



THE COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

[48/19]

Neutral Citation Number: [2021] IECA 44

**The President
Kennedy J
Ni Raifeartaigh J**

BETWEEN

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT**

AND

CONOR METCALFE

APPELLANT

JUDGMENT of the Court delivered on the 18th day of February 2021 by Birmingham

P.

1. On 19th December 2018, following a five-day trial, the appellant was convicted of the offence of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939 (as amended) by the Special Criminal Court. He was sentenced to a term of four and a half years imprisonment and has now appealed his conviction. He had stood charged that he was, on 24th November 2015, within the State, a member of an unlawful organisation styling itself the IRA, otherwise the Irish Republican Army or Óglaigh na hÉireann.
2. Eight grounds of appeal were formulated on behalf of the appellant. These were as follows:

- (i) The court of trial erred in accepting the prosecution proposition that the appellant had failed to answer material questions in circumstances where, by reason of temporal and other considerations, the questions were not material.
- (ii) The court of trial erred in failing to address, or address properly, the weight to be given to the evidence of the Chief Superintendent in circumstances where the Chief Superintendent insulated himself from any effective or real cross-examination.
- (iii) The court of trial erred in attaching significant weight to the opinion of the Chief Superintendent in light of the extensive and general claims of privilege in relation to all collateral questions posed by the defence.
- (iv) The court of trial erred in failing to exclude evidence in respect of alleged associations with persons not convicted of membership of an unlawful organisation.
- (v) The court of trial erred in admitting and having regard to the Chief Superintendent's belief in circumstances where the nature of the privilege claimed by him left open the possibility that the belief was formed on the basis of the same material in respect of which the accused was questioned during the course of section 2 interviews, and in respect of which his non-responsiveness to those questions was relied upon as collaboration.
- (vi) The court of trial erred in law and in fact in upholding general or blanket claims of privilege in relation to general matters and further failed to give any or any cogent reason for its decisions.
- (vii) The court of trial erred in law and in fact in failing to withdraw the case from further consideration at the close of the prosecution case.
- (viii) The court of trial erred in law in failing to impose an appropriate sentence.

The Trial

3. There were two main elements to the prosecution case at trial. First, there was the opinion or belief evidence of a Chief Superintendent admissible pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972, and secondly, the Court was invited to (and did, in fact) draw adverse inferences from the failure of the appellant, when questioned, to answer what were contended to be material questions. In these circumstances, the appellant has grouped or clustered the grounds formulated into two general grounds; a ground relating to the belief evidence of the Chief Superintendent and a ground relating to the interviews that were conducted pursuant to s. 2 of the Offences Against the State (Amendment) Act 1998.

4. In the course of her opening statement, counsel indicated that the fulcrum of the case would be the opinion evidence of Chief Superintendent Tony Howard. As to the supporting evidence required as a result of the Supreme Court decision in *Redmond v. Ireland* [2015] 4 IR 84, it is said that the appellant was arrested at his home in Clondalkin on 24th November 2015 and was detained. During the course of his detention, the appellant was interviewed on two separate occasions when the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 were invoked. Counsel indicated that the Court would be hearing evidence which would be relevant to the Court's assessment of the materiality of the questions that were asked during those two interviews. She said she was making it clear, and had made it clear to the defence in the opening of the case, that she was not asking the Court to view evidence, which she was contending is relevant to the question of materiality of questions, as being a separate and distinct pillar of evidence which, in and of itself, was probative of the charge before the Court.

5. The appellant is very critical of the approach of the Director in contending and asserting that evidence was being put before the Court for one purpose only, namely, to

establish the materiality of questions asked during detention, but in a situation where the prosecution was disavowing any reliance being placed on the evidence, as itself offering support to the opinion belief evidence of the Chief Superintendent. The prosecution approach is described as “Jesuitical” and as amounting to casuistry. Before addressing those criticisms, it is appropriate to review just what that evidence was.

The Evidence before the Special Criminal Court

6. Evidence was led of the appellant’s involvement in the movements of a stolen van prior to and on 3rd June 2014, during the course of which he was observed in the company of Mr. Kenneth Donoghue, a convicted member of the IRA. Mr. Donoghue had been convicted of the offence of membership of the IRA before the Special Criminal Court in October 2002. The vehicle in question, a white Renault Kangoo bearing registration number 08-D-58643, was a stolen vehicle and the registration plates were false. On 3rd June 2014, the van was parked at Claremont Court, Glasnevin, in Dublin. At that stage, surveillance was being undertaken by members of the National Surveillance Unit. On that morning, the accused left his house and met nearby with Mr. Donoghue in the Clondalkin area. Mr. Donoghue and the accused travelled to the Blanchardstown Shopping Centre *via* the Nangor Road area where they met up with a third man, Mr. David Quinn. The three men then left in a blue BMW driven by Mr. Donoghue and at 12.20pm, they travelled to Claremont Court, Glasnevin *via* the Navan Road area. The three men left Claremont Court in the BMW and drove into the Glasnevin Industrial Estate where Mr. Quinn walked around for a short time. The three men then drove back to Claremont Court in the BMW. The three men arrived back at that location at 12.44pm. The accused, now appellant, got out of the BMW and went to the stolen Renault Kangoo. He got onto his hands and knees and retrieved the key of the van by rummaging in the area of the front wheel arch. The accused then drove the stolen Kangoo van from

Claremont Court, in convoy with the BMW that was being driven by Mr. Donoghue, from Glasnevin, from the Clonee Exit of the N3, and thereafter, on the R149 in the direction of Newcastle. The Kangoo was later parked by the accused at Maplewood Road, Tallaght.

7. On the evening of 4th June at 8.40pm, the van that had previously been parked at Maplewood Road by the appellant was driven at that location by a Mr. Dean Byrne of Drumcairn Park. The van drove down Cookstown Way and into Birchwood Heights where it reversed into house no. 1. Mr. Byrne opened the rear doors of the van and another male got out, following which there was interaction between these two males in the area between the open doors of the van and the door of house no. 1. The van then drove to the Belfry Estate, arriving there at 9.00pm, by which time the windows of the rear door had been blackened or screened off. The van came to a stop thereafter and Mr. Byrne was later seen walking along the N82 towards the N81 and back towards Tallaght. At 8.25am on 5th June 2014, the Renault Kangoo was moved from Belfry Downs to Glenshane Crescent, Tallaght, where it was parked. There was a male in the front and a male in the back of the van. Members of An Garda Síochána intervened. Following the intervention, Mr. Byrne of Drumcairn Park was found in the driver's seat of the van, and a Mr. Michael Finlay of Maplewood Road, Tallaght, was found in the rear of the van. Also in the rear of the van was a handgun. Mr. Finlay was dressed in an An Post uniform. A semi-automatic pistol and a magazine with ammunition was found on the rear floor of the van, together with a holdall containing disguises; spectacles, beards, glasses and there was also a bicycle. Messrs. Byrne and Finlay were convicted of offences involving the unlawful possession of firearms and ammunition by the Special Criminal Court on 16th June 2016. The sentence hearing in the Special Criminal Court was told that both men were engaged in the operation that had been frustrated by Gardaí in furtherance of the activities of the IRA.

8. On 14th September 2014, the appellant was observed associating with Mr. Eddie O'Brien of Hazelcroft Road, Finglas, at the Maple Shopping Centre in Cabra, and later at the Hampton Green Estate on the Navan Road. On 29th June 2018, Mr. O'Brien was convicted by the Special Criminal Court of being a member of the IRA. On the same evening, 14th September 2014, Mr. Donoghue was seen walking around the Russell Lawn area of Tallaght at 11.30pm and his blue BMW was seen parked outside the address of the accused at 23, Monastery Rise, Clondalkin, at 12.15am. The accused was then seen in conversation with Mr. Donoghue in the driveway of the accused's home.

9. On 7th August 2015, the accused was observed associating with Mr. David Nooney of Coultrey Green, Ballymun, at the carpark of McDonald's in the Blanchardstown Shopping Centre. On 29th June 2018, Mr. Nooney was convicted by the Special Criminal Court of the offence of membership of the IRA, the offence having been committed on 8th August 2015, one day after he was seen in the company of the appellant. Mr. Nooney and Mr. O'Brien were convicted of offences following their association with what seems to have been an internal IRA inquiry at a premises in Castleknock.

10. On 25th March 2015, the dwelling of a Mr. David Murray of Cappogue Cottages, Finglas, was searched under warrant. This was a follow-up investigation from the arrest of another individual at Balbutcher Drive, Ballymun, when firearms, ammunition and other paraphernalia were recovered. In the course of the search of Mr. Murray's residence, a document was found headed 'Tobacco Land Limerick'. The document read as follows:

"Van from Limerick meets van at Red Cow carpark every morning and divides up smokes and both do the rounds and then meet back in evening (preferable Friday).

John Ryan, Tallaght village, owns post office in Tipperary town."

Mr. Murray was charged with membership of the IRA, and on 6th April 2017, was convicted by the Special Criminal Court. The document headed 'Tobacco Land Limerick' formed part

of the evidence at trial. When the accused was arrested and detained, his fingerprints were taken, and when they were compared with marks that had been developed from the document, a match was obtained.

11. The accused was arrested and detained on 25th November 2015. While he remained in Garda custody, a member of An Garda Síochána, Detective Sergeant Boyce, returned to the accused's home to give keys back to his mother. He arrived at the home of the accused just after midnight and observed a male known to him as Patrick Brennan of Lindisfarne Avenue, Clondalkin, walking out of the residence of the accused. Mr. Brennan was known to Detective Sergeant Boyce as a person who had been convicted of membership of the IRA in 2004, against a background of an incident that had occurred on 11th October 2002.

12. While, strictly speaking, there would be a certain logic in dealing first with the opinion/belief evidence, in a situation where evidence was put before the trial for a limited purpose that has just been referred to, it is convenient to deal first with the interviews conducted with the accused/appellant.

The Interviews

13. The first interview of note was conducted by Detective Sergeant Padraig Boyce and Detective Garda Leanne Cruise. The interview began at 10.17am on 25th November 2015. Dealing with the interview in the course of the trial in the Special Criminal Court, Detective Sergeant Boyce explained that the questions were formulated to take into account the search of the home of Mr. David Murray on 25th March 2015, and his movements, actions, activities and associations with persons convicted of membership of the IRA on 3rd June 2014, and his association with other persons who had been convicted before the Special Criminal Court.

14. The other interest of potential evidential significance was conducted by Detective Garda Colm Finnerty and Detective Garda Leanne Cruise. The interview commenced at 2.54pm on 25th November.

15. The questions which the Court was prepared to regard as material were set out by the Special Criminal Court in the course of the judgment delivered on 19th December 2018. The memoranda of interview appear in the transcript of the proceedings before the Special Criminal Court of 6th November 2018.

16. In recording the questions identified by the Special Criminal Court as significant, where the response recorded in the memorandum is “no comment” in the majority of cases, generally speaking, the Special Criminal Court has not recited this. The questions identified as being of relevance were as follows:

“Question: "Can you tell me anything about 3/6/2014?" Question: "Can you tell me about anything you did on that date?" Question: "Were you in Tallaght on that date, the 3rd of June?" Question: "Do you know Ken D[o]noghue?" Question: "Is he a member of the IRA?" Answer: "I wouldn't know as I am not a member of the IRA." Question: "Were you ever involved in an IRA operation with Ken Don[o]ghue?" Answer: "I wouldn't know as I am not a member of the IRA." Question: "Were you ever involved in any job with Ken D[o]noghue?" Question: "Did you get into Ken Don[o]ghue's car on 3/6/14?" Question: "At 10.50 am on 3/6/14 Ken Don[o]ghue picked you up in his BMW 04WW5659, why were you in a car with a convicted member of the IRA?"

Question: "At 10.53 am you and Ken Don[o]ghue drove on Nangor Road in the direction of Penny Hill Pub to Lucan village and on to Blanch, what was the purpose of this trip?" Question: "Did you arrange this trip with K Don[o]ghue?" Question:

"Did K Don[oghue direct you to go on this trip?" Question: "Are you aware that Ken Don[oghue is a convicted member of the IRA?" Question: "On 3/6/14 were you aware you were in a car in Blanchardstown associating with a convicted member of the IRA?" Question: "What were you told about this trip to blanch?" Question: "What were you told to do?"

Question: "At 12.20 pm on 3/6/14 you were parked in blanch shopping centre outside Harvey Norman's shop in car with Ken Don[oghue and David Quinn, who is David Quinn?" Question: "What happened then?" Question: "Where did you go?" Question: "Did you go in the direction of Glasnevin?" Question: "Whose idea was it to go to Glasnevin?" Question: "Were you told why you were going to Glasnevin?" Question: "Did Ken Don[oghue tell you why you were going to Claremont Court in Glasnevin?" Question: "What was in Claremont Court?" Question: "Were you to pick up something there?" Question: "Were you to pick up a car for an IRA operation?" Answer: "No, as I am not a member of the IRA." Question: "What did you do in Claremont Court?" Question: "Did you pick up a white Berlingo van in Claremont on 3/6/14?" Answer: "No." Question: "Did you pick up any car in Glasnevin?" Question: "At 12.35 pm you were under surveillance by guards on 3/6/14, you got out of Ken Don[oghue's car and got into a white Berlingo van, why did you do this?"

Question: "Was this to further an IRA operation under control of Ken Don[oghue?" Answer: "Not a member of the IRA." Question: "Did you get into a white Berlingo van on 3/6/14 in Claremont Court?" Question: "Why did you get into a white Berlingo van?" Question: "This van was bearing reg plate 08D58643, what can you

tell me about these number plates, Conor?" Question: "Were you aware that the number plates on 08D58643 on Berlingo van were false number plates?" Question: "What were you told this van was to be used for?"

Question: "Where were you told to bring this van?" Question: "The van bearing plate 08D58643 was a stolen van, did you steal this van for the IRA?" Answer:

"No." Question: "Did you arrange for this van to be stolen?" Answer: "No."

Question: "Were you aware that this van was stolen?" Question: "You then left Claremont Court, Glasnevin driving behind Ken Don[o]ghue who was in 04WW5649, where did you go then?" Question: "Did you drive to Tallaght?" Question: "Why were you in convoy with a convicted member of the IRA driving a stolen Berlingo van with false plates on 3/6/2014?"

Question: "Did K Don[o]ghue arrange this operation?" Question: "How long have you known Ken Don[o]ghue?" Question: "Were you in regular contact with him at this time?" Question: "How did you arrange to meet him on that day?" Question:

"You drove to Tallaght on 3/6/14 in a stolen van, where did you go in Tallaght?"

Question: "Did you drive to Maplewood Road?" Question: "Did you drive to

Maplewood Road in convoy can K Don[o]ghue?" Question: "Why did you move a stolen van from Glasnevin to Tallaght on 3/6/14?" Answer: "I didn't." Question:

"Why were you driving a stolen car in convoy with Ken Don[o]ghue from Glasnevin to Tallaght on 3/6/14?" Answer: "I didn't." Question: "I just want to point out that you are lying to me?"

Question: "I am showing you a picture of the van 08D85643, photo No. 2 in trial exhibit 2, did you drive that van on 3/6/14?" Question: "At 12.46 pm, you parked up the van in Maplewood Road, why?" Question: "Why was this spot picked to park up, Conor?" Question: "Did you have any contact with this van afterwards?" Question: "Do you know Dean Byrne from Drumcairn Avenue in Tallaght?" Question: "Is Dean Byrne a member of the IRA?" Answer: "I wouldn't know as I am not a member of the IRA."

Question: "Do you know Michael Finlay from Crumlin and Tallaght?" Question: "How long have you known Michael Finlay?" Question: "How long have you known Dean Byrne?" Question: "Are you aware that Michael Finlay and Dean Byrne were arrested in the stolen van you drove on 5th of June 2014 in possession of a loaded Makarov pistol?" Question: "What can you tell me about this job?" Question: "When Michael Finlay was arrested he was wearing a disguise, as was Dean Byrne and they were on an IRA operation, can you tell me ..." -- "... what can you tell me about this?" Answer: "I wouldn't know as I'm not a member of the IRA."

Question: "Were you part of an IRA operation that led to the arrest of two IRA volunteers, Byrne and Finlay on 5/6/14 in possession of a loaded pistol in a stolen van with false plates that you drove to Tallaght on 3/6/14?" Answer: "No, because I am not a member of the IRA." Question: "Were you shocked, Conor, that the van you drove on 3/6/14 was involved in an IRA operation?" Answer: "I wouldn't know anything about IRA operations, as I am not a member of the IRA." Question: "Do you know Patrick Brennan from Lindisfarne?"

Question: "Are you aware that Patrick Brennan is a convicted member of the IRA convicted before the Special Criminal Court?" Question: "Are you an associate of an IRA man Patrick Brennan?" Question: "Has Patrick Brennan ever been to your house in Monastery Park?" Question: "Is Patrick Brennan a convicted IRA member and associate of yours?" Question: "Last night shortly after midnight, I called to your house at 23 Monastery Park to give your mother back Damien's car keys as she asked me to do, as I went to the front door Patrick Brennan or Whacker Brennan was leaving your house. Can you explain to me or give any reason why a convicted IRA man was in your house following your arrest?" Answer: "I have no idea."

Question: "Can you explain to me why you were driving stolen plated up car on 3/6/14 and associating with convicted IRA members?" Question: "Have you ever carried out surveillance on behalf of IRA?" Answer: "I'm not a member of the IRA." Question: "Did you ever carry out surveillance for behalf of IRA?" Answer: "No, I'm not a member of the IRA, I've carried out nothing on behalf of the IRA." Question: "Have you ever been involved with David Savage Murray from Finglas?" Question: "Are you aware that he is currently charged with membership before the Special Criminal Court?"

Question: "Are you aware that David Murray lives at 8 Cappogue Cottages, Finglas?" Question: "Have you ever been to David Murray's house in Cappogue Cottages, Finglas?" Question: "Have you ever carried out any jobs or work for/on behalf of David Murray?" Question: "Have you ever met David Murray anywhere other than at his house?" Question: "I am sure you are aware where the Red Cow Inn is?"

Answer: "I am." Question: "Have you ever carried out any observations by anybody parked up in Red Cow or business transactions?" Answer: "Not to my knowledge."

Question: "Are you aware of a company called Tobacco Land from Limerick?"

Answer: "No." Question: "Were you aware or did you make anyone else aware that Tobacco Land company use the Red Cow Inn carpark as a transitional work point for the start and end of deliveries in Dublin on specific dates?" Answer: "No."

Question: "Did you ever take details even by accident of any movement of the Tobacco Land company?" Question: "Did anyone ever tell you of movements of Tobacco Land company in Dublin?"

Question: "Did you ever discuss the movements of cigarette delivery van with David Savage Murray?" Question: "Do you know Kevin Hannaway, Sean Hannaway and Eva Shannon from Belfast?" Question: "On 4th and 5th of July the Hannaway's were down with Eva Shannon and the 7th and 8th of August, were you in Castleknock area on 7th and 8th of August?" Question: "Do you know David Nooney?" Question: "Have you ever associated with David Nooney?" Question: "Are you aware D Nooney is charged as a result of an IRA operation on 8th of August 2015?" Question: "Do you know Eddie O'Brien?" Question: "Are you aware Eddie O'Brien was charged before Special Criminal Court arising out of this IRA operation in Castleknock on 7th/8th of August?" Question: "Did you have anything to do with David Nooney, Eddie O'Brien, Kevin and Sean Hannaway or Eva Shannon the weekend of the 7th and 8th of August?"

- 17.** The questions identified as relevant from the second interview conducted by Detective Gardaí Cruise and Finnerty were as follows:

“Question: "Conor, do you know David Murray who lives at 8 Cappogue Cottages, Finglas, Dublin 11?" "Have you ever been to Cappogue Cottages also known as 8 Cappogue Cottages just off Finglas Dublin 11?" Answer: "Can't remember."

Question: "Do you know anyone that lives in that area that you might have been visiting?" Answer: "Can't remember." Question: "Have you ever met David Murray, also known as David Savage Murray?" Question: "Have you ever worked with or for David Savage Murray?" Question: "Are you a friend of David Murray's?" Question: "Have you ever worked with David Murray or had any dealings with him through security business?"

Question: "Is David Murray a colleague comrade of yours in the IRA?" Answer: "I am not a member of the IRA." Question: "On Wednesday 25th of March 2015 at 1.26 pm, myself and another member of An Garda Síochána entered David Murray's house at 8 Cappogue Cottages, Finglas, Dublin 11 on foot of a search warrant held by D Sergeant Boyce. These premises were searched and then in David Murray's bedroom I found a handwritten note headed, Tobacco Land Limerick, which appears to describe the movements or schedule of a cigarette delivery around the Red Cow carpark and details of a post office employee. I am now showing you exhibit CF4, do you recognise that note?" Answer: "No."

Question: "Have you seen that note before?" Answer: "No." Question: "Did you give that note to David Murray?" Question: "Have you ever handled or been in possession of that note?" Answer: "Not to my knowledge." Question: "Is that your handwriting on that note?" Answer: "No." Question: "Marks were found on this note on exhibit CF4 and have been identified as being identical to a set of prints that

were taken from you in custody last night, can you explain this?" Answer: "No."

Question: "It was a right thumb print which is marked on that exhibit there as exhibit

4B. Can you tell us how your thumb print came to be on this document?" Answer:

"I have no idea."

Question: "I'm now showing you exhibit CF2 which are two ring bound blue covered journals, the name Conor Metcalfe, 23 Monastery Park, Clondalkin is written in the inside cover of both. These journals were found by me on the coffee table in the

sitting room of your house, do you recognise these journals?" Question: "Is that your

writing in those journals?" Question: "Do you accept that there is a similarity in the

documents in handwriting in journals and notepaper recovered from David Murray's

house?" Answer: "No."

Question: "Can you explain what a document in relation to cigarette deliveries and post office employees and bearing fingerprints identified as being yours are doing in the bedroom of a suspected IRA man, David Murray?" Answer: "I have no idea."

Question: "A statement was taken from the owner of Tobacco Land in Limerick which confirms that Tobacco Land vans have previously used the back of Moran's Red Cow Hotel in Dublin as a location to exchange large amounts of cigarettes for distribution throughout Dublin. Can you explain why this document with your finger marks on it has recorded details about this operation?" Answer: "I have no idea."

Question: "Did you gather information in relation to the movements of Tobacco Land cigarette movements?" Answer: "No, I did not." Question: "Was it your intention to

pass this information through the ranks of the IRA?" Answer: "I never gathered such

information and I am not a member of the IRA." Question: "Tell me the truth about how you know David Murray or what is your association with David Murray?"

Question: "Is there any innocent explanation that you can think of as to how a piece of paper with your finger marks and those details recorded in handwriting about post office employees and cigarette deliveries ended up in the possession of David

Murray?" Answer: "No." Question: "Is there any reason your finger mark would have ended up on the note?" Answer: "Can't think." Question: "Are you sure that

none of that is your handwriting?" Answer: "No." Question: "Does that mean

yes/no?" Answer: "As far as I'm concerned it is not my writing." Question: "In the last few years, have you ever worked around the Red Cow?" Answer: "No."

Question: "Have you ever had anything to do with cigarette deliveries or restocking machines?" Answer: "No."

Question: "Can you think of anything at all you need to tell us at all about this note?"

Answer: "No." Question: "Do you know Paddy Patrick Brennan, do you know who I am talking about, he has a house in Lindisfarne in Clondalkin?" Question: "Do you

know that Paddy Brennan was at your house last night after you were arrested?"

Answer: "I was informed." Question: "Do you have any idea what purpose he was there for?" Answer: "No." Question: "Have you been long time family

acquaintances with Brennan's from Lindisfarne?" Question: "Is Paddy Brennan

a member of the IRA?" Answer: "I don't know, because I am not a member of the IRA."

Question: "Are you aware that Paddy Brennan was convicted in the Special Criminal Court in 2005?" Question: "This is for his role in an IRA operation in Bray a number of years before when he was caught in a van with a number of others in disguises where a firearm was located, did you know about that?" Question: "Is Paddy Brennan a colleague/comrade of yours in the IRA?"

18. Having identified the questions that they regarded as relevant, the Special Criminal Court went on to comment as follows:

“With reference to the provisions of section 2 of the Offences Against the State Act -- the Offences Against the State (Amendment) Act 1998, we are fully satisfied that the questions from each interview set out above were highly material to the issue of the suspicions that the interviewing Gardaí then entertained that the accused was a member of an unlawful organisation. The materiality of the events of the 3rd to the 5th of June 2014 is established by the continuity of the involvement of the stolen Kangoo over that period of time, culminating in the incident where it was in use by two men equipped with firearms, ammunition and disguises. There were some controversy during the trial as to the extent to which we were entitled to rely on the conclusions set out in a judgment in verdict of the Special Criminal Court in relation to the nature of that operation.

We do not need to rely at all on the findings of any other court as to the nature of that operation. The materiality of the nature of the operation as an IRA operation is in our view firmly established by the central involvement of Mr Kenneth Don[o]ghue. He was and is a long since convicted member of that organisation who is involved from the outset in the sequence of events involving the stolen van. The accused met up with Mr Don[o]ghue, obviously by prior arrangement and was brought to the stolen

van by Mr Don[oghue in Mr Don[oghue's car. After the accused took possession of the van on retrieving the key from the wheel arch he was accompanied by Mr Don[oghue in convoy.

This was a central and integral part of an unbroken sequence of events that culminated in the van being intercepted by the Gardaí two days later in the circumstances set out above. Likewise, the evidence also associated the accused with Mr Don[oghue on the evening of the 14th of September 2014, a day when the accused had also been observed in the company of Mr O'Brien, yet another person subsequently convicted of membership of the IRA by the Special Criminal Court.

On the 7th of August 2015, the accused associated with Mr Nooney also a person subsequently convicted of IRA membership by the Special Criminal Court.

Moreover, that association took place at a time and place very close to the IRA interviews which resulted in the other conviction set out above, including the conviction of Mr O'Brien, another observed associate of the accused. Of particular and very weighty significance in this case is the forensic connection established between the accused and Mr Murray, yet another person convicted of IRA membership by the Special Criminal Court.

The circumstances of that connection were integral to the evidence that supported the conviction of Mr Murray for membership of the IRA. The accused fingerprint was located on a document that is clearly and obviously related to surveillance of third parties for criminal purposes. The proper context of those criminal purposes is in fact established by the conviction of Mr Murray of IRA membership. In the absence of

expert evidence on the point, we cannot say beyond reasonable doubt that the writing in the journals belonging to the accused and found in his house is definitively the same as that which appears on the so called Tobacco Land document, but we share the opinion of Detective Garda Finnerty that it is in appearance very similar.

There is certainly no obvious difference in the writing that would in any way detract from the force of the fingerprint evidence connecting the accused to that document. Finally, the evidence disclosed that another convicted member of the IRA, namely Mr Brennan was observed visiting the accused home after the accused was detained for questioning as to the suspected commission of the offence with which he is now charged.

We are satisfied that the prosecution have in this case established a particularly and almost uniquely high degree of materiality of the questions based on this evidence given the quantity and relevance thereof. There are obvious issues arising from the accumulated evidence that strongly justify the suspicion on the part of the investigators that the accused too was an IRA member. We are satisfied that the question set out above based on the evidence led by the prosecution clearly qualify for consideration for the purpose of the possible drawing of inferences pursuant to the provision of section 2.

However, in order to actually draw such inferences against the accused, we must be satisfied in terms of the statute that it is proper so to do. It would not be proper so to do if we were satisfied there was a possible explanation for silence or false or misleading answers, other than the fact that a truthful answer to any of these questions

would reveal IRA membership on the part of the accused. Having considered the matter and considered the closing submissions of Mr Greene, we cannot discern any explanation for a failure or refusal to answer these highly specific and relevant questions other than the fact that the accused was in fact at the relevant time a member of the IRA and a truthful answer was not possible to these highly detailed questions without revealing that fact.

In the circumstances, insofar as the accused failed or refused to answer any of the questions set out above, we are satisfied beyond reasonable doubt that the only possible and correct inference is that he deliberately did not do so because he did not possess any truthful explanation of these multiple events that would stand up to the slightest degree of scrutiny. Insofar as the accused occasionally answered questions, either with a denial or a boilerplate assertion that he was not a member of the IRA, we are satisfied that such answers were false and misleading, in that they were either untruthful, or were not a proper answer to the question actually posed and were therefore designed and intended to mislead the interrogator. The obligation under the section is to provide a full account, see section 2(4)(a).

None of the questions posed were answered fully, truthfully or at all with the exception of the answer where he indicated that he was unable to provide an explanation for the fingerprint on the Tobacco Land document. His general lack of truthfulness in answering the questions that he did answer is established by his denial of matters plainly evidenced by the photographs produced to him during questioning. This eliminates any possibility that he was misled by the reference to a Berlingo van rather than a Kangoo in some of the questions. Consequently, we are also satisfied to

draw adverse inferences against the accused based on questions answered in the manner set out above. Therefore in the absence of any reasonable possible neutral or benign basis for the attitude of the accused during these interviews, we are satisfied that -- satisfied that adverse inferences drawn against the accused pursuant to the provisions of section 2 of the 1998 Act are available to us as evidence capable of supporting the statutory belief evidence in this case, as is required by the decision of the Supreme Court in *Redmond v. Ireland*.”

19. The appellant has submitted that many of the questions relied on by the prosecution and identified as relevant by the Special Criminal Court did not satisfy the test of materiality, and the court of trial therefore erred first in allowing the drawing of adverse inferences, and then second in placing reliance on the adverse inferences in support of the belief evidence of the Chief Superintendent.

20. We regard it as so plain as to be beyond argument that the questions identified were material to the investigation and, indeed, highly so.

21. The court of trial went so far as to say that they were satisfied that the prosecution had, in this case, established a particularly and almost uniquely high degree of materiality of the questions based on the evidence given and the quantity and relevance thereof. Whatever about the question of whether the level of materiality was at an almost uniquely high degree, we are quite satisfied that the questions exhibited a very high degree of materiality indeed.

22. The point is made that questions were put to the appellant surrounding the events of 3rd and 5th June 2014, but it is said that there was no evidence that the operation was, in fact, operated by the IRA, nor that those who subsequently faced charges were IRA volunteers. In ordinary language, material is the equivalent of relevant or important or significant. It seems to us that it would be an absurdity to suggest that the fact that someone is driven to the place where a stolen van is located by a convicted member of the IRA, retrieves a key from the area

of the wheel arch, and then drives the car away, driving for a period in convoy with a convicted member of the IRA is not material. It seems to us that it would be equally absurd to suggest that it was not material or relevant or important or significant to ask about the fact that two days later, the van was intercepted by Gardaí at a time when it contained a firearm. We do not think that the materiality of the questions is in any way diminished by the fact that the two occupants of the stolen van, at the time of the Garda intervention, pleaded guilty to firearms offences and the charge of membership that was before the Special Criminal Court, where the case was dealt with, was in the circumstances not proceeded with.

23. Therefore, we are satisfied that the Special Criminal Court was correct to conclude that questions material to the investigation had been asked and had not been answered, or had not been answered truthfully. We are also satisfied that there was potential to draw adverse inferences, and potentially to treat the failure to answer the material questions as corroboration of other evidence in the case. We will return to this question further, having considered the issues that arise in relation to the belief/opinion evidence of the Chief Superintendent.

The Belief Evidence of Chief Superintendent Howard

24. Detective Chief Superintendent Howard gave evidence on 6th November 2018. He began by explaining that he had been appointed to the rank of Detective Chief Superintendent on 13th July 2017, and that he had subsequently been assigned to take charge of the Special Detective Unit on 29th August 2017. He said that his current role and responsibilities included ensuring the security of the State and that he was involved in the gathering, assessment and investigation of intelligence relating to subversive activity and subversive crime. He explained that he had 37 years' service in An Garda Síochána. Prior to his promotion as Detective Chief Superintendent, he had served as a Detective Superintendent in the Garda

National Drugs and Organised Crime Bureau, where he investigated serious organised crime within the State and was involved in a number of international investigations. He had 25 years of experience as a detective and had served in a number of national units. Central to his role at present is the gathering of intelligence, the analysis of it and the investigation of it with a view to gathering evidence to sustain prosecutions. The IRA had been his central focus for the past 14 months, but while serving as a Detective Inspector in Coolock, he had investigated the murder of two individuals with very strong connections to the IRA. He told the Court that following the retirement of Detective Chief Superintendent Peter Kirwan, he was asked by the investigation team at the Special Detective Unit to review all the material in his possession and in the possession of An Garda Síochána in relation to the accused, Mr. Metcalfe. He told the Court that as a result of reviewing all the said material, he believed that Mr. Metcalfe was, within the State, on 24th November 2015, a member of an unlawful organisation styling itself the Irish Republican Army, otherwise known as Óglaigh na hÉireann, otherwise known as the IRA. As to the material he reviewed, he was satisfied as to its authenticity, its accuracy and its contents. When asked by prosecution counsel whether he could tell them about the material, or make it available, he said that he was making a claim of privilege in relation to all the material that he relied upon. He said that one of the primary areas of his concern was the protection of life. Public interest, he said, would be huge, and he also relied on the fact that the material related to the security of the State. He said that if directed to do so, he would produce the material to the Court. He said that in forming his belief, he did not rely on any matter of fact, or on any matter or issue that was recovered at the time of the arrest, or on any admissions or material gleaned during the course of the investigation following the arrest on 24th February 2015. He was including in that the interviews that were conducted with Mr. Metcalfe during the period of his detention which traversed 24th and 25th October.

25. When cross-examined by counsel on behalf of the now appellant, Detective Chief Superintendent Howard confirmed that he would claim privilege in relation to whether he had read documents on a computer screen or on paper. This caused the presiding judge to intervene and say that they would rule on the issue if necessary. He also asked counsel what the relevance of whether it was stored on a computer or in a paper file would be.

26. Asked about how he was in a position to say that he had not taken into account anything obtained or procured by An Garda Síochána on 24th November 2015 as part of the investigation, he commented that he had not read any memorandum of interviews nor had he looked at the book of evidence. It was suggested to him by counsel that in asserting that he had not taken into account anything that arose from the interviews, that he was doing that “on the blind”. Detective Chief Superintendent Howard was asked whether he would be claiming privilege over the period of time covered by the material available to him and he confirmed that he would. Counsel pressed as to whether the witness could exclude the possibility that he had considered matters relating to 3rd, 4th and 5th June 2014, and the Chief Superintendent maintained his position that he was claiming privilege, referring again to the need to preserve life and to protect the security of the State.

27. A similar position was taken in relation to 7th and 8th August 2015. It will be noted that, unlike other cases, there was no request to the Special Criminal Court to review the material over which privilege was claimed. Neither was there any challenge, as such, to the claim of privilege, as distinct from establishing that the claim was relied on in respect of certain matters, in particular, the events of 7th and 8th August 2015, and the events of 3rd to 5th June 2014.

28. In the course of closing submissions by counsel on behalf of the accused, it was contended that a Chief Superintendent asserting privilege has consequences; it was not “a free pass”. It was argued that the Court should look with a greater degree of scepticism when

identifying the amount of weight to be given to the opinion or the belief that was being proffered. Counsel submitted that a special caution was needed when a witness engages in a blocking exercise, as he suggested had happened in this case. Counsel referred to observations of the late Hardiman J. about the difficulties of somebody defending in a case such as this when there is a claim for privilege. He referred also to quotations from Fennelly J. to the effect that where privilege is claimed, as it inevitably is, the defendant does not know the basis of the belief; he does not know the names of the informants or the substance of the allegations of membership. Counsel referred to the concept of “examinable reality” and suggested that it was very hard to achieve anything in a cross-examination, notwithstanding remarks in some of the cases about how the level of expertise of the witness can be tested; that the reality was that engaging with the real meat of the case was an extremely difficult task indeed.

29. The arguments before this Court relating to the opinion/belief evidence of the Chief Superintendent mirror the arguments that were advanced in the trial Court. These arguments also mirror arguments that have been advanced in many other trials and on many other appeals. As pointed out recently by this Court in the case of *DPP v. Hannaway & Ors* [2020] IECA 38, the provision by statute for the opinion/belief evidence of an officer of An Garda Síochána not below the rank of Chief Superintendent has now been part of Irish law for almost half a century. We pointed out that its presence on the statute books is very unwelcome from the perspective of those charged with the offence of membership of an unlawful organisation, and it is a section that has given rise to debate and unease among sections of civil society. It is, however, unquestionably part of Irish law. Despite numerous challenges over the years, its validity as part of Irish statutory law remains, and as such, courts must give effect to it. It must be said that by this stage, many of the criticisms and objections formulated have become somewhat repetitive. It is true that it is normally the case

that the Chief Superintendent, if questioned about the material to which he had access or the material or sources by reference to which he formed his belief or opinion, will claim privilege. The fact that privilege is claimed and upheld, if that is the case, does not mean that courts are precluded from placing reliance on the evidence of the Chief Superintendent.

30. We do not see anything unusual in the terms in which privilege was claimed in the present case and, as we have pointed out, there was no challenge to the claim of privilege in the present case, nor was the trial Court asked to review the material on which the Chief Superintendent had based his opinion. It also wasn't a case where there was any attempt to challenge the Chief Superintendent's opinion by a denial of membership from the witness box. As the presiding judge pointed out, the experience had been that where that has occurred, it has often been very effective.

31. We are quite satisfied that this is a case where the court of trial was entitled to place reliance on the belief evidence of the Chief Superintendent. That, however, is not the end of matters. It has long been the approach of the courts not to convict on the evidence of the Chief Superintendent alone, but to convict only if the evidence of the Chief Superintendent is supported by some evidence implicating the accused in the offence charged. There is specific statutory provision which provides that the failure to answer questions material to the investigation may, on the basis of the drawing of inferences, be treated as or as being capable of amounting to corroboration of any evidence in relation to the offence. However, both in the trial court and before this Court, though formulated slightly differently, it has been urged that the only supporting evidence available, that being the inferences from the failure to answer material questions, is inadequate to support to the necessary extent the belief evidence of the Chief Superintendent. It is said that in various ways the evidence of the failure to answer questions was not independent of the evidence of the Chief Superintendent and involved an element of "double counting". Essentially, the point made is that the possibility

cannot be excluded, and, indeed, on the contrary, it is likely that, in forming his belief evidence, the Chief Superintendent had regard to many of the issues that were raised with the then detainee in the course of his detention.

32. For this reason, it is said that the distinction between evidence being adduced for the purpose of providing evidence that the accused was a member, and in that regard, providing support for the belief evidence of the Chief Superintendent, and evidence admitted only to establish materiality of questions, was a distinction that was Jesuitical or involved casuistry.

33. It seems to us that the criticisms ignore the fact that two distinct but specific statutory measures are in place. Section 3 of the Offences Against the State (Amendment) Act 1972 provides:

“(2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.”

34. Chief Superintendent Howard has so stated. This means that there was, therefore, evidence before the Court that Mr. Metcalfe was a member on the date charged. The weight to be attached to the evidence was a matter for the Court, though the Court was not at large. That was because the Supreme Court had made it clear that in order for there be a constitutional construction of s. 3(2) of the Act of 1972, it was necessary that the belief evidence of the Chief Superintendent be supported by some other evidence implicating the accused in the offence charged, which other evidence had to be seen by the trial judge as credible in itself and had to be independent of the witness giving the belief evidence.

35. By statute, the inferences drawn from the failure to answer material questions could be treated as, or as being capable of, amounting to corroboration of any evidence in relation

to the offence. It is beyond doubt that the reference to any evidence must include the belief evidence of a Chief Superintendent rendered admissible as evidence by statute. Indeed, in *DPP v. Nolan* [2015] IECA 165, this Court re-affirmed the decision of the former Court of Criminal Appeal in *DPP v. Donnelly* [2012] IECCA 78 that inferences drawn from an accused's failure to respond to material questions could corroborate belief evidence given by a Chief Superintendent pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972.

36. There remains for consideration whether the trial court was entitled to regard the evidence as to the failure to answer material questions as cogent. The trial court approached that task with conspicuous care. We cannot understand how it could be suggested that the evidence as to the failure to answer questions was not cogent, or that the inferences drawn were not ones that were available and were proper to draw.

37. There also remains the question of whether the evidence is independent of the Chief Superintendent. It seems to us that if the situation is properly and thoroughly analysed, the two pieces of evidence in issue are, in truth, quite distinct and quite independent. It is the fact of failing to answer questions material to the investigation in circumstances from which inferences are drawn which is evidence. That involves consideration of the question: what are the material questions, if any? What might be described as the background evidence in this case which was designed to establish the materiality of the questions; the relevance, significance and importance of the questions? So far as the Chief Superintendent's belief is concerned, it is the belief evidence of the Chief Superintendent, which was expressed in clear terms, and from which he never resiled.

38. We are satisfied, therefore, that this is a case where the Court had: (i) the belief evidence of the Chief Superintendent; and (ii) the independent evidence of the response of the appellant when asked material questions. In those circumstances, the Court of trial was fully

entitled to conclude that there was evidence on which it could convict, and indeed it might be said it would be very surprising if they concluded otherwise. We have not been persuaded that the trial was unfair or that there is anything unsafe about the conviction.

39. Accordingly, we dismiss the appeal.