THE COURT OF APPEAL

CCA Ref: [2013/30]

Bill No. SCC 12/2011

The President
Birmingham J.
Edwards J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DEREK PALMER

APPELLANT

JUDGMENT of the Court delivered by the President on 20th July 2015

Introduction
1. The appellant and another man were tried in the Special Criminal Court on a charge of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939, as amended by s. 48 of the Criminal Justice (Terrorist Offences) Act 2005. The particulars of the offence alleged that each man was, on 14th of July 2011, within the State and a member of an unlawful organisation, to wit, an organisation styling itself the Irish Republican Army, otherwise known as Oglaigh na hÉireann, otherwise known as the IRA.

2. On 14th December 2012, the appellant was found guilty, as was his co-accused, Mr. Clarke. He was sentenced to 6½ years imprisonment with one year suspended. He now appeals against his conviction, and if he is unsuccessful in that, against the sentence imposed on the ground of severity.

3. Counsel for the appellant distilled the grounds of appeal down to three at the hearing before this Court. First, it is contended that the belief evidence of the Garda Chief Superintendent should not have been admitted by the Special Criminal Court because the Director of Public Prosecutions had not been able to assess the reliability of that evidence. Secondly, the trial Court should not have accorded weight to that evidence when the officer refused to give any information as to the basis of his belief. Thirdly, the appellant submits that the trial Court erred in determining that the appellant had refused to answer questions and in drawing inferences from such erroneous determination.

The Crime and the Investigation
4. On 14th July 2011, Garda Michael McCabe was travelling on the M1 Motorway when he noticed two vehicles travelling together in convoy. He noticed that there were ten men in all, five in each vehicle, and his suspicions were aroused by these observations. He followed the cars for a short distance and radioed into Command and Control and reported what he had seen. Arising out of this, additional Garda units were dispatched to the Balbriggan area. At about the same time, reports came in from one Ms. Lena Whitehouse, stating that there was activity outside the house of 65, Hampton Green, Balbriggan, and that some men outside were acting suspiciously and that they were in two vehicles. Ms. Whitehouse said in evidence that "there was cars there, there were men came to the house, they were covered up like in balaclavas, hoods. There were seven or eight people".

5. Mr. Paul Doyle lives at 12, Castleland Court in Balbriggan and was living there on 14th July 2011 with his girlfriend. At about 9.30pm, he went out to get something from the car and saw two men who were calling to him from 400 or 500 metres away. He noticed two car loads full of men but he did not see their faces. He ran back straight into the apartment and exited through a window out the back. Mr. Doyle had Court appearances in July 2011 for possession and sale and supply of drugs.

6. Ms. Shauna Baxter is Mr. Paul Doyle's girlfriend and lives at 12, Castleland Court in Balbriggan. On 14th July 2011, she was at this address with Paul Doyle and her daughter watching TV. At some point, Paul left to get something out of the car and ran back in through the house and out the back window. A short time later, a few people called to the house. They informed her that they did not want to harm her: they just wanted to talk to Paul. She only spoke with one individual but she could not describe any of them. She then went and grabbed her daughter and left.

7. Shortly thereafter, some members of An Garda Síochána heard over the Garda airwaves that there was activity near the home of a Mr. Doyle at Castleland Court in Balbriggan, and they made their way to that location. When Gardaí arrived, they saw two cars trying to leave that particular housing estate. They stopped the vehicles; there were five men in each.

8. It was stated in evidence that Mr. Palmer, the appellant, was the driver of one of the vehicles and Mr. Clarke was the passenger in the same vehicle. When the appellant turned off the engine and got out of the vehicle, he gave his Driving License to Gardaí. He was asked what he was doing in the Castleland Court, Balbriggan area and the appellant replied: "I was on a bit of business".

9. Other Gardaí arrived to assist and a search of the area ensued. The appellant was informed of a search of the vehicle under s. 30 of the Offences Against the State Act. Once the search was conducted, all the passengers of the vehicle moved to the wall where they remained. Various items were recovered from the vehicles as well as from the nearby area, including balaclavas, gloves and a pickaxe handle, and down a laneway in the locality, a copy of 'Saoirse Nua' magazine was found and, it was alleged, a picture of the accused attending a Republican funeral.

10. Both men were arrested on suspicion of having committing a scheduled offence, namely, membership of an unlawful organisation,

namely, the Irish Republican Army. Subsequent to the arrest, a number of interviews took place during which s. 2 of the Offences Against the State (Amendment) Act 1998, and s. 18, s.19 and s.19A, respectively, of the Criminal Justice Act 1984 (as amended) were all variously invoked. Both men denied membership of an unlawful organisation and the appellant's responses to questions put to him in the interviews are examined in detail below.

The Trial

11. During the course of their detention, the defendants were interviewed on a number of occasions. Section 2 of the Offences Against the State Act 1998 was invoked in some of those interviews. It was indicated that the prosecution would be relying on those interviews. The provisions of s. 2 are as follows:-

> "2. Membership of an unlawful organisation: inferences that may be drawn
>
> (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 whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967] or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether 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 or mainly on an inference drawn from such a failure]."

The Court, in its judgment, summarised as follows:-

> "Mr. Palmer was also interviewed a number of times. In the course of the first and second interviews he was interviewed under the normal caution. And he replied to questions asked, among his replies were strong denials of membership of the IRA or engagement in any of its activities. In the third interview, section 2 was invoked and again Mr Palmer answered a large number of questions, which included denials in respect of membership of the IRA or involvement in any of its activities. He said that he did remember the 14th of July 2011, which was the previous day. He gave certain answers in respect of allegations raised. He did, for example, say that he was accompanied by a few friends. But when asked to name them, he said that he'd nothing to say. He was asked and we quote question: 'Where were you at approximately 10.15 yesterday, 14th of July?' Answer: 'Something, somewhere in Balbriggan.' Question: 'Who was driving?' 'I was driving.' Question: 'So you knew where you were going?' 'I did indeed.' 'Where did you go? 'I went to my friend's house.' 'Who else went into your friend's house?' 'I do not wish to say.' 'Who accompanied you in the car last night?' 'I do not wish to name them as they have never been in trouble before. Anyways, you have them in the stations.' Question: 'When you were stopped by the gardaí, Joe Clarke was sitting beside you?' Answer: 'Nothing to say.' In the course of the fourth interview, section 2 was again invoked and explained in the course of that interview. When asked could he remember the 14th of July 2011 he replied: 'No.' And to a large number of other questions, he said that he'd already answered the same. On having the necessity to answer questions repeatedly explained, he continued to give the same reply. He further gave answers in respect of exhibits that were shown to him. At yet another interview, the seventh, section 2 was invoked -- was also invoked and the questions and answers included the following two: 'Have you ever been in Joe Clarke's company?' Answer: 'No.' 'Are you still saying you do not know Joe Clarke?' 'I have nothing to say.' As with Mr Clarke, sections 18, 19, and 19(a) of the Criminal Justice Act were also invoked in interview. These questions were answered and the same does not form part of our deliberations."

The Court went on to state:-

> "In Mr. Palmer's case, he failed to answer fewer questions. But the same, such as his knowledge of the events of the 14th of July and his knowledge of Mr. Clarke were material to the aforesaid investigation. Equally in Mr. Palmer's case the section was read to him a number of times and was explained in ordinary language. The Court is satisfied that the said failures of each of the accused to answer the questions was wilful, deliberate and calculated. The Court is satisfied beyond doubt on the evidence that the section was explained to each of the accused on a number of occasions by the gardaí in the course of interview. And that independent legal advice was available to them. The Court is satisfied that each of the accused understood the section and the implications there of. The Court is satisfied that it is entitled to draw an inference that the accused in each of them was a member of the IRA from their failures to answer the questions. And in the context of all the evidence cannot reasonably find that there is any other inference to be drawn."

12. During the trial, a Detective Chief Superintendent gave "belief" evidence regarding the appellant's membership in an unlawful organisation.

13. In relation to the opinion of Chief Superintendent O'Donoghue regarding the appellant, the evidence was as follows:

> "Q. And if I could ask you in terms of your belief arising out of why Mr Palmer is in Court today?
>
> A. Judge, in respect of Derek Palmer I have a belief that on the 14th of July, 2011, within the state, Derek Palmer was a member of an unlawful organisation, namely the IRA, also known as the Irish Republican Army, also known as Óglaigh na hÉireann.
>
> Q. And what is your belief based on or founded upon?
>
> A. My belief in respect of Derek Palmer, Judge, is based on confidential information available to me as chief superintendant in charge of the Special Detective Unit.
>
> Q. And --?
>
> A. And is of course independent of any facts relating to this current investigation …."

14. In cross-examination, the Detective Chief Superintendent was asked questions in relation to the opinion which he had formed and given pursuant to s. 3(2) of the Offences Against the State Act 1972, that the accused were men were members of the proscribed organisation. He claimed privilege over the confidential information and materials which informed his opinion.

15. He was asked whether the material which he had seen, and upon which his opinion was based, had been shown to anyone on the prosecution's side outside of members of An Garda Síochána and he denied that there had been any such disclosure.

> "Q. In relation to that material, will you tell me the most recent document, dated document in that file or folder? Or is the answer the same?
>
> A. Judge, the position is that in respect of all details surrounding that confidential information available to me, I'm claiming privilege.
>
> Q. Can I ask you in relation to this file of documents; have you disclosed it to anybody else?
>
> A. I'm not sure, Judge, in respect of disclosure of what I'm asked.
>
> Q. All right, I'll try and refine the question in fairness to you, and I'll give you a specific example: has Mr Heneghan seen it?
>
> A. No, no. Sorry, I thought you were discussing from my point of view my clarification was in respect of members of An Garda Síochána; certain members of An Garda Síochána would have access to –
>
> Q. All right?
>
> A. -- the information, but not outside that.
>
> Q. All right. So, again, just in relation to that specific example, when I asked you has Mr Heneghan seen it, the answer is no?
>
> A. That's right, Judge.
>
> Q. And has Mr O'Donovan seen it?
>
> A. No, Judge.
>
> […] I have no further questions of the witness, Judge.
>
> and
>
> Well, did you have any interaction with the non-garda sources? Is that on the file?
>
> A. Judge, I'm slow to give any level of detail on the grounds that I've already outlined.
>
> Q. Yes?
>
> A. And that's -- I'm afraid that's probably the position I'm in at the moment.
>
> MR. JUSTICE BUTLER: Just to make things clear; you can claim privilege, but it doesn't stop the defence asking but if you're in difficulty, just do claim the privilege, and, if necessary, we'll rule on it. And if you –
>
> MR. DWYER: Okay.
>
> MR. JUSTICE BUTLER: -- both continue on that basis, we'll –
>
> MR. DWYER: All right.
>
> Q. So you're not in the position to advise the Court as to whether or not you, yourself, had any communication with non-garda sources; is that correct?
>
> A. Judge, I'd prefer not to disclose that level of detail.
>
> Q. All right, fine. Okay, grand. So can we take it then that you're not in a position, because you're claiming privilege, to enlighten the Court as to the reliability of the non-garda sources?
>
> A. Judge, I've indicated, my belief in respect of Mr Palmer is based on a variety of sources.
>
> Q. Yes?
>
> A. I'm satisfied in respect of the veracity of the information on which my belief is based.
>
> Q. Yes, but that doesn't -- in relation to confidential information, obviously, Chief Superintendent, you would have relied on that and used that on many occasions in the past, okay, as a guard and an officer going up through the ranks; isn't that correct? For example, in order to obtain a warrant?
>
> A. Yes, Judge, yes.
>
> Q. Okay. And as I understand it, unlike the position with respect to, for example, a warrant, where you would be able to tell the Court that the confidential information was coming from a reliable source, you are claiming privilege now to the extent that you will not enlighten the Court as to the reliability of the non-garda sources; isn't that so?
>
> A. That's not the position at all, Judge. I have indicated a belief I have; I've indicated that it's a belief based on confidential information to which I am satisfied the veracity of which. And -- and, again, I would suggest, Judge, that I can't divulge a level of detail for a load of reasons around the sources to which I'm relying.

> Q. And it appears to be the case, I might be wrong, is it, that you were, in fact, reviewing the interaction between non-garda sources and garda sources; is that correct; in order to come up with an opinion?
>
> A. Judge, I'm relying on a range of sources. Non-garda sources has been introduced, which I've confirmed contributes to the confidential information I have but it's far from being the sole source or sources of information on which the belief is based."

16. An objection was raised, arising out of this evidence, that none of the safeguards which should be in place, in terms of independent scrutiny or disclosure, were complied with and that there had been no assessment of the reliability of the sources, or the quality of the intelligence which they had supplied. Counsel for Mr. Clarke argued:

> "And I respectfully submit that while a witness is entitled to claim privilege on material, the overriding obligation in this jurisdiction in relation to that question, is on the prosecutor to consider that material herself, by which I mean the Director of Public Prosecutions, so that that claim can be stood over and that questions of whether or not some of the material might be disclosed or whether questions in relation to aspects of the innocence at stake exception and all of those matters might be considered by an independent prosecutor who can assure the defence in the first instance and the Court in the second instance, that the claim for privilege is properly made. And I understand that that is the first and primary obligation on a responsible prosecution service in relation to a question of this type".

17. The Court ruled on the issue as follows:

> "Counsel for each of the accused indicated that they were not impugning the bone fides of Chief Superintendent in giving his evidence. Mr. Gillane has articulated very skilfully an argument which is not been considered by the courts in the past. This relates to the opinion evidence of the Chief Superintendent and the fact that the confidential information that he relies upon was not shared with the prosecutor. And it is incumbent upon the prosecutor herself to consider that material. We can find no basis for what would, in our view, amount to an exercise in setting down new procedures to be followed by the prosecution. The Court is very conscious of the fact that where confidential information is relied upon, and there is a claim of privilege, the accused is not nor or his legal advisers in a position to challenge that information in anyway. We must weigh the fact that although neither of the accused gave evidence in relation to the allegation as was their right, they did consistently deny member -- deny membership during the course of interviews -- of the interviews referred to above. In the circumstances, the Court will not in this case proceed on the basis of that belief alone in the absence of some form of independent corroboration. Although the Chief Superintendent was in charge of the Special Detective Unit, he was not in de facto command of the operation and was therefore at some remove therefrom."

Grounds of Appeal

18. While written submissions were filed addressing numerous grounds of appeal, when the matter came on for hearing before this Court, the appellant distilled those grounds to the following.

Ground No. 1

> The learned Trial Judges erred in allowing into evidence and/or in giving weight to the opinion evidence of Detective Chief Superintendent O'Donoghue regarding Membership, where the Director of Public Prosecutions had not been given access to the material upon which the opinion was based and therefore had no opportunity to assess the reliability of that evidence or the suitability of the claim of privilege over it. Further or in the alternative, this evidence should not have been admitted without being subject to independent scrutiny and confirmation.

Ground No. 2

> The learned Trial Judges erred in law and in their assessment of the facts in allowing into evidence and/or giving weight to the opinion evidence of Detective Chief Superintendent O'Donoghue regarding membership of an illegal organisation when the Chief Superintendent declined to provide any information or detail as to the basis upon which his opinion was arrived at.

Ground No. 4 and Ground No. 5

> The learned Trial Judges erred in determining that the appellant had failed to answer questions material to his membership of the Irish Republican Army in the answers which he gave under caution, prior to the invocation of s. 2 of the Offences Against the State (Amendment) Act 1998

and

> The learned Trial Judges erred in law and on the facts in assessing that the appellant had failed to answer questions material to his membership of the Irish Republican Army, within the meaning of s. 2 of the Offences Against the State (Amendment) Act 1998, and in weighing this as evidence of his guilt.

Appellant's Submissions

19. On the question of the admission of the "belief" evidence, the appellant submitted that while a witness is entitled to claim privilege on material, there is an overriding obligation on the prosecutor to consider that material so that that claim can be stood over. There must be an assessment of the reliability of the sources, or the quality of the intelligence which have been supplied. The appellant cited the 'Guidelines for Prosecutors (November 2010)' in support of this contention.

20. It was argued that the involvement of the Office of the Director of Public Prosecutions is a valuable safeguard which ensures real organisational independence in the assessment of such evidence, and not merely personal or divisional independence which is provided by the opinion of a Chief Superintendent. This safeguard assuages concerns that would otherwise exist in relation to what is essentially an unverifiable opinion offered by one Member of An Garda Síochána (though a senior Member and presumed to be acting *bona fides*). It protects against abuse, error and simple misjudgement - any one of which could, in the wrong circumstances, lead to a

potentially catastrophic miscarriage of justice. The appellant relied on *DPP v Special Criminal Court/Ward* [1999] 1 I.R. 60 in this regard.

21. Since no safeguards such as independent scrutiny or disclosure were complied with in this case, the evidence should not have been admitted. Furthermore, it was argued that the ruling of the learned trial judges did not correctly or fully address the issue of admissibility of this evidence (absent it being considered by the Director), as opposed to the weight to be attached to it, once it was deemed admissible.

22. On the question of the admissibility and the weight to attach to the opinion evidence of Detective Chief Superintendent O'Donoghue when he has declined to provide any information or detail as to the basis upon which his opinion was arrived at, the applicant accepts that such evidence is not unconstitutional per se, see *The People (Director of Public Prosecutions) v Donnelly McGarrigle and Murphy* [2012] IECCA 78 (Unreported, Court of Criminal Appeal, O'Donnell J, 30th July 2012). However, it was submitted that where the verdict is based on such evidence to a "decisive extent" a different approach is necessary. The European case of *Rowe and Davis v. the United Kingdom* [GC] (no. 28901/95, ECHR 2000-II) found the UK were in breach of Article 6 ECHR after the domestic case seemed to place some importance in the role of an ethical prosecution disclosure in ameliorating the dangers of receiving the testimony of untested witnesses.

23. Of course, in the Irish context and on the facts, a more immediately relevant decision is that of the same Court in *Donohoe v. Ireland* (Application no. 19165/08 given in Strasbourg on 13th December 2013). Though the convicted appellant was unsuccessful in *Donohue*, there is an important factual distinction between the cases: in Mr. Donohue's trial, the Court of Criminal Appeal had actually conducted a review of the Garda files to ensure fairness and there was no suggestion that the usual supervision of the Director of Public Prosecutions had been foregone. In the present case, neither of these safeguards were invoked, though the appellant must of course accept that the first of the two would have been available as a matter of course, though to avail of this procedure would have involved the Court of trial reviewing unseen material and was not preferred.

24. On the question of adverse inferences, it was submitted that when a Court (or jury) is assessing whether there has been a failure to answer a given question, in the context of a series of seven separate interviews where at least three substantially different legal cautions pertained (the normal caution that there is a right to silence, the s. 2 membership caution, and finally the s. 18, s.19, and s.19A inferences caution), some considerable latitude must be given to answers which express weariness at the repetitiveness of this process. It is respectfully submitted that this was precisely the situation which pertained in the appellant's case and it would not seem that this aspect of the s. 2 inferences was addressed by the Court of trial in its decision.

25. It was argued that the interaction of the various inference provisions and ensuring overall procedural fairness remains a matter for the courts, and that it cannot have been the intention of the Legislature that a few isolated incidents of impatience or ill-temper, occurring as result of sitting through an ordeal of the same questions being asked over and over under warnings which are of subtly different legal import, would have the consequence of a most serious inference of guilt falling on an accused man.

Respondent's Submissions

26. The respondent submitted that the Director of Public Prosecutions has no role in assessing the evidence of a Chief Superintendent. Section 3(2) of the Offences Against the State Act (Amendment) Act, 1972, as amended by s. 4 of the Offences Against The State (Amendment) Act 1998 provides as follows:-

> "3(2)Where an officer of the Garda Siochana, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was them such a member."

27. In *The People (Director of Public Prosecutions) v. Donnelly, McGarrigle and Murphy* [2012] IECCA 78 O'Donnell J. stated as follows:-

> "The section makes the belief of a chief superintendent evidence that an accused was at a material time a member of an unlawful organisation. As the cases show, it does not make that evidence conclusive or preclude it from being challenged, tested or contradicted. For present purposes, it is important however, that it is the belief of the Chief Superintendent which is evidence, and not the material upon which that belief is based. Thus, the section does not involve the giving of hearsay evidence where the relevant evidence is that of a person who is not available in court for cross-examination. Nor is it akin to the giving of evidence by an anonymous witness. Here, the relevant evidence is the belief of a Chief Superintendent, who is identified and gives his or her evidence in open court. It is to be anticipated that the belief of such a senior officer in the garda will be based on a variety of sources: technological, electronic, and human, including information supplied by informants. But even in cases where the evidence of the Chief Superintendent is based upon the direct statements provided to him or her by an informant or informants, the court is not asked to act upon the hearsay statements of such informants: rather it is the belief of the Chief Superintendent based upon such informants which is the evidence. The formation of that belief would normally involve the application of the Chief Superintendent of his or her experience in dealing with informants and in dealing with illegal organisations and where relevant, in assessing the significance and value of diverse pieces of information and intelligence. Accordingly, where evidence is given pursuant to s.3(2) it is not the case that the court is asked to act upon either the evidence of anonymous witnesses or witnesses who are out of court and not available for cross-examination. Accordingly, any analysis based upon Doorson and Al-Khawaja should take account of this structural distinction."

28. The section permits in evidence the evidence of a Chief Superintendent as to his belief regarding the conduct or activities of a person when charged with a membership offence. There is no requirement in the statute that there would be any add-on that the opinion should be verified, checked or analysed by the Director of Public Prosecutions or anyone else. It was submitted that, in fact, it would be quite improper if the Director of Public Prosecutions took it upon herself to analyse evidence that is to be given by a witness. The Director of Public Prosecutions' function and role is not to analyse, review and inform evidence to be given in relation to any witness, and it was submitted that that applies to the belief evidence of a Chief Superintendent pursuant to s. 3(2) of the Offence Against the State Act 1972 as amended. That would be usurping the function of the trial court. The statute requires that it is the Chief Superintendent who forms the belief and gives that evidence to a trial Court.

29. In the course of the analysis of s. 3(2), the Superior Courts have stated that regard does have to be had to the fact that it is a superior Member of An Garda Síochána who gives this evidence.

30. In *The People (Director of Public Prosecutions) v. Cull* (1980) 2 Frewen 36, it was stated:-

> "It seems probable that an officer of the rank of Chief Superintendent in the Garda Siochana would have available to him information from many sources of enquiry unfettered by the organisational structure of the Garda Siochana. It would seem probable also that the Legislature would expect an officer of that rank to reach, in a responsible manner, an opinion in accordance with principles of justice in relation to the guilt of a person in whose favour there is a presumption of innocence. If the opinion of a Chief Superintendent is founded upon or supported by facts capable of being established by evidence in relation to statements or conduct of the accused person, such evidence should be given to the court of trial."

31. This passage was quoted with approval by the Supreme Court in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. at p. 135 by Fennelly J. where he went on to say:-

> "Put otherwise, a court of trial is entitled to assume that an officer of the rank of Chief Superintendent will give evidence of his belief that an accused person is a member of an unlawful organisation only when he has satisfied himself of this fact beyond reasonable doubt. Hence, even when that is the only evidence, a court is entitled to act on it, in the absence of some challenge or question sufficient to raise such a doubt."

32. The section does not refer to a Chief Superintendent's opinion being reviewed by the Director of Public Prosecutions. Any review by The Director of Public Prosecutions of the Chief Superintendent's belief would not be admissible as it is his belief that is provided for by the legislation. The information that is available to the Chief Superintendent may not be such as would be intelligible on its own, per se, and any examination of such material by the Director of Public Prosecutions could, in any event, be a pointless exercise. The Court obviously then has to weigh that evidence. The Chief Superintendent's belief is evidence like any other evidence, but that said, it is evidence from a superior officer who obviously has regard to the serious nature of the opinion he is expressing, the fact that the courts have indeed referred to the fact that it is a very important and careful consideration that the Chief Superintendent must apply in coming to the opinion that he has come to. The Court of trial assesses the evidence and decides what weight should to attached to the evidence. The Chief Superintendent's belief is informed by information he has received but obviously it is a belief that he holds on foot of his and only his consideration of that information. It was submitted a Chief Superintendent's evidence is a piece of admissible evidence borne from his considered opinion or belief expressed to the court of trial and then to be assessed and weighed by that Court of trial.

33. In *The People (Director of Public Prosecutions) v. Special Criminal Court/Ward* [1999] 1 I.R. 60, O'Flaherty J. at p. 87 stated as follows: -

> "Counsel for the prosecution must have a role in disclosing all relevant material to the defence but counsel must also be in a position to take a stance on the matter of informer privilege which, in turn, is subject to the innocence at stake exception. It is a position , to adopt McLachlin J.'s phrase speaking for the Supreme Court of Canada in *R. v. Leipert* [1997] 2 L.R.C. 260 at p. 270 that the right to disclosure is not to trump privilege. They must both be accommodated and prosecution counsel has a key role in this concord. However, when it comes to a stage where there is any doubt in the matter, it will be essential to get the ruling of the trial judge."

34. In the *Special Criminal Court/Ward case*, O'Flaherty J. agreed with the judgment of Carney J. in the High Court that when the issue of privilege is raised, the Court of trial can review the material. It was submitted that it was open for the appellant to make a request of the Special Criminal Court to review the information that was in the possession of the Chief Superintendent to ascertain the veracity of same. He did not do so.

35. It was submitted that the Court made no error in making this finding and that it would be quite improper that the Director of Public Prosecutions would remotely involve herself in relation to an opinion, because the people who have to view this opinion and determine the weight that should be applied to it are the members of the Court of trial.

36. On the question of adverse inferences, it was submitted that these grounds rest on the facts of the case and that the Court of trial was entitled, as it did, to reach the conclusion that it did, after assessing the evidence and there was no error in fact or in law in the judgment of the Court.

Discussion

Ground 1

37. The first point raised by the appellant is that the claim to privilege made by Detective Chief Superintendent O'Donoghue should not have been admitted in evidence, or alternatively, should not have been given any weight because the material on which the belief of the Chief Superintendent was based had not been put before the Director of Public Prosecutions.

38. The Chief Superintendent had said in evidence that his belief in respect of Derek Palmer was based on confidential information available to him, as Chief Superintendent in charge of the Special Detective Unit of An Garda Síochána. He refused to answer any questions about the sources of his information, claiming privilege.

39. The Court held that it would not, in this case, proceed on the evidence of the Chief Superintendent's belief alone in the absence of some form of independent corroboration. The Court found such corroboration in independent evidence of the accused's failure to answer questions, as the Court found, within the meaning of s. 2 of the 1998 Act.

40. The first point to emphasise is that the evidence is of the belief of the Chief Superintendent that the accused is, or was at the relevant time, a member of an unlawful organisation. It is not hearsay evidence as to what other people have said. The belief of this senior officer is itself the evidence that is before the Court. That belief is, of course, grounded in information that the Officer has obtained from a variety of sources and he will be expected to have brought his experience, training and judgment to bear on the evaluation of material that he has had available to him. In this case, it was the Head of the Special Detective Unit who gave the belief evidence.

41. Section 3(2) of the 1998 Act, cited above, is clear and unequivocal. It was considered and analysed in detail by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Donnelly, McGarrigle and Murphy*. The statement of the Chief Superintendent that he believes that the accused was, at a material time, a member of an unlawful organisation is evidence that the person was then such a member.

42. If any doubt remained as to the applicability of *The People (Director of Public Prosecutions) v. Donnelly, McGarrigle and Murphy*, it has been removed by the recent Supreme Court decision in *The People (Director of Public Prosecutions) v. Connolly* [2015] IESC 40.

43. There is no provision in the sub-section for consideration of the material on which the Officer's belief is based by the Director of Public Prosecutions or another agency. It is not the belief of the Director of Public Prosecutions. Neither is it the Chief Superintendent's belief as approved or authorised or evaluated by the Director. The Director's functions in regard to prosecutions do not include consideration of the confidential material on which the Chief Superintendent's belief is based.

44. This ground of appeal and the submissions supporting it suffer from the misunderstanding that the evidence before the Court is of the Officer passing on hearsay information. The distinction may at first sight appear to be a fine one between a belief based on confidential information from a variety of sources, on one hand, and reporting information provided by others, on the other hand. However, as the case of *Donnelly & Ors* makes clear, the distinction is an important one for a proper understanding of the section and how it operates. The Court in that case also highlighted the evaluative role of the officer giving the evidence and the fact that it is a person of very senior rank in the Garda Síochána who has particular and relevant experience.

45. The Court accepts the submissions of the Director on this issue and rejects this ground of appeal.

46. Ground 2 falls for the same reasons.

Grounds 4 and 5
47. These grounds contest the judgment of the Special Criminal Court insofar as it held that Mr. Palmer had failed to answer questions material to his membership of the IRA prior to the invocation of s. 2 of the 1998 Act, and that the Court erred in assessing such failure as it found and in weighing that as evidence of guilt.

48. The Special Criminal Court found that Mr. Palmer did not answer questions that were material to the investigation of his alleged membership of the IRA and that his failure was wilful, deliberate and calculated. The Court was satisfied beyond doubt that the section was explained to him on a number of occasions and that he had access to independent legal advice. The Court concluded that he understood the section and its implications. The Court was satisfied to draw the inference that he was a member of the IRA from his failure to answer the questions. It said that in the context of all the evidence, it could not reasonably find that there was any other inference to be drawn.

49. The appellant submits that the context of this finding is material to the question of his guilt by reason of refusal to answer questions. Three substantially different legal cautions were relevant to the circumstances in which the accused found himself. First, there was the normal legal caution in accordance with the judges' rules. Secondly, there was the s. 2 membership caution. Thirdly, there were the inferences that had to be outlined and the caution attaching thereto. It followed that some considerable latitude should have been allowed. It was not surprising, in the circumstances, that the accused might express weariness.

50. The respondent submitted that the Special Criminal Court was entitled to arrive at the conclusion that it did. It considered the questions in detail and held that no other conclusion was open to it. It was, accordingly, driven to the conclusion that the accused had wilfully refused to answer the questions and that the court must draw the conclusion as to membership.

51. This Court is of the view that the Special Criminal Court considered the questioning of the accused carefully and arrived at a conclusion which is unchallengeable on appeal. There is no basis for suggesting that the Court was mistaken in its assessment and this Court finds no basis on which it would be entitled to interfere with the considered judgment of the Special Criminal Court on this matter.

52. The Court, accordingly, rejects these grounds of appeal also.

53. This Court notes that the Special Criminal Court declared that it had taken all the evidence into account in reaching its decision. The evidence outlined at the beginning of this judgment afforded cogent corroboration of the charge of membership of an unlawful organisation. The conduct observed and described by the witnesses was consistent with, and in many respects, characteristic of activity of a paramilitary nature, and taking account of the accused's participation in that activity, the Special Criminal Court would have been entitled to take that evidence into account in finding that it corroborated the other evidence.

Conclusion
54. The appeal against conviction is accordingly dismissed. The Court will proceed to hear submissions in regard to the sentence imposed.