THE SUPREME COURT

[Appeal No. 2020/100]

Clarke C.J.

MacMenamin J.

O'Malley J.

Baker J.

Woulfe J.

BETWEEN/

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

JAMES JOSEPH CASSIDY

APPELLANT

Judgment of Ms. Justice Iseult O'Malley delivered the 13th September, 2021

Introduction and overview

1. The appellant has been convicted of the offence of membership of an unlawful organisation styling itself the Irish Republican Army, otherwise Óglaigh na hÉireann, otherwise the I.R.A. That offence is created by the Offences Against the State Act 1939, as amended.

2. As has been explained in many judgments of the appellate courts, it is clear from the experience of this State in dealing with secretive and violent organisations such as the IRA that direct evidence of membership will rarely be forthcoming by way of either admission by an accused person, sources within such an organisation or uninvolved civilians. The legislature has sought to deal with that situation by enacting particular evidential provisions that are applicable only to this offence.

3. The first relevant provision for the purposes of this appeal is s.3(2) of the Offences Against the State (Amendment) Act 1972, which permits the admission, as direct evidence of membership, of the belief of a senior Garda officer. An officer not below the rank of chief superintendent (or a superintendent who has been given the necessary authorisation) may give "belief evidence" – that is, evidence that he or she believes the accused to have been, on the date particularised in the indictment, a member of a specified unlawful organisation. This provision is unique to the charge of membership – there are no other circumstances in Irish criminal law in which probative value is accorded to the belief of any witness in the guilt of the accused. While part of the justification for such a measure is the difficulty in adducing direct evidence, it is also the case that a belief held about an ongoing state of affairs (since membership is a continuing offence) by an experienced person may have more probative value than a belief in respect of a single event.

4. As a matter of practice, it is not seen as sufficient for the purposes of the section that the witness holds the requisite rank. The chief superintendent who gives belief evidence will be one of a relatively small group of officers at that rank who have the appropriate range of experience and expertise relating to unlawful organisations within the State. In some cases, the officer giving the belief evidence may have been operationally involved in the investigation giving rise to the charge or charges against

the accused. In others, he or she may have had no involvement until requested to assess the intelligence available in respect of the accused, for the purpose of seeing whether or not it gives rise to a belief that would be of evidential value on a membership charge.

5. It is necessary to emphasise that it is the belief itself that constitutes evidence under the section, and not the factual grounds for the belief. Thus, belief evidence will always be admissible, and the trial court will not examine the validity of the belief by applying the administrative law concept of reasonableness, or by reference to its detailed factual or logical basis. However, the court may for a variety of reasons conclude that, in a particular case, a greater or lesser degree of weight should be attached to the belief. It is in that context that much of the debate about the impact on fair trial rights arises.

6. The jurisprudential history of this section shows a distinct evolution from a time when it was accepted that a conviction might, at least in theory, be properly grounded upon belief evidence alone (see *People (DPP) v Ferguson* (unrep., Court of Criminal Appeal, 27th October 1975)) *("Ferguson")*. This theory was, however, always subject to the assessment by the trial court of the weight to be attached to the belief in the light of a variety of factors. In earlier years, the important factor here was whether there was any challenge to the belief by way of cross-examination or by a denial of membership on oath. The constitutionality of the provision was upheld by the High Court in *O'Leary v Attorney General* [1993] 1 I.R. 102, where Costello J. pointed out that it could not be construed as meaning that the court *must* convict in the absence of exculpatory evidence – the question was always whether the evidence established guilt beyond reasonable doubt.

7. It appears that, quite apart from the question of whether a challenge had been mounted to the belief, at least some formations of the Special Criminal Court were disinclined, as a matter of practice, to convict on the basis of a belief in the absence of corroborative evidence. However, the practice does not appear to have been uniform. In *People (DPP) v. Gannon* (unrep., Court of Criminal Appeal, 2nd April 2003) *("Gannon")* the Court of Criminal Appeal upheld a conviction where the trial court had found the evidence of belief to be sufficiently strong on its own. This case is now

mainly noteworthy for the *obiter* comments in which the Court approved of a ruling by the trial court that it could not rely upon, as corroborative evidence, matters which might have formed a fundamental part of the basis for the belief.

8. Conversely, in *People (DPP) v. Binéad* [2007] 1 I.R. 374 the Court of Criminal Appeal acknowledged that, in ruling that it would not convict without supportive or corroborative evidence, the trial court had clearly recognised the disadvantage to the defence flowing from the admission of belief evidence coupled with a claim of privilege. Meanwhile, in *People (DPP) v. Kelly* [2006] 3 I.R. 115 *("Kelly")* this Court described the practice of not convicting on belief evidence alone as "commendable" although not required by law.

9. The necessity for supportive evidence was ultimately recognised by this Court in *Redmond v. Ireland* [2015] 4 I.R. 84 *("Redmond")* as having a binding constitutional status, and accordingly the current position is that a person may not be convicted of membership solely on the basis of belief evidence. The belief must be supported by credible evidence that implicates the accused in the offence and that is independent of the witness giving the belief evidence.

10. Other safeguards have become necessary because of the fact that the officer giving evidence of belief will invariably make a claim of privilege over the sources of information upon which the belief is based. It has been acknowledged many times by the courts that, even where the claim of privilege may be entirely justifiable, it can create significant difficulties in any attempt to challenge the accuracy of the belief by way of meaningful cross-examination.

11. In different cases, different approaches have been adopted in order to minimise the risk of injustice. On occasion, the judges of the trial court have in the exercise of their discretion examined the documentation over which privilege is claimed, in order to determine whether there is anything in it that might assist the defence. It is always open to the court to do this, as the ultimate decision-maker on the issue of privilege. At other times, it has been proposed that the documents should be examined by counsel for the prosecution (acting as a "minister of justice") to see if the "innocence at stake" principle arises. However, the gardaí may object to this course of action on

grounds of security and personal safety. The possibility of appointing a special advocate to fulfil this role has been ruled out, as being beyond the powers of the courts in the absence of legislation.

12. In the recent case of *People (DPP) v. Michael Connolly* [2018] IECA 201 *("DPP v. Connolly"),* the belief evidence was given by an assistant commissioner who had taken over the file for that purpose on the retirement of a chief superintendent. The trial court declined to examine the documentary material itself, taking the view that it did not have the requisite expertise and that any unfairness arising from the claim of privilege would be offset by the requirement that the belief evidence must be supported by other evidence. The Court of Appeal allowed the appeal on the ground that the trial court had erred in so ruling. This Court is aware that in the subsequent retrial, the accused was acquitted after inspection of the file. The trial court concluded that it was reasonably possible that the officer had considered and relied upon the matters that had been put forward by the prosecution as supporting his belief.

13. I do not propose to make any comment on the merits of *DPP v. Connolly*, since it remains the subject of ongoing litigation. However, it illustrates the manner in which a claim of privilege may give rise to a risk of "double counting" – that is, that evidence relied upon as independent evidence, intended to support the belief evidence, might already have contributed to the formation of that belief. The way in which the claim of privilege is framed may, in this way, affect the assessment that the court must carry out when determining the weight to be accorded to the belief evidence. On occasion, where the claim of privilege is broad, the court will accord relatively little weight to the belief, and will require correspondingly strong supporting evidence. It will disregard, for the purpose of finding supportive evidence, matters which, because of the breadth of the privilege claimed, cannot be excluded as having been part of the foundation of the belief.

14. A further issue may arise if the inference provisions set out in the Offences Against the State (Amendment) Act 1998 are deployed by the prosecution. Section 2 of that Act provides that, where specified measures to protect the accused have been put in place as set out in the statute (including appropriate access to legal advice), a trial court may draw such inferences as appear proper from the failure or refusal of the

accused, when interviewed by investigating gardaí, to answer any question that is "material" to the investigation, or from the giving of false or misleading answers to such questions. (Inferences arising in this context will be referred to here as "s.2 inferences".) The section provides that references to a question that is "material to the investigation" include references to any question requiring the accused to give "a full account" of his or her "movements, actions, activities or associations" during any specified period. In determining whether or not it is appropriate to draw adverse inferences against the accused, it may therefore be necessary for the court to first determine whether or not the questions asked were in fact "material".

15. Section 2 inferences can be utilised only in trials of the offence of membership. Furthermore, answers to questions asked under the provision cannot be used in evidence for the purpose of prosecuting any offence other than membership. This aspect may be of particular significance in some cases. If it is argued by the defence that the evidence as to the activities of the accused is consistent with ordinary criminal activity, the prosecution may rely upon the fact that no such explanation was offered in response to relevant questions where s.2 was invoked.

16. The section provides that the accused may not be convicted on the basis of an inference alone, but the failure to answer may, on the basis of any inferences drawn, be treated as "corroboration" of any other evidence in the case. Under normal principles of law, evidence is "corroborative" if it is credible, is independent of the evidence requiring corroboration and implicates the accused in the offence charged.

17. This provision undeniably encroaches on the constitutional right to silence. The normal principle (albeit one that is increasingly subject to legislative adjustment) is that a suspect is not obliged to answer questions and must be expressly informed of that fact (by means of what is referred to as the "ordinary" caution). Evidence of the exercise of the right to silence under garda questioning will not normally be presented to the jury in such circumstances, for fear that they might draw a general inference of guilt (as explained by this Court in *People (DPP) v. Finnerty* [1999] 4 I.R. 364. The accused, if he or she does not give evidence, will also be protected by an instruction to the jury that no adverse inference can be drawn from his or her silence in the trial. Juries have, of course, always been entitled (subject to any warning appropriate to a

particular case) to draw rational inferences from the fact that the accused gave a false or misleading account to gardaí or on oath.

18. Section 2 alters that situation by permitting adverse inferences to be drawn where the accused remained silent in interview or where false or misleading answers were given, and by giving such inferences the status of corroborative evidence. However, the section may not be relied upon at trial unless the interviewing gardaí withdrew the ordinary caution, and *inter alia* the suspect was given both an adequate explanation of the provision and the opportunity to seek legal advice. The suspect is also entitled to have his or her solicitor present during the interview. Moreover, any inferences drawn must be "proper" and there must therefore be a rational connection between the responses to the questions and the inferences drawn. It is not the case that a failure to answer automatically leads to an inference of guilt.

19. In order to deal with the risk of double counting, the courts have over the past two decades held that the s.2 inferences cannot be regarded as corroborating the belief of the chief superintendent if that belief was, or might have been, based to any extent on the responses of the accused in the s.2 interviews.

20. The final evidential measure relevant to this appeal provides that any conduct of the accused person (which includes movements, actions, activities and associations on his or her part) that implies or leads to a reasonable inference that he or she was at a material time a member shall be evidence of such membership. The weight to be attached to evidence of this nature will naturally vary. People are in principle entitled to hold and express political views, to attend politically-oriented events, to have personal friendships of their choice and to acquire emblems and memorabilia that reflect their views. However, it may be that in a particular case the close association of the accused with persons previously convicted of offences relating to an unlawful organisation will be relevant.

21. As a result of the combination of these measures and the related case law, it is now common for the trial court to be invited by the prosecution to accept the belief evidence of the chief superintendent and to find the necessary support for it in the s.2 inferences to be drawn from the failure to answer questions or the giving of false or

misleading answers, combined with any relevant circumstantial evidence. It has also become the norm for the officer giving belief evidence to state that the belief is not based on anything that arose during the investigation of the offence or from the arrest and detention of the accused. The officer may, to emphasise this point, say that he or she has not read the book of evidence or disclosure material. The objective of this approach is to exclude, as a concern for the court, the possibility of double counting. However, there will also be a claim of privilege over the sources of the information giving rise to the belief.

22. In the trial of the appellant, evidence was given by a chief superintendent as to his belief that the accused was a member of the unlawful organisation styling itself the Irish Republican Army. Chief Superintendent Mangan had been involved in and was familiar with the progress of the investigation to at least some extent, insofar as it was he who had authorised the first extension of the appellant's period of detention after his arrest. (The power to grant such an extension is also confined to officers not below the rank of chief superintendent.) It was necessary, for that purpose, that he be made aware of the progress of the investigation. However, he stated in evidence that his belief was not based on the arrest or on anything that occurred during the detention of the appellant, but only on material relating to events prior to the arrest. He also stated that he had not read either the book of evidence or the disclosure material that had been furnished to the defence. The chief superintendent made, and maintained throughout his evidence, a very broad claim of privilege over the sources of his information. This combination of circumstances appears to have had the consequence that he could not, when asked directly by the trial court, eliminate the possibility that some of the evidence being relied upon by the prosecution to support his belief had in fact contributed to that belief.

23. Accordingly, the Special Criminal Court determined that, given the breadth of the claim of privilege, the requisite independent, supportive evidence would need to be relatively strong or, as it put it, "relatively speaking, to be high on the scale". It also determined that, in order to avoid double counting, any evidence of events prior to the arrest of the appellant should be disregarded for the purposes of deciding whether or not there was such evidence. However, having accepted the evidence of Chief Superintendent Mangan that he had not based his belief in any way on the appellant's

responses to questioning, the court considered that it was entitled to take the evidence of the prior events into account for the different purpose of determining the "materiality" of the questions put to the appellant in the s.2 interviews. Its reasoning was that it is the failure of a suspect to answer (or the provision of false or misleading answers) that gives rise to the inferences, and thus provides the necessary corroborative evidence, rather than the information available to the gardaí asking the questions. The relevance of this ruling to the issues in the appeal relates to questions about the prior events only, since questions about matters discovered in searches after the appellant's arrest were not caught by the "double counting" problem.

24. Having carried out an assessment of the evidence, the court concluded that the questions asked in interview had been material and consequently drew inferences adverse to the appellant from his responses to them. It found that those inferences supported the belief of the chief superintendent, as did the circumstantial evidence, and convicted the appellant. The Court of Appeal considered that the trial court had proceeded correctly.

25. The primary issue in the appeal is whether the analysis of the Special Criminal Court and Court of Appeal was correct, or whether, as the appellant argues, the approach taken let excluded evidence in "through the backdoor" and did indeed entail double counting. The issue is rendered more complex by the extensive claim of privilege made by the chief superintendent, which the appellant contends had the effect that there was no "examinable reality" in cross-examination on the question of what information had been taken into account in the belief evidence.

26. It will be necessary, in this context, to address the question whether there can be circumstances in which the various legislative provisions, when read and operated in the light of the Constitution, cannot be applied together in the same trial or whether it is in all cases possible to give due protection to the rights of the accused while applying legislation that has, after all, been held to be capable of operating in a constitutionally compliant manner. I propose, therefore, to set out the principal jurisprudence on the topic before embarking upon an analysis of the facts of the case.

The case law

27. In *People (DPP) v. Kelly* [2006] 3 I.R. 115, the appeal against a conviction for membership was argued largely on the basis that the chief superintendent who gave the belief evidence had claimed privilege for the source of his information. The appellant accepted that the evidence was admissible, and also accepted that the witness was entitled to claim privilege. However, it was argued that he had been deprived of a trial in accordance with law by reason of the fact that he had been precluded from investigating the basis of the belief.

28. Delivering the majority judgment in this Court, Geoghegan J. observed that the legislation had been enacted out of legitimate concern that it would not in practice be possible in many cases to adduce direct evidence from lay witnesses. An argument put forward by the prosecution, to the effect that the section did not permit any evidence to be given as to the basis of the belief, was rejected as involving a disproportionate infringement of the rights of the accused. However, an alternative argument was accepted. Geoghegan J. considered that the section did indeed authorise the giving of evidence about the basis for the belief, if to do so did not infringe any protection of informers, but that it was not intended to interfere with or defeat the purpose of informer privilege. In those circumstances, the restrictions on the possibilities of cross-examination were inherent in the section. The weight to be attached to the belief evidence remained a matter for assessment in each case, and there was, in the case before the Court, substantial evidence implicating the accused independently of the belief. The appeal was accordingly dismissed. (A subsequent application to the European Court of Human Rights was dismissed as manifestly illfounded.)

29. Geoghegan J. noted that the Special Criminal Court had adopted a practice of not convicting an accused on the basis of belief evidence alone, while the Director of Public Prosecutions had, similarly, adopted the practice of not initiating a prosecution based on such evidence alone. He considered these practices to be “commendable” although not absolutely required by law.

30. Fennelly J., although agreeing that the appeal should be dismissed and while stating that the evidence given by the chief superintendent in the trial under appeal had been "perfectly plausible, indeed compelling", engaged in a comprehensive consideration of the difficulties caused by the section:-

> *"The real problem is that, where privilege is claimed, as it inevitably is, the defendant does not know the basis of that belief. He does not know the names of the informants or the substance of the allegations of membership. Without any knowledge of these matters, the accused is necessarily powerless to challenge them. Informants may be mistaken, misinformed, inaccurate or, in the worst case, malicious. None of this can be tested."*

31. Fennelly J. saw the essential question to be answered in the case as being whether the undisputed restriction on the right of an accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution had been such as to render his trial unfair. He emphasised the importance of cross-examination as an essential element in a fair trial. While accepting that restrictions could be imposed on that right in the interests of overall balance and the efficiency of the criminal justice system, and that there could be derogations from the normal rights of the defence for overriding reasons of public interest, these should not go beyond what was strictly necessary and must in no circumstances imperil the overall fairness of the trial. In that regard, he considered it to be of crucial importance in the case that there was quite extensive evidence of guilt other than the belief. The restrictions on the rights of the defence had not gone further than was strictly necessary to protect other potential witnesses or informants, and he did not see how their identity and safety could have been protected otherwise.

32. It is relevant to note that in *Kelly* the accused had given evidence in the trial and had denied membership. Fennelly J. considered that, where the accused took that course, there could be a powerful argument based on fair trial rights if the sole plank of the prosecution was the belief and the witness had claimed.

33. It appears from the judgments in *Kelly* that s.2 inferences were not a feature of the case. In *People (DPP) v. Donnelly* [2012] IECCA 78 (*"Donnelly")* the Court of

Criminal Appeal considered an appeal against conviction based on the argument that the combination of belief evidence, the claim of privilege and the s.2 inferences amounted to a breach of the appellant's fair trial rights pursuant to Article 6 of the European Convention on Human Rights. The Court approached the issues involved on the basis that the overall requirement under both Article 38 of the Constitution and Article 6 of the European Convention on Human Rights was that the trial be fair. It was acknowledged that even if the statutory provisions did not, either individually or cumulatively, offend at the level of principle, there remained in any given case an issue as to the fairness of the individual trial.

34. The judgment of the Court (delivered by O'Donnell J.) noted that the privilege claimed was well established in the law of this and many other jurisdictions. It must therefore be seen as compatible with the due administration of justice. In those circumstances, a properly raised claim could not of itself give rise to an argument that there had been a breach of Article 38. It was acknowledged that the claim of privilege could be of particular significance in the context of the admissibility in evidence of a belief that might be based on informants whose identities were unknown and whose credibility could not be tested. However, the Court pointed out that, firstly, it was necessary for the witness to establish a valid basis for the claim of privilege; secondly, the privilege was not absolute and was subject to the "innocence at stake" principle; and, thirdly, a claim of privilege did not mean that the credibility of the witness could not be challenged by way of cross-examination on collateral issues. On this last aspect, it is relevant to quote from paragraph 31 of the judgment:-

> *"Furthermore, as the Supreme Court expressly held in Kelly in rejecting a submission made on behalf of the Director of Public Prosecutions, the evidence of a Chief Superintendent under s.3(2) can be explored and tested in a number of ways, such as whether the belief is based upon one or more sources of information, whether in the case of a human informant the Chief Superintendent is personally aware of the identity of the informant and has dealt personally with him or her, and whether as in this case, the witness has experience in dealing with such informants and rating and analysing their evidence."*

35. The Court observed that, in practice, the defence might, in a particular case, choose not to probe the evidence of the chief superintendent for fear of unwittingly strengthening it. In such circumstances the preferred strategy might be to make submissions to the effect that the evidence was bare and that little weight should be attached to it. The fact that such a choice might have to be made did not mean that cross-examination was impossible and did not render the trial unfair.

36. It is relevant to note here that the chief superintendent in *Donnelly* had described in evidence how he had assessed the reliability of his information. He had applied an internationally used standard tool described as a "four by four system", and had rated both the source and the accuracy of the information at the highest level. He also stated that he was aware of the identity of one source which had led to the setting up of the garda operation in the case.

37. In relation to the s.2 inferences, the Court quoted from the judgment of the European Court of Human Rights in *Murray v. United Kingdom* (1996) 22 EHRR 29, where significantly more extensive inference provisions were found not to be *per se* incompatible with the Convention. The ECtHR stated that it was self-evident that a conviction could not be based solely or mainly on an accused's silence, or on a refusal to answer questions, or a decision not to give evidence. However, it considered that it was equally obvious that the immunities protected by the Convention could not and should not prevent the silence of the accused, in a situation that clearly called for an explanation from him, from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

38. The Court of Criminal Appeal applied the same reasoning in considering the effect of s.2 inferences in the case before it. On the evidence, the appellants had failed to answer virtually every material question put to them. O'Donnell J. noted that the trial court had concluded that the failure to answer material questions was capable of amounting to corroboration of the belief evidence. However, that belief evidence did not, as such, require corroboration in the sense in which that term was used in the law of evidence. The following explanation was provided at para. 40:-

> *"It appears the section uses the term in the more general sense of other evidence of guilt, which by virtue of the section may amount to corroboration, where that is required by law. Furthermore it is perhaps important to point out that it is not the failure to answer questions which itself amounts to corroboration or indeed is itself evidence. Rather, the failure to answer questions material to the offence permits the court (but does not require it) to draw inferences from such failure as appear proper. It is those inferences which provide the basis on which the failure may amount to the type of corroboration contemplated by the section. Accordingly, any fact finder faced with s.2 must first consider whether there has been a* ***failure*** *to answer questions material to the investigation of the offence, and thereafter what* ***inferences*** *may be drawn from such failure as a matter of logic. An inference of guilt is not an inevitable consequence of a failure to answer."*
> (Emphases in the original.)

39. The Court considered that it was obvious that the trial court had concluded that the only possible inference from the sequence of events in the case and the manner of response to questions was that the accused were members of an unlawful organisation. They had made no effort to challenge the assertion that they were members other than by formal denial, and had offered no explanation for their conduct. Their refusal to answer questions was "complete and comprehensive".

40. Not long after the decision in *Donnelly*, the ECtHR gave its judgment in *Donohoe v. Ireland* [2013] ECHR 19165/08 *("Donohoe")*. In that case, the trial court had examined the documentary evidence itself (over the objections of the accused) and had determined that the claim of privilege was appropriate and that there was nothing in the material that could assist the defence. The questions considered by the ECtHR were (i) whether it was necessary to uphold the claim of privilege; (ii) whether the evidence of the chief superintendent was the "sole or decisive" basis for the conviction; and (iii) whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair.

41. In finding the justification for the privilege to be "compelling and substantiated", the ECtHR referred to the nature of the IRA as described by the Irish courts – a "secretive and violent organisation" that assiduously sought out and punished police informers through torture and death, and relied upon the inevitable fear of the consequences of testifying which these methods engendered. It accepted that the admission of belief evidence, based on intelligence gathered from numerous and varied sources, and over some time, was a crucial tool to overcome the evidential difficulties in prosecuting the crime of membership.

42. Secondly, the ECtHR accepted (with reference to earlier jurisprudence concerning evidence from anonymous witnesses who are not made available for cross-examination in court) that the belief evidence was not the "sole and decisive" basis for the conviction. The trial court had expressly stated that it would not convict on this evidence alone and had in fact heard other material evidence. However, since the belief evidence clearly carried significant weight it was necessary to examine whether there were adequate counterbalancing factors and safeguards. The fact that the trial court had reviewed the documentary evidence itself would not, on its own have been a sufficient safeguard but it was, nonetheless, important in that it enabled the trial judges to monitor, throughout the trial, the fairness or otherwise of upholding the privilege. The court had been alert to the importance of the "innocence at stake" exception. If the applicant had had any reason to doubt the court's assessment, he could have asked the Court of Criminal Appeal to carry out a further review in the course of his appeal, but had not done so.

43. Finally, the ECtHR considered it to be significant that the belief evidence had to be given by a high-ranking officer with significant experience, that his belief did not have a special status but was just one piece of admissible evidence, and that the possibility of cross-examination, while restricted, was not eliminated:-

> *"The Chief Superintendent's evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on*

whether he knew or personally dealt with any of the informants; and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained."

44. This Court returned to the issue of belief evidence in *Connolly v. Director of Public Prosecutions* [2015] 4 I.R. 60 *("Connolly v. DPP")*. Part of that appeal focussed on a question, certified by the Court of Criminal Appeal, as to whether the jurisprudence of the Court as enunciated in *Kelly* was still applicable in the light of the European Convention on Human Rights Act 2003. The sole judgment in this Court was delivered by MacMenamin J., who concluded the certified question was fully answered by the judgments of the Court of Criminal Appeal and of the ECtHR in, respectively, *Donnelly* and *Donohoe*.

45. It may be noted here that the chief superintendent who had given belief evidence in *Connolly v. DPP* had stated that the information upon which his belief was based had come in both written and oral forms and from both garda and non-garda sources, and further stated that he was satisfied that it was true. He was asked if he knew the names and addresses of the informants, and stated that he knew the sources of the information. The additional evidence relied upon by the trial court consisted of an IRA debriefing document found in the possession of the appellant, inconsistencies in his account of his movements and s.2 inferences.

46. Later that year the Court decided *Redmond v. Ireland* [2015] 4 I.R. 84. The plaintiff, having been convicted of membership and having been unsuccessful in his appeal against conviction, brought plenary proceedings challenging the constitutionality of s.3(2) of the Offences Against the State (Amendment) Act 1972 (the provision that makes the belief evidence admissible). Since the judgments are concerned with that issue, and not with an appeal against conviction, the evidence against the plaintiff in his trial was not of central importance. However, it may be noted that he had been convicted on the basis of belief evidence, coupled with evidence that he was in possession of two metal objects which were identified as being an improvised firing pin and part of an improvised grenade. The objects were similar in construction to items found in IRA arms dumps.

47. The Court concluded that the provision was not unconstitutional. However, and very significantly, it reached this conclusion by finding that a constitutional interpretation required that the belief evidence be supported by some other evidence implicating the accused in the offence charged. That other evidence must be credible in itself and independent of the witness giving the belief evidence.

48. For present purposes, part of the significance of the judgments delivered lies in the analysis of the effects on the rights of the defence of the combination of belief evidence and a claim of privilege. The leading judgment is that of Hardiman J., who specifically endorsed the observations of Fennelly J. in *Kelly* about the risk that a chief superintendent might be deceived by mistaken, misinformed, inaccurate or malicious informants. While it was possible for the defence to cross-examine the witness, that course of action could be "fraught with danger" because of the risk that it would open the door to the tendering of prejudicial material.

49. Hardiman J. stated that the provision would not be consistent with the Constitution if it was interpreted as permitting the conviction of a person solely on the basis of belief evidence. The concept of "examinable reality", meaning some feature of the opinion or of the (usually undisclosed) evidence supporting it that was capable of rational examination and assessment, was key to his analysis. In its absence, the defence might have no material whatever that was capable of contradiction or investigation, so that the opinion of the witness would stand alone:-

> *"This is even more obviously the case if privilege is successfully asserted over the material which led to the formation of the opinion. This is because these matters in combination tend to exclude any 'examinable reality' from the case and thereby undermine any potential avenue to effectively challenge the opinion evidence. The effect of this is wholly to subvert the prospects of useful cross-examination and to exclude even the theoretical possibility of undermining the opinion by cross-examination. This creates scope for the possibility of a conviction on opinion evidence only, which evidence is effectively unchallengeable."*

50. If that had been the only possible construction of the legislation, it would mean that a trial could not be conducted "in due course of law" as required by the Constitution. However, Hardiman J. observed that to hold the provision unconstitutional for that reason would be a far-reaching finding, and one not lightly to come to in relation to a statute designed to combat "an undoubted subversive threat" that was "well capable of intimidating witnesses". He noted that the section simply made the belief admissible in evidence, where it would otherwise be inadmissible, without requiring a trial court to attach any particular weight to it or to interpret it in any particular way. Having regard to the normal principles of constitutional interpretation of statutes, it was possible to adopt a constitutional construction of s.3(2) and to read it as requiring that the charge of membership should be supported by "*some other evidence that implicates the accused in the offence charged, is seen by the trial court as credible in itself, and is independent of the witness who gives the belief evidence*".

51. It may be noted here that Hardiman J. stated that he would have seen no difficulty in describing supporting evidence of this nature as "corroborative". However, he accepted the point made by Charleton J. to the effect that to do so might lead to a risk of confusion, and was therefore content not to use the term "corroboration". Charleton J., in his own judgment, referred to "some other evidence relevant to the charge", that was credible and that was independent of the belief evidence.

52. Finally, it may be observed that, since this was a constitutional challenge turning on the construction of the section and not an appeal against conviction, the Court was not concerned with the manner in which the claim of privilege had been made in the plaintiff's trial or with any question of double counting.

The evidence in the trial

53. The appellant is a mechanic who lives in a very remote part of rural Co. Monaghan. There was a shed or outhouse on land close to his house. Although he did not own it, he was in the habit of using it to stable two horses. At the trial, the case against the appellant rested in part upon the belief evidence of Chief Superintendent Mangan; in part on the fruits of a search carried out of the appellant's home and the shed, on the

day of his arrest on the 21st September 2016; in part on evidence of his activities and association with other persons prior to that date; and in part on his responses during interviews under both the normal caution and the s.2 caution.

54. As prosecution counsel opened the case, the court inquired as to the role to be played by the evidence relating to matters other than the belief of the chief superintendent, The inquiry was made by reference to the conduct of a prosecution in another then-recent trial, where the prosecution had made it clear to the court that certain circumstantial evidence was being adduced in order to establish the materiality of questions asked in interview, rather than as evidence supportive of the belief and probative of the charge. (The Court of Appeal subsequently upheld the conviction in that case – see *People (DPP) v. Conor Metcalfe* [2021] IECA 44. Counsel at that stage confirmed that in the instant case, items found in the course of the search of the appellant's home and associated lands would be offered as supporting evidence within the principles established in *Redmond*, and not merely as relevant to the materiality of the questions asked.

The association evidence

55. Evidence was adduced that the appellant "associated" with known members of the IRA in that he attended at three public events in 2014, 2015 and 2016 at which Declan Carroll and/or Saoirse Breathnach were also present. Each of these men had convictions for IRA-related offences.

56. The appellant denied in interview that he had ever associated with members of the IRA. When asked specifically about Seamus McGrane, he said that he knew him socially, had asked him for work, fixed his van and was friendly with him. Asked when he fixed the van, he did not answer. Asked how often he had met him, he said that he did not remember. Finally, he was asked if he admitted that he was an associate of convicted terrorist Seamus McGrane and did not respond. Seamus McGrane was convicted of IRA-related offences in the Special Criminal Court in 1976, 2001 and 2017.

57. The appellant was asked if he knew Saoirse Breathnach. It was put to him that he had been seen with Mr. Breathnach at a commemoration in 2016. He did not answer any questions about this man, who was convicted of possession of three firearms arising out of his involvement in an IRA armed robbery in 1998.

58. The next questions were concerned with Declan Carroll, with whom he had been seen at the same commemoration and at a similar event in November 2014. He did not respond to any questions about Mr. Carroll, who was convicted of membership in 2001, or to a question as to why he would directly associate with convicted members of the IRA. It was put to him that it was to further IRA activities. He did not respond.

Evidence arising from the search on the 21st September 2016

59. A length of steel pipe with a series of holes drilled in it was found in the shed. This was subsequently identified in evidence as a booster tube, an integral part of an improvised explosive device. The prosecution established that the tube had been manufactured by the same process and to the same design as previously-discovered tubes used by the IRA and other subversive groupings over recent decades. Their purpose was to ensure uniform detonation of a bulk explosive within the IED. Ammonium nitrate was typically used in items of this nature.

60. In interview under ordinary caution, the appellant denied having constructed the tube and stated that it looked like an axle stand. He agreed that in the course of his work he would cut pipes for vehicle exhausts. He accepted that he might have handled the tube and therefore left fingerprints on it when using the shed. The prosecution evidence on this aspect was to the effect that the tube was not commercially manufactured, and was not similar to any known type of axle stand. It did not have a top or base plate, or any means of attaching such a plate.

61. When the ordinary caution was withdrawn, and the inference provisions had been invoked, the appellant was asked whether he had the booster tube for the purposes of IRA activity, and why he had a booster tube concealed in a shed that he had access to. He answered "No" to the first question and "I know nothing about it" to the second. In a later interview, he insisted that he was not responsible for anything that was not

on his own property. He denied having control over access to the shed but accepted that he had installed a gate with a lock on it at the bottom of the laneway leading up to it. He said that he kept the gate locked because of the horses, and had put up a warning sign about his guard dogs. He had also installed a spotlight, controlled from inside his house, that lit up the lane.

62. Part of the evidence related to mobile phones and could be said to have involved both the search on the 21st, events on a prior date and the questions subsequently put to the appellant. Two new, sequentially-numbered, mobile phones were found in the appellant's home. One was in a box, with the name "Dec" written on the outside of the box and the name "Conor" written on the inside. The second was in a box which also contained a receipt, dated the 17th September 2016, for a mobile phone top-up from a shop in Newry. t One phone had a SIM card in it, and examination revealed that there was only one saved number, under the name "Conor". The number was that of another (also sequentially-numbered) phone.

63. The appellant was asked about the mobile phones under the s.2 caution. He initially said that he did not own any phone other than the one seized by gardaí when he was arrested. He said that these two were old phones, and were to be given to charity. He then claimed that he had come home one evening, found the two phones on a forklift outside his house, and had brought them in out of the rain. He denied having bought them. He did not answer a question as to whether he knew anyone called "Dec" who was in the IRA. He did not answer a question as to whether he had been in Newry on the 17th (four days before his arrest). He said that he did not know when he had last been north of the Border. He did not answer questions as to whether he was holding the phones for an IRA operation. When asked if he had switched either of them on, he said that he did not know or could not say.

64. The gardaí obtained CCTV footage from the shop and elsewhere in Newry which clearly showed that the man who purchased the top-up met with the appellant about half an hour after that purchase, and handed him a bag containing a box. The man, a Mr. Rooney, was identified in evidence by gardaí as a known associate of one Seamus McGrane (already mentioned above). However, the appellant was not asked about this

footage and it is to be presumed that it was obtained at a later stage in the investigation.

65. A USB key was found in the appellant's bedroom. Examination of this item revealed that it had been used in an effort to save a YouTube video on the topic of the extraction of ammonium nitrate from fertiliser. It was established in evidence that this was a material often used for making improvised explosive devices, and that it had previously been found in association with improvised booster tubes. It was not possible to identify the user of the USB key, and there was no indication that it had been used with the appellant's computer. The analysis of this item was not completed until some time after the appellant's arrest and he was not questioned about it. The defence argument in the trial did not challenge the analysis, but suggested that the evidence did not prove it to be connected to the appellant.

66. A number of items described as "Republican paraphernalia" were also found, including prison memorabilia, flags, banners, posters and a military-style cap and camouflage jacket with a Union Jack on it. The appellant said in interview that this had been "left behind" by some unnamed person. He said that he had bought the memorabilia and that he had an interest in historical matters.

The belief evidence

67. As would be normal practice, the defence had sought pre-trial clarification and disclosure of the material upon which the proposed belief evidence was based. In particular, the prosecution was asked to clarify whether the belief was based on documentary evidence, surveillance evidence, informer evidence, electronic evidence or evidence from other organisations. The response was that a claim of privilege would be asserted in respect of the sources of information, based on grounds of State security, the protection of life and property and the potential impact on ongoing and future Garda operations. It was stated in the letter that the Chief Superintendent had reviewed the material available to him and had satisfied himself as to its reliability and accuracy. He believed that to disclose the information sought by the defence would defeat his claim of privilege.

68. In the trial, Chief Superintendent Mangan said that he had been a member of the Garda Síochána for almost 37 years. He was at that stage the chief superintendent in charge of the Louth Garda Division, having previously served at the same rank in the Cavan/Monaghan Division. His responsibilities included State security and the gathering and assessment of intelligence relating to subversive crime.

69. The chief superintendent stated that he believed, on the basis of confidential information, that the appellant was a member of the IRA on the 21st September 2016 (the day on which he was arrested). The belief was based on material that he had in his possession on the 22nd September, and was not based on the arrest, or on any matter discovered as a result of the arrest or subsequent detention. He had not considered the answers given by the appellant during questioning.

70. In cross-examination the chief superintendent said that he had been asked to review that material at some time on the 22nd September but could not recall what time that request was made. He began his consideration that day, and concluded it the afternoon of the 23rd September. It was at that point that his belief was formed.

71. The chief superintendent was asked about his involvement in the extension of the appellant's detention on the 22nd September. He said that he had been aware of the arrest of the appellant on the 21st, and of the search, and made the extension decision after speaking with two other officers involved in the investigation at around 7.43pm on the evening of the 22nd September and he was therefore aware of the state of the investigation as it stood at that point. He knew that the booster tube had been found, and that it was being alleged that the appellant had given false answers in interview. He was also informed about the matters that had yet to be put to the appellant in interview.

72. To put this evidence in context, it should be pointed out that a lawful arrest for membership of an unlawful organisation must be grounded on a reasonable suspicion on the part of the arresting officer that the arrested person is a member of that organisation. The initial period of detention is limited to 24 hours, which can be extended by an officer not below the rank of chief superintendent who holds a *bona fide* suspicion to the same effect.

73. It was put to the chief superintendent that, in order to be satisfied that the extension of detention was justified, he had to have had the view on the 22nd September that there were reasonable grounds for believing that the appellant was a member of the IRA. He did not answer this question directly, but stated that he believed that the appellant was lawfully arrested and detained, and repeated that his belief as to membership was not based on any of the matters generated by the arrest and detention.

74. The chief superintendent stated that he had not looked at the book of evidence or at the disclosure material provided to the defence. He said that he was unaware of the appellant's previous arrest record and had not looked for it. He had not considered it necessary to take account of any answers, including denials of membership, given by the appellant in interview and had not looked at the interview notes.

75. The witness confirmed that his position on the claim of privilege was as set out in the letter sent by the prosecution to the defence (which was read out in full). In reliance on privilege, he declined to answer questions on the following topics:

- The period of time over which the information in his possession extended.
- Whether the information came from garda or non-garda sources.
- Whether the information came from bugging or surveillance.
- Whether the information came from officers involved in the investigation.
- Whether the information included association by the appellant with members of the organisation, or drilling with the organisation (i.e. participating in training exercises), or failing to deny a published report that he was a member.
- Whether he had considered the information relating to the appellant's alleged association with convicted IRA members.

76. In those circumstances the witness could not, when asked, exclude the possibility that there was evidence being relied upon by the prosecution in the trial that was also a component of the formation of his belief.

77. At the end of the chief superintendent's evidence, the claim of privilege was challenged by the defence, but only by way of a purely formal application for a ruling.

No submissions were made by either party. Noting that privilege was claimed on three bases – state security, the protection of life and property, and the possible adverse effect on ongoing and future garda operations – the Court upheld the claim on grounds of public interest in the following terms:-

> *"We're satisfied that the sources of confidential information of the kind that would be and no doubt was used to form the belief stated in court is precisely the kind of thing that the public interest privilege exists to protect. Sources of confidential information are an important aspect of policing whether in relation to the types of considerations that arise in this case, or indeed generally. And on the basis of the information and material available to us, we uphold the claim of privilege in respect of the sources. This necessarily includes the nature of the sources, because if the Chief Superintendent was to indicate that it was a garda source or a civilian source or a mixture, or was to indicate that there was some kind of technical assistance available, quite clearly to the informed observer, or perhaps even the not-so-well-informed observer, that would yield up possible leads in terms of where, how and why the information was garnered. In our view, those matters are squarely covered by the public interest privilege claimed, and we also uphold that as we do then the third general claim of privilege over sources that was finally made by the Chief Superintendent. So based on what we have we feel that the claim is well made."*

Prosecution closing

78. The prosecution relied upon the belief evidence as the primary evidence in the case. It was submitted that the fact that the witness had some knowledge of the investigation was of importance, in that he had been in a position to say that his belief was not based on anything arising in that context.

79. It was contended that supporting evidence was to be found in the circumstances of the arrest and in particular the evidence relating to the booster tube (which was described

as a fundamental piece of supporting evidence), the USB stick and the phones. In relation to each of these matters, reliance was also placed on the inferences that could be drawn from the appellant's answers to questions in both ordinary interviews and s.2 interviews. The camouflage jacket and other paraphernalia were relied upon to a lesser extent.

80. In an alteration of its stance at the outset of the trial, the evidence of association was not put forward as evidence of membership, but as relevant only to the materiality of questions asked in interview. The prosecution also referred to the CCTV evidence of the appellant's presence in Newry on the 17th September, and his meeting with Mr. Rooney, as being in the same category and relevant only to the issue of materiality.

Defence closing

81. As far as the association evidence was concerned, the defence laid emphasis on the fact that there was no evidence of direct contact between the appellant and the named individuals at any of the events attended by them. Such attendance, like the paraphernalia, could indicate sympathies for the Republican movement but no more. The s.2 questions should be discounted by the court because they gave a misleading impression that the appellant was in the company of the named persons. Counsel argued, further, that the association evidence might have been the basis for the belief and that therefore double counting was involved.

82. The defence then argued that other persons could have had access to the shed where the booster tube was found and that it had not been proven that the appellant was in control of it. It was suggested that the USB key might have been used by the other person living in the house, and it was stressed that there was no evidence that it had ever been connected to the home computer. The appellant had not been asked any questions about it.

83. In relation to the phones, the defence argued that the evidence about the meeting in Newry did not prove anything. The man in question had not been identified in evidence as a convicted Republican. However, it was expressly accepted that the

answers to s.2 questions about the phones "could lead a jury to deduce that false and misleading answers had been given in relation to some of the questions", and that this was, from the point of view of the defence, "the worst part of the case in terms of questioning". Asked by the court whether some form of *Lucas* warning would be proposed, counsel suggested that the appellant might have felt that he would be in some form of trouble for taking delivery of the phones, or that the person who gave them to him might get into trouble, or that the phones were intended for use in some unrelated criminal activity.

84. It was submitted that in general the appellant had engaged with the questioning and that the s.2 inferences should be given little weight.

85. Addressing the belief evidence, counsel pointed out that the chief superintendent had not given the court any assessment of the strength of his confidential information, and that the court had no means of making such an assessment. The presiding judge suggested that this had been the point of the decision in *Redmond*, and the reason why corroboration was required. Counsel then advanced an argument, based on *Damache v. DPP & Others* [2012] 2 I.R. 266 and the principle of natural justice that no one should be a judge in their own cause, to the effect that the chief superintendent's belief had not been independent of the investigation. He had extended the appellant's detention, and therefore had the matters relating to the investigation in his mind while forming his belief. (This argument also failed before the Court of Appeal. It does not arise in this appeal, and in any event is disposed of by the recent judgment in *Braney v. Ireland and the Attorney General & ors.* [2021] IESC 7.)

Verdict of the Special Criminal Court

86. In its judgment, the trial court stated that it was satisfied that the chief superintendent genuinely held the belief that the appellant was a member of the IRA. That finding, however, could not determine the weight to be attached to his evidence by the court. The court referred to the chief superintendent's extensive experience in relevant areas of the work of the Garda Síochána as a matter augmenting the weight to be afforded to his belief, and then moved on to consider the factors detracting from it.

87. It was accepted that the ability of an accused to challenge such evidence by normal cross-examination could be significantly compromised by claims of public interest privilege. In this case the witness had made a comparatively broad claim and, while even limited cross-examination could be capable of devaluing belief evidence, the complete absence of underlying detail had not permitted counsel for the defence to make even limited headway. Furthermore, the chief superintendent had not (as would often be the case) said in evidence that he was satisfied that the information was reliable or accurate, or explained how its strength was measured or assessed. In those circumstances, the court ruled that the weight of any evidence found to support the belief "would need, relatively speaking, to be high on the scale of support" before the combination of the belief and other evidence could justify a conclusion adverse to the appellant beyond reasonable doubt. The prosecution was obliged to produce a body of evidence sufficient to displace the presumption of innocence, by proving beyond reasonable doubt that he was a member of the IRA.

88. The court referred to the judgments in *Redmond* for the proposition that the evidence offered in support of the belief evidence must be credible in itself, must be independent of the witness whose evidence was to be supported and must implicate the accused in the offence charged. The *People (DPP) v. Gilligan* [2006] 1 I.R. 107 made it clear that, in the context of a membership charge, evidence would implicate the accused in the offence of membership if it made it more probable than not that the belief evidence was correct.

89. The court accepted the evidence of the chief superintendent that he had not taken into account anything arising from the arrest or subsequent investigation, and did not find that the information imparted to him when he was asked to extend the appellant's detention had compromised his belief evidence. However, having regard to the fact that the witness was not able to say whether he had taken account of the events in 2014, 2015 or in that part of 2016 prior to the arrest, the court determined that it should eliminate the evidence in relation to those matters from its consideration of potentially supportive evidence. It applied the normal principle that an item of evidence could not fairly or reasonably be regarded as providing independent support

for or corroboration of belief evidence, where it was reasonably possible that the same item of evidence was also a constituent in the formation of the belief.

90. However, this did not mean, in the view of the court, that evidence put before the court relating to prior events could not be used for other purposes. In particular, it remained available for the purpose of establishing the materiality of questions put at interviews where the inference provisions had been invoked. This was so because it was the failure to answer material questions (or the giving of false or misleading answers) that gave rise to the inferences capable of corroborating the belief evidence. There was no double counting, or a possible interdependence between corroboration and the evidence to be corroborated. The chief superintendent had given credible evidence that he had not taken account of what the appellant had said in interview.

91. Looking at the facts surrounding the appellant's arrest, the court accepted that if it was reasonably possible that he did not know about the booster tube, and that others might have put it in the shed, it would follow that the presence of the tube could not provide the necessary support for the belief evidence. However, it found, on the evidence before it, that no other person exercised actual access to the shed around the relevant time, that the gate was locked on a consistent basis and that the gate, dogs and security light would have presented significant difficulties to any third party wanting to store something covertly in the shed. It was not an area where there would be casual passers-by. In the circumstances, the likelihood of some person other than the appellant placing the tube in a shed to which only the appellant had access was so remote and fanciful that it could safely be dismissed as a reasonable possibility.

92. The court concluded that, as the tube was an item specifically associated with the IRA, its presence in the shed constituted strong independent support or corroboration of the belief evidence given by Chief Superintendent Mangan.

93. The judgment refers to the answers given by the appellant about the booster tube while under ordinary caution. The court was satisfied that the tube was patently not part of an axle stand, and would be manifestly unsuitable for use as such by reason of the number and arrangement of the holes drilled in it, and the absence of any way to attach a base or top plate. It was further satisfied such a suggestion could not have

been made truthfully by the appellant, who was an experienced mechanic. It was a false assertion on his part, designed to mislead and to present a benign picture of an object that he knew would inevitably be associated with him by the circumstances in which it was discovered. Similarly, the Court found that the assertion that the appellant had no control over access to the lands was calculated to deceive.

94. The Court therefore concluded that the exculpatory answers given by the appellant under ordinary caution could not be relied upon. They illustrated that he did in fact have knowledge of the presence and purpose of the booster tube, and had engaged in dissembling to cover this up.

95. Moving on the s.2 interviews on the topic of the booster tube, the Special Criminal Court was satisfied that the questions asked were material to the investigation of the offence. It found that the answers given were false and misleading and therefore amounted to a failure or refusal to answer within the meaning of that section. The matters put to him by the gardaí called for an explanation, and the failure to provide truthful answers was for no reason other than to obscure the appellant's connection with an item, manifestly associated with subversive activity, in a shed that he was using. The inference drawn by the court was that the questions were not answered truthfully because the appellant knew that a truthful answer would associate him with the booster tube, and by extension corroborate the garda assertion that he was a member of the IRA. There was no logical alternative inference that would be consistent with innocence.

96. Next, the Court referred to the evidence relating to the USB storage device and its attempted use in an internet search for methods of extracting ammonium nitrate from fertiliser. It considered that this item also provided significant independent support for the belief evidence, observing that the process in question was of interest only to a limited category of persons "which would principally include members of the IRA or similar organisations". It had additional significance in this case because it was completely consistent with the discovery of the booster tube and thus served to resolve any lingering doubt there might have been about the connection of the tube to the appellant. The evidence was that a booster tube and ammonium nitrate were both common components of improvised explosive devices. The Court commented that the

point had been reached where a possible series of coincidences had, in fact, become part of a linked pattern.

97. The Court then reviewed the evidence relating to the mobile phones, the top-up receipt and the meeting between the appellant and the man in Newry. It stated in its judgment that it was not relying on the Newry evidence to corroborate or support the belief evidence, but relied upon it solely to establish the materiality of the questions asked about the phones.

98. While there was nothing inherently unlawful about the possession of two new phones with consecutive numbers, the main inference to be drawn about such possession was that they were purchased together. This was, in the court's view, a legitimate subject of inquiry in the context of the garda suspicion of membership and the questions asked in this regard were material. If the phones were in the appellant's house for a legitimate purpose, there should have been no difficulty in explaining it. If they were not for a legitimate purpose, but were for an unlawful purpose unconnected with IRA membership, the appellant could have answered the questions without his answers being used against him in a prosecution relating to such other unlawful purpose.

99. The Court was satisfied that the answers given by the appellant in relation to his possession of the phones were highly false and misleading, that such answers were given because the phones were in fact connected with IRA activity and he did not have a viable alternative explanation, and that the proper inference to be drawn from them was that his possession was in fact connected with IRA activity.

100. The judgment goes on to state that there were other circumstances tending to eliminate the possibility that the phones were connected to anything other than IRA activity. One was the connection between Mr. Rooney (the man in Newry) and Seamus McGrane, who had serious convictions related to IRA activities. The appellant had been "not at all forthcoming" about the fact that he had met with Mr. Rooney on the 17th September. If it had been an innocent meeting there should have been no difficulty in relation to the questions put to him about the morning of the 17th. The "economy" of his approach in dealing with these questions could only justify an inference that he knew that these activities could not be truthfully explained otherwise

than by connection with the IRA. There was no other logical explanation for his implausible untruths.

101. The second circumstance tending to connect the phones with IRA activity was the evidence establishing the appellant's acquaintance with Seamus McGrane. The materiality of questions put about that acquaintanceship was established by the evidence relating to Mr. McGrane's convictions and by the connection of Mr. McGrane to Mr. Rooney. Having reviewed the answers given by the appellant to questions about Mr. McGrane, the court concluded that, whether truthful or not, they established at a minimum that the appellant had a familiarity with Mr. McGrane. Since he had that acquaintanceship in common with Mr. Rooney, he had good reason to be reticent about his presence in Newry. The court stated that Mr. McGrane was another factor in the conclusion that the false and misleading account about Newry and the two phones was offered because the truth would have revealed that the appellant's acquisition and retention of the phones was not as innocent as he portrayed and was not explicable other than by reference to involvement in IRA activities.

102. In the circumstances, the Court was satisfied that the discovery of the phones, coupled with adverse inferences drawn from the false and misleading answers given about them, provided strong and independent support for the belief evidence and for the court's interpretation of the strands of evidence concerning both the booster tube and the USB key – in other words, that the strands interrelated and strengthened each other.

103. Turning to the evidence relating to the republican paraphernalia found in the appellant's home, the Court stated that on their own these items would offer very limited support for the belief and would be unlikely to support beyond a reasonable doubt a conclusion that the owner was a member of the IRA. In those circumstances, the Court did not attach positive significance to this evidence and simply observed that it did not undermine the prosecution case. A similar conclusion was reached in respect of the appellant's attendance at various events also attended by persons with serious IRA-related convictions. Innocent attendance at such events was possible, and in the absence of any direct association between the appellant and either Declan

Carroll or Saoirse Breathnach at the events, his attendance did not provide strong support for the belief evidence. However, the evidence did not undermine any other aspect of the prosecution case that did provide such support. The specific consistency between the name Declan and the writing of "Dec" on one of the phone boxes was not a weighty factor.

104. In its conclusions, the Court acknowledged the general principles that circumstantial evidence might not include any individual piece of evidence that sufficiently implicated the accused, that belief evidence could not be sufficient on its own to implicate the accused, that conduct evidence could be ambiguous, and that s.2 inferences could only be corroborative or supportive and could never be sufficient to prove membership on a standalone basis. However, having reviewed all of the evidence in the case, it was satisfied that the prosecution had disproved beyond reasonable doubt any possibility that the appellant was not a member of the IRA through the evidence relating to the booster tube, the contents of the USB, the phones and associated matters and the adverse inferences to be drawn from false and misleading answers, in combination with the belief evidence. It found the supporting evidence in the case to be particularly strong. The bare denials of membership on the part of the appellant did not give rise to a reasonable possibility that the various strands of evidence were explicable on some alternative basis.

The grant of leave to appeal

105. In granting leave to appeal, the Court framed the issue as being whether, where a trial court is considering the belief evidence of a chief superintendent pursuant to s. 3 of the Offences Against the State Act 1939 (as amended), and has ruled that certain evidence cannot be considered by it in support of that belief because the chief superintendent may have relied upon that same material in forming his belief, the court is entitled to draw inferences of guilt from false or misleading answers given by the accused to questions pursuant to s. 2 of the Offences Against the State (Amendment) Act 1998 concerning that same evidence/material, or whether this would amount to double counting.

Submissions in the appeal

106. The primary contention put forward on behalf of the appellant is that the trial court drew inferences based on a failure to answer questions about what the appellant describes as "excluded" evidence, and used those inferences as support for the belief evidence. *Redmond* is seen as constitutional bulwark that prevents the risk of double counting, and it is submitted that the court breached the *Redmond* principles in that it did not ensure beyond reasonable doubt that there was no double counting. Having excluded the evidence, the court had let it into the case "through the back door" of s.2, and used the resulting evidence as independent evidence to support the belief.

107. Specifically, the appellant objects to the drawing of inferences from the evidence relating to the purchase of the phones, the meeting between the appellant and the other man in Newry, and the association with Seamus McGrane. He contends that it is artificial and illogical to separate the s.2 inferences from the materials from which the inferences were drawn. If evidence is excluded, questions about that excluded evidence should not be used for the purposes of s.2. The chief superintendent might, in forming his belief, have relied upon the evidence. In view of that possibility, the inferences could not be considered to be independent evidence.

108. The appellant then argues that because, as the trial court saw it, the circumstantial evidence and the inferences interrelated and strengthened each other, there was no evidence capable of supporting the belief evidence that was not "infected" by the excluded association evidence.

109. The case is made that s.2 of the Act of 1998 and s.3(2) of the Act of 1972 are self-contained codes, that permit exceptions to the common law and that must be strictly construed. They should not be extended to incorporate evidence that has otherwise been excluded by the court of trial.

110. Further, it is argued that despite its ruling excluding the evidence of events prior to the 21st September from its consideration of potentially supportive or corroborative evidence, the Special Criminal Court did in fact use the association evidence from the

17th September in its analysis of the inferences arising in relation to the phones. This argument refers to the finding of the court that the phones were used for IRA activity – that finding is said to be based on the excluded association evidence. It is submitted that this fails the *Redmond* test because evidence, before it can be found "credible", must be found to be admissible.

111. It is also submitted that the claim of privilege made by the chief superintendent had the effect of preventing the disclosure of relevant material, depriving the appellant of his right to confront his accusers, and insulating the evidence from any meaningful or effective cross-examination. The appellant argues that the belief evidence must be seen as the "sole and decisive" evidence, as that term is used in the ECHR jurisprudence, given that none of the other evidence in the case would have been sufficient to ground a prosecution. Since he could not cross-examine on the "sole and decisive evidence", he was deprived of his right to a fair trial.

112. The respondent submits that the primary evidence grounding the conviction was the belief evidence. The trial court found that this evidence required strong support, and it found that support in the evidence relating to the improvised explosive device in a shed to which only the appellant had access; the falsehoods told by the appellant about access under ordinary caution and after the invocation of s.2; the evidence of the internet search for methods of extracting ammonium nitrate from fertiliser; and the fact of the sequentially-numbered phones and the answers given about them.

113. It is not accepted by the respondent that there was double counting. The trial court excluded the material that arose prior to the 21st September for the purposes of determining whether there was evidence capable of supporting or corroborating the belief evidence, but included it for the purpose of determining the materiality of questions put to the appellant. It is incorrect, in those circumstances, to refer to the evidence as "excluded". It is submitted that for the purposes of s.2, it is not the evidence underpinning the questions, but the failure to answer questions coupled with a finding of materiality, that permits the inferences to be drawn.

114. The respondent objects to the consideration by the Court of the appellant's submissions on the privilege claim, on the basis that it is outside the terms of the determination granting leave to appeal.

Discussion and conclusions

115. I think it necessary to make it clear at the outset that I do not consider the privilege issue to be outside the terms of the grant of leave to appeal to this Court, insofar as the claim in this case very clearly affected the operation of the legislation providing for belief evidence and for the inferences that could be drawn from the failure to answer material questions.

116. Four things emerge with clarity from the evidence of the chief superintendent (which was accepted as truthful by the trial court) – (i) that his belief was not based on anything arising from the arrest, search or detention; (ii) that he was claiming privilege over all sources of his information and therefore refusing to answer any questions about them; (iii) that he had not read the book of evidence or disclosure material; and (iv) that he could not say whether or not the book of evidence or disclosure material contained any information which had formed part of the basis for his belief. The claim of privilege was an integral factor in the trial court's decisions as to how the evidence was to be treated, giving rise to the issues in this appeal.

117. The position taken by the chief superintendent was what led the court of trial to take the path of excluding the association evidence and the Newry evidence for the purpose of determining whether or not there was any independent evidence supporting the belief. However, part of that task involved assessing the interviews and determining whether it would be proper to draw inferences from the appellant's responses to material questions. That, in turn, involved as decision as to materiality, and the court considered that it could have regard to the association evidence and the Newry evidence for that purpose.

118. The appellant says that this process involved admitting excluded evidence through the back door, and led to double counting and reliance on evidence that was not

independent. It seems to me that this analysis is based on a misunderstanding of some of the key principles applicable to the situation.

119. Firstly, the trial court had not "excluded" the evidence in question – there was no reason to suggest that it was inadmissible under any rule of evidence. What it said was that the evidence would be disregarded for one particular purpose, but taken into account for a wholly different purpose. This is not a process unknown to the law of evidence – for example, a hearsay utterance may be admitted for the purpose of establishing that words were said, but not to prove the truth of the words. Evidence of a prior conviction may be admitted, not to prove bad character, but to prove the whereabouts of the accused at a particular time (or for some other permissible purpose).

120. It is important to bear in mind the context in which the double counting rule emerged. The trial courts (or, at least, some of them) had been taking the approach that they should not convict solely on the basis of the belief evidence. After the enactment of s.2, the prosecution sought to rely on inferences drawn from interview responses as the necessary additional evidence. The trial courts responded by refusing to accept that approach if they could not be sure that the belief was not itself based on the interviews. The concern was that the court might, unbeknownst to itself, be inadvertently using one piece of evidence to serve two separate functions. *Gannon*, and the practice of the courts thereafter, has nothing to say about the conscious cross-application of one admitted piece of evidence to an assessment of the relevance of another piece of admitted evidence that, as a clear matter of fact, has nothing to do with the (unknown) basis for the belief.

121. What this Court was concerned with in *Redmond* was the proper interpretation of s.3(2), and the effect of its decision was to overrule decisions like *Ferguson* and *Gannon*, and the Court's own dicta in cases as recent as *Kelly*. A conviction could no longer, even in theory, be sustained solely on the basis of the belief. The constitutional requirement (and not just the practice of the courts) was for independent evidence to support the belief. The rationale for the decision lay in the possibility that the belief might, for various reasons, be wrong and the claim of privilege could hamper the efforts of the accused to establish that fact. However, there

is no discussion in the judgments of the double counting problem, since the issue of principle was simply whether the provision, read in the light of the Constitution, permitted a conviction without supporting evidence.

122. It is not the case, therefore, that *Redmond* prevents double counting – rather, it is that double counting risks a breach of the requirement for independent evidence. Viewed in this way, it can be seen that the rule against double counting comes into play only where the evidence in question might otherwise be wrongly treated as the credible, independent evidence required to support the belief. That is what was avoided in this case in relation to the Newry evidence and the association evidence. The rule in no way requires the "exclusion" of that evidence for all other purposes.

123. The requirement for "independent" evidence, as discussed in the judgment of Hardiman J., is clearly based on the jurisprudence relating to corroboration (although Hardiman J. agreed that it was not necessary to use that terminology). "Independent" evidence in this context simply means evidence that does not emanate from, or is not influenced by, the witness whose evidence requires support. If it is established that a particular piece of evidence is, as a matter of fact, independent in origin, then it is to be regarded as independent. Again, this concept has no particular relevance to the double counting issue.

124. In this context, there is one sentence in the judgment of the Court of Appeal that requires further examination. At paragraph 35 the Court stated that it was "well settled that the belief of a Chief Superintendent must be based on matters external to the evidence in the trial". This might appear to be a logical application of the double counting rule. However, I think that it may be a reflection of a misunderstanding of the purpose of the rule, which is to prevent *inadvertent* reliance by the court on evidence as supportive if in fact that evidence was the basis for the belief, support for which was required. If such inadvertent reliance were to happen, it could appear superficially (but wrongly) that the *Redmond* principles were satisfied, and the prosecution case would seem considerably stronger than it actually is. It does not necessarily follow from this that the chief superintendent must know something that the court does not.

125. To illustrate the issue, I will put forward an entirely hypothetical (and very unlikely, but not entirely inconceivable) scenario. Gardaí raid a house in which they suspect that a meeting of members of an unlawful organisation is taking place. Nearly all of those present have previous convictions for membership, but there is one man who turns out to be completely unknown to the force and there is no intelligence pertaining to him. Nonetheless, he is found to be in possession of a highly incriminating document relating to the organisation, and a recording taken by a surveillance device demonstrates that he was taking an active role in the meeting. He refuses to answer any questions about his presence in the house, or his association with the others present, or about the purpose of the meeting, or about the document.

126. What would be the consequence if, at that man's trial, a chief superintendent stated his belief that the man was a member of the organisation, but made no claim of privilege and made it clear to the court that he did not in fact possess any information other than that which had been adduced in evidence? The court would, obviously, be compelled to accept that the belief was based on the totality of evidence before it and not on anything external to the trial. But it would, I think, defy both principle and common sense to suggest either that the belief evidence should not be admitted – the statute makes it admissible – or that the circumstantial evidence was not independent and supportive of the belief, or that inferences could not be drawn from the refusal to answer questions. Neither would it be correct to say that the belief added nothing to the evidence already before the court, since the belief would probably still be the only direct evidence of membership as opposed to some other offence such as assisting an unlawful organisation. The weight to be attached to the belief, as always, would be a matter for the court of trial.

127. I accept that this may be a very unlikely scenario, but the applicable principles must be capable of operating in any given case including a hypothetical one where the court has, in fact, all of the information that the chief superintendent has. It seems to me therefore that the double counting rule applies only, as it did in the cases giving rise to it, where the court cannot know whether or not particular elements of the evidence before it formed the basis of the belief.

128. The issue relating to the inferences must be considered in this context. If it is correct in principle to say that evidence may be disregarded for one purpose but taken into account for another, it nonetheless remains necessary to consider whether the use of the information in question can be permitted for what is, after all, an essential part of the process of determining whether or not the inferences could properly be used to supply independent supportive evidence.

129. Section 2 relates to questions that are "material to the investigation of the offence". Interviews are part of the investigatory process and they may well take place, as they did in this case, at a time when other avenues of investigation are still being pursued. The interviewers, therefore, may not have a full picture of all of the evidence and can only proceed on the basis of their own assessment of materiality. This could, in some cases, result in questions being put on a basis of a mistaken theory or a factually incorrect understanding. However, should that transpire, the trial court would probably find that it would not be "proper" to draw any inferences from the responses.

130. Since the interviews will be conducted on the investigators' assessment of materiality, it is highly unlikely that they would be aware that particular information being put to the suspect might later be the subject of a claim of privilege. The whole point of the interview would be to obtain either a truthful answer, or responses that could be used for the purposes of inferences. Either way, it will be assumed that the information upon which the questions are based is of evidential value. As a matter of fact, in this case the information was put before the court in evidence, and if the court had been asked for a ruling at that stage it could certainly have found the questions to have been material.

131. The question then is whether the terms in which the chief superintendent subsequently gave his evidence were capable of affecting the status of the s.2 interviews. The full impact of the *evidence upon which the questions were based* was certainly affected, since in order to avoid double counting the trial court declined to take that evidence into account for the purposes of finding independent support. But how could the chief superintendent's evidence alter the operation of s.2?

132. The finding of materiality resulted from the consideration by the court of the relationship between each of two pieces of admissible evidence – the Newry evidence and the association evidence, and another piece of admissible evidence – the evidence that questions were put and were not truthfully answered. That consideration gave rise to a finding of materiality, which in turn meant that the evidence of the fact that questions were not answered could result in the drawing of inferences. The evidence giving rise to the inferences did not, therefore, emanate from the chief superintendent, but was the result of the appellant's own choices as to how to respond to the questions. Double counting would arise if the court had any reason to fear that the chief superintendent had relied upon the interviews in forming his belief, but the court accepted his evidence that he did not. In my view, therefore, no issue about double counting arises from the fact that the court considered the evidence for the purpose of assessing materiality while disregarding it in the assessment of evidence supporting the belief.

133. The appellant makes a further argument that the court of trial did, as a matter of fact, take account of the Newry evidence and the association evidence in its assessment of the supporting evidence. I think that this is based on a misreading of the decision of the court on this aspect (summarised at paragraphs 101 and 102 above). It seems to me to be clear that the focus of the court in the relevant passage from its judgment remained upon the s.2 interviews. What it was doing was examining the responses given by the appellant in the light of the other evidence, and determining that it was proper to draw inferences from the failure to answer or, in some instances, the misleading or false answer, as for example in relation to questions about whether he had been in Newry on the 17th September. The Newry evidence and the association evidence were not accorded probative value in answering the separate question whether there was evidence supporting the belief.

134. I am satisfied, therefore, that the verdict of the court of trial did not involve any impermissible double counting. However, it is still necessary to examine the impact of the claim of privilege on the overall fairness of the trial. The question posed earlier in this judgment must be addressed – are there circumstances in which the various statutory provisions cannot be fairly applied together, such that the trial court should exclude some portion of otherwise admissible evidence?

135. It seems to be the case that the claim of privilege made by belief witnesses in membership trials is getting broader, and the range of potential cross-examination narrower, than was envisaged in the authorities cited above. The assumption in the past appears to have been that the claim would be one of informer privilege, to protect informants who would otherwise not come forward. On that basis, the chief superintendent could at least be asked for and could give an assessment of the reliability of his or her sources. In referring to those authorities, I have included a short description of the evidence actually given on that issue.

136. It will however be apparent that, if the current case is anything to go by, the claim now encompasses a refusal to say how long a timespan the information covers, whether it came from gardaí or civilians, and whether it came from human or electronic sources. The chief superintendent in this case does not appear to have been actually asked whether he had assessed the reliability of the information. This may have been an oversight, in that the pre-trial letter stated that he was satisfied as to reliability, but it remains a fact that the evidence was not given. It is clear that the level of detail given fell significantly short of that provided in at least some of the earlier cases.

137. Further, the scope of the privilege claim has moved beyond the protection of confidential informants to cover matters such as garda methods and operations (whether current or future). However, whether these matters are properly the subject of a claim of privilege is not the concern of the Court in this case. There was only a purely formal challenge to the claim, with no argument put forward as to its permissible range.

138. It is the claim of privilege that can gives rise to the double counting problem since it can have the effect of preventing the court, if it is left in doubt, from being able to treat evidence as independent and supportive. That seems to be the reason why, currently, the witness will say that he or she has not read the book of evidence. The objective is to ensure that none of the rest of the admissible evidence will be excluded from consideration as supporting evidence. However, the current approach can raise its own problems.

139. There is no issue if the witness can say (as will frequently be the case) that the belief was formed before the events giving rise to the arrest. However, the instant case is complicated by the fact that the witness did not form his belief until two days after the arrest and search. Any experienced officer would know that the prosecution would intend to adduce evidence arising from the arrest and search, and that it would always be possible that other material might be furnished as part of the disclosure process. In those circumstances I would query both the purpose and validity of a blanket claim of privilege. As a matter of principle, privilege cannot be claimed over material that has already been disclosed for the purpose of a prosecution. Furthermore, it might well be that in a different case the court of trial could have difficulty in accepting that a witness who had close involvement in the assessment of the progress of an investigation could set aside his or her knowledge of the discoveries made when assessing whether or not there were grounds for a belief that the suspect was a member of an unlawful organisation.

140. However, it is not part of the task of the Court in this appeal to circumscribe the parameters of a privilege claim or to direct witnesses as to what they should read, or be aware of, or admit to having knowledge of. None of these issues were debated in the trial and the court accepted the evidence of the chief superintendent in full. What matters, in this appeal, is the impact of the claim of privilege on the fairness of this trial.

141. There is no doubt that the privilege claimed was, for all practical purposes, about as broad as can be envisaged. As the court of trial acknowledged, counsel for the defence did not even make limited headway in cross-examination. If the belief evidence had been the only evidence in the case, then, even without the binding authority of *Redmond*, it would seem to me that the trial court would have had to find that it would be unsafe to convict.

142. However, the solution to the problem is not, in my view, to exclude other admissible evidence or to decline to apply relevant legislation as some form of counterbalance. The Constitution requires the trial courts to ensure that trials are fair, but the way to deal with potential unfairness is to focus on its source – in these cases, the belief

evidence. Since the effect of a broad claim of privilege is to insulate that evidence from a cross-examination that might demonstrate that the belief is wrong, the appropriate course of action is to attribute significantly reduced weight to the belief and to require correspondingly strong supportive evidence. I think, therefore, that it is appropriate to say that if there is a very wide claim of privilege, there will be a correspondingly greater need for strong supportive evidence that clearly did not form part of the basis for the belief. It will of course remain necessary to disregard any individual piece of evidence for that purpose, if it is unclear to the court whether it was or was not the basis, or part of the basis, for the belief.

143. This was the approach taken by the trial court in the instant case. The judgment makes it clear that, in view of the breadth of the privilege claim and the effect thereof on the defence ability to cross-examine, the strength of the supporting evidence had to be high on the scale. It found that standard to have been met and I see no reason to disagree. In particular, the evidence about the booster tube, combined with the USB stick and the s.2 interviews, presented a clear picture of, as the court said, a linked pattern rather than a series of coincidences. In my view the court was entitled to find that the case was proved beyond reasonable doubt.

144. I would therefore dismiss the appeal.