THE COURT OF APPEAL

Record No: 166/2011

Birmingham J.
Sheehan J.
Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-V-

M.

APPELLANT

Judgment of the Court delivered on the 27th day of March, 2015 by Mr. Justice Edwards

Introduction
1. In this case the appellant was convicted on the 15th of April 2011 by the unanimous verdict of a jury at his trial before the Central Criminal Court of a single count of rape contrary to common law as provided for by s.48 of the Offences Against the Person Act, 186 and s. 2 of the Criminal Law (Rape) Act, 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990.

2. On the 11th of July 2011 the appellant was sentenced to 12 years imprisonment and directed to undergo 10 years post release supervision.

3. The appellant now appeals against his conviction.

The Grounds of Appeal
4. Although seven discrete grounds of appeal are pleaded in the Notice of Appeal, not all of them were proceeded with and the essence of the appeal can be distilled down to two points:

5. The first is that the learned trial judge erred in refusing to grant a direction and withdraw the case from the jury at the end of the prosecution case. The second is that the verdict of the jury was perverse and contrary to the evidence.

6. In consequence, the appellant contents that his trial was unsatisfactory, and his conviction is unsafe and ought to be set aside.

The Evidence Adduced
7. The complainant in the case was S.A., a daughter of the appellant who was 11 years of age at the time of the trial. She gave her evidence by video link.

8. She recalled a time when she was about eight years of age when she was living with her father and mother, three brothers and a sister. She agreed that the family had lived in a number of places before settling in a location in Co Kildare. The complainant, upon being asked *"Did anything happen in those other houses? Did your father do anything to you in those other houses*?", replied *"Yes, he did"* and that *"He sexed me".* When asked to explain what was sexing, the complainant explained *"when you do it, the woman has the baby".* She added: *"It's when you take off your clothes and then you sleep in bed together and you get on top of each other", "[a]nd you just you go up and down on people and then that's it.*

9. The complainant stated that she knew that a man's private part was called *"a penis or willy".* When asked *"Now, does the man do anything with that in sexing?",* she replied: *"He does", "He rubs it off your private", "Like, when he's going up and down, he puts his private in your private".* When asked to confirm that, *"…,when you say sexing and that your father did sexing to you, he put his willy into your private, is that right?",* she replied *"Yes, he did."*

10. The complainant was asked:

> *Q. So, I want to ask you about the day before you went to the police station. Now, on that day, S.A., you didn't go to school; isn't that right?*
>
> *A. I didn't.*

11. She was then later asked:

> *Q. Okay. So, you get into bed, S.A., and you're wearing your Mickey Mouse top and a skirt; is that right?*
>
> *A. Yes.*
>
> *Q. And did your father, … , come into the room when you were in bed?*
>
> *A. He did. He would often do that.*
>
> *Q. All right. And when he came into the room, and you were in the bed, where did he go?*
>
> *A. He went into bed with me.*

12. She was further asked:

Q. And were you wearing your Mickey Mouse top and your skirt still?

A. Well, he took them off me, he did.

Q. So, he took off your clothes and he took off his own clothes; is that right?

A. Yes.

Q. And he got into bed with you; is that right?

A. He did, yes.

Q. And did he do anything to you, S.A., that you didn't like?

A. He sexed me.

Q. And is that the same thing that you talked about a few minutes ago, that he put his willy into your private?

A. He did I yes.

Q. He did. And when he put his willy into your private, which you use for going to the toilet, did he do anything then?

A. He went up and down on me.

13. The evidence of the complainant was that she was "sexed" on many occasions, but specifically on the night before an occasion on which she went with other family members to the Garda Station in the place where they were living, which visit, according to other evidence adduced, had taken place on the 28th of September 2007.

14. There was evidence in the case from a number of Gardaí concerning the appellant's arrival at the Garda Station in question on the 28th of September 2007 with his family, following which all of his children were taken into care. The complainant and her younger sister were placed in immediate foster care. The reason for this was not made explicit to the jury, and was unstated throughout the trial.

15. The complainant herself, in the course of being cross-examined, told the jury of her recollection of the occasion of the visit to the Garda station:

Q. Okay. Now, just going back to the day that we the family went to the garda station, you're telling us that your Dad is looking for a new house?

A. That's what he said.

Q. All right. And he went off into the garda station, did he?

A. He did.

Q. And did you and your Mum and your sister and your brothers stay in the car?

A. Yes, we all did, except my Dad because he went in.

Q. Okay. And then did somebody come out?

A. Yes, a guard came out and told us to come in.

Q. Okay. And when you got into the garda station, I think I read somewhere in the papers that you were given chips?

A. We were.

Q. And tell me, S. A., after that day, did you ever see your Dad again?

A. No, I've never seen him since that day again, I've never seen him.

16. The complainant told the jury that she was living with "A" and "B", at the time of the trial. "A" and "B" are foster parents to her, and "A" gave evidence before the jury.

17. The complainant stated that typically she and her sister would go up to bed and that *"after a while my Dad would come up and pretend he's saying good night but he'd actually do sexing us."* The complainant, both when interviewed at a specialist child sexual abuse investigation unit and also when giving evidence, stated that she had also been "sexed" by a number of others including her birth mother, her two brothers, and two unrelated girls who had resided for a time with the appellant and his family. The complainant suggested, *inter alia*, that at various times the appellant, his wife, all the children in the house, and the two unrelated girls were in the parental bedroom and that they were engaging in sexual activity with one another. One of the unrelated girls, and also one of the two brothers that were said to have "sexed" the complainant, were called as witnesses by the prosecution and both witnesses denied all allegations of misconduct. The defence required that the video recordings of the interviews with the complainant at the aforementioned specialist child sexual abuse investigation unit be played to the jury.

18. The evidence was that the complainant's first disclosure was when she told her foster mother "A" about being "sexed". She regards her "A" as her "Mam". She said in the course of her evidence that everyone was involved in "sexing" but her dad was the worst. She admitted that she herself had "sexed" "R" whom she described as her niece, but who is in fact the granddaughter of her foster mother and a special needs child. The details of the complainant's admission, concerning what she had done to "R", were confirmed by "A" in graphic terms.

19. The complainant was extensively and forensically cross-examined. This was a re-trial and the complainant had given evidence at

an earlier trial (again by video link) and had also been cross-examined at that earlier trial. It was suggested to her that various aspects of her evidence in the current trial were inconsistent with what she had said on the previous occasion.

20. The complainant, when asked specifically in cross-examination, about the night before going to the Garda Station stated:

> *Q. We were dealing with the situation the night before you went to the garda station, okay?*
>
> *A. Yes.*
>
> *Q. And, as I understand what you're telling the ladies and gentlemen of the jury, that when you'd gone to bed that night, that your Dad came into the room and had sexual intercourse with you?*
>
> *A. He had.*
>
> *Q. And is that all that happened?*
>
> *A. Yes, he did, that's all that happened.*
>
> *Q. And after you say he had sexual intercourse with you, what happened then?*
>
> *A. He went back into his room. We went to bed.*

21. It was suggested to the complainant that at the previous trial she had stated that on the occasion in question (27th September 2007) her sister had left the room before her father had "sexed" her, whereas on this occasion she had given a completely different account stating on the one hand that her sister was asleep, at least initially, in the same bed in which she (the complainant) was "sexed" by the appellant and at the same time as she was allegedly "sexed" by the appellant, and on the other hand that the appellant had also gone on to "sex" her sister after he had "sexed" the complainant. The complainant responded: *"Well, I don't know, because but I know I was in the bed at that time. I definitely know, he did it to me in the bed."*

22. It was put to her that her evidence had been that she had been wearing a skirt and a Mickey Mouse top whereas in her statement to the Gardai she had said she was wearing jeans and a Mickey Mouse top. She responded:

> *A. Yes, that was the day I went when Mum and Dad were I don't know was it jeans or a jean kind of skirt.*
>
> *Q. So, it's it could be a jeans kind of skirt?*
>
> *A. Well, a skirt, I think it was a skirt made out of jeans, like.*
>
> *Q. Because, in the statement you're giving the guard, you say I was wearing jeans and a Mickey Mouse top?*
>
> *A. Yes, I don't know was it jeans or a skirt that was made out of jeans, do you know, a skirt and kind of jeans look like skirt.*

23. The appellant's denials were put to the complainant in the following exchange:

> Q. S.A., I just want to put it to you, on behalf of your Dad, that he never sexed you at any time, either in your Mum's bed, your bed or anybody's bed or anywhere in any of the houses?
>
> A. He did do it.

24. Cross-examination further elicited other inconsistencies in regard to matters of detail as between the various accounts given by the complainant.

25. The jury heard evidence concerning the arrest, detention and interviewing of the appellant. In the course of being interviewed the appellant said that he, his wife, and the three children they had at that time (two sons and the complainant), came to Ireland from England in September 2000. He acknowledged moving around a great deal after coming to Ireland and specified no fewer than eleven locations at which they had stayed for a time. He was unable to provide dates or very specific details, save in respect of the location in Co Kildare in which they had eventually settled. They had stayed in two different houses at that location. He acknowledged that the two unrelated girls, referred to earlier, had stayed with them for a period of time.

26. He denied "sexing" the complainant on the night of the 27th of September 2007, as described by her. Asked why the complainant would make such allegations against him, he replied:

> *"Answer: My only suspicions (sic) is that [the appellant's wife] put this into her head. There is an agreement that we had that the HSE have started to supervise her visits as she have been caught telling the children to say things.*
>
> *"Question: Was that the agreement you had?*
>
> *"Answer: The agreements (sic) we had was that I take the blame for everything so she can get the kids back.*
>
> *"Question: When you same (sic) blame, what do you mean by taking all the blame?*
>
> *"Answer: Basically she had to paint me in a bad light so that she could get the children."*
>
> *"Question: I'm not clear what you're saying, … . What do you mean?*
>
> *"Answer: The agreement was that if the children were in care, that I'm involved, I was to say I'm looking after them.*
>
> *"Question: Was there anything else in the agreement?*
>
> *"Answer: I have a letter from [the appellant's wife] stating that she would have to say some early shit which we both*

know isn't true. I can get a photocopy of it and you can have them. I have them with me.

"Question: Can you explain?

"Answer: Basically, she has accused me of all sorts to take the blame off her and that I will keep quiet about anything which happened in the past.

"Question: What type of things was she talking about?

"Answer: I don't know. It was whatever she would come up with, whatever she would think would be best.

"Question: That's very vague, … . Did you ever discuss what she might say about you?

"Answer: Anything I was prepared to accept, just for her to get the children. I was just to keep quiet about anything else in the past."

27. Both in this interview, and in a subsequent interview, the appellant denied that there was any occasion that the children might have seen him and his wife engage in sexual activity. The appellant in his second interview re-iterated that his view that the complainant was lying, that his wife had put her up to it, and that his wife's reason for doing so was *"[t]o paint me in a bad picture so that she could get the kids".*

28. The jury also heard medical evidence from two consultant paediatricians who examined the complainant following her disclosures. The first of these witnesses gave evidence of finding, on the 15th of July 2008, that the complainant had a crescentic shaped hymen, which was narrow posteriorly. The evidence was that this finding was sometimes seen in pre-pubertal girls who had a history of vaginal penetration, but it was also sometimes to be found in girls who had not been subjected to penetrative sexual abuse. On cross-examination the witness accepted that the finding was indeterminate. The second medical witness stated that she had been asked for a second opinion on the genital examination findings made by the first medical witness. She agreed with the finding of a narrow posterior hymen rim and stated that while such a finding could be supportive of an allegation of child sexual abuse, it was neither diagnostic of, nor proof of, child sexual abuse.

29. The jury further heard evidence from a consultant gynaecologist who stated that in the case of pre-pubertal girls who were suspected to be victims of penetrative sexual abuse genital examination was really only useful if conducted within a very short time of the alleged incident because injuries to the hymen and genital tissues can heal very rapidly, i.e., within three to five days. Studies showed that diagnostic findings were to be observed in less than 5% of cases. This could be for three reasons: no penetration into the vagina in the first place, alternatively the victim could have a flexible hymen, alternatively that any injury occasioned to the victim had healed. Under cross-examination the witness agreed that the findings upon medical examination of the complainant were not diagnostic of abuse.

30. The defence did not go into evidence.

The Application For A Direction

31. Counsel for the appellant, relying on *R v Galbraith* (1981) 73 Cr App R 124 ; [1981] 1 W.L.R. 1039, and in particular the second limb of Lord Lane's statement of the principles applicable to how a judge should approach a submission of "no case", applied for a direction at the end of the prosecution case on the following basis:

"I would respectfully submit that the evidence which your lordship has heard in relation to [S.A.] sustaining, so to speak, the count number 1, the charge of rape against [the accused], in my respectful submission falls into the tenuous category and that in so far as your lordship attempting to help the jury to understand, in my respectful submission, the bizarre account given by [S.A.]and involving her father, her mother, [the two unrelated girls], her [three brothers and sister] and the extraordinary claims of what was happening inside in the bedroom in that the father was encouraging [a named brother], your lordship has the evidence from [the said named brother]that such a thing never happened, that in relation to [one of the unrelated girls], that what is being alleged never happened.

And there your lordship has now heard the medical evidence that's completely neutral and doesn't offer any corroboration of the accounts given by [S. A.]. And, as your lordship knows, in the ordinary course, that where there are ongoing allegations of child sexual abuse, such as is the case here in the sense that after the first disclosure, some time subsequent to the 25th of June, and [S.A.] is referred to [a named] unit, a specialist unit for the purpose of carrying out an assessment and these disclosures are made. Your lordship has got the jist of them, involving all of these parties, and if there was any validity or strength to them, then in the ordinary way, an indictment would be framed as let's say between the 1st of January and the 31st of March you were guilty of rape and there'd be the alternative count of guilty of sexual assault and so on, say, four charges during a period of a year and covering the period involved in the allegations.

However, in this particular case, the allegations commenced when [S. A.] was living in England at the age of 18 months and it's beyond belief that an 18 month old child could have a memory of such a thing and the very fact that she was alleging as part of her disclosures against her father that she was being sexually molested in England at that age and that, in a sense, is a warning light in so far as the proceedings are concerned. But notwithstanding the fact that all of these allegations were caught on video tape, so to speak, nevertheless the prosecution chose not to formulate the indictment in the what I would say the normal manner spanning a period of time without having to give any detail about a specific date or time or place and that that would be the ordinary way. That here we have a situation that after [S. A] has been assessed by [the named] unit and these extraordinary allegations been made, she's then interviewed by members of An Garda Síochána and statement is taken from her and that seems to be the first time when she specifies the evening of the 27th of September into the morning of the 28th of September because of the movement and time, so to speak, and yesterday when she was being cross examined about it, the time had moved out to 2 am in the morning organisation 1 to 2 am in the morning. Whereas on the last occasion when she was giving evidence, it was put at 10 o'clock at night, that in so far as this is the foundation of Count No. 1, that on one account she was wearing a skirt and a Mickey Mouse top. On another occasion that she was wearing a jeans and a Mickey Mouse top. When this was drawn to her attention, the jeans and the skirt seem to morph into some jean skirty type of arrangement. And so that where the goalposts are concerned, that in my respectful submission that she is an unreliable witness and capable of moving the goalposts to maintain the fiction of the evidence which she is giving.

Then we know that she was further interviewed by the guards. On one account this happened in the bedroom when her father come in and had full sexual intercourse with her. In other account, she's saying that it happened in her Dad's room. In one account she's saying she was asleep and in another that she was awake. And then we get the description of the so called incident of rape, that on one occasion {the complainant's sister] has gone into her Mum's room when her Dad carries out the rape, and then it's pointed out to her well what about [her said sister], wasn't [the said sister] in the bed and wasn't she supposed to have been raped as well and how could she possibly forget that this was the case. And I just think, my lord, that for all of those reasons that your lordship has the second leg of Galbraith in terms of the tenuous evidence and the onerous task that your lordship would have in terms of directing the jury as to how they would go about evaluating that testimony.

And then in the final part of the Galbraith decision, there seems to be an acknowledgement that the trial judge has a discretion in the interests of justice to determine these matters and decide whether it is an appropriate case to allow go before the jury, having regard to the risks involved."

" …I say, my lord, that there is a residual danger that the jury may not be able to come to terms with it on the basis that where there's smoke there's got to be fire and would an injustice be perpetrated in those circumstances. And for that reason, my lord, I'm making this application to your lordship for a direction"

The Trial Judge's Ruling on the Application for a Direction.
32. The trial judge ruled as follows:

"Now, as far as [the rape count] is concerned, there is, of course, evidence supportive of that count if the jury were to accept it. It seems to me that this is a case where it would be particularly undesirable for the trial judge to enter the arena by way of ambush and terminate the proceedings by reason of any reservations or misgivings he might have in relation to the case. It seems to me that this is a matter which calls for a community judgment, as expressed by the verdict of a jury.

The matters raised by Mr O'Carroll will, of course, be there to be raised in his jury's speech. So far as my misgivings are concerned, and they are many, I propose to deal with those by giving a corroboration warning, which will probably be very close to the full corroboration warning and that is something I predominantly do not do since the change of the law, but in this case, there are matters for severe and serious misgivings and I propose to address those by, as I say, a close to full corroboration warning."

Submissions on behalf of the Appellant
33. In relation to the complaint based upon the failure to grant a direction, the appellant relies principally upon *R. v Galbraith* cited earlier. The seminal statement of principle was contained in the judgment of Lord Lane, who stated:

"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 prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution 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 upon 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. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

34. Counsel for the appellant has submitted that the trial judge's approach was incorrect. He contends that the trial judge left the matter to the jury with a strong warning on the danger of conviction without corroboration in circumstances where he should instead have intervened and granted a direction thereby circumventing that danger. Counsel for the appellant has submitted that the strong warning appears to have been ignored by the jury and this Court should now intervene.

35. Further, in relation to the contention that the verdict of the jury should be set aside as perverse, the appellant has referred the Court to a number of authorities, as well as to a sentence from *The Irish Criminal Process* by Thomas O'Malley (Round Hall, 2009), in support of his contention that the Court has jurisdiction to set aside the jury's verdict as perverse.

36. The authorities relied on in that regard are *The People (Director of Public Prosecutions) v Egan* [1990] ILRM 780; *Attorney General v Sugden* (1936) 1 Frewen 32; *The People (Director of Public Prosecutions) v Morrisey* (1998) WJSC-CCA 5863; *The People (Director of Public Prosecutions) v Quinn,* (Court of Criminal Appeal, *ex tempore*, 23rd March 1998); *The People (Director of Public Prosecutions) v A.D.* [2008] IECCA 101 (unreported, Court of Criminal Appeal, Finnegan J, 25th July 2008); *The People (Director of Public Prosecutions) v Mulligan* (1980) 2 Frewen 16; and *The People (Director of Public Prosecutions) v P.C.* [2002] 2 I.R. 285. The Court has read and considered all of these authorities.

37. The sentence in Mr O'Malley's text book, to which the Court has been referred appears at para 23.13 where the author, having in the previous paragraph considered both *Attorney General v Sugden and The People (Director of Public Prosecutions) v Egan,* concluded:

"The possibility of setting aside a verdict on the ground of perversity is not therefore entirely ruled out, but it is clearly intended to be an exceptional measure."

38. Counsel for the appellant has argued that the complainant's testimony was so "bizarre" and "extraordinary" and "outside of the norm" as to be "in the realm of fantasy and not reality" (counsel's words), and that it was unsafe to allow the jury to consider it. Further, the jury having been allowed to consider it in circumstances where they ought not to have been so allowed, the trial was

unsatisfactory and the jury's verdict of guilty must in turn be regarded as being unsafe.

39. It was further argued (in substance) that the jury could not have regarded the complainant as either credible or reliable; that indeed no jury approaching her evidence forensically and analytically could have so regarded it, and that accordingly the jury's verdict should be set aside as being perverse.

Submissions on Behalf of the Respondent
40. In relation to the application for a direction, the respondent has submitted that the complainant in fact gave largely consistent evidence throughout her examination-in-chief and cross-examination in relation to the events which she stated took place the night before she went into foster care. Moreover, to the extent that there were inconsistencies these were matters for the jury to engage with and resolve in considering the reliability and credibility of the complainant's testimony.

41. The respondent also relies upon Lord Lane's statements of principle *in R v Galbraith*, which, it is correctly pointed out, have been adopted and applied by courts in Ireland since they were cited with approval in *The People (Director of Public Prosecutions) v Barnwell* (Unreported, High Court, Flood J, 24th of January 1997).

42. The Court was also referred to the more recent decision *of The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001), as an example of the correct application of the *Galbraith* principles.

43. It was submitted that the trial judge also correctly applied the *Galbraith* principles, and that the level of inconsistencies, and indeed the extent to which complainant's account, or features thereof, might be regarded by some as strange, unusual, or out of the ordinary, was not such as to render it unfair to allow the trial to proceed.

44. Counsel for the respondent sought to emphasise that under our system of criminal justice the primary decision maker on issues of fact is the jury. The trial judge, having heard the evidence first hand, and having observed the demeanour of the witnesses, and their reaction to and performance under cross-examination, is in a much better position than an appellate court to adjudicate on *Galbraith* type considerations. It was submitted that this Court, to whom an appeal only lies in respect of matters of law, must not usurp the trial judge by interfering with a legitimate exercise of his discretion.

45. It was further submitted that it was incumbent on the appellant to demonstrate a clear departure by the learned trial judge from the correct process, and that the appellant had failed to do so. It was acknowledged that the case might be characterised as a borderline one, but it was submitted that ultimately it was a matter for the trial judge to determine on which side of the notional line the case fell. It was clear that the trial judge had considered all of the evidence, and the particular alleged infirmities in it that were identified by defence counsel, but that having done so he had arrived at the legitimate conclusion that the jury was best placed to assess the complainant's evidence in terms of its credibility and reliability, and that the case should proceed to the jury who would, however, be warned by him in strong terms about the dangers of convicting on the uncorroborated testimony of the complainant in a sex offence case.

46. The respondent did not dispute that a jurisdiction exists to set aside a jury verdict on the grounds of perversity. However, counsel for the respondent contends, it is a jurisdiction to be exercised sparingly, and only exceptionally, and so the question for the Court is whether this is a case in which it ought to do so. The respondent submits that there are no goods grounds on which this Court could find the jury's verdict in this case to have been perverse.

The Court's Analysis and Decision
47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, <u>unless</u> the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.

49. Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

50. This Court considers that the matter is well put in the following quotation from *Archbold, Criminal Pleading Evidence & Practice* 2014 at page 484, where the authors state:

> "In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function."

51. Further, in *The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the *Galbraith* principles ought properly to be applied:

> "If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case."

52. Approaching matters in that way, this Court finds itself in agreement with the respondent that in the present case the trial

judge's decision on the application for a direction was a legitimate exercise of his discretion, and one that was made within jurisdiction. The mere fact that aspects of the complainant's evidence might be characterised by some, as counsel for the appellant sought to do, as "bizarre" and "extraordinary" and "outside of the norm" did not render it unfair that the jury should be asked to consider that evidence. Whether it was correct to so characterise it, or indeed to characterise her overall account as being "in the realm of fantasy and not reality", were quintessentially matters for the jury. These were matters for consideration by the jury in assessing whether the prosecution evidence, and complainant's evidence in particular, could be regarded as credible and reliable. This Court asks rhetorically was there any reason why it would be unfair to ask the jury to make that assessment? There was nothing in the evidence that rendered it necessarily incapable of belief, or inherently unreliable. It was therefore proper that the jury were allowed to consider that evidence. It was then a matter for the jury to determine whether it was in fact credible and whether they could in fact rely upon it. However, this Court is satisfied that the trial judge was correct in the circumstances of the case to allow the evidence to go to the jury. The state of the evidence was not such as to render it unfair to proceed with the trial.

53. In regard to the suggestion that the verdict was perverse, the Court has already found that it was legitimate to allow the jury to consider the evidence adduced up to the closure of the prosecution's case, and there was no unfairness in it. No further evidence was adduced, and there was nothing about the remainder of the trial to suggest that any unfairness might have crept into the process. The matter was allowed to go to the jury on the basis that a jury, properly directed, could potentially convict upon it. It was significant that the matter was allowed to go to the jury on the express basis that the jury would be given a strong discretionary corroboration warning by the trial judge, which was in fact given and in respect of which no complaint was made. It is difficult in the circumstances to understand how it can be contended that the jury's verdict was perverse.

54. It appears to be the case that the verdict is being characterised as perverse simply because the appellant disagrees with the trial judge's decision to allow the prosecution case to go to the jury. The fact that he disagrees with that decision is neither here nor there. To secure a finding of perversity he would have to be in a position to persuade this Court that no jury, properly directed, could have returned a guilty verdict on the evidence in this case. The Court is not so persuaded for the reasons stated above upholding the trial judge's decision to allow the case to go to the jury.

55. The evidence adduced by the prosecution was properly before the jury. It was evidence on which it was properly open to them to convict the appellant. As it transpired they in fact convicted him. In this Court's view there is no reason to believe the appellant's trial was unsatisfactory, or that his conviction is unsafe.

56. In the circumstances, the appeal is dismissed.