Neutral Citation: [2017] IEHC 618

THE HIGH COURT

[2016 No. 1185 S.S.]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 AND 40.4.3 OF THE CONSTITUTION

BETWEEN

M. H.

APPLICANT

AND

GOVERNOR OF CORK PRISON

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of July, 2017

1. These proceedings are a constitutional challenge to s. 2A of the Bail Act 1997, whereby the applicant asserts that he is being held on foot of an unconstitutional provision of the said Act.

Background

2. On 27th May, 2016, the applicant was charged before Limerick District Court with the alleged assault of a third party causing him harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, and the false imprisonment of the said third party contrary to s. 15 of the same Act.

3. The case the prosecution seeks to mount against the applicant is that he lured the third party to a house at a named address in Limerick, whereupon the third party was set upon by a number of assailants, including the applicant, who were wearing white protection clothing. The alleged assault against the third party was that a gun was put to his head and he was asked if he wished to be shot in the eye or the ear with the assailants stating that they were from the IRA. It is alleged that they also made a demand of money from the third party. It is alleged that the third party was then shot in both feet by a nail gun. It will be alleged that two of the assailants told a third assailant to keep the third party in the house while they made good their escape. After some minutes, the third party managed to get out of the house. He attended University Hospital Limerick, where a steel nail was surgically removed from each foot. It will be the prosecution's case that the applicant was one of the males wearing the white forensic suits in possession of a nail gun and that he was effectively a central figure in the alleged assault of 14th September, 2015.

4. The applicant was refused bail in the District Court on 27th May, 2016, and subsequently brought an application for High Court bail, which was first listed on 16th June, 2016. On that date, the applicant was furnished with a written notice of objection and the matter was adjourned to 23rd June, 2016.

5. On 23rd June, 2016, the application for bail proceeded in the High Court sitting at Cloverhill before the President of the High Court and the prosecution called evidence from Detective Garda Pat Whelan, Sergeant Brian O'Connor and from Chief Superintendant David Sheahan in opposition to the bail application on the grounds established under *The People (Attorney General) v. O'Callaghan* [1966] IR 501 and pursuant to s. 2 of the Bail Act 1997.

6. Chief Superintendant Sheahan gave evidence that the refusal of bail was absolutely necessary to prevent commission by the applicant of a serious offence. As his evidence is central to the issues in the within proceedings, it is apposite to set it out in some detail.

7. He commenced his evidence by stating that he had approximately 33 years service in the Gardaí. He was promoted to Superintendent in 2004, and in 2009, promoted to Chief Superintendant. He stated that for the six and a half years up to the hearing, he was the Division Officer in charge in Limerick which included Limerick City and County. He testified that he had responsibility for all criminal activity, in particular organised criminal activity, and that his actions in the six and a half years in charge related to trying to quell the level of serious ongoing criminal activity in Limerick. In his capacity as Chief Superintendant, he received intelligence briefings from both Crime and Security Division and his senior management team in Limerick. He testified that prior to the alleged incident on 14th September, 2015, he received confidential information from Garda HQ in respect of certain players in a new grouping who were arriving in Limerick City, and to the possibility of their being involved in criminal activity in the city. Additionally, a number of active patrols and searches had been carried out in key areas in the city based on the intelligence received up to that point. The applicant was known to Chief Superintendant Sheahan for a number of years as an operator of a business which previously was involved in carrying out refurbishment works to local authority housing under the Limerick Regeneration Scheme. The Chief Superintendant's concerns were that literally overnight, the applicant seemed to recruit the services of persons well known to the Gardaí locally and nationally as dissident republicans who had no connection to Limerick City and who were suspected of targeting people in extortion and protection money. Chief Superintendant Sheahan testified that the individuals who arrived in Limerick City appeared to come under the offer of employment from the applicant although in reality they were working as enforcers in a parallel organisation operated by the applicant. It was his belief that this gang had access to assault rifles and had the capacity to cause loss of life and, if necessary, prevent witnesses from giving evidence. It was his belief that the applicant was a pivotal figure in facilitating these dissident republicans. While he did not believe the applicant had the capacity of causing the level of fear within the community that those individuals could engender, he was certainly in close association and very closely aligned with his co-accused in respect of the 14th September, 2015, incident who was a known dissident republican who had moved to Limerick in mid-2015. The applicant had assisted this individual by providing him with housing and vehicles, including the vehicle being driven on the day of the alleged incident. Chief Superintendant Sheahan also stated that he was aware that this co-accused had been charged with serious offences in 2007 but that those charges had not been able to proceed before the Special Criminal Court because witnesses would not give evidence. It was Chief Superintendant Sheahan's belief from information communicated to him that the failure of the witnesses in those cases to give evidence was due to intimidation. He "firmly" believed that the applicant, if granted bail, would orchestrate the commission of serious offences including the intimidation of witnesses "by putting them in fear, causing them harm, possibly leading to loss of life in order to successfully intimidate witnesses in this particular case".

8. Chief Superintendant Sheahan also outlined that following a bail hearing in the High Court in respect of the applicant's co-accused (the person he had assisted with accommodation and vehicles following his arrival in the city), a named witness in the case had been approached and interrogated by the co-accused and it was suggested to the witness that he go to a solicitor to retract any information he may have disclosed to the Gardaí in respect of the incident of 14th September, 2015.

9. In response to questions as to what level he had satisfied himself that his evidence was necessary to give, Chief Superintendant Sheahan testified that his belief was that the witness referred to in his evidence "will be interfered with" which imposed a significant difficulty.

10. In cross examination, it was put to Chief Superintendant Sheahan that the evidence he had tendered to the court was not within his own personal remit but rather information which had been relayed to him from investigating Gardaí, from intelligence and from various sources, to which the Chief Superintendant replied:-

> "I have six and a half years at the rank of Chief Superintendant in Limerick. I have to say to take the step, come to the High Court to object to bail in a 2(a) application is not done on a whim…I would like to think that during the course of my tenure in Limerick, that I have been very fair to all witnesses in the context of that."

11. As to when his concern in relation to the s. 2A objection to bail for the applicant first arose, he stated that from his perspective, it arose on 14th September, 2015.

12. At the conclusion of the prosecution evidence the matter was further adjourned at the request of the prosecution to 5th July, 2016, for further inquiries in relation to the tendering of the witness (alleged to have been intimidated by individuals acting for the applicant's co accused) in respect of whom hearsay evidence was led in the course of the hearing.

13. On 5th July, 2016, the application was again adjourned so that the prosecution witness could be served with a subpoena by the applicant and for the calling of any defence witnesses and submissions.

14. On 27th July, 2016, the prosecution withdrew their objection to bail under the O'Callaghan grounds. The applicant's mother was then called on behalf of the applicant and proposed herself a surety for bail.

15. Submissions were then made by counsel on both sides. Counsel for the prosecution submitted that there was a strong case against the applicant which began with eye witness accounts that placed him wearing a form of boiler suit in the company of people who lured the third party to the house where he was assaulted. There was evidence that a vehicle the applicant had used was placed at the scene of the alleged incident and that there was CCTV footage which showed the applicant dropping off his co-accused after the incident. Counsel also alluded to the evidence of Chief Superintendant Sheahan which, it was submitted, was borne out of his knowledge of the investigation itself and from information from intelligence sources that was corroborative and credible evidence of the applicant's recruitment of people believed and known to be involved in criminality, and of his provision of cars and accommodation to his co-accused. Counsel also referred to Chief Superintendant Sheahan's awareness of the co-accused's attempt to contact a witness in an attempt to get him to retract information given to the Gardaí. It was submitted that that evidence of Chief Superintendant Sheahan was admissible for the limited purpose of allowing the court to gauge the weight to be placed on Chief Superintendant Sheahan's evidence pursuant to s. 2A and in aid of the court forming a view of the cogency of the information which Chief Superintendant Sheahan brought to bear in forming his opinion.

16. In the course of his submissions, counsel for the applicant stressed the presumption of innocence which the applicant enjoyed and the presumption that he was entitled to bail, which was being sought to be displaced. It was submitted that the Court should limit its view to effectively what evidence was proffered against the applicant in respect of the charges. It was further submitted that the evidence in relation to alleged intimidation of a named witness had to be disregarded in light of the dropping of the *O'Callaghan* objection to bail save to the extent that it may have informed the opinion of Chief Superintendant Sheahan. It was also argued that witnesses who allegedly put the applicant at the scene of the incident were unidentified to the applicant which bordered on the "kafkesque" in circumstances where the applicant was not able to cross-examine them. The court was also asked to discount evidence from Sergeant O'Connor of a threatening phone call to the injured third party in the absence of it being established that the applicant was connected to it and it was submitted that the entirety of Sergeant O'Connor's evidence amounted to an *O'Callaghan* objection.

17. Counsel for the applicant then turned to what he characterised as the main objection to bail, namely the evidence of Chief Superintendant Sheahan. Counsel objected to s. 2A evidence if it was to be construed in a fashion so as to give rise to a refusal of bail and the rebuttal of the presumption of bail in favour of the applicant. Counsel challenged the evidence given by Chief Superintendant Sheahan as founded on hearsay and in respect of which privilege was claimed. It was submitted there was nothing in s. 2A to affect the rule against hearsay. Counsel stated that many of the sources of the information tendered by Chief Superintendant Sheahan were Garda operatives including those of the rank of Chief Superintendant or higher. It was submitted that there was nothing to prevent those individuals themselves giving evidence. Counsel also submitted that there was no constitutional basis for the claim of privilege which was asserted over the evidence given by the Chief Superintendant. In those circumstances there was no constitutional basis for the court to grant a determination in relation to evidence which was based on privileged information and in respect of which no cross-examination was possible. In that regard, counsel referred to the decision of Mac Eochaidh J. in *McDonald v. Governor of Cloverhill Prison [*2016] IEHC 292. Counsel contended that what the court was left with was an applicant who had no previous convictions, who had never infringed bail conditions and who was a pillar of the community. It was submitted that there was no adequate evidential basis for the court to constitutionally construe s.2A such as to determine that Chief Superintendent Sheahan's opinion that the refusal of bail was reasonably necessary outweighed the presumptions which attached to the applicant.

18. Kelly P. then gave his ruling on the bail application. He firstly recounted the circumstances of the alleged assault and false imprisonment and stated that it was clear from the evidence he had heard that the applicant was part of a common or joint enterprise on 14th September, 2015 which lured the third party to the premises in which he was assaulted and falsely imprisoned. He referred to the evidence given against the applicant in respect of the charges including evidence of CCTV footage of a car (which had been leased by the applicant's company) being driven by the applicant close to the house where the alleged assault took place and footage of the applicant driving into the area in question and later dropping off his co-accused. He alluded to GPS tracker devices putting the car at the scene of the alleged incident at the relevant time. Kelly P. discounted certain ballistic and forensic evidence and also the evidence concerning the witness in respect of whom it was alleged was being subject to intimidation as it was not possible to produce him to give evidence as had been requested by the applicant. Kelly P. noted that the applicant had no previous convictions and no history of bail infringements. He accepted that the applicant had done much good in his community and had displayed courage in giving evidence in the case of *Director of Public Prosecutions v. Dundon* which had been a case "of no little controversy". He

accepted that the applicant had the presumption of innocence in his favour and also had a presumption in favour of bail being granted to him.

19. The learned President then went to on state:

> "What, therefore, is the objection to bail? The sole objection to bail is raised by reference to section 2 of the Bail Act 1997 as amended. Section 2, subsection 1 says; 'Where an application for bail is made by a person charged with a serious offence, a Court may refuse the application if the Court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.' Subsection 2 provides that:
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> 'in exercising the jurisdiction conferred under subsection 1, a Court shall take into account or may where necessary receive evidence or submissions concerning …' and it then lists a number of matters only some of which have a relevance here. The first matter is: 'The nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction.' Well, from the brief description which I have given which is taken from the evidence which was led before me, these offences are undoubtedly ones of very great seriousness and if a conviction results, it would be impossible to imagine other than a substantial custodial sentence being imposed. Second, and this is at sub head (b) of s. 2.2: 'The nature and degree of seriousness of the offence apprehended and the sentence likely to [be] imposed on conviction.' And I'll come to consider that in the context of certain evidence which I will address in a few moments in the course of this ruling. The third matter for consideration is the nature and strength of the evidence in support of the charge and I have given an outline of that insofar as it affects the applicant for bail here. The next matter is one which is of no consequence insofar as (sic) this applicant is concerned because it entitles the Court to have regard to any conviction of the accused person for an offence committed while he or she was on bail and that simply doesn't apply. Neither does the next subheading which is: 'Any previous convictions of the accused person including any conviction the subject of an appeal to a court'. And that has no application either. And neither has the following subsection which provides for the consideration of any other offence in respect of which the accused person is charged and is awaiting trial. Finally, the last matter that is mentioned is the addiction to a controlled drug which may afflict the applicant, and that, likewise, has no application here.

20. Kelly P. continued:

> "This is a case in which evidence was led from a Chief Superintendent of the Guards and that is permitted having regard to the terms of section [2A] of the Bail Act which was brought about as a result of a section of the Criminal Justice Act 2007 which interposed [s. 2A] into section 2 of the Act of 1997. It reads: Where a [member] of the Garda Síochána not below the rank of Chief Superintendent in giving evidence in proceedings under section 2 states that he or she believes the refusal of the application is reasonably necessary to prevent the commission of a serious offence by that person the statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose.' That evidence pursuant to the permissive provisions of section [2A] was led from Chief Superintendent Sheahan… He gave evidence of his belief, the belief being expressed in accordance with what is permitted under section [2A], namely that in his view, the refusal of this application is reasonably necessary to prevent the commission of a serious offence by [the applicant] I am satisfied on a consideration of the opinion which he expressed that it was one which was formed reasonably and responsibly. It was not formed or given in a capricious or superficial way, it was balanced. I accept that he is, as a matter of his own practice, reluctant to give such evidence as he said and I am satisfied he would only do so, as the responsible divisional officer, if he felt it were appropriate and justified that he should do so. The evidence which he gave was unequivocal as to his belief that the refusal of bail was reasonably necessary in order to prevent the commission of a serious offence by [the applicant]. He told me of a new grouping of persons involved in organised crime that has emerged in recent times in Limerick. Many of the persons involved here have no previous criminal history and it is part of dissident republican activity. He described [the applicant] [as] a pivotal figure in facilitating maverick dissident republican activities. His belief in that regard was formed by reference to first of all his own knowledge as a very experienced divisional officer for Limerick City and County. Secondly it was formed by reference to information which he receives on an ongoing basis from [his] own officers, who are on the ground and under his direct command, and their knowledge about organised crime in the areas that they police. He was also apprised of information and intelligence forthcoming from Crime and Security branch and I am satisfied that having being so apprised, he appraised all of this in forming the belief which he expressed to me. It is of course the case that in respect of some of the information which he relied upon, a claim of privilege was maintained in respect of it. That being so, there was of course no ability to cross-examine on that element of his evidence, and I take that into account in the weight that I give to his evidence. Much of the cross-examination was an endeavour to try an devalue his evidence by suggesting that he was merely repeating information which he had received without any real evaluation of that taking place on his part. I do not accept that that was so. I believe that he gave evidence responsibly and with full knowledge of the seriousness of the material that he was dealing with and the consequences of the evidence if it were accepted by the Court for [the applicant] and his liberty. However, I have come to conclusion that the Superintendent's view was one which was responsibly arrived at, that it was formed with care and expressed with caution. I do not regard myself as in any way bound to accept his evidence and if I thought that it was given without due care or attention or that it suffered from any other deficit, then I would reject it. But that is not the case here.
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> So, weighing all of this in the balance I have on the one hand [the applicant] with his clear record to date, with his considerable involvement in community activities which have been well set out in the documentary material that I have had the opportunity of reading since it was handed in this morning, the evidence of his own family circumstances, the courage which he displayed on a former occasion when he gave evidence for the DPP, and on the other side of the balance I have the Chief Superintendent's statement of belief. Taking into account all that has been said and can be said in favour of [the applicant], and it is considerable, I nonetheless have come to the conclusion that having regard to the evidence that I've had from the Chief Superintendent and in circumstances where the only evidence I have had from [the applicant] is the affidavit sworn by him which is fairly perfunctory form, that I have come to the conclusion that in the circumstances, the Chief Superintendent's view is one which prevails upon me. And I believe that having regard to that which I have attempted to express in short form in the course of [this] ruling I have come to the conclusion that in this case, it is reasonably necessary to prevent the commission of a serious offence by [the applicant] by refusing bail and that's the order which I make."

21. A notice of appeal was filed against the refusal of bail on 5th August, 2016 with the applicant expressly reserving the right to challenge the constitutionality of s. 2 A of the 1997 Act.

22. On 26th August, 2016, the Director of Public Prosecutions (DPP) filed a response to the appeal in which an objection was

maintained to the challenge to the constitutionality of the Act in the appeal proceedings.

23. On 26th October, 2016, the Book of Evidence was served on the applicant in Limerick District Court and he was sent forward for trial to the Special Criminal Court. At the time of the hearing of the within application, the applicant's trial was due to come on for hearing in March 2017.

24. The within proceedings commenced on 2nd November, 2016, by way of an enquiry into the legality of the applicant's detention pursuant to Article 40 of the Constitution. It was indicated by Counsel for the applicant that it was proposed to invoke Article 40.4.3 for the purposes of challenging the constitutionality of s. 2 and s. 2 A of the Bail Act, 1997. Mac Eochaidh J. opened an enquiry and directed that the respondent should certify the grounds of the applicant's detention.

25. Following the commencement of the within proceedings and before the matter came on for hearing, on 31st January, 2017, the Court of Appeal rendered its decision in the case of see *CMcD. v. Ireland and the Attorney General* [2017] IECA 81. In the course of the within hearing, counsel for the applicant advised the Court that following upon the decision of the Court of Appeal in *CMcD*, certain aspects of the within challenge were not being pursued as they had been addressed by Birmingham J. in *CMcD*. Counsel submitted however that a significant issue in *CMcD* was not decided by the Court of Appeal and had been expressly left over. Accordingly, the applicant was maintaining his challenge to the constitutionality of s. 2A of the 1997 Act because it allows for the refusal of bail that was based wholly or decisively on the belief evidence of Chief Superintendent Sheehan which concerned matters that he himself had not witnessed or observed.

26. Before considering the matters in issue in the within proceedings, it is apposite at this juncture to set out the relevant provisions of the 1997 Act.

27. Section 2 subs. 1 and subs. 2, as amended provide:

> "2.—(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.
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> (2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning—
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> (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,
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> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,
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> (c) the nature and strength of the evidence in support of the charge,
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> (d) any conviction of the accused person for an offence committed while he or she was on bail,
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> (e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,
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> (f) any other offence in respect of which the accused person is charged and is awaiting trial,
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> and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977".

28. Section 2A(i) of the 1997 Act (as inserted by s.7 of the Criminal Justice Act 2007) provides:

> "Where a member of an Garda Síochána not below the rank of Chief Superintendent, in giving evidence in proceedings under section 2, states that he or she believes that refusal of the application is reasonably necessary to prevent the commission of a serious offence by that person, the statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose."

29. In the course of his submissions, counsel for the applicant maintained that although two other prosecution witnesses gave evidence in the applicant's bail application, the wholly decisive evidence was that of Chief Superintendent Sheehan. This, counsel submitted, is entirely apparent from the structure and context of the ruling. In particular, it is submitted that the latter portion of the ruling of Kelly P. established that Chief Superintendent Sheehan's evidence was clearly the decisive evidence and that Kelly P. did not cite any other evidence or witnesses in denying bail, his focus being on his acceptance of what was said by Chief Superintendent Sheehan over what had been said in favour of the applicant. While it is accepted that Kelly P. did carry out an assessment under (a) – (f) of s. 2(2) of the 1997 Act, nevertheless it was only in the context of Chief Superintendent Sheehan's evidence that bail was refused. Counsel submits that the frailty in this approach was contemplated by Birmingham J. in *CMcD* when he left over the question of whether s. 2A of the 1997 Act would be unconstitutional if it allowed for bail to be refused solely on account of the opinion evidence of a Chief Superintendent.

30. It is submitted that the transcript of the bail hearing in issue in these proceedings is illustrative of the concern expressed by Hardiman J. in *Redmond v. Ireland and The Attorney General* [2015] IESC 98 in respect of s.3(2) of the Offences Against the State (Amendment) Act 1972 ("the 1972 Act"), which render admissible the belief of a Chief Superintendent that a person accused of membership of the Irish Republican Army (IRA) is in fact a member of that Organisation. As to the nature of that belief, Hardiman J. opined (at paras. 5-7):

> *" I have no doubt that the provisions of s. 3(2) represent a very serious diminution in the protections ordinarily afforded to an accused person by the law of evidence. On the face of it, it merely makes the opinion of the Chief Superintendent admissible in evidence. In reality, however, its effect is far greater. That effect cannot be better stated than it was by Fennelly J. in DPP v. Kelly [2006] 3IR 115. Fennelly J. said, at p.135:*
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> > *"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 worse case, malicious. None of this can be tested." (Emphasis added)

…

If a superintendent can be 'manipulated' in relation to a professional function which was reserved to him under the law as it stood, then it seems clear that little comfort can be taken in the high rank of the giver of belief evidence under s.3(2). He too might be 'manipulated' by the giver of a 'mistaken, misinformed, inaccurate or malicious information', from within the Force or from outside it.

It must also be said that the cross-examination of a Chief Superintendent giving evidence pursuant to s. 3(2) is fraught with danger because it will almost invariably open the door to the tendering by an adept and experienced witness, of prejudicial material without any notice to the defence. See the use made of undisclosed material in a slightly different context in the membership case of DPP v. Cull [1980] 2 Frewen 36."

31. At para. 24, Hardiman J. went on to state:

" I do not consider that s.3(2) would be consistent with the Constitution if it permitted the conviction of a person solely on the basis of the opinion evidence. 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."

32. Ultimately, the Supreme Court upheld the constitutionality of s. 3(2) of the 1972 Act. Hardiman J. endorsed the view of Charleton J. that there were safeguards available in the statute in that belief evidence itself could not stand alone and would have to be supported by other evidence. Hardiman J. stated however that the section would have been repugnant to the Constitution if it permitted an accused person to be convicted solely on the basis of belief evidence.

33. In the present case, counsel for the applicant contends that fair procedures for the applicant required that there must be, in the words of Hardiman J., an "*examinable reality*" to the applicant's cross-examination of Chief Superintendent Sheehan but such cross-examination was not possible as all that had been proferred to the bail court was the belief of the Chief Superintendent who was not stating what he himself heard or saw, and where he was conveying only an accumulation of information from other sources.

34. It is submitted that while s. 2A only renders admissible what would otherwise be inadmissible, the difficulty is that s.2A inevitably permits the prosecution to lead what is hearsay evidence. Counsel contends that it is not the case that the Chief Superintendent merely states his or her belief. Invariably, the prosecution counsel is permitted to ask the Chief Superintendent to state the basis of his or her opinion, as done by prosecution counsel in the applicant's case. Chief Superintendent Sheehan was asked how he assessed the reliability of his sources, how he categorised the information received and dealt with it and how the applicant fitted in with this information. Yet, none of this underpinning evidence as given by the Chief Superintendent was based on what he himself had heard or seen. That, counsel submits, is the reality of life under s. 2A. It is contended that the alternative scenario, as proffered by the respondents in their written submissions, is that the Chief Superintendent could state only his opinion and that the applicant would not cross-examine him, is equally unfair to the applicant as the belief within go unchallenged, leaving a bail applicant in a vulnerable position, given that the belief evidence in s. 2A is framed in the same language as the statutory test in s. 2 for the refusal of bail. It is argued that notwithstanding the *dictum* of Birmingham J. in *CMcD* that s. 2A does not permit evidence to be lead by way of hearsay, what occurred in the applicant's case is that the reality was that the Chief Superintendent's evidence conveyed information from persons who were not heard at the bail hearing.

35. Counsel thus submits that s. 2A breaches the principles of *egalité des armes*, with the scales being tipped in favour of the prosecution. Moreover, it allows the prosecution to say that the refusal of bail is reasonably necessary, yet no provision of the 1997 Act allows an accused to adduce belief evidence from his or her own witnesses to say that refusal of bail was not reasonably necessary. That, counsel submits, is unfair, having regard to the broad range of cases to which s. 2A can be applied.

36. It is further submitted that s. 2A is unconstitutional because of the absence of any safeguards (such as the necessity for corroboration) in the provision itself, thereby causing a disproportionate interference with the applicant's rights. In aid of his argument in this regard, Counsel cites the *dictum* of Denham J. in *D.v. DPP* [1994] 2 I.R. 465, where she states:

"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.

A court must give some consideration to the community' right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community' right to prosecute.

If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted."

37. Counsel also submits that while the rights of the applicant are not absolute and that there may be competing public interests, the burden and onus of proof is on the party who asserts that the curtailment to the constitutional right is proportionate. As to how proportionality is to be assessed, counsel referred to *Heaney v. Ireland* [1994] 3 I.R. 593, where Costello J. drew his test of proportionality from the jurisprudence of the Canadian Supreme Court. It is argued that s. 2A of the 1997 Act breaches the second limb of Costello J.'s test of proportionality in Heaney, such that the breach should "*impair the right as little as possible*."

38. Reliance is also placed on the 2003 decision of the Canadian Supreme Court in *Nova Scotia v. Martin* [2003] 2 SCR 504, where the Court stated:

"A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria

must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable." (at para. 107).

39. In opposing the within challenge the respondent submits that:

1. The constitutionality of s. 2A of the 1997 Act was upheld by the Court of Appeal in *CMcD*;

2. S. 2A does not permit the prosecution to lead hearsay evidence as alleged by the applicant or at all;

3. The provisions of s. 2 and s. 2A of the Act are proportionate, permissible and balanced by procedural and statutory safeguards;

4. Any belief evidence tendered by s. 2A is not determinative of the objection to bail but rather constitutes one piece of evidence to be weighed in the balance. It is a matter for the bail court to determine the weight, if any, to be attached to the belief evidence and to consider the bail application in light of all the evidence before the court.

40. From the applicant's written and oral submissions, the arguments as to the unconstitutionality of s.2A fall into three broad categories:

(a) The nature of the evidence grounding the opinion of a Chief Superintendent, hearsay evidence and confidential information;

(b) The necessity for proportionality and the absence of adequate safeguards; and

(c) The consequences flowing from the admissibility of an opinion as evidence in identical terms to the test for bail.

41. Counsel for the respondent argues that all the issues raised by the applicant in these proceedings have been settled by the Court of Appeal *CMcD*, in favour of the State, and submits that what is left for consideration in the present proceedings is a hypothetical situation referred to by Birmingham J. in *CMcD*, at para. 45 thereof, namely whether a refusal of bail solely on the Chief Superintendent's belief evidence would be constitutional. The respondents contend that insofar as the constitutionality of such a scenario might have been left open by Birmingham J., it was not in any event the situation which pertained in the applicant's bail hearing. Counsel for the applicant disputes this assertion.

42. Before turning to this particular question, I will firstly address the applicant's other principal arguments as addressed in written and oral submissions. In fairness to the applicant, it is not disputed that many of his complaints have been rendered redundant by reason of the decision of the Court of Appeal in *CMcD*.

43. The first of the applicant's complaints, namely the hearsay nature of the belief evidence and asserted privilege and the consequent constraints put on his counsel's ability to cross examine has been comprehensively addressed by the Court of Appeal in *CMcD*, where Birmingham J. states:

"33. There is nothing exceptional about the court hearing evidence that an appellant for bail is likely, or indeed highly likely, to re-offend. I make those remarks not to downplay the significance of the evidence of a Chief Superintendent in the context of a s. 2 application where s. 2A is called in aid by the prosecution in opposing bail. The Chief Superintendent is permitted not just to state a belief that refusal of the application is reasonably necessary to prevent the commission of a serious offence by the person concerned (which he would not normally be allowed to do under the rules of evidence unless put forward as a properly credentialed expert speaking within the scope of his expertise) but the provision goes on to provide that where he has made a statement to that effect the statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose. No objection can therefore be made to the admissibility of the belief evidence of the Chief Superintendent in reliance on the normal rules of evidence. Moreover, even if there was no other evidence in support of a s. 2 objection, the stated belief of the Chief Superintendent would constitute such evidence. That having been said, the section renders admissible the evidence of the garda officer only and does not provide for the admission of hearsay evidence of the statements of informants or other persons. Moreover, apart from what has been already stated, belief evidence admitted pursuant to s. 2A does not have any special status. It has to be weighed and evaluated in the normal way; and an applicant may seek to test it by means of cross-examination of the Chief Superintendent in the normal way, and with a view to trying to persuade the court that little weight should be attached to it."

44. I will return in due course to the manner in which the Chief Superintendent's evidence was weighed and evaluated by Kelly P.

45. As is also clear from *CMcD*, it is for the bail court to accept or reject the opinion evidence and it is not the case that it is invariably accepted:

"34. …Statistics put before the High Court establish that s. 2A is invoked very rarely. In 2015, in only seventeen cases or 0.8% of the cases dealt with in the High Court Bail List was the section relied on. More significantly, in eleven of the seventeen cases, where reliance was placed on s. 2A, the applicant was nonetheless admitted to bail despite the opposition of the Chief Superintendent. There can be no doubt but that the fact that a Chief Superintendent is of a particular belief does not result in automatic refusal of bail. An applicant for bail is refused bail and remanded in custody only if the court, not the Chief Superintendent, is of the view that the refusal of bail is reasonably necessary to prevent the commission of further offences." (Emphasis added)

46. As to whether s. 2A of the 1997 Act permits hearsay evidence, Birmingham J. addressed that issue in the following terms:

"35. The complaint is made that the section permits the introduction of hearsay evidence and indeed allows the determination of the application on the basis of hearsay evidence. However, on closer analysis, the section is not about the introduction of hearsay. What the Chief Superintendent was told outside the court is not admissible in evidence. Even if a Chief Superintendent was prepared to say what someone else told him, perhaps because his source was now dead or for some other reason not amenable to retribution, that evidence would not be admissible absent acquiescence

or consent by the party entitled to object. However, what is admissible by virtue of the statute is the belief or opinion formed by the Chief Superintendent. That is not hearsay. However, and but for the statute, it would have been inadmissible as opinion evidence offered by a non – expert witness. The fact that the belief or opinion may have been formulated on the basis of material that has come from informants, either coming directly to the Chief Superintendent or through garda colleagues, on the basis of other sources of information, whether by telephone intercepts or otherwise has no impact on its admissibility or its status as evidence. It may, however, negatively affect the weight to be attached to the belief or opinion. That being so, the reality is that in a great many cases, the applicant will in fact be keen to have had elicited, or to elicit himself, that the belief is based on information coming from a third party or third parties, knowing full well that privilege is likely to be claimed preventing any further testing or exploration of the matter, thereby allowing a strong submission to be made that the court must attach little weight to that evidence in those circumstances. Therefore, as a matter of practicality, any theoretically possible objection based on the rule against hearsay will, very often, be rendered nugatory."

47. In so far as counsel for the applicant raises the issues of the "*examinable reality*" of opinion evidence, (as commented on by Hardiman J. in *Redmond*), it is apparent from the foregoing passage in *CMcD* that that issue did not give the Court of Appeal cause for concern in the context of the constitutionality or otherwise of s.2(A). Birmingham J. was satisfied that anything elicited by cross-examination (or indeed by the prosecution in direct examination) from a Chief Superintendent who provides belief evidence which touches upon the extent to which the belief evidence emanates from information gleaned from third parties will invariably be a matter for the bail judge to evaluate for the purpose of attaching weight to such evidence. The same went for evidence in respect of which privilege may be claimed.

48. I now turn to the applicant's proportionality arguments and the safeguards which counsel for the applicant posits as ought to have been included in the 1997 Act in order to ensure proportionality. These are:

(i) A requirement that a special application should be made to the bail judge for leave to call belief/hearsay evidence;

(ii) A requirement that the prosecution must first demonstrate they have exhausted their efforts at securing evidence from witnesses who will give their evidence viva voce;

(iii) Building in a safeguard that confines usage of the section to use in the Special Criminal Court, or other such narrow remit;

(iv) A requirement that the evidence would be given by a Chief Superintendent who is independent of the investigation; and

(v) A requirement that bail could not be refused solely on the basis of the belief evidence of the Chief Superintendent.

49. Similar safeguards were advocated in *CMcD*. Birmingham J. addressed those submissions in the following terms:

"39. Once the constitutional amendment was passed, it was for the Oireachtas to determine the shape of the legislation to give effect to the peoples' decision. It would have been open to the Oireachtas to prescribe a limited list of offences charged and/or apprehended in respect of which s.2A might be utilised. However, it did not do so, and it is not for the courts to legislate, or to prescribe the terms of any future legislation. Section 2 reflects the terms of the constitutional amendment. Section 2A simply provides an evidential provision which is applicable in the context of s. 2 objections. However, although on the statute book since 2007, s.2A has in fact been invoked in only a few cases to date. Be that as it may, I am completely satisfied in any event that the measure in controversy is not in any way disproportionate to the legitimate aim being pursued. The people of Ireland were sufficiently concerned with offences being committed by persons on bail to amend the Constitution. In circumstances where a prediction as to future behaviour is involved, it would be inimical to the will of the people as expressed in the Bail referendum that evidence of belief or opinion could not be given by at least some garda officer as to whether an appellant was considered likely to commit a serious offence while on bail unless it was established first of all that he/she was in a position to give that evidence in the capacity of an expert speaking within the scope of his/her expertise. I am satisfied that s. 2A, which merely eliminates that requirement in the case where an objection under s. 2 of the Act of 1997 is being relied upon, so as to allow a Chief Superintendent to give evidence of his or her relevant belief or opinion in support of that objection, and only for that limited purpose, is entirely proportionate to the legitimate aim of properly giving effect to the will of the people as expressed in the referendum."

50. Furthermore, with regard to the first three of the suggested safeguards, I am also satisfied that the *dictum* of Birmingham J., namely that there is "*nothing exceptional*" (at para. 33) about opinion evidence and that it falls to be "*weighed and evaluated in the normal way*" (at para.33) militates against the requirement for the safeguards advocated by counsel for the applicant before such evidence is tendered. As to the suggestion that the opinion evidence should come from a Chief Superintendent who is independent of the investigation, this was expressly rejected by the Court of Appeal in *CMcD* when Birmingham J. described such a suggestion as "*fundamentally misconceived*" and "*bordering on the absurd*" (at paras. 36-37) The final safeguard suggested by counsel for the applicant is that bail should not be refused solely on the basis of the belief evidence of the Chief Superintendent. However, it is imminently clear from the provisions of s.2 and s.2A(i) of the 1997 Act when construed together, as they must, that the belief of the Chief Superintendent is no more than evidence which falls to be considered when the bail court is exercising its jurisdiction under s.2(1) to refuse bail. This has been made abundantly clear by Birmingham J. in CMcD. As stated by the learned Judge:

"S. 2A does not create a free standing basis by means of which bail can be objected to. All s. 2A in fact does is to permit a certain form of evidence to be adduced in support of a s. 2 objection" (at para. 17).

51. Thus, the question which remains for determination by this Court is whether, having regard to the factual matrix in this case, the applicant has made out a challenge to the constitutionality of s. 2A of the 1997 Act in that the provision essentially compelled Kelly P. to refuse bail based wholly upon the belief evidence given by Chief Superintendent Sheahan. A contention of similar ilk arose in *CMcD*, both in the High Court and in the Court of Appeal and was rejected by both courts. In the Court of Appeal, Birmingham J. found no need to address the issue, being in agreement with Mac Eochaidh J. in the High Court that "*the s. 2A evidence was by no means the only evidence"* offered to oppose bail in CMcD. Birmingham J. put the matter as follows:

"42. The evidence rendered admissible by virtue of s. 2A was certainly significant evidence, and that cannot be gainsaid, but it was very far from being the only evidence in support of the s. 2 objection.

43. Being firmly of that view I am very reluctant to become involved in expressing views on what is a hypothetical situation, i.e., what would the situation be if bail was refused solely on the belief evidence of a Chief Superintendant? I would prefer to leave an answer to that question until it arises, if indeed it ever arises and I am far from convinced that it will. I would though repeat the view that I expressed earlier that expressing a belief as to what is likely to happen in the future is not to be equated with expressing a view in relation to an ongoing state of affairs.

44. I am in agreement with the High Court judge that the challenges to the constitutionality of s. 2 (to the extent that it has featured in the present hearing) and to that of s. 2A, respectively, of the Act of 1997 have not been made out, and I would therefore dismiss the appeal."

52. In the present case, it is submitted on behalf of the applicant that the hypothetical situation upon which Birmingham J. declined to opine came to pass in the applicant's bail hearing, namely that bail was refused based wholly on the belief evidence of Chief Superintendent Sheahan. It is contended that the ruling in issue here is a world apart from the factual matrix in *CMcD*, and that as a matter of reality bail was refused on s. 2A grounds on the uncorroborated belief evidence of Chief Superintendent Sheehan, as weighed against the credit given to the applicant.

53. In considering this particular argument, it is apt again to rehearse the words of Birmingham J. in *CMcD*, to wit, "*s.2A does not create a free standing basis by means of which bail can be objected to*." (At para. 17) The question in the present case therefore is did Kelly P. determine the objection to bail solely on the basis of s.2A?

54. Having reviewed the transcript of the ruling, as set out above, the Court is not satisfied that the refusal of bail was based wholly on the belief evidence of the Chief Superintendent, as contended for in these proceedings. A perusal of the transcript shows that in the first instance, Kelly P. considered the weight of evidence against the applicant, as he must in order decide whether his statutory discretion to refuse bail on s.2 grounds should be exercised. There was a range of evidence before the learned Judge, not confined to that tendered by Chief Supintendent Sheahan. While he does not name Garda Whelan in his ruling, it is apparent from that in the context of s.2(2)(a) of the 1997 Act, Kelly P. had regard, *inter alia*, to the evidence which Garda Whelan gave concerning the "very great seriousness" of the alleged offence, in respect of which, if a conviction ensued, "it would be impossible to imagine other than a substantial custodial sentence being imposed". He went through the statutory requirement set out in s. 2(2) (c) of the 1997 Act and noted the nature and strength of the evidence in support of the charge. In this regard he noted the evidence (given by Garda Whelan) said to connect the applicant to the alleged offences as part of a "common enterprise" on 14th September, 2015. The learned Judge reprised that evidence in his ruling and expressly referred to those aspects of it that he was accepting, while declining to take account of other aspects for the reasons stated. It is thus demonstrably clear from Kelly P.'s treatment of the evidence that he satisfied himself that very significant matters had been put before him and that he was satisfied that two at least of the six requirements set out in s. 2(2) were met for the purposes of the test for refusal of bail as set down in s.2(1) of the 1997 Act. In the context of his assessment of the objection to bail pursuant to s.2(2)(b), Kelly P. stated that that would be addressed in the context of "*certain evidence"* which he went on to address, namely that of Chief Superintendent Sheahan.

55. Having appraised the ruling, I am firstly satisfied that the learned President of the High Court placed Chief Superintendent Sheahan's belief in its proper context, namely as *evidence* given in the context of the s.2 objection to bail. At no stage did the learned Judge indicate or intimate that the Chief Superintendent's belief could, without more, sustain a refusal of bail. I note that the learned Judge was at pains to point out that he was in no way bound to accept the Chief Superintendent's evidence and indicated circumstances whereby evidence such as that given by the Chief Superintendent might be rejected. That militates against any suggestion that pursuant to s.2A the learned Judge believed himself compelled to accept the belief evidence tendered by Chief Superintendent Sheahan. However, the learned Judge found no deficit in the manner of its giving as would mandate it to be rejected as evidence given without due care or attention. Kelly P. outlined the factors upon which he found the opinion to have been reasonably and responsibly formed. He noted the breadth of the Chief Superintendent's experience and his length of time in Limerick and noted that it was his practice to give such belief evidence with "*reluctance*". He had regard to the evidence tendered by the Chief Superintendent as to the latter's belief of the pivotal role played by the applicant in facilitating maverick dissident republican activities by reference to the Chief Superintendent's own knowledge as a very experienced divisional officer for Limerick City and County and by reference to information he received on the ground in Limerick from officers under his command and from the Crime and Security branch. Given Chief Superintendent Sheahan's own knowledge of the applicant and his association with known dissident republicans, it cannot, in my view be contended that the evidence he led was a case of bare belief.

56. In the course of his ruling, Kelly P. went on to state that the weight he would afford the Chief Superintendent's evidence would have to be tempered by the fact that privilege was asserted over some aspects of the Chief Superintendent's evidence and this had rendered nugatory the applicant's counsel's ability to cross-examine on those particular aspects.

57. The nub of the applicant's contention that s.2A should be declared unconstitutional appears to be based on the final portion of Kelly P's ruling, which the applicant contends bears out the hypothetical situation referred to by Birmingham J. in *CMcD*. To my mind, having regard to the entire evidence which was led before Kelly P., and the manner of its addressing, counsel for the applicant's categorisation of the final portion of the ruling as an unequivocal reliance by Kelly P. on Chief Superintendent Sheahan's belief as a stand alone ground for refusing bail is an unmeritorious attempt to deconstruct the analysis which the learned President of the High Court applied to the s.2 objection to bail.

58. I am satisfied from a reading of the ruling overall that Chief Superintendent's Sheehan's belief was treated by Kelly J. in accordance with the statutory confines of s.2A for the purpose of the s.2 objection to bail. It was not afforded any higher status in the ruling. Ultimately, however, it prevailed for the reasons set out by Kelly P. Counsel for the respondent submitted that if it was considered to be the decisive evidence ultimately, then Kelly P. was entitled to so hold and there was nothing unconstitutional in that approach. I am in agreement with this general proposition, although the Court declines to comment on the weighing exercise engaged in by Kelly P. (or indeed the upholding of the asserted privilege) as the merits of the ruling are not matters for this Court to adjudicate upon.

59. For completeness, I should say that as regards the third principal plank of the applicant's constitutional challenge to s.2A, namely that the section permits the bail court to elevate the belief of the Chief Superintendent to the status of meeting the necessary statutory threshold for refusing bail, I am satisfied that this challenge has not been made out. It is entirely evident from his ruling that Kelly P. did not accord it such status and that bail was refused to the applicant because the learned President of the High Court was of the view that the refusal of bail was reasonably necessary to prevent the commission of an offence.

60. Accordingly, for the purposes of the within proceedings, I am satisfied that Kelly P. applied the test for bail as set out in s.2 (1) and (2) of the 1997 Act and that he did not indicate either expressly or impliedly (by the manner of his ruling) that he was compelled to conclude that refusal of bail was reasonably necessary because of the evidence offered by Chief Superintendent Sheahan.

61. Accordingly, I do not find that the challenge to the constitutionality of s.2 and s.2A of the 1997 Act has been made out.