS ADMISSIBILITY

Previous
convictions are
admissible

Similar fact
evidence/striking
similarity

Imputations on
character of
prosecution
witness

The End

