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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **26/1/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

WILLIAM COURTNEY

_____

PROSECUTION APPEAL PURSUANT TO ARTICLE 17 OF THE CRIMINAL JUSTICE (NORTHERN IRELAND) ORDER 2004

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Before Kerr LCJ, Campbell LJ and Coghlin J

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KERR LCJ

Introduction

[1] This is an application for leave to appeal against a ruling made by McLaughlin J on the trial of William Courtney whom we shall refer to as 'the defendant'. He had appeared before the learned judge, sitting without a jury, at Belfast Crown Court on a charge of the murder of Alan McCullough and two charges of belonging to a proscribed organisation. On 28 November 2006, at the close of the Crown case, the judge acceded to an application made on Mr Courtney's behalf for a direction of no case to answer on each of the charges.

[2] After the ruling was given, the prosecution applied to the judge for an adjournment pursuant to article 17 (4) of the Criminal Justice (Northern Ireland) Order 2004 in order to consider whether to apply for leave to appeal against his decision. The matter was adjourned until 30 November and on that date an application was made for leave to appeal against the ruling in relation to the charge of murder. McLaughlin J refused that application and the Crown now renews the application to this court.

The prosecution evidence as summarised by the judge

[3] The learned judge summarised the evidence called on behalf of the prosecution in the following passages of his judgment: -

> "[5] It is not in dispute that the deceased, Alan McCullough, was a member of C Company of the UDA in early 2003. At that stage it was under the command of Johnny Adair. In February 2003 two men were murdered as they left a ferry terminal at Belfast Docks. The blame for these murders fell upon C Company and as a result the other sections of the UDA combined and ordered all members of C Company to leave Northern Ireland. The deceased did so in the company of his girlfriend and others immediately upon the utterance of the threat. Between February and April 2003 efforts were made by his mother and the deceased to facilitate his return to Northern Ireland. Initially Mrs McCullough made inquiries and contacted a number of people, including the defendant. She managed to obtain the defendant's mobile telephone number and spoke to him on a number of occasions about the possibility of securing the return of the deceased to Northern Ireland. She could not remember much of the detail of her conversations but did remember that she had spoken to him on more than one occasion. She also recalled that he had visited her house a few times accompanied on one occasion by a Denis Cunningham. In the course of this meeting it would seem that she had explained to the defendant the difficulties she had faced through the previous 20 years following upon the murder of her husband and that she did not feel that she had been treated right over those years. She stated the conversation culminated with the defendant saying he would go to see other people including other commanders of the Inner Council of the UDA and he would do so as he thought that "they" owed her something. The meeting lasted about 10 to 15 minutes. The evidence of Mrs McCullough was particularly vague about the detail of this conversation. It is obvious that she was having discussions with a considerable number of people and it was never alleged there was any sense of threat in any of the words or actions of the

defendant. Indeed she seemed willing to accept that his interventions were, so far as she could see, designed to help secure his possible return. She admitted candidly that it was explained to her by a number of people how difficult that might be.

[6] It also emerged in the evidence that the deceased became increasingly impatient with the time consuming process and returned to Northern Ireland against all the advice he had been given. Not only did he do that but he actually began to live in the Denmark Street area and was seen by a number of people there and in the Shankill area in general. During the period after his return to Northern Ireland he lived for a part of the time in Millisle but apparently also spent time in Dublin and Portugal. Clearly this was a high risk strategy on his part knowing the vehemence of the opposition to the return of any members of C Company after their expulsion.

[7] Part of the process of negotiating or facilitating his return involved the deceased meeting with the defendant and others on Monday 26 May 2003. The defendant and two others arrived at his mother's home in Denmark Street around 6.00pm. The deceased left the house, got into the car and it is not in dispute that the four men went for a meal to Corr's Corner Restaurant. Their arrival in the car park and their passage through the foyer of the hotel was recorded on CCTV footage. The deceased returned home safely following that meeting.

[8] It is then alleged the defendant was involved in collecting the deceased again in very similar circumstances, at a similar time, from his home on Wednesday 28 May 2003. It was alleged that on both occasions he had used his own blue Mitsubishi car. There is little doubt the deceased left home at around 6.15pm that evening and was not seen alive again by any of his family or friends thereafter. His body was found in a shallow grave, referred to as the body deposition site, at a place known as Aughnabrack Road, just over one week later. He had been shot several times.

[9] A large number of lines of specialist investigations of a forensic nature were instigated. It is not necessary for present purposes to analyse the details of this evidence. The key points however satisfy me, on a *prima facie* basis, that the deceased died very shortly after he was taken away in the car on 28 May and that soil and lime traces which matched those from the body deposition site were found on clothing and footwear ascribed to the defendant and recovered from his home during follow up searches. In the course of lengthy interviews he did not answer questions but he did give the police two statements as to his movements, one account being given during the course of his initial arrest and interview and a second, somewhat more detailed account, when later re-arrested and charged.

[10] In addition to evidence from members of the deceased's family linking the defendant to the deceased on the evening of 28 May there was also evidence which the prosecution adduced with a view to linking the defendant to the body deposition site on the evening of his disappearance. Witness A was travelling along the Aughnabrack Road when he found his progress halted by the presence of, inter alia, a blue car which was parked at the entrance to the laneway leading to the point where the body of the deceased was later recovered. In the course of police interviews the witness appeared to be able to say the car was a Mitsubishi and could give some of the letters and digits from the registration number. These were consistent with the presence of the defendant's car at the scene as they matched to a large extent the description of his car.

[11] As part of their inquiries the police staged a reconstruction of events surrounding the disappearance of the deceased and the press, including the Irish News in particular, published a photograph of the car used in the reconstruction. They also gave details of its make, model and registration number. This took place about a week after the disappearance of the deceased and witness A happened to read the Irish News on the date of publication. He immediately put two and two together but, curiously, instead of telephoning the

police and reporting his suspicions he then went to the Aughnabrack Road, walked the laneway and ultimately discovered the body of the deceased at the deposition site. Clearly he was a most important witness but I am satisfied in the course of the trial it became apparent that it was impossible to disentangle what he could remember of events as they actually took place on 28 May and those details which he gathered upon reading the article in the Irish News."

The ruling

[4] The judge explained why he decided to grant the application in the following paragraphs: -

> [13] I must now ask myself the question … if, in the light of the evidence I have heard to date, I am convinced there are no circumstances in which I could properly convict the accused of any of the counts on the indictment.
>
> [14] I am satisfied the evidence of the members of the McCullough family circle is insufficiently cogent and reliable to establish that the accused was in fact the driver of the car which collected the deceased around 6.00pm on the evening he disappeared. There are many contradictions in their evidence, many explicable on the basis that honest witnesses viewing the same event may recall it and describe it in different ways, but other parts are so contradictory as to be all but impossible to explain. For example:
>
> > (i) How could Mrs McCullough have repeatedly told the police that she saw Ihab Shoukri in the passenger seat of the car calling at her house on 28 May and then admit under cross-examination for the first time that she never saw him?
> >
> > (ii) How could Shireen claim to have been in the house and to have witnessed the departure of the deceased from the house and the collection of him by the defendant when both Mrs McCullough and Mr Hagan state positively that she was not there?

(iii) How could the family witnesses claim that many phone calls were made during the evening/night of 28/29 May to the deceased's phone and there be no trace of such calls in the telephone records proved?

These difficulties are compounded when one considers the following further matters:

(a) The fine details of the alleged positions of their respective viewing points of the events outside the house which cannot all be correct since it would have been impossible then for all of them to make meaningful observations outside.

(b) The identifications of the accused as the person driving the car made by Shireen and Mr Hagan were dock identifications as they had not previously had the opportunity to do so since no identification parade was held. As their previous knowledge of the accused was very limited I could not possibly act on their purported identifications. In the case of Mrs McCullough I consider the state of the evidence is such that I cannot assess the value of her identification of the defendant for although she knew him for very many years it is impossible to say where she was when the car arrived at her house and Mr McCullough left, or what or how much she actually saw. Given the dramatic turn in her evidence relating to Ihab Shoukri I could not rely upon her purported identification in any circumstances. The fact that she stood back over such a long time and failed to inform the police that she could not identify Ihab Shoukri as the passenger in the car when he was remanded in custody is particularly difficult to understand.

[15] An analysis of the evidence of witness 'A' leaves me unable to draw any firm conclusion except that he saw a blue car at the Aughnabrack Road on the 28th May. The absence of any report to the police or written or clear mental note of the car details in

> advance of the reconstruction staged by the police and reported, inter alia, in The Irish News, leaves a gaping hole in the prosecution case. His later mistaken identification at the identity parade [underscores] the frailties of his evidence. His public spiritedness and alertness in going to the police should be noted by me however and I commended him in the highest degree for doing so; but for his vigilance the body of the deceased would not have been found so quickly, perhaps not at all.
>
> [16] As a result of the highly skilled work of the many experts it is possible to prove, taking the prosecution case at its height, that boots and jeans found at the defendants house can be linked to the body deposition site at some undefined period; no temporal connection relevant to the case can be made however and so this evidence does not help me to link the defendant to the body deposition site at the time of the killing.
>
> [17] Thus the inherent weaknesses of the evidence of the McCullough family relating to the alleged collection of the deceased by the defendant at Denmark Street and of the alleged presence of the defendant's car at the body deposition site, is such that they cannot be proved by the evidence of these witnesses. In those circumstances I am satisfied I could not properly convict the accused of the murder of Alan McCullough and shall direct that a verdict of not guilty be entered on count 1. In addition the prosecution case is highly deficient in establishing that the defendant was part of a common design to kill the deceased but I need not explore that further here."

The application for leave to appeal

[5] For the prosecution Mr Miller QC submitted that the judge had neglected to take proper account of a substantial body of evidence beyond that of the McCulloughs and Mr Hagan which, he said, was sufficient to establish a *prima facie* case against the defendant. This included the following: -

1. Evidence was given by Samuel John Speers, a senior scientific officer in the Northern Ireland forensic science service that a pair of jeans found in the shed at the defendant's home had significant staining in the knee

area and this staining was fresh, indicating recent contact. This, Mr Miller argued, supported the conclusion that the defendant had been at Aughnabrack Road recently.

2. Scientific evidence from a Dr Pirrie and a Ms Wiltshire established that the person who had worn the clothing recovered from the defendant's home had been at the deposition site itself and not merely in the general area of the Aughnabrack Road. This evidence called for an explanation. None had been proffered by the defendant.

3. Quite apart from the evidence of the McCulloughs about the telephone exchanges between the deceased and the defendant and the absence of contact following his disappearance, independent evidence from telephone records established that (i) there had been substantial contact between the deceased and the defendant before he disappeared, albeit that most of this was initiated by the deceased; (ii) that a telephone call from the defendant's mobile telephone to the deceased's took place on the day of his disappearance just before he left the house; (iii) that, after Alan McCullough disappeared, attempts were made by Mrs McCullough to contact the defendant and, although his telephone was active at these times, he appeared to have decided not to take her calls.

4. Closed circuit television evidence was available which, Mr Miller claimed, showed a motor vehicle which was not inconsistent in appearance with the Mitsubishi car that the defendant had owned. This vehicle appeared to take a route that would have been followed by a car conveying the deceased from Denmark Street to the Aughnabrack Road. Its journey was recorded at a time that was consistent with the time that the deceased had left his mother's home.

5. When the accused was interviewed and the allegations made by the McCullough family put to him his explanations for his movements and activities for the night of the 28 May were, Mr Miller asserted, manifestly untrue and self-contradictory.

6. When he read the article in the Irish News, witness A associated the description of the car that was said to have taken him from Denmark Street. The judge said that he was unable to draw any firm conclusion from this evidence except that the witness saw a blue car at the Aughnabrack Road. This seriously undervalued and misunderstood the significance of the evidence, Mr Miller suggested. The association that the witness made between the events that he had witnessed in Aughnabrack Road and the newspaper article made it more likely that he had retained a sufficiently reliable recollection of the make of car, particularly when allied to the fact that there was an undisputed

forensic connection between the owner of a Mitsubishi car and the body deposition scene.

[6] For the defendant Mr Harvey QC drew our attention to certain statements made by the Attorney General, Lord Goldsmith, during the passage through the House of Lords of the Criminal Justice Bill (which later became the equivalent legislation in England and Wales to the 2004 Order). Referring to the availability of a prosecution appeal from a ruling of no case to answer based on what is commonly known as the 'second limb' of the decision in *R v Galbraith* [1981] 2 All ER 1060, the Attorney said: -

> "I turn to the second limb, the second kind of ruling of no case to answer identified in *Galbraith*; namely, one where a properly directed jury could not convict on the evidence.
>
> …
>
> I indicated in Committee that I would expect it to be exceptional in practice for the Court of Appeal to overturn a judge's ruling of no case to answer falling within the second limb of *Galbraith*. But, given the regularity with which such rulings are made and the nature of such rulings, it is vital that the prosecution also has the right to test this kind of ruling."

[7] Mr Harvey submitted that the test to be applied was not whether the trial judge had erred in his conclusion that there were no circumstances in which he could properly convict, but that provided for in Article 26 (c) of the 2004 Order, namely, that the ruling to stop the case was not a reasonable ruling for him to have made. This, Mr Harvey said, allowed for a substantial element of discretion on the part of the judge with which this court should be slow to interfere. The breadth of the discretion reflected the view of the government, as enunciated by the Attorney General, that the legislation was intended to sanction a reversal of a ruling under the second limb of *Galbraith* only in the most exceptional of circumstances.

[8] We were reminded by Mr Harvey that the learned trial judge not only heard and saw the witnesses in this case; he also had the benefit of extensive written and oral submissions from the prosecution and the defence. In the course of the oral submissions he displayed an acute awareness of all the factors on which the prosecution sought to rely. He made it abundantly clear that his ruling was not intended to analyse all the evidence but rather to cover its vital aspects. It would be wrong, therefore, to conclude, Mr Harvey argued, that simply because a matter was not referred to in the written ruling the trial judge had not considered it and given it appropriate weight.

[9] Mr Harvey submitted that the core of the Crown case on the trial of the defendant was the evidence of the McCulloughs and Mr Hagan and that of witness A. That evidence had been totally discredited in cross examination. The other evidence such as the CCTV evidence, the telephone evidence and the scientific evidence were proffered in support of the central core of the prosecution case that the defendant was observed by the McCullough family picking up the deceased on the evening of 28 May 2003. An assessment of that evidence depended crucially on the demeanour of the witnesses. The judge's conclusions that he could not place any reliance on the evidence of the McCulloughs, Mr Hagan and witness A, depending as it did on his observation of them as their evidence unfolded, could not be impeached.

[10] In response to the particular submissions made on behalf of the prosecution Mr Harvey presented the following arguments: -

1. The scientific evidence, taken at its height, did no more than establish a possible connection between the defendant and the site at the Aughnabrack Road. It could not show when contact between clothing and footwear alleged to belong to the defendant and materials at that site had occurred.

2. The fact that a call from the defendant's telephone had been received by the deceased's telephone on the evening of 28 May 2003 did not advance the prosecution case in any respect. This could not on any reasonable basis be construed as giving rise to the inference that the deceased was collected by the defendant on the evening of his disappearance. The evidence of Mrs. McCullough, Mr. Hagan and Shireen McCullough in relation to telephone calls was so inconsistent, contradictory and manifestly unreliable as to be inexplicable on any basis consistent with truth.

3. The fact that the defendant did not contact the McCullough family after the deceased's disappearance was neither surprising nor untoward. This was a matter that had received widespread media coverage. There was a myriad of reasons, all consistent with innocence, that the defendant might not wish to be in contact with the deceased's family.

4. The defendant did not give contradictory accounts. The prosecution submission on this issue was based on an incomplete understanding of the content of the defendant's statements.

5. The evidence in relation to the CCTV stills and video established that the Blue Mitsubishi motor vehicle alleged to have been owned by the defendant could be positively identified only on the 26 and 30 May

2003. The proposition that a car consistent in appearance to it could be observed on a notional route from Denmark Street travelling towards Aughnabrack Road was based entirely on speculation. It was impossible even to say that the vehicle seen in the various pieces of footage was the same car.

6. The evidence of witness A could not be relied on as support for the case that the defendant's car was at the Aughnabrack Road in the evening of 28 May. He had been interviewed by the police on 5 June 2003. At that time he gave a description of the car which was wholly at variance with the car attributed to the defendant. During further interviews on 29 September 2003 he was shown photographs of a car which replicated the blue Mitsubishi. Following this he provided a further description of the car which was consistent with the appearance of the car in the photographs. Not only was this completely at variance with his earlier description, the witness professed to be unaware of any alteration in his accounts which he believed had always been consistent. It was therefore impossible to place any reliance whatever on his claim that he saw a car resembling the Mitsubishi on the evening of 28 May 2003.

The relevant statutory provisions

[11] Article 17 of the 2004 Order introduced a general right of appeal for the prosecution in respect of rulings made by a judge in the course of a trial. It provides: -

> "**17.** - (1) This Article applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.
>
> (2) The prosecution may appeal in respect of the ruling in accordance with this Article.
>
> (3) The ruling is to have no effect whilst the prosecution is able to take any steps under paragraph (4).
>
> (4) The prosecution may not appeal in respect of the ruling unless, following the making of the ruling –
>
> (a) it informs the court that it intends to appeal; or
>
> (b) it requests an adjournment to consider whether to appeal and if such an adjournment is granted, it

informs the court following the adjournment that it intends to appeal.

(5) If the prosecution requests an adjournment under paragraph (4)(b), the judge may grant such an adjournment.

(6) Where the ruling relates to two or more offences –

(a) any one or more of those offences may be the subject of the appeal; and

(b) if the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.

(7) Where –

(a) the ruling is a ruling that there is no case to answer; and

(b) the prosecution, at the same time that it informs the court in accordance with paragraph (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal,

that other ruling, or those other rulings, are also to be treated as the subject of the appeal.

(8) The prosecution may not inform the court in accordance with paragraph (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in paragraph (9) is fulfilled.

(9) Those conditions are -

(a) that leave to appeal to the Court of Appeal is not obtained; and

(b) that the appeal is abandoned before it is determined by the Court of Appeal.

(10) If the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, the ruling mentioned in paragraph (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.

(11) If and to the extent that a ruling has no effect in accordance with this Article –

(a) any consequences of the ruling are also to have no effect;

(b) the judge may not take any steps in consequence of the ruling; and

(c) if he does so, any such steps are also to have no effect.

(12) Where the prosecution has informed the court of its agreement under paragraph (8) and either of the conditions mentioned in paragraph (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this Article "applicable time", in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury.

(14) The reference in paragraph (13) to the time when the judge starts his summing-up to the jury includes the time when the judge would start his summing-up if there were a jury."

[12] It is not in dispute that the prosecution complied with the requirements of paragraph (4) of the article. In relation to paragraph (6) the prosecution has made it clear that no application is made for leave to appeal the judge's ruling in relation to the second and third counts on the indictment. It has also

confirmed that, in the event that the application for leave to appeal in respect of the first count being refused, the defendant is entitled to be acquitted.

[13] Article 20 deals with the determination of prosecution appeals by the Court of Appeal. It provides: -

> "**20.** - (1) On an appeal under Article 17, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.
>
> (2) Paragraphs (3) to (5) apply where the appeal relates to a single ruling.
>
> (3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.
>
> (4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following –
>
> (a) order that proceedings for that offence may be resumed in the Crown Court;
> (b) order that a fresh trial may take place in the Crown Court for that offence;
>
> (c) order that the defendant in relation to that offence be acquitted of that offence.
>
> (5) But the Court of Appeal may not make an order under paragraph (4) (a) or (b) in respect of an offence unless it considers it necessary in the interests of justice to do so.
>
> (6) Paragraphs (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.
>
> (7) Where the Court of Appeal confirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.

> (8) Where the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in paragraph (4)(a) to (c) (but subject to paragraph (5))."

[14] Mr Miller has accepted that, if this court accedes to the application for leave to appeal and allows the appeal against the judge's ruling, it would not be feasible to order that the trial be resumed. He has invited the court to order that a new trial should take place in the Crown Court. It is to be noted, however, that, even if this court was to conclude that the judge should not have made the ruling, this is not an automatic consequence. The court may only make such an order where it considers that it is necessary in the interests of justice to do so – paragraph (5).

[15] Article 26, which deals with the reversal of rulings made by a judge, provides: -

> "**26.** The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied –
>
> (a) that the ruling was wrong in law;
>
> (b) that the ruling involved an error of law or principle; or
>
> (c) that the ruling was a ruling that it was not reasonable for the judge to have made**.**"

[16] It has not been suggested by the prosecution that the judge's ruling was wrong in law or that it involved an error of law. It has been submitted, however, that the judge failed to apply the principles governing the approach to be taken by a trial judge in considering a case built on circumstantial evidence. It has not been contended that the judge failed to articulate the proper principles; rather that he failed to apply those principles and that it was not reasonable for him to have made the ruling.

[17] Although Mr Miller disavowed any challenge to the judge's ruling on the basis that he had erred in law, it appears to us that his argument that the judge failed to conduct a proper evaluation of the Crown case and, in particular, failed to adopt the correct approach to the assessment of

circumstantial evidence is tantamount to an averment that the judge was wrong in law to have acceded to the application for a direction of no case.

The applicable principles

[18] The judgment in *Galbraith* remains the *locus classicus* for the exposition of the principles to be applied in determining whether a direction of no case to answer should be made. This is how Lord Lane CJ described it: -

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[19] In *Chief Constable of the PSNI v LO* [2006] NICA 3 the Divisional Court discussed the application of these principles in the context of a non jury trial. The following passages from the judgment are relevant: -

> "[13] In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of *Galbraith* but with the modification that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the

> accused's guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.
>
> [14] The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith.* The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

[20] Where, as in this case, the prosecution rely on circumstantial evidence to establish the defendant's guilt, it is well established that a particular approach to the evaluation of the evidence is required. This is perhaps still best encapsulated in the well known passage from the judgment of Pollock CB in *R v Exall* [1866] 4 F&F 922 at 928; 176 ER 850 at 853 (endorsed in this jurisdiction by the Court of Appeal in *R v Meehan No 2* [1991] 6 NIJB 1): -

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise . . . Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more likely the case of a rope

> composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence -- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."

[21] Mr Miller argued that the learned trial judge concentrated too strongly on the weaknesses that he perceived in the evidence of the McCulloughs, Mr Hagan and witness A and that he was distracted from a proper consideration of the evidence that supported the case against the defendant that was freestanding of that testimony. He argued that, even if the evidence of these witnesses was left wholly out of account, the material at the close of the Crown that had not been nullified by cross examination was more than ample to sustain a *prima facie* case.

[22] Mr Harvey's riposte to this argument was that the entire thrust of the prosecution's case had been focused on the evidence of the McCulloughs, Mr Hagan and witness A. The other evidence was ancillary to that central thrust and had been advanced as support for their evidence rather than having any independent intrinsic strength. This was how the case had been opened to McLaughlin J and that was how it had been met by the defendant. It was not in the interests of justice that he should be put on trial on the basis of a case of a wholly different construct.

[23] We do not accept that the Crown case was irredeemably dependent on acceptance of the evidence of the McCulloughs, Mr Hagan and witness A in the sense that it stood or fell, depending on what view one took of that evidence. It was of course the prosecution case that the scientific evidence, the evidence in relation to the telephone traffic and the CCTV footage supported the claim that the McCulloughs and Mr Hagan made that the deceased had been taken from his home by the defendant. But the relevance of that evidence could not be said to depend exclusively on its connection with that claim.

[24] As to Mr Harvey's complaint that the defendant should not be required to answer a case that had not been made against him, we consider there is no merit in that argument. If this had been a jury trial, it would not have been open to the defendant to contend that, if the evidence of the McCulloughs, Mr Hagan and witness A was rejected by the jury, they would have to disregard the other evidence simply because the Crown had referred to that evidence as supporting the central claim that those witnesses had made.

[25] We are satisfied that the judge's conclusion that the evidence of the McCulloughs, Mr Hagan and witness A could not in any circumstances be regarded as sufficient to support a finding of guilt did not relieve him of the obligation to assess the other evidence for its potential to raise a *prima facie* case against the defendant. It was necessary for him to consider all the evidence against the defendant in order to address the ultimate question whether there was any possibility of him finding the defendant guilty on that evidence. Our task is firstly to determine whether this is what the judge did; if we conclude that this is what he did, we must then consider whether this gives rise to an error of law or principle.

[26] We accept Mr Harvey's contention that, if it is necessary for this court to address the question whether the ruling was one that it was not reasonable for the judge to have made, it is not for the members of this court to consider whether they would have reached the same conclusion. The ruling could only be reversed on this basis if it was established that the judge did not act reasonably in making it. As a matter of inevitable logic, if we consider that the ruling was one that lay within the spectrum of reasonable conclusions on the available evidence, the application for leave to appeal, in so far as it depended on this ground, would fail.

Did the judge consider all the evidence?

[27] Mr Harvey was right to remind us that the judge had the benefit of substantial written and oral submissions in which all the evidence called by the prosecution was reviewed. It would be wrong to assume that, because the judge does not refer expressly to an item of evidence, he left it out of account.

[28] In the conclusion section of the ruling the learned trial judge dealt pithily with the scientific evidence. He did not refer to the evidence from telephone records nor did he advert to the evidence of the CCTV footage purporting to show a car similar in appearance to the Mitsubishi travel along a possible route from Denmark Street to Aughnabrack Road. He said nothing of the reaction of the defendant to questions put to him by the investigating police officers although there is a fleeting, essentially neutral, reference to this in an earlier passage of the ruling at paragraph [9] which has been reproduced above. The judge made it clear, however, that he did not consider it necessary to review all the evidence and he explained why he reached that conclusion in paragraph [12] as follows: -

> "[12] In view of the nature of the present application and the decision which I have reached it would be inappropriate for me to continue with a detailed analysis of all of the evidence and of my assessment of what I have heard. That is not appropriate at this

> point. Instead I shall comment on the state of the evidence on key points because it is obvious that unless the prosecution can establish the deceased was collected from his home in a car driven by the defendant, if not in the defendant's car itself, and that the defendant's car was present on 28 May at Aughnabrack Road that there is a significant gap in its case."

[29] Although, as the judge said, it was not necessary for the purposes of the ruling to undertake a detailed analysis of the evidence, it *was* required of him that he should take all relevant evidence into account. This is not disputed by Mr Harvey, although he would have it that the judge was only obliged to do so in order to examine whether the other evidence lent any support to the claim by the McCulloughs and Mr Hagan that the defendant had collected the deceased from Denmark Street. For the reasons given earlier we do not accept that it was open to the judge so to confine his consideration of the evidence. It appears to us, however, that this is how he approached the matter. It is clear from the final sentence of paragraph [12] of the ruling that he considered that, unless the prosecution could establish that the deceased was collected from Denmark Street by the defendant, a *prima facie* case could not be raised. This discloses a concentration on the evidence of the McCulloughs and Mr Hagan to the exclusion of the remainder of the prosecution case. We are of the opinion that this was not a correct approach to take.

[30] We accept Mr Harvey's argument that it was open to the judge to conclude that the evidence of the McCulloughs and Mr Hagan was so much in conflict and was so riddled with inconsistencies that it *alone* could not provide the basis for a finding of a *prima facie* case. We consider, however, that this conclusion should not have been regarded as disposing of the question whether a direction of no case to answer should be given. The testimony of the McCulloughs and Mr Hagan had to be considered in conjunction with the other evidence. The approach of the trial judge was to assess the evidence of the McCulloughs and Mr Hagan in isolation from the various other strands of evidence; to determine that their evidence could not support a *prima facie* case; and then to conclude that it could not be rescued from its discredited condition by recourse to the other available evidence. This was not so much a failure to consider all the evidence as a failure to consider it all together.

Was there an error of law or principle?

[31] We can quite understand how the judge came to focus on the evidence of the McCulloughs and Mr Hagan since the claim that they made was the centrepiece of the Crown case. But we consider that he was wrong to isolate

this evidence from the remainder of the Crown case. In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case.

[32] If the judge had adopted what we consider to be the proper approach, he would have had to review the following aspects of the evidence: -

1. During the period from the deceased's return to Northern Ireland until his death he was in regular contact by telephone with the defendant.

2. The defendant had presented himself as someone who wanted to help the deceased in circumstances where Mr McCullough was clearly at risk from members of a paramilitary group.

3. After the deceased's disappearance, despite the regularity of contact between the defendant and the deceased, there is *prima facie* evidence that the defendant refused to accept telephone calls from Mrs McCullough.

4. There was *prima facie* evidence that the defendant owned a Mitsubishi car that was blue in colour.

5. The deceased left his mother's home in Denmark Street within a very short time of receiving a call from a mobile telephone owned by the defendant.

6. Mr McCullough had been collected from the house on 26 May by the defendant after receiving a telephone call from him at a similar time on that date.

7. Evidence was given by the McCulloughs and Mr Hagan that, on leaving the house in Denmark Street on 28 May, the deceased was collected by the defendant.

8. Witness A was prompted to return to the Aughnabrack Road after reading an article in the Irish News which suggested that Alan McCullough had been taken from his mother's home by a blue Mitsubishi car.

9. The witness had made a connection between the article that he had read and the experience that he had had on the Aughnabrack Road on 28 May. This was at least indicative of his having recalled that one of

the cars that he had seen was consistent in appearance with a blue Mitsubishi.

10. The discovery by witness A of the body on his return to the Aughnabrack Road provided *prima facie* evidence that he had seen those who had been involved in the murder leaving the scene.

11. One of the cars observed by witness A at the scene was blue.

12. A car (or cars) can be detected in CCTV footage whose appearance is not dissimilar to the Mitsubishi car with which the defendant was associated. It was observed over a route that would have travelled between Denmark Street and the body deposition site.

13. A scientific connection had been established between clothing and footwear belonging to the defendant and the body deposition site. Staining on the knees of a pair of trousers provided *prima facie* evidence that the defendant had been at that site in the recent past.

14. The defendant had given what were at best inconsistent and unsatisfactory accounts of his movements on 28 May. He refused to answer questions about the accounts given by Mrs McCullough regarding his movements on 26 and 28 May. When he was interviewed on 1 June 2003 he said that he had been watching television at 'the house' in Glenbryn, leaving at 6.15pm with one passenger who was not the deceased. He refused to answer questions about his ownership of the Mitsubishi car. During interviews on 12 and 13 June in a prepared statement read by his solicitor during interview he said that he had been in Ihab Shoukri's house from about 5pm on 28 May. He left shortly after 6pm with a Gary McKenzie to meet a man called 'Geordie Mack'. There had been a prior arrangement for the meeting for the purpose of selling the Mitsubishi car. When asked why he had not given this account to the police on 1 June he made no reply.

[33] We consider that if the judge had taken all this evidence into account on an all-encompassing basis he would have found that there was sufficient evidence to raise a *prima facie* case against the defendant, notwithstanding the frailties of the testimony of the McCulloughs and Mr Hagan. The failure to approach the case in this way constituted, in our opinion, an error both in law and in principle. In the circumstances it is unnecessary to address the question whether the ruling that the judge made was one that could not reasonably have been made.

Is it in the interests of justice that a fresh trial take place?

[34] It is necessary to consider whether it is in the interests of justice that the defendant be tried again. We have concluded that it is. We recognise that the McCulloughs and Mr Hagan will now be prepared for the attack on their reliability that was made on the first trial but we believe that any apprehension about the effect that this might have on the fairness of a new trial can be adequately catered for by the availability of records of their evidence on the trial before McLaughlin J.

[35] We are satisfied that the interests of justice require that the defendant stand trial on the first count of the indictment that has been preferred against him. We will therefore grant leave to appeal, allow the appeal against the judge's order and direct that the defendant stand trial again on the charge of the murder of Alan McCullough.