THE COURT OF APPEAL

Record Number: 225/18
Neutral Citation Number: [2021] IECA 223

Edwards J.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

CIARAN MAGUIRE

APPELLANT

JUDGMENT of the Court delivered on the 30th day of July 2021 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 30th May 2018 the appellant was convicted of a count of membership of an unlawful organisation contrary to section 21 of the Offences Against the State Act 1939, as amended.

Background

2. The prosecution case against the appellant was predicated on three strands: Firstly, there was the belief evidence. Detective Chief Superintendent Thomas Maguire gave evidence of his belief that Mr Maguire was a member of the Irish Republican Army,

otherwise known as Óglaigh na hÉireann, otherwise known as the IRA, within the State, on the 2nd of August 2017.

3. Secondly, there was the conduct evidence. This evidence formed the trigger event which led to the appellant's arrest. Surveillance and CCTV evidence garnered on the 12th and 13th of July 2017 showed that the appellant participated in two journeys to the Oakleigh Estate at Longwood. The first of these, on the 12th of July 2017, was for the purpose of reconnaissance and was preparatory to the second on the 13th of July 2017 which was for the purpose of intimidating Robert Moore. Mr Moore was, at the time, in a dispute with his former employer over an injury suffered at work. Mr Moore gave evidence that two men called to his door told him to drop his claim against his employer. When he questioned them, one of the men stated, "We are the IRA, and the next time we come down to see you, we'll be coming down to shoot you."

4. The third and final strand of the prosecution case against Mr Maguire rested on inferences to be drawn from the appellant's failure to respond to material questions put to him after the invocation of certain statutory inference provisions.

5. The trial court found the appellant guilty and concluded as follows:-

> "In considering the totality of the strands of the evidence put forward by the prosecution, the Court has likewise borne in mind the requirement that the belief evidence in Mr Maguire's case as to membership must be supported by some other evidence that implicates the accused in the offence charged and is independent of the witness giving the belief evidence. We refer again to the formulation of that requirement as set out by the late Hardiman J in Redmond, and we emphasise again that such independent support may be found in circumstantial evidence. We point out again that circumstantial evidence consists, as it does in this case, of individual strands that are insufficient in themselves to prove the proposition in issue but the cumulative

weight of which may suffice for that purpose. It is in the nature of circumstantial evidence that it may be difficult to find one piece of such evidence which, of itself, sufficiently implicates the accused. Belief evidence in this case could not implicate the accused. Conduct evidence may be argued to be ambiguous as to context, in terms of membership. Inferences drawn pursuant to section 2 of the 1998 Act, or indeed in relation to section 19 of the 1984 Act, as a matter of law can only be corroborative or supportive of other evidence and can never be sufficient on a standalone basis to prove membership, and indeed may only be drawn if it is proper to do so under those sections.

In this case, the Court has taken the view that it is proper to draw an inference that the silence of the accused in response to material questions corroborate the other strands as they bear upon the issue of his membership of an unlawful organisation. Crucially, the conduct evidence and the statutory inferences from silence have the necessary quality of being independent of the belief evidence. The Court has reviewed the entirety of the evidence in Mr Maguire's case and has not found any fact or consideration in the conduct or inference evidence which is inconsistent with the premise of the belief evidence. On the contrary, the other two strands of evidence relied upon by the prosecution, when taken in combination with the belief evidence, are of such weight that, in our view, they point surely and inevitably to the conclusion that there remains no reasonable possibility consistent with the proposition that Mr Maguire was not a member of the IRA on the date in question. In view of our conclusion that membership is sufficiently and unambiguously established by the combined weight of the belief, conduct and inference strands of the evidence, the Court therefore convicts Mr Maguire on the sole count on the indictment and the Court will so order."

Grounds of Appeal

6. The appellant puts forward four discrete areas in which it is argued that the trial of the appellant was unfair:-

(1) The arrest of the Appellant was unlawful, in circumstances where no warrant was sought for his re-arrest, as required by S.30(a)(1) OASA, as amended.

(2) The prosecution failed to prove the lawfulness of the surveillance evidence adduced against him, in circumstances where no evidence was given of approval granted by a senior officer to plant a surveillance device in the Appellant's car.

(3) The trial process was rendered unfair due to the repeated interruption by the Trial Court of the cross-examination of a centrally relevant witness.

(4) The Trial Court erred in admitting s.19 inferences.

Ground One- The appellant's arrest

7. This ground is concerned with the lawfulness of the appellant's arrest in August 2017. On the 2nd August 2017 the appellant was arrested under the provisions of section 30 of the Offences Against the State Act 1939. During the trial the appellant argued that this arrest was not in accordance with law as the appellant had previously been arrested in June 2015 for the offence of membership of an unlawful organisation, but no charge had been directed.

8. Section 30(a)(1) of the 1939 Act provides as follows:-

"(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him, he shall not—

(a) be arrested again in connection with the offence to which the detention related, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that either of the following cases apply, namely—

(i) further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought,

(ii) notwithstanding that the Garda Síochána had knowledge, prior to the person's release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence."

9. During the course of cross-examination, Chief Superintendent Maguire stated that he was aware of the appellant's arrest in June 2015 as follows:-

"Q.…in your reply on the 21st March of this year, you refer to my client's arrest on the 18th of June 2015?

A. That's correct.

Q. So you'd no difficulty referring to that; is that right?

A. No difficulty whatsoever, he was arrested in Donegal.

Q. And he was arrested for the same offence which he appears before this Court today; isn't that right?

A. That's correct, Judges.

Q. And—and there was ultimately no charge in relation to that offence; isn't that right?

A. That's correct, Judges."

The exchange continued as follows:

"A. As I've outlined in the letter, I most certainly was aware that Mr Maguire was arrested in Killygordon in County Donegal on the 18th of June 2015. I was a Detective

Superintendent in SDU at the time, and I dispatched members of SDU to assist local detectives in that investigation. So I was aware of it.

Q. So you actually – so just give us that again, your involvement?

A. Well, members of the Special detective Unit assisted local detecties in that investigation.

Q. Yes, yes. But you – what's your involvement, you said you assisted?

A. I was the Detective Superintendent in SDU at the time.

Q. Yes?

A. I didn't travel to Donegal to assist in that investigation.

Q. But you were aware of it, you—I think you dispatched – sorry, I'm not trying to catch you out, I just missed the word you said, I think you said you dispatched—

A. No, no, member of my – yes, members.

Q. -- you dispatched members to Donegal to assist the local people in relation to that; isn't that right?

A. Yes, correct, that's right.

Q. So is that arrest part of your material that you base your opinion on?

A. Yes, Judges, it forms part of my belief because while Mr Maguire was not charged, the DPP directed that he not be charged, and the DPP as is well known will not charge persons unless on the grounds of belief, if a belief is available of a Chief Superintendent, there must be other grounds to prefer a charge."

10. The appellant argued that his arrest in August 2017 was for the same offence for which he had been arrested in June 2015. Membership was a continuing concept and the failure to demonstrate a break in the continuum from June 2015 to August 2017 means that the appellant had been arrested twice for the same offence and the failure to obtain a warrant for his re-arrest rendered the arrest unlawful.

11. The court below rejected the appellant's submissions and stated that proper construction of s.30(a)(1) becomes clears when read as a whole. The Court was satisfied that the gardaí in 2017 were not investigating the same offence of which the appellant was suspected in June 2015, but that the investigation in 2017 was actuated by new information, that being the events in July 2017 and not on foot of further information relating to matters under consideration in 2015. Significantly, the court below in its ruling stated:-

> " If the current investigators had gone to the District Court in August 2017 as it was suggested that they should have, the information that would have been placed before that Court would not have pertained to his suspected participation in the offence for which he had previously been arrested."

12. The Court further held that the concept of membership of an unlawful organisation may be continuous but that does not mean it is permanent and it does not mean that a member of such organisation commits only one offence in respect of a term of membership. The trigger point for the allegation of membership in 2017 was entirely different to what was contemplated in 2015 and there was no onus on the prosecution to disprove a continuum of membership between those periods.

Submissions of the appellant

13. The appellant submits that the Court erred in focusing on the trigger point for the allegation of membership rather than on the charge of membership itself. The trigger event permits the gardaí to ground a reasonable suspicion to carry out an arrest but it is belief that the suspect is a member of an unlawful organisation which permits an arrest or re-arrest to be carried out. This belief will predate the arrest and persist after the arrest on the basis that the offence has continued.

14. The appellant further argues that the trial court was incorrect in concluding that an individual may commit multiple offences of membership during a continuous period while

a member of an unlawful organisation. The implications of such a ruling would create considerable unfairness as it would allow gardaí to repeatedly carry out fresh arrests without the need of a warrant by simply asserting that they are investigating a new membership offence.

15. The appellant submits that the evidence of Chief Superintendent Maguire was not adequately addressed in the Court's ruling. The evidence of Chief Superintendent Maguire was that the arrests were in respect of the same offence. While it was held that the issue of whether an arrest was in respect of the same offence as a previous arrest was a mixed question of fact and law which did not depend on the views of particular gardaí, the appellant submits that it is not clear how the Court could have completely discounted Chief Superintendent Maguire's evidence.

16. The appellant further submits that there was simply no evidence before the Court which would allow it to conclude that the successive arrests arose in respect of different offences and therefore, it cannot be said that the Court properly assessed all of the relevant evidence.

Submissions of the respondent

17. The respondent submits that it is significant that the offence for which the appellant was arrested in 2017 relates to a specific date. The suggestion that it is the same offence is not borne out by the evidence and in fact the conduct evidence which grounded the arrest in 2017 only came about after June 2015.

18. The offence of membership is one which generally, and actually in this case, is linked to a particular date. While the appellant contends that since belief evidence will usually both predate the arrest and persist after the arrest on the basis that the offence has continued and that new information which prompts a re-arrest does not relate to the previous trigger event but rather, relates to the subsisting membership offence which the previous trigger event had

also evidenced, this premise is not borne out by the jurisprudence of this Court in the case of *The People (DPP) v. AB* [2015] IECA 139, and *The People (DPP) v. Banks* [2019] IECA 319.

19. The respondent submits that there was no error in the trial court concluding that a person may commit multiple membership offences during a continuous period.

Discussion and Conclusion

20. The appellant was arrested on the 2nd August 2017 by Detective Garda Judge at his home pursuant to s.30 of the Offences Against the State Act, 1939 on suspicion of membership of an unlawful organisation, namely the IRA. He had previously been arrested in June 2015 on suspicion of membership of an unlawful organisation. The arguments made by both parties are set out above and do not require repetition. Where an argument of this type is made, it is necessary to examine the factual matrix leading to a subsequent arrest and the application of s.30(a)(1) of the 1939 Act.

21. For the purposes of this argument, pursuant to s.30, a person who has previously been arrested and detained under that provision and released without charge may not be re-arrested for the same offence except by way of a judicial warrant.

22. Membership is a continuing offence, nonetheless, the jurisprudence establishes that a person may be re-arrested without a warrant where the circumstances leading to the subsequent arrest may be distinguished from the previous arrest. It is a question of fact to be assessed in each case. As established in *The People (DPP) v. AB* [2015] IECA 139, it cannot be said that because membership of an unlawful organisation is a continuing offence that the offence of membership of an unlawful organisation on two separate occasions constitutes the same offence. The period of time which had lapsed between arrests in *AB* was that of 24 years This Court in *AB* stated at para. 16:-

"Whether a suspicion or charge is based on information about events or the belief of a Chief Superintendent or on a combination of both, the source of each kind of material giving rise to the concept of membership on the part of the particular person is in facts that have allegedly happened at a time prior to the existence of the suspicion or charge."

23. At para. 18 Ryan P. goes on to say:-

"It is a question of fact whether the membership that was suspected on the previous occasion is the same offence for which the person has been subsequently charged. It cannot be presumed simply because membership is by its nature a continuing condition or state that the offence alleged is the same. One way of approaching the issue is to examine whether the circumstances, facts or events that gave rise to the suspicion on which the later arrest was based had happened or come about at the time of the previous arrest. This is a matter of evaluation and judgment by the Court."

24. In the present case the previous arrest was on the 18th June 2015, some 25 months prior to this arrest on the 2nd August 2017. While the gap in time in *AB* was significant, in the recent decision of this Court in *The People (DPP) v. Banks* [2019] IECA 319, the period of time between the arrests was that of 3 months. It may be said that the time period is simply one factor to be considered in determining whether the offence for which the appellant was arrested in August 2017 was same offence of which he was suspected and arrested in June 2015.

25. The offence with which the appellant was charged concerns a specific date. The evidence adduced by the respondent concerning the arrest in August 2017, *inter alia* was that of Detective Garda Judge who set out the grounds for the arrest on the relevant date which related to events on the 12th and 13th July 2017. Quite obviously, that material was

not known to the gardaí in June 2018. However, that is not the end of the matter, such activities could be said to be related to membership of an unlawful organisation, the real question is was the offence the same offence as that suspected in June 2015, membership being a continuing state of affairs.

26. Mr Carroll SC for the appellant drew the Court's attention to the evidence of Detective Chief Superintendent Maguire, who said that he was aware of the arrest in June 2015. It is said that the Court failed to assess the evidence of Chief Superintendent Maguire, however, we are not persuaded that this is correct. The court of trial specifically referred to the cross-examination of the witness and to the submission made by Mr Carroll.

27. The argument in the court below was, in effect, that the respondent had failed to prove a break in the continuing offence from June 2015 to August 2017 and therefore the appellant had been arrested for the same offence. Consequently, a warrant ought to have been obtained and as this was not done, the arrest was unlawful. The submission was predicated on the offence being a continuing state of affairs and Mr Carroll sought to distinguish between the incidents supporting the offence of membership and the underlying fact of membership itself. In analysing the submission made, the court of trial carefully considered the terms of s. 30 and was satisfied that the proper construction of s.30(a)(1) required the court to read the section as a whole and with that, this Court agrees.

28. The court below carefully scrutinised the facts as required in order to determine the issue. We do not intend to rehearse the evidence adduced in the court below but will confine ourselves to expressing satisfaction that the court of trial made findings which were open to them on the evidence. Specifically, that the gardaí were not investigating the same offence in August 2017 as they were in June 2015. The court was satisfied and entitled to be so satisfied on the evidence that the investigation in 2017 was actuated by new information

which only came about in July 2017 and not by further information regarding matters which gave rise to the arrest in June 2015.

29. We can find no error in the court of trial concluding that the respondent is not under an obligation to establish a continuous factual narrative concerning an accused in the time frame between arrests, neither the jurisprudence nor the statutory provisions invite of such a requirement. It is necessary for the respondent to prove to the required standard that the subsequent arrest did not relate to the same offence for which an individual was previously arrested in order to arrest without warrant.

30. The court of trial quite clearly assessed the evidence in coming to their conclusion that the offence for which the appellant was arrested in August 2017 was not the same offence under investigation in June 2015.

31. We are satisfied that the finding of fact that the activities in July 2017 were separate and distinct from the arrest in June 2015 as those activities only occurred in July 2017 and therefore were not in existence in June 2017 was one which was supported by the evidence. There simply cannot have been a connection between the two arrests as the events which gave rise to the August 2017 arrest only came about in July 2017. Moreover, the offence of membership for which the appellant was arrested related to a single specified date. We find no error in the evaluation of the evidence and the ultimate conclusion by the court of trial and accordingly this ground fails.

Ground 2

32. During the trial the prosecution proposed to adduce evidence of direct observations by members of the National Surveillance Unit of the movements of certain vehicles and persons on the 12th and 13th of July 2017. It was conceded by the prosecution that an audio recording surveillance device was in use at least one point over the two days, and the defence

contended that a tracking surveillance device was in use on one or both of the vehicles under observation. The defence contended that because the surveillance operatives were facilitated and aided by other types of device in making their visual observations those observations come "as a result" of the use of such devices, and that the observation evidence is inadmissible unless the prosecution also prove the legality of the use of any audio and/or tracking surveillance devices by reference to the provisions of the Criminal Justice (Surveillance) Act 2009.

33. In concluding that the evidence was admissible the Court relied on *inter alia* the judgment of MacMenamin J. in *Idah v. DPP* [2014] IECCA 3. In *Idah* the evidence that the prosecution sought to adduce in that case was a transcript of an audio recording of a face to face conversation between two members of the gardaí and the accused in circumstances where the investigating gardaí were equipped with surreptitious audio recording devices. The Court held that as that evidence was directly generated through the use of a device that fell within the definitions contained in the 2009 Act the Act was applicable, and that the evidence could not be admitted unless it was supported by appropriate legal authorisation issued pursuant to any of the relevant provisions of that Act. In considering the meaning of surveillance, MacMenamin J. stated as follows at:-

> "42. Which actions in this case, if any, amount to surveillance? The express terms of the 2009 Act seek to confine surveillance to specified activities carried out "by or with the assistance of surveillance devices." If such devices are not used, then the Act does not apply. It, therefore, has no application to other investigative techniques. Section 2(2) of the 2009 Act provides:
>
> "Nothing in this Act shall render unlawful any activity that would otherwise be lawful."
>
> Section 14(2) provides:

"Nothing in this Act is to be construed as prejudicing the admissibility of information or material obtained otherwise than as a result of surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8."

43. The Court must examine the actions of the members of An Garda Siochana to determine whether they fall within the scope of the Act. To do so, the Court must ask itself how the information or material was obtained. Subject to any other technical objection, the admissibility of evidence obtained directly by gardaí through their own senses, without any assistance in the form of a surveillance device, is unaffected by the 2009 Act. Therefore, evidence will fall into one of two distinct categories, evidence which is obtained "by or with the assistance of a surveillance device" and evidence which is not."

34. The trial court concluded as follows:-

"We are therefore satisfied that the provisions of the Act do not apply to the evidence, the material or information which the prosecution seek to put forward in this trial, and proof is therefore not required as to the means or the legality of the means by which the gardaí came to be in a position to exercise their faculties to obtain that evidence. Consequently, we hold that the admissibility of this evidence is unaffected by any provisions of the 2009 Act; to hold otherwise would be to turn every criminal trial into an enquiry as to how the evidence came to be, rather than what the evidence actually is, and if the prosecution were obliged to explain and justify each and every prior step, every trial would become an unwieldy and unfocused exercise. Trial Courts are not obliged to enquire into how every piece of evidence came about, and whether evidence emerged by happenstance, guesswork, hunch, confidential information or the myriad of other routes by which members of An Garda Síochána are placed in a

position to obtain otherwise admissible evidence. This is not a reasonable conclusion and is not a conclusion that is justified by any relevant legal provision. We are satisfied that the correct interpretation of the 2009 Act is that the provisions thereof apply to evidence which is directly generated by or with the assistance of a surveillance device. Clearly, it will, for example, and must apply to recordings or data directly relied upon in evidence which is directly generated by or with the assistance of a surveillance device. Provisions of the 2009 Act do not apply to human observation evidence, even where that has been facilitated indirectly by use of such a device. In such a case and when confronted with such evidence, the Court is required to assess the accuracy and reliability of the observation evidence; the means by which the observer came to be in a position to make his or her observation is, in our view, an entirely irrelevant consideration. We are satisfied there is support for this approach in the decision of the Court of Criminal Appeal in Idah. That decision clearly holds that gardaí participating in a "surveillance" operation may equally be engaged in normal investigative work independent of any "surveillance device" that may be in use. It confirms unequivocally that undercover gardaí are not affected in their ability to give vive voce evidence of what they perceived through their own senses in their interactions, even at a distance, with the accused in any trial by virtue of the 2009 Act, even where they are simultaneously equipped with electronic surveillance devices. That is precisely the type of evidence that the gardaí propose to give in this case. Equally, it is clear that if the gardaí purported to rely on any material directly obtained by virtue of a recording or transmitting device, that material would be captured by the provisions of the 2009 Act. An example of material generated by the use of a surveillance device would be the transcript of a recorded conversation where that conversation has been recorded and captured by a device. An example of evidence generated with the assistance of a

surveillance device would be a tracking map prepared with the assistance of GPS coordinates produced by a vehicle tracking device. No such evidence is proposed to be given in this case. Even if it were, it could be justified by reference to an appropriate permission under the Act, or in an appropriate case, admitted pursuant to statutory discretion if there was non-compliance with a valid authorisation or approval once certain conditions had been satisfied. In view of the fact that we find that the 2009 Act has no application to the evidence proposed for admission into this trial by the prosecution, we do not find it necessary to consider any further application or matter arising under the provisions of that Act."

Submissions of the appellant

35. The appellant submits that the trial court erred in its reliance on *Idah v. DPP* [2014] IECCA 3 because in *Idah* it was established that there was no causative link between the audio recording device and the evidence relied on at trial whereas in the instant case the trial court concluded that it was possible that the device in the appellant's car contributed to the tracking of his movements and therefore there was a causative link between the device and the observations relied on as evidence.

36. The appellant further takes issue with the court's reliance on *DPP v. Cash* [2010] 1 IR 609 because in *Cash* the issue concerned evidence which formed the basis for a reasonable suspicion which was used to ground an arrest which led to the generation of evidence. Any unconstitutionality in the formation of the reasonable suspicion was very remote from the evidence ultimately relied on at trial. Such remoteness is not present in the instant case as the garda observations which formed the evidence at trial were intrinsically linked to the tracking device.

37. The appellant submits that the trial court erred in characterising the observation evidence as independent evidence. Such evidence could have been independent but in this

case a tracking device was used and therefore approval for this device was required to be established in evidence. In the absence of such the evidence was inadmissible.

38. In essence Mr Carroll contends that there was a causal link between the observation evidence and the surveillance device and therefore the statute was engaged.

Submissions of the respondent

39. The respondent submits that while the Court indicated at the outset that it would entertain the possibility that there was a link between the observation evidence and the use of a device, the Court ultimately concluded as follows:-

> "Having examined the actions of members of An Garda Síochána to assess whether they are within the scope of the Act, we are entirely satisfied that the observation evidence obtained directly by the Gardaí in this case through their own senses was not obtained "by or with the assistance of a surveillance device."

40. Therefore, there was a finding of fact that the evidence to be adduced was in no way linked to the surveillance device.

41. The respondent submits that the reliance on *Idah* was absolutely appropriate and in accordance with law. There was no causative link shown in the instant case between the surveillance device and the evidence to be given at trial.

42. Ms. Murphy SC argues that the court of trial's ruling makes it clear that the observation evidence was not obtained by or with assistance of devices. She says that no evidence was adduced of the surveillance devices at all.

Discussion and Conclusion

43. Following a voir dire, the defence submitted that if evidence was obtained as a result of surveillance within the meaning of the 2009 Act, the evidence is only admissible if the proper authorisation or approval has been granted. The issue was canvassed at some length on Day 10 and Day 11 of the trial with the court of trial on Day 11 indicated its ruling on the

issue in short form and giving reasons for its decision on Day 12, some of which is quoted above.

44. The succinct ruling of the court of trial on Day 11 bears repetition:-

> "Firstly, the evidence of eye witness observations of the public movements of vehicles and persons are matters whose admissibility is in no way governed or affected by the provisions of the Criminal Justice (Surveillance) Act of 2009, even where the use of surveillance devices or techniques specifically covered by that Act have played some part in putting members of An Garda Siochana in a physical position to make such observations and secondly, this is because the evidence actually sought to be led in the trial is generated by the operation of the normal human processes of observation and retention of live happenings and events.
>
> Our view of the proper construction of the 2009 Act is that it applies solely to material directly generated by the operation of devices specifically referred to in the definition sections of that Act. This is clearly illustrated for us by the facts of the Sunny Idah case opened by Ms. Murphy, which show that the human observations of surveillance gardai were held to be admissible and not covered by the Act, notwithstanding the fact that such observations were generated in circumstances where a transaction was in being that appeared, on the face of it, to be at least equally concerned with the generation of material from the surreptitious recording devices with which the police officers were equipped whilst they were at the same time having face-to-face conversations which subsequently resulted in the generation of face-to-face evidence."

45. The court was of the view that it was therefore unnecessary to rule on a disclosure application pursuant to s.15 of the Act.

46. We say at the outset of this discussion that we do not see an error in the court's analyses or conclusion which the court expanded upon the next day. The respondent proposed to rely upon the visual observation of members of the NSU and such covert observations are frequently part and parcel of an operation such as this leading to the arrest of a suspect. In general terms this type of surveillance does not come within the 2009 Act as it does not include the use of a surveillance device for which an authorisation or approval is needed.

47. Section 1 of the Act states that 'surveillance device' does not include equipment such as binoculars or the use of a camera ('in a place to which the public have access'); these are items which may well be used by persons carrying out covert observation. In *Idah* and as stated by the court of trial, this Court found that the requirements under the 2009 Act were engaged where the evidence was facilitated by the use of a surveillance device but the Act was not engaged where the evidence was obtained without the use of a device.

48. The key question in this case was whether the visual observation evidence came about as a result of the use of surveillance devices. The respondent contended that the Act did not apply to visual observation surveillance, that the respondent did not rely on the content of audio recording of conversations and that the only evidence sought to be adduced by the Director was that of visual observation.

49. In the present case it was contended, in effect that the members of the NSU would not have been in the relevant location absent the use of a surveillance device, thus the 2009 Act was engaged. It is said that the court of trial erred in that while finding that it was reasonably possible the visual observation evidence was assisted by the use of surveillance device(s), the court concluded that there was no obligation on the respondent to prove the lawful use of the device(s).

50. It is important not to lose sight of the evidence which the respondent actually relied upon and that was the visual observation evidence. In our view, rather than misapplying

Idah, the court of trial was absolutely correct in their assessment of the evidence and application of the legal principles. In the words of the court below this evidence was gathered 'at least one remove from the use of any surveillance device'. The respondent did not intend to rely on any information gathered by any device. The evidence was that of eyewitnesses and therefore did not fall foul of the provisions of the 2009 Act.

S.14(2) of the 2009 Act provides:-

> "Nothing in this Act is to be construed as prejudicing the admissibility of information or material obtained otherwise than as a result of surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8."

Therefore, if evidence is gathered otherwise than as a result of surveillance as defined in the Act, it will generally be admissible subject of course to the rules of evidence and constitutional issues such as privacy.

Pursuant to s.1 of the Act surveillance is defined as:-

> "(a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movement, activities and communications, or
>
> (b) monitoring or making a recording of places or things,
>
> **by or with the assistance of surveillance devices**;"(our emphasis).

51. As we have previously stated, equipment to assist in visual observation such as binoculars are not included as surveillance devices under the Act.

52. As stated in *Idah* if such devices are not used, the 2009 Act does not apply. In determining whether the actions of the NSU in conducting their visual observations fell within the scope of the Act, the court of trial examined their evidence in this context and in that regard adhered to the legal principles established in *Idah*.

53. The court found that the evidence gathered by members of the NSU came about 'through their own senses and was not obtained "by or with the assistance of surveillance devices"".

54. The evidence in issue included the observation by the members of the movements of persons and vehicles and did not require the use of any devices. The court properly found, in our view that surveillance devices would not guarantee the presence of either persons or vehicles at any particular location and that the evidence arose independently of the use of any device.

55. We can find no error in the court of trial concluding that the Act did not have application. We endorse the opinion expressed by the court that the provisions of the 2009 Act (insofar as approval/authorisation is required) do not apply to visual observation evidence.

56. That class of evidence is admissible subject to the ordinary rules of evidence and constitutional imperatives.

57. We find no error in the trial court's ruling in this respect and we reject this ground of appeal.

Ground 3

58. This ground is concerned with interjections from the court of trial during the cross-examination of Robert Moore. The appellant argues that it was the defence strategy to demonstrate that the witness had an animus towards his former employer, Mr Duffy, and therefore may have fabricated the allegations. The appellant contends that attempts to explore the dealings between Mr Duffy and Mr Moore were repeatedly interrupted by the court with queries as to the relevance of questioning.

59. The appellant submits that the alleged repeated interjections interrupted the flow of cross-examination and showed the witness that the court placed no credence on the defence line of questioning. This, it is said bolstered the witness in giving his evidence.

60. The appellant submits that the court pre-emptively foreclosed on the possibility that there were aspects of Mr Moore's relationship with Mr Duffy which pointed to a motivation to lie about what happened and in doing so, the court demonstrated prejudgment in respect of Mr Moore's credibility.

61. The respondent submits that the manner of the court's engagement with the cross-examination of Mr Moore was appropriate and lawful. The defence was in no way impeded by the interruption of the court. On a full reading of the cross-examination it could never be said that the interventions reached a level of being so frequent, prolonged, or of such nature to be unfairly disruptive or to give the impression of partiality in favour of one side of the case.

Discussion and Conclusion

62. When counsel for the appellant's co-accused sought to cross-examine the witness on the issues outlined above, the court queried the relevance of such questioning. Cross-examination is not unfettered, a court is entitled to stop questioning which has no relevance, which is purely vexatious or excessive in terms of time.

63. In the course of cross-examination on behalf of the co-accused, questions were asked relating *inter alia* to Mr Moore's accident at work in October, 2016, how he was paid by Mr Duffy, and an issue concerning payment for a van. All were designed to explore the relationship between the witness and Mr Duffy, specifically that there were issues between them.

64. The court of trial queried the relevance of some of the lines of cross-examination, as the court is fully entitled to do. In all the instances referred to above, on being asked to explain the relevance, the cross-examination continued.

65. Moreover, during cross-examination a specific question was put relating to the relationship as follows:-

> "Q. …So you – there were a lot of issues going on between you and Mr Duffy; isn't that correct.
>
> A. Yes."

66. The cross-examination then continued regarding payment on a van, at which point the presiding judge legitimately intervened to query the relevance of such a peripheral question.

67. As we have stated cross-examination is not unfettered, there are limitations. Questions to a witness challenging his/her credibility must be relevant, questions which are so remote or of such a character so as not to affect the credibility of a witness are not relevant.

68. While there were interventions during the cross-examination on behalf of the co-accused, insofar as this appellant is concerned, the interventions by the court of trial were extremely limited and were for clarification purposes only.

69. We are not persuaded that the interventions by the court of trial were unfair or impeded the cross-examination of the witness. Nor are we persuaded that the interventions by the court effectively protected the witness. It must be recalled that this was a court of extremely experienced judges who sought to ensure that the cross-examination of the witness was fair and within the rules of evidence.

70. Accordingly, we reject this ground of appeal.

Ground 4

71. This ground is concerned with the admissibility of an interview of the appellant wherein section 19 of the Criminal Justice Act, 1984 was invoked. The appellant argued that

the requirements of the statute were not met and it was not properly invoked. The trial court ruled as follows in finding the evidence admissible:-

> "Turning then to the section 19 point, we have a different view in relation to this. We're quite satisfied that the statutory prerequisites in terms of the invocation of the section were met. Specifically, the matter that Mr Carroll took issue with was that there was no communication of the point. This is addressed by the question, "I wish to advise you that we believe that your presence at the locations which we will be asking you to account for is attributable or due to your involvement in the commission of the offence. Do you understand this? No response." That clearly conveyed, in our view, to Mr Maguire that, not only did the gardaí have the requisite state of mind, but it clearly conveyed it to him in express terms, so we feel there's nothing in that point.
>
> The second point made by Mr Carroll in relation to the matter is that the matters subsequent raised were raised in relation to the 13th of July, whereas, as previously noted, the offence charged and prosecuted relates to the 2nd of August, and therefore they -- they are not captured by the, "at or about", wording of the section. We don't believe that this is correct for the reason that "at or about" imports an element of flexibility into the section, and we believe that the reason why flexibility is imported into the section is that, of course, the section in question is a provision of general application and may be invoked in relation to a whole range of offences of -- with different characters and ingredients. It therefore allows for the particular features of an allegation of membership, which I've just alluded to, and that is that the belief evidence is on a specific date, but the prosecution and the gardaí rely on matters on other dates as illustrative or supporting the matters contained in the belief evidence. It's almost inevitable it won't be on the same date as that to which the belief relates. It in fact falls into the substantive question in the case, does the evidence -- the other

evidence support the belief evidence. But, on the specific issue, we've no doubt in the context of an allegation of membership of an unlawful organisation that putting matters to be accounted for under section 19, some two and a half weeks prior to the date of the belief, is certainly well within the ambit of what might be regarded fairly as, "at or about", the date of the alleged offence. So we don't feel there's any substance in that, and therefore that section of the interview is admissible for the purpose of considering whether it's proper, fair or appropriate to draw any inferences. We're not necessarily saying that any of the questions or answers will actually be used in that way."

72. The appellant submits that the requirements of the statute were not met, the appellant should have been informed that it was believed that his presence at that place and at that time may be attributable to his participation in the offence.

73. The appellant further submits that the question regarding presence at a location must relate to "at or about the time of the offence". In this case, the time of the offence was specified as the 2nd August 2017 and yet the appellant was asked about his presence at locations on the 13th July 2017. This was contrary to what was provided for by the legislation.

74. The respondent submits that the s.19 inferences were dealt with appropriately and the court was correct in its assessment that it was clearly conveyed to the appellant by gardaí that they had the requisite state of mind in express terms as required by statute.

75. In relation to the questions concerning the 13th July 2017, the respondent submits that the court correctly ruled that "at or about" introduces a certain flexibility into the section and to hold otherwise would introduce an unwarranted limitation on the use of the section.

Discussion and Conclusion

76. Evidence was given by Detective Garda Power on Day 12. He was involved in interviewing the appellant during his detention pursuant to s.30 of the 1939 Act. The issue arose regarding an interview of the 3rd August 2017 where the provisions of s.18 and s.19 of

the Criminal Justice Act 1984 as amended were invoked. Insofar as s.19 is concerned, having explained the provision in ordinary language, the following was said:-

> "Question: You have been informed in ordinary language what the effect of a failure or refusal to account for your presence at a particular place at or about the time an offence is alleged to have occurred will be; is there anything you wish me to clarify further? Answer: No response. Question: We are requiring you to account for your presence at Clearwater Shopping Centre, Finglas, Dublin 11 between 12.45pm and 1.20pm on the 12th July 2017? Answer: No response."

77. The appellant was then asked to account for his presence at other locations on the 12th July and locations relating to the 13th July 2017. The appellant argues that there was a failure to comply with the statute which requires that the member of an Garda Síochána reasonably believes that the presence of an accused at that place and at that time may be attributable to his participation in the offence and that the member inform the accused of that belief. It is said that Detective Garda Power ought to have informed the appellant of his belief and secondly, that the section requires the question to presence at a location "at or about the time of the offence" and that as the offence is dated the 2nd August 2017, questions regarding the 12th and 13th July 2017 did not fall within the section.

78. Section 19 of the Criminal Justice Act 1984 as substituted by section 29 of the of the Criminal Justice Act 2007, the relevant portion of which says:-

> "19 –(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—
>
> [ ]
>
> [ ]
>
> was requested by the member to account for his or her presence at a particular place **at or about the time the offence is alleged to have been committed** and the member

reasonably believes that the presence of the accused at that place and at that time may be attributable to his or her participation in the commission of the offence and **the member informed the accused that he or she so believes**, and the accused failed or refused to give an account,…" (our emphasis).

79. Insofar as the evidence against this appellant was concerned, evidence was adduced of events of the 12th and 13th July 2017 as evidence supportive of the respondent's case that he was, on the 2nd August 2017, a member of the IRA.

80. Turning to Mr Carroll's second point. the appellant was asked to account for his presence at particular locations on the aforementioned dates, approximately 3 weeks prior to the date of the offence for which he had been arrested. Those dates are not random dates, the dates are clearly linked to offence of the 2nd August 2017.

81. We are entirely satisfied that the words 'at or about' encompass that time frame. It would be absurd if this were not so. The use of those words is designed to ensure a level of flexibility to the section, should the legislature have desired a less flexible approach, different words would have been used.

82. Insofar as the first point is concerned, at the point when s.19 of the Act was invoked, Detective Garda Power explained the provision in ordinary language and then, having done so, stated as follows:-

"Question: I wish to advise you that we believe that your presence at the locations which we will be asking you to account for is attributable or due to your involvement in the commission of the offence…"

83. When we examine the information which was given by Detective Garda Power to the appellant, we come to the same conclusion as the court of trial, and that is that the garda conveyed in clear terms to the appellant he held the requisite belief. The words above

expressly convey that the member had the requisite belief and that he informed the appellant of this belief.

84. The court of trial carefully considered the submissions made on behalf of the parties and gave its reasoned judgment the following day and ruled that the statutory prerequisites for the proper invocation of s.19 were met. We can find no error in this regard and accordingly, this ground of appeal fails.

Decision

85. As we have rejected all grounds of appeal, the appeal against conviction is hereby dismissed.