THE COURT OF APPEAL

[118/19]

The President.
Edwards J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DAMIEN METCALFE

APPELLANT

JUDGMENT of the Court delivered on the 1st day of July 2020 by Birmingham P.

1. On 26th February 2019, the appellant stood trial before the Special Criminal Court charged with the offence of membership of an unlawful organisation. The trial concluded after seventeen days on 21st March 2019. On 17th May 2019, the Court delivered a judgment which convicted the appellant of the offence charged. Subsequently, on 27th May 2019, the appellant was sentenced to a term of two and a half years' imprisonment, backdated to 6th May 2019 to take account of time spent in custody while on remand. He has now appealed against that conviction. The DPP initially sought a review of the sentence on grounds of undue leniency, but at the commencement of the oral hearing, counsel on her behalf indicated that she was not now proceeding with that application.

2. The factual backdrop to the prosecution is the same as existed in the case of *DPP v. Hannaway & Ors* [2020] IECA 38, in which this Court delivered judgment on 6th February 2020. Given the considerable detailed narrative set out in the body of that judgment, we do not propose to repeat that exercise herein. Suffice to say that the prosecution case was that IRA business, in the form of a "Court of Inquiry", was conducted at 10 Riverwood Park, Castleknock, in Dublin on 7th and 8th August 2015. The purpose of the inquiry was to ascertain how certain IRA operations were frustrated, involving the arrest and prosecution of IRA members. The prosecution case was that the appellant attended at 10 Riverwood Park in his capacity as a member of the IRA, and that while present, was interviewed in the course of the inquiry.

3. The trial court heard that a surveillance operation was put in place by members of the National Surveillance Unit ("NSU") – focused on 10 Riverwood Park – on 7th and 8th August 2015. A surveillance device (or devices) capable of recording audio from within that location was deployed by the NSU in accordance with the terms of an authorisation obtained from the District Court. The movement of persons, including the appellant, and a number of vehicles to and from 10

Riverwood Park on 7th and 8th August were monitored by members of the NSU. Central to the prosecution case was the audio recording from 10 Riverwood Park of 7th and 8th August 2015.

4. The case against the appellant involved a number of elements, these being:

(a) The belief evidence of Detective Chief Superintendent Anthony Howard of the Special Detective Unit of An Garda Síochána that the appellant was, on the date in question, a member of an unlawful organisation;

(b) The participation by the appellant in the IRA inquiry on 7th and 8th August 2015 at 10 Riverwood Park; and,

(c) Adverse inferences drawn from the appellant's failure to answer material questions put to him during the course of interviews conducted following the invocation of s. 2 of the Offences Against the State (Amendment) Act 1998.

Grounds of Appeal

5. In all, the following fourteen grounds of appeal were set out:

(i) The court of trial erred in law and in fact in failing to withdraw from further consideration the issue of the belief evidence of the Chief Superintendent in circumstances where he had given entirely contradictory evidence as to the basis for his belief and where he had claimed privilege in relation to all enquiries made by the defence regarding the basis of his belief, and thus had ensured there was no examinable reality to this piece of evidence;

(ii) The court of trial erred in failing to address the significance of the contradictions as to the basis for the Chief Superintendent's belief in view of the extensive nature of the privilege claimed by the Chief Superintendent in relation to the materials grounding his belief which was upheld by the court of trial and which disabled the defence from effective cross-examination;

(iii) The court of trial erred in law and in fact in upholding general or blanket claims of privilege in relation to general matters such as the duration of time, which the underlying information covered, and further failed to give any or any cogent reasons for its decision;

(iv) The court of trial erred in law and in fact in holding that there was evidence on which it could hold that the Chief Superintendent's belief was based on Garda sources only and, in effect, without any basis for doing so, discounted the significance of the contradiction in the evidence of the Chief Superintendent as to whether his belief was based on Garda sources only or sources other than Garda sources;

(v) The court of trial erred in holding that circumstantial evidence could corroborate or support the belief evidence of the Chief Superintendent in circumstances where there was a contradiction in that evidence going to the very core of the belief in circumstances where this could not be further explored due to extensive claims of privilege;

(vi) The court of trial erred in law and in fact in ruling as valid the authorisation made pursuant to s. 5 of the Criminal Justice (Surveillance) Act 2009;

(vii) The court of trial erred in law and in fact in allowing into evidence recordings obtained on foot of the aforesaid authorisation;

(viii) The court of trial erred in law and in fact in addressing the evidence in the case and in its finding that the Court was entitled to find beyond any reasonable doubt that it could identify the voices of various people heard on a surveillance tape when the prosecution had decided not to lead any evidence purporting to identify the individual voices and where, as a result, the defence were not in a position to address the Court in relation to these identifications prior to the Court giving its final judgment;

(ix) The court of trial erred in law and in fact in identifying the accused as having spoken certain words on the surveillance tape introduced in evidence when this

identification was never contended for by the prosecution and where no expert or other evidence was led in relation to this identification;

(x) The court of trial erred in law and in fact in basing its findings on certain timings when there was no evidence in relation to the accuracy of these timings and where the prosecution had not contended for them;

(xi) The court of trial erred in law and in fact in finding beyond a reasonable doubt that the conversation heard on the surveillance tape were consistent only with the accused being a member of the IRA and in failing to consider properly or at all the possibility that the accused was helping or assisting the IRA despite argument to this effect, and despite the fact that the DPP had charged two of those present at the relevant time with the separate offence of assisting the IRA only;

(xii) The court of trial erred in law in allowing into evidence interviews pursuant to s. 2 of the Offences Against the State Act 1998, in circumstances where the accused had not been warned in ordinary language of the full meaning of the section and its consequences and where there had been a breach of the requirements of s. 2 of that Act;

(xiii) The court of trial erred in law and in fact in failing to withdraw the case from further consideration at the close of the prosecution case; and

(xiv) The court of trial erred in law and in fact in failing to impose an appropriate sentence.

6. Both sides were agreed that the grounds could be consolidated into the following six broad categories:

(i) The belief evidence of Chief Superintendent Howard: grounds (i) to (v),

(ii) Surveillance authorisation: grounds (vi) and (vii),

(iii) The identification of the appellant from the audio recording: grounds (viii) to (x),

(iv) Failing to consider whether the appellant was merely assisting the IRA (an offence contrary to s.21A of the 1939 Act) : ground (xi),

(v) Compliance with the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998: ground (xii), and,

(vi) Failure to withdraw the case from further consideration following the close of the prosecution case and failing to impose an appropriate sentence: grounds (xiii) and (xiv).

At the start of the appeal hearing, counsel on behalf of the appellant indicated that he was not proceeding with grounds (vi) and (vii) or with any ground of appeal in relation to sentence .

Grounds (i) to (v): The Belief Evidence of Chief Superintendent Howard

7. Chief Superintendent Howard gave evidence of his opinion/belief. He made clear that his opinion/belief was not based on any matter discovered at the time of the arrest of the appellant, or the investigation following on the arrest on 24th November 2015, and neither was it based on his activities, associations or anything else (*i.e.* his movements in relation to 7th and 8th August 2015). He claimed privilege in respect of the material that he had reviewed. In particular, he claimed privilege about the timespan over which the material that he had reviewed extended. He

was cross-examined extensively as to whether the material comprised information from members of An Garda Síochána only, and the appellant says that his responses to questions on this topic were inconsistent, and, indeed, contradictory. These inconsistencies and contradictions formed the basis of an application for a "direction" application at the close of the prosecution case, and the same issues are now raised in the course of this appeal.

8. In ruling on the direction application, the Court observed as follows:

> "[w]e have considered the evidence and demeanour of Chief Superintendent Howard as he gave his evidence of belief, together with the questions put by Mr. Hartnett in cross-examination, and the Chief Superintendent's responses thereto. We accept Mr. Hartnett's point that the Chief Superintendent was relatively new to his rank at the time that he carried out his assessment, but as against that, we are also satisfied that his lengthy and varied experience enabled him to properly [typed as probably] assess and evaluate the reviewed material by reference to that body of experience and knowledge.
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> We do not think that there is anything in the point that he didn't know Mr. Metcalfe personally. An officer of high rank is specifically selected by the legislation to give an overall view or conspectus of the information held by An Garda Síochána, and in many cases would not have personal knowledge of the persons concerned.
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> We are satisfied that the Chief Superintendent honestly and genuinely holds the belief expressed by him on the basis of the process that he described in evidence. Our conclusion is not affected by his relative lack of experience in his new posting at the time of his assessment, having regard to the length and breadth of his previous experience in An Garda Síochána.
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> However, as the late Hardiman J. pointed out in the *Redmond* decision, it is expected that a Chief Superintendent could not [offer] such evidence of belief unless he honestly and genuinely held such belief and that this would not be a source of comfort if the beliefs were based on materials which were, for whatever reason, false, misleading or otherwise inaccurate. In circumstances where that material is not known to the Court or defence counsel, the Court must be alert to that situation and to consider carefully the totality of the evidence in assessing the belief.
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> Of more concern is the initial lack of clarity on the part of the Chief Superintendent as to the composition of the sources reviewed by him. Ultimately, having considered his evidence as a whole, we accept as a fact that the information founding the beliefs held by Chief Superintendent Howard was based solely on Garda sources. Therefore, his earlier suggestion that there was another type of source in the information is a concern in terms of the weight to be attached to the belief in this case.
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> Undoubtedly, it is debatable whether this belief evidence will be of sufficient weight to support a conviction in a situation where it was the sole evidence offered in support of a conviction. Following *Redmond*, such situations no longer arise. We accept that it is not the strongest of belief evidence and was weakened by the matters identified in cross-examination.
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> However, we are not satisfied that it is so weak that it should be dismissed from consideration altogether, or that it is in a condition whereby it could not be saved or

supplemented by corroborative evidence. The fact that the belief evidence is based only on Garda sources does not go to admissibility, it is a factor that goes to the weight of that evidence. There is no prohibition on a belief being formed on the basis of Garda sources alone. As a matter of fact, we are satisfied that the belief was held genuinely by the Chief Superintendent and is admissible for our consideration pursuant to statutory provision.

The case law in this area clearly establishes that the belief is the evidence and not the material which underlines that belief. The material can be examined by the Court at the [instigation] of an accused person; no such application was made in this case.

The reason why corroboration is required generally in the law of evidence, is because the evidence to be corroborated is potentially suspect and the Tribunal of Fact should have the reassurance of independent support before acting on such suspect evidence. We are of opinion that the same rationale appears to underline the requirement for independent scrutiny of belief evidence as set out recently by the Supreme Court in their decisions in *Redmond*.

The requirement for corroboration arises precisely because of the dangers recognised by those judgments in relation to this category of evidence. Although the weight of the belief of the Chief Superintendent is tempered in this case by the matters elicited by Mr. Hartnett in cross-examination, as both of the judgments of the Supreme Court in *Redmond* note, the particular weight to be attached to the belief evidence and the other evidence in the trial is a matter for the court of trial and [the] relative importance attached to the two types of evidence will vary between one case and another. A corollary of this is that the weaker the belief evidence, the stronger will be the corroboration or support required to propel the nation to a conclusion of proof of guilt beyond a reasonable doubt.

Therefore, in this case, given the restricted weight to be attached to the belief evidence, the supporting evidence will be required to be particularly compelling before the belief evidence could be acted upon and safely. The Court may not convict in any case unless the weight of the combination of belief and supporting evidence achieves the standard of leaving no reasonable doubt as to the issue of membership of an unlawful organisation in the individual case under consideration."

9. In the course of the appeal hearing, counsel on behalf of the appellant has brought the Court through the cross-examination of Chief Superintendent Howard in very considerable detail indeed. It may immediately be said that the cross-examination was a very effective one and much ground was made.

10. The appellant says that the manner in which the prosecution opened and closed the case seemed to involve an acceptance on their part that the evidence of Chief Superintendent Howard was the primary evidence in the case. It is said that this becomes highly significant if regard is had to the fact that a very broad-based claim for privilege was advanced and upheld, to the extent, it is said, that the Chief Superintendent was able to insulate himself from cross-examination. These issues have taken on an additional significance, it is contended, by reason of the fact that, inexplicably, the Chief Superintendent had failed to review his file before giving evidence.

11. The appellant draws attention to the following passage in the judgment of the Court of Criminal Appeal delivered by Macken J. in *DPP v. Maguire* [2008] IECCA 67:

> "[i]t is his statement of belief which is granted status as admissible evidence pursuant to the Act of 1972. This was made clear by Costello J. in the case of *DPP v.* O'Leary…and in several other cases since. The belief is just that, no more and no less. It is axiomatic that, if it is established that the belief is very well-founded, that may properly affect the weight to be attached to it. On the other hand, if it is established during the course of the trial, for example by cross-examination on behalf of an accused, that the belief is not well-based, that too will affect the weight, *if any*, to be given to his belief – adverse in such a case **–** *even to the extent of it being wholly disregarded in appropriate cases.*" [emphasis that of the appellant]

It is submitted by the appellant that this is a case for not giving any weight to the belief evidence and for wholly disregarding it.

12. In this case, counsel for the appellant highlights what are described as attempts by the Chief Superintendent to advance a blanket claim for privilege and not to engage with the cross-examination in a meaningful way. It is said that in contrast to the present case, in *DPP v. Maguire*, the Court could take some comfort from the fact that the Chief Superintendent giving evidence there had 35 years' service in An Garda Síochána, had been involved in the investigation of subversive crime for 29 years, was head of the Special Detective Unit involved in the provision of State security, as well as the investigation and monitoring of subversive crime and the assessment of intelligence. He had confirmed to the Court that he had not based his belief on anything that happened on the day when the offence in issue occurred, nor had he based it on matters arising therefrom, but he had also told the Court that he had received information about the applicant's status in the IRA at various times, knew the identity of all the sources of the information, none of whom had been paid (as far as he knew) and none of whom had previous convictions (as far as he knew). Furthermore, he told the Court that he had checked the information, which came from "both Garda and non-Garda origins, by assessing it with other information and by looking at the totality of the same, emanating from different sources, verifying also whether the sources had been accurate in the giving of information in the past".

13. Against the background of the broadly-based claim for privilege, attention is drawn to observations of the Court of Criminal Appeal in the course of a judgment delivered by O'Donnell J. in *DPP v. Donnelly & Ors* [2012] IECCA 78. At para. 31 O'Donnell J. had commented:

> "[e]ven where such privilege is upheld, it does not follow that the evidence of a Chief Superintendent cannot be tested. The credibility of any witness is not dependent solely on the material which that witness seeks to adduce in evidence-in-chief. On the contrary, credibility can be challenged on any issue collateral to the particular testimony. Furthermore, as the Supreme Court expressly held in *Kelly* in rejecting a submission made on behalf of the Director of Public Prosecution, 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."

Very similar views were expressed by the European Court of Human Rights in *Donohoe v. Ireland* ECHR 19165/0812/12/2013, where, at para. 92, the Court had commented:

> "[t]he Court further notes that while the scope of cross-examination was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent's evidence in a range of ways still remained. Consistently, such evidence could be tested by the defence even if privilege had been granted as regards the sources upon which that opinion was based. As pointed out by the Supreme Court in *DPP v. Kelly*…the principle is that any restriction on the right to cross-examine is limited to the extent 'strictly necessary' to achieve its (protective) objective. As noted by O'Donnell J. in *DPP v. Donnelly & Ors*… 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. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted…and where the cross-examination of these witnesses is hindered or not possible at all."

Having drawn attention to the passages quoted in *Donnelly* and *Donohue,* counsel for the appellant asked, rhetorically, what would the judges of the Court of Human Rights make of what transpired in the present case, where there was a blanket claim of privilege and counsel for the accused was prevented from pursuing lines of enquiry which had been pursued in other cases. To this, counsel for the Director might have replied (though with commendable restraint did not) with the rhetorical question: what would the members of the Court, or anyone else possessing reasonable common sense, make of a situation where the guilt of the accused was manifest, in a situation where he was recorded participating in IRA activities over a weekend, and yet, the matter was debated at trial for no less than 17 days.

14. As pointed out by the Supreme Court in *Redmond v. Ireland* [2015] 4 IR 84, in a passage referred to by the trial court in the present case, there will be membership trials where the evidence, other than the belief evidence, will be weighed by the Special Criminal Court as very important, while in other trials, it is the belief evidence that assumes prominence. Charleton J., in the course of his judgment, went on to add:

> "[f]or the avoidance of doubt, there is no order in which each such piece of evidence is to be assessed. It is in the overall context of the state of admissible evidence at the end of the trial that the Special Criminal Court may convict or may fail to be convinced by an entire body of testimony."

In the present case, the evidence other than the opinion evidence, was cogent in the extreme; it might be described as crushing. In the Court's view, the court of trial was fully entitled to have regard to the evidence of Chief Superintendent Howard. No remotely credible basis for suggesting that the Court was obliged to exclude it from consideration has been advanced. The Court of Trial

dealt with the matter with some care. It recognised that some real headway had been made by the defence in cross-examination, and that this served to weaken the opinion/belief evidence somewhat. However, as the trial court subsequently made clear when delivering its judgment, the supporting/corroborative evidence that was present in this case was absolutely overwhelming. In the course of the judgment of the Special Criminal Court delivered on 17th May 2019 at p. 35 of the transcript, Hunt J., speaking for the Court, commented:

> "[t]he corroboration in this case is so strong and so unequivocal that it eliminates any doubt that might otherwise arise in relation to the belief evidence. Indeed, if it was possible to convict in such a case in the absence of belief evidence, this could arguably be such a case."

This Court would just simply add that there have, of course, been cases in the past where individuals were convicted of the offence of membership without opinion/belief evidence forming part of the case. There were many such cases prior to 1972. Indeed, by way of an aside, the Court would observe that it goes well beyond being arguable that this was a case where a conviction could have resulted, even absent belief/opinion evidence. In this case, the approach adopted by the trial court of assessing all of the admissible evidence was precisely what the Court had been mandated to do by the Supreme Court in *Redmond v. Ireland.*

15. Accordingly, we dismiss the grounds of appeal relating to the opinion/belief evidence of Chief Superintendent Howard. It follows that we regard the suggestion that the case should have ended following the closing of the prosecution case and should not have been further considered to be a suggestion entirely without merit. Our reasons for so concluding will be outlined in further detail below.

Ground (viii)-(x): Identification of the Appellant on the Audio Recording

16. The appellant protests that the trial court went a step too far in concluding not only that IRA operations were being discussed, but that the appellant had been present at the location as an interviewee. It was pointed out that there was no expert evidence to identify the speakers on the audio, and in particular, to identify the appellant as a speaker at any stage.

17. The trial court dealt with the matter as follows:

> "[f]rom the beginning to end, the recording is replete with explicit reference to the IRA and associated activity and criminality. One of the most remarkable features of the recording is that, apart from scattered references to requirements for food or refreshments, the conversations on the recording focus exclusively on affairs of the IRA and associated criminal operations.
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> . . .
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> We are satisfied that the speaker with the Dublin accent in the interview that proceeds from 53 minutes into the recording of the 7th August to the return of Mr. Nooney at one hour 37 minutes 37 seconds is the accused, Damien Metcalfe. We draw this inference on the basis that he was observed to enter the premises at 6.11 pm which is 58 minutes after the starting point of the recording if it terminated precisely at 9.30 pm. If 5.13 pm was the actual starting point of the recording, then the interaction at 53 minutes would have been at 6.06 pm. However, Mr. Nooney was observed to enter the

house at 7.02 pm and is heard speaking loudly about getting lost at one hour 37 minutes 37 seconds. This provides a reliable basis to find as a fact that the recording in fact began at around 5.25 pm and therefore terminated at about 9.40 pm. Therefore, the conversation involving Mr. Metcalfe began at approximately 6.18 pm which is consistent with his observed arrival seven minutes later and about 45 minutes before the voice of Mr. Nooney is heard complaining about getting lost twice. All of this is entirely consistent with the observations of Detective Sergeant BK who was outside at the time, and indeed, the photographs that he took during that period.

The conversations began by reference to the speaker with the Dublin accent working for 'At Risk Security'. Damien Metcalfe confirmed at a subsequent police interview that he did work for this company. After the interview ended, Mr. Metcalfe referred in a general conversation involving Mr. Nooney and the Northern voices about working on security on the Luas. This is also consistent with an admission by Mr. Metcalfe at a later interview. Mr. Metcalfe was seen to leave the house at 7.07 pm, some five minutes after Mr. Nooney had arrived back, and this is consistent with the contents of the audio recording which appears then to involve Mr. Nooney discussing with the Northerners matters that clearly continue the strong IRA theme, such as: 'Chris opening comms on the way out of prison'.

Comms is a matter that is referred to on various occasions during these recordings. In our experience, coms is a phrase used within the IRA to describe secret communications smuggled to and from IRA prisoners to the organisation outside. That discussion also contains expert reference to IRA robberies, a split within the IRA, Sean Connolly and his sister at one hour 57 minutes 10 seconds. There is specific reference, among others, to John Brock and Kevin Brayney. Detective Garda Finnerty gave evidence that John Brock was convicted by the Special Criminal Court in 2008 of possessing firearms. At one hour 59 minutes 15 seconds, there was a reference to 'that lad, Damo, and Sean being up in the toilet and he'll be down now'. This reference would appear to be at approximately 7.24pm which is three minutes after Mr. Metcalfe was observed returning to the house with Patrick 'Quacker' Brennan."

18. The respondent says that the findings made by the trial court were justified and warranted and came against a background of the court having listened to three days of recordings, and then having listened once more to relevant parts of the recordings at the deliberation stage.

19. We agree with those submissions. This Court is quite satisfied that the conclusions of the trial court are unimpeachable. Accordingly, we dismiss these particular grounds of appeal.

Ground (xi): Failing to Consider Whether the Appellant was Merely Assisting the IRA (An Offence Contrary to s. 21A of the 1939 Act)

20. The appellant says even taking major elements of the prosecution case, such as the belief evidence of the Chief Superintendent, and the inferences drawn from a failure to answer material questions at their height, that there were inferences available short of membership, including that the appellant was present, assisting, but not actually present as a member. The trial court is criticised for failing to engage in a meaningful way in the alternative findings that were open. The

appellant says that there could be an entirely innocent explanation for presence, pointing to the example of the property owner, who, entirely innocently, visited his premises on a number of occasions. On the other end of the spectrum, there could be individuals who were actually members of the IRA, conceivably, senior members of the IRA. However, between those two end points on the spectrum, there were many other possibilities, and with these possibilities, the trial court failed to engage.

21. The appellant says that this argument is not advanced at a purely theoretical level, that there were others present over the weekend at Riverwood Park who were charged with assisting rather than membership. It is said that in those circumstances, the general rule that where two inferences are reasonably possible on the evidence, then the inference favourable to the accused should be drawn, unless the prosecution has established beyond reasonable doubt that it is proper to draw the alternative inference for which they contend.

22. Similar arguments were advanced in the course of the appeals by *DPP v. Hannaway & Ors* [2020] IECA 38, whereby this Court dealt with the argument as follows:

> "[t]he argument that has been advanced appears to be premised on the notion that before evidence can be deemed capable of supporting, or corroborating, belief evidence in a membership case, it must be demonstrated that that evidence was consistent only with membership of an unlawful organisation as opposed to being evidence which could also possibly be consistent with involvement in another offence or other offences.
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> We expressly reject that notion. In doing so we acknowledge and accept the 'two views' rule, set forth in the seminal case of *People (A.G.) v. Byrne* [1974] IR 1, which is to the effect that where two views on any part of the case are possible on the evidence, the tribunal of fact should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt. However, the two views rule is only engaged where 'two views on any part of the case are possible on the evidence' and the tribunal of fact is required to prefer one view over the other in the course of its fact-finding function. In that event, it must certainly adopt that which is favourable to the accused, unless the State has established the other beyond reasonable doubt (our emphasis). It is not engaged, however, where the court of trial engages in the first instance in determining as a matter of law whether a piece of evidence is capable of providing support or corroboration of other evidence."

23. The conduct in which the appellant has engaged was, in fact, potentially consistent, both with membership, and with assisting an unlawful organisation. The Special Criminal Court considered that it was nonetheless capable of providing the necessary support/corroboration for the belief evidence provided by the Detective Chief Superintendent and we find no error in their having done so. As alluded to by the Special Criminal Court in its ruling, the legal test in that regard is that set out in *Redmond v. Ireland*, namely, that it is evidence which:

(a) Tends to implicate the accused in the offence charged;

(b) Is seen by the trial court as credible in itself; and,

(c) Is independent of the witness who gave the belief evidence

24. On one view of it, it undoubtedly implicated Mr. Hannaway in the offence of membership. This was an inquiry conducted for and on behalf of the IRA, with a manifestly illegal objective in

mind. It was overwhelmingly probable that the main participants were, in fact, IRA members. The fact that in some cases, other evidence required in addition to sustain a membership charge might not have been available, leading to some being charged with providing assistance to, rather than actual membership of the IRA, is neither here nor there in terms of the inferences capable of being drawn from the controversial evidence. It, therefore, undoubtedly tended to implicate those involved in likely membership. It might not have been enough on its own to found a conviction for membership, but in our view, it was definitely implicatory at a level sufficient to satisfy the test in *Redmond*. In our view, the same observations could be made, though, if anything, the case for membership is even stronger if it is accepted that the appellant was an interviewee. We make that observation, recognising the reality that it is not unusual for bodies engaged in disciplinary proceedings, or inquiries, to engage external assistance.

Ground (xii)-(xiii): Invocation of Section 2 of the Offences Against the State (Amendment) Act 1998

25. On two occasions, during the course of the appellant's detention, the provisions of s. 2 of the 1998 Act were invoked. The appellant's complaint is that the interviewers failed to explain the meaning of "misleading". The approach of the trial court was that it was willing to have regard to any outright refusal to answer questions, but not to have regard to answers which were misleading.

26. The issue arises by reference to s. 2(1)(ii) of the 1998 Act. It provides:

> "2.—(1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939, evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining . . . the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.
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> Subsection (1) shall not have an effect unless:
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> (2)(a) the accused was told in ordinary language when being questioned what the effect of such a failure might be."

27. It appears that the focus on the terms of the advice given to the interviewee by the interviewers arises from the fact that a template availed of by those who conduct such interviews has been changed and now addresses the meaning of "misleading".

28. It appears the change in the terms of the template may have been prompted by the decision of the Special Criminal Court in *DPP v. Kenna* (SCC, 3 May 2017) where the Special Criminal Court did not allow reliance to be placed on s. 2 interviews in circumstances where the interviewee had not been told in ordinary terms what the result of providing misleading answers would be.

29. The Special Criminal Court dealt with the matter as follows:

"This case does appear to have, not only similarities, but to be identical to other cases the Court has dealt with in various of its guises. The similarity or the identical nature of the case arises out of the fact that precisely the same template was used as in other cases. We hear Mr. Hartnett's argument that this should bring everything to a halt in terms of drawing a s. 2 inference from any of the questions that follow. We disagree with that because the interpretation of the Act suggests that the matter must be dealt with at the time when the questions are asked because it refers to ordinary language being given during questioning. So, it is a precondition, but not in the sense that it must be given at the outset of the interview; it is a precondition that, by the time the question is asked, the appropriate ordinary language must have been used. But we take the view that where the section has been partially explained, and where the interviewee could be under no misapprehension as to the parts or types of questioning that were properly explained, there is no reason not to consider drawing inferences pursuant to s. 2 in relation to these questions. So, outright refusals will be candidates for s. 2. Matters which are found beyond reasonable doubt and to the exclusion of reasonable possibilities to the contrary to be false, will also be candidates for the drawing of inferences if it is considered so to do. But that which is misleading, or might, on a reasonable possible view of it, be a misleading answer, will not be such a candidate. And it is open to the parties at the appropriate time to make suggestions as to which particular category any answer might fall into."

30. It seems to us that there is a more fundamental point here. The word "misleading" is a word that is used every day in ordinary conversation, and in our view, is not a word for which any synonym is required. In that regard, it is of some interest that the definition in the Oxford Pocket Dictionary is "cause to infer what is not true; deceive". The language of the definition cannot be said to be in any way more ordinary, more commonplace or more readily understood than the actual word "mislead". In England, the requirement by statute is that the accused be told in ordinary language, when being questioned, what the effect of a failure might be. Beyond question, the now appellant was so informed.

31. Therefore, we are satisfied that the trial court's approach to the question of the invocation of s. 2 was an appropriate one and dismiss this ground of appeal.

Ground (xiii): Failure to Withdraw the Case From Further Consideration at the Close of the Prosecution Case

32. At the conclusion of the prosecution's case, counsel on behalf the appellant made a "direction" application the arguing that the evidence was limited to the extent that there was no case to answer. The said application was based on:

(i) the weakness of the belief evidence of Chief Superintendent Howard;

(ii) the bare assertion of privilege such that it prevented any meaningful cross-examination of Chief Superintendent;

(iii) the fact that the inferences draw from the s. 2 interview could not serve to bolster the inherent lawed and contradictory belief evidence given by Chief Superintendent Howard; and

(iv) that to proceed in such circumstances would offend the principle of fairness.

Senior counsel for the prosecution made submissions in opposition of same.

33. The Special Criminal Court gave what was a reasonably detailed ruling in which it made a number of points on how such applications might be dealt with in the context of belief evidence. Given that the respondent relies heavily on that ruling, it is worth quoting in its entirety:

> "[r]ight, well, we've had a little time to consider what we have to say was a very well-made application by Mr. Hartnett on behalf of his client, and clearly a lot of thought went into it. So, we've just a number of points to make before giving our decision, or in the course of giving our decision.
>
> The first is that we're satisfied that the Court of Appeal decision in *DPP v. M* represents the law in this case, as in all others. We're not aware of anything in it to suggest that it doesn't apply with full force to cases such as this, in the same way as it applies to everything else.
>
> We also, secondly, accept the point that belief evidence is an unusual category of evidence, to use a different word, but perhaps the same meaning. But it must be borne in mind that the receipt of such evidence and the ability to give it is governed by statute. That has been found to be constitutional, once it's operated in a particular manner. And the manner in which it is to be operated and, indeed, the decision that highlights the unusual nature of the evidence, is set out in the *Redmond* decision, which recognises the fact that it's unusual evidence by providing that it would be unconstitutional to convict somebody based solely on that evidence, and that some other independent evidence, whether one calls it support, corroboration, or something else -- it is, in effect, it would seem, akin to corroboration. That is required.
>
> The third point to make is belief evidence isn't uniform or monolithic in nature. The possible variability of the strength of such belief evidence is also expressly recognised by the Supreme Court in *Redmond*, where one of the judgments points out that the relative strength of the belief and the other evidence will vary from case to case, so this connotes a situation whereby a Court might take a view that, relatively speaking, the belief evidence, although there, is weak, but this could be compensated for by the strengths in the supporting evidence. On the other hand, one could have the same -- or a different situation, entirely different situation, where there's very strong evidence of belief, where there's little or no support for it, and that would be insufficient. And so, it all depends, really, on the, as is pointed out in *Redmond*, as to the sum total of the relative value of the individual components.
>
> Fourthly, then, it would seem, in the light of those observations, it's incumbent on a Court dealing with such a case to indicate the strength or otherwise of each piece of evidence, and their relative strength to each other if there's more than one piece, and then to explain what the conclusion is in relation to the sum total because, after *Redmond*, the net effect of *Redmond* is that these cases fall into the general category of circumstantial evidence cases, where you have more than one piece of evidence, and it's not the

individual strength of the component parts that matters. What matters is deciding what's admissible, allotting weight to the individual pieces, and then standing back and saying, 'What's the combined or cumulative weight of the whole?'

Fifthly, there may well be inconsistencies or weaknesses in this part of the evidence, but it's expressly not our function, at this point in the case, to resolve those points one way or the other. It is to acknowledge that issues have been very fairly and properly raised by Mr. Hartnett on behalf of his client. But the law is that, at this point in the case, we are obliged to take the prosecution evidence as a whole, and at its high point, and it's not for us to resolve individual matters such as have been pointed out here this morning.

Sixthly, we do have an expression of belief in this case which was, in fact, proved by intensive and extensive cross-examination and, indeed, some picture emerges of what underlies the belief. But, as has been pointed out here today and yesterday, and on many other occasions, it is the belief, at the end of the day, and not the underlying evidence, and at the end of the cross-examination, the witness was challenged on his belief, and he stood by it. It's in the case; whether it has weaknesses or not is a matter to be decided at the next stage.

So, the next and last point is that we have to approach the case on the totality of the prosecution evidence taken at its high point. In so doing, there is more than adequate to go to the next stage, which, lastly, is to consider whether the combined weight of the strands put forward by the prosecution reached the necessary standard of proving guilt beyond reasonable doubt, and we do so specifically in the light of the *M* case, and specifically in the light of the observations in *Redmond* which indicate that belief evidence may be variable in strength, but it is -- the next question is, is there evidence to support the belief and, if so, what is the sum total or value of the combination? And it may be that, of course, the weaker the belief evidence, the stronger will be the requirement for weight in the supporting evidence, but they are all analyses to be conducted at the next stage. So, with due acknowledgment of the application, we have to refuse it."

34. Counsel for the appellant relies on two key cases in advancing his submission before this Court. The first is *DPP v. M* (CCA, 15 February 2001) wherein Denham J. (as she then was) held that if the inconsistencies in a given case were such as to render it unfair to proceed with the trial the judge, in the exercise of his or her discretion, should stop the trial. The second is *DPP v. Murphy and Kennedy* (SCC, 5 December 2019) wherein Burns J. held that an overly broad assertion of privilege is a matter which goes to fairness and not to weight.

35. It is said that the flaws in Chief Superintendent Howard's evidence – the contradictions established therein, his having only recently been promotion to the rank of Chief Superintendent at the time he carried out the underlying assessment, and his lack of any personal knowledge of the accused when combined with the broad assertion of privilege –amounted to a breach of the appellant's right to a fair trial. Moreover, the Special criminal Court is said to have erred in that it failed to meaningfully engage with the said belief evidence and properly assess its impact on the

appellant's right to fair trial. The respondent is satisfied to rely on the ruling of the trial court, noting that the appellant's submission on this point is entirely misconceived.

36. In our view, the approach adopted by the Special Criminal Court was the correct one. We have already indicated that the grounds of appeal dealing with the belief evidence are without merit and outlined our reasons for same. The ruling of the Special Criminal Court demonstrates the serious consideration given to the matter. It could not be said that there was a failure to meaningfully engage with the arguments advanced. An application based on the *R v. Galbraith* [1981] 2 All ER 1060 jurisprudence carries with it a high threshold. The fact that aspects of evidence may, on one view, be the subject of criticism, is not sufficient to meet such a threshold. Accordingly, we dismiss this ground of appeal.

Conclusion

37. In summary, we have not been persuaded to uphold any ground of appeal, nor has any doubt been raised in our minds about the safety of the conviction or the fairness of trial.