



THE COURT OF APPEAL

27/2017

**Mahon J.
Edwards J.
Hedigan J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PLAINTIFF/RESPONDENT

AND

DARREN WELDON

DEFENDANT/APPELLANT

Judgment of the Court delivered on the 27th day of June, 2018 by

Mr. Justice Hedigan

Nature of the Appeal

1. The appellant was convicted by the Special Criminal Court of the sole count of membership of an unlawful organisation, that being the Irish Republican Army, otherwise the I.R.A, otherwise Óglaigh na hÉireann, contrary to s.21 of the Offences Against the State Act, 1939. The appellant was sentenced on the 15th of December 2016 to five years imprisonment with 12 months suspended. The appellant puts forward 24 grounds of appeal against conviction.

Background

2. The appellant was brought before the court arising from an incident which took place on the 22nd of February 2010 at Newry courthouse, County Down. Between 10-10.30 pm, a number of people observed a car parked at the courthouse entrance, which then reversed and backed-up against the gate of the entrance. Sergeant Patterson and Sergeant Gilmore of the Police Service of Northern Ireland then arrived on the scene.

Somewhere around 10pm, two phone calls were made by a caller who did not identify himself but did say "This is the real IRA". The calls were made to the Canal Court Hotel in Newry, and to the Daisy Hill Hospital, also in Newry, to say that there was a bomb in Newry courthouse that would detonate within 30 minutes. A code word was also provided.

A bomb exploded in the vehicle outside the courthouse around 10.35pm.

3. An investigation subsequently took place, which found that the vehicle in question was a brown Mazda 6, which was unlawfully taken from a residential area in County Dublin between the 2-3rd of January 2010. The car's registration number was 09D7439, however a different registration number was found at the scene of the bombing. The car was owned by a financial institution but was in possession of a staff member at the time it was taken. The registration number 09MH2297 found at the scene of the bombing could be linked to a different vehicle, a Peugeot Partner van which was owned by a limited company.

4. In October 2014, Detective Superintendent Thomas Maguire became aware of information which gave him reason to believe or suspect that the appellant was connected with the courthouse bombing. A warrant was successfully obtained under s.29 of the Offences Against the State Act by Detective Sergeant Padraig Boyce to search a residential premises at Boyne View, Trim, County Meath. Detective Sergeant Boyce and Detective Garda Kieran Regan arrested the appellant outside the premises on the 14th of October 2014 under s.30 of the Offences Against the State Act, 1939 on the suspicion of two offences, those being membership of an unlawful organisation, the I.R.A, and for possession of explosives on the 22nd of February 2010. The appellant was detained in Finglas Garda Station under s.30 where photographs, fingerprints and forensic evidence was taken, including buccal swabs which were then sent to the Forensic Science Laboratory in Dublin.

5. The appellant was interviewed on six occasions. He was questioned in relation to the vehicle used in the explosion in Newry and in relation to the theft of that vehicle. He was subsequently interviewed about membership of an unlawful organisation, being the I.R.A. He denied being or having ever been a member of that organisation. He obtained legal advice and had a solicitor present with him during each interview.

6. The forensic samples taken were compared with samples taken from the vehicle number plate found at the scene of the explosion outside the Newry courthouse. At trial, prosecution evidence was that the possibility of an error in finding the matching DNA profiles that they did, which linked the appellant to the scene in Newry, is less than one in one thousand million.

7. At trial, Chief Superintendent Peter Kirwan gave evidence of belief that the appellant was a member of an unlawful organisation. He claimed privilege over the sources of his belief evidence on the grounds of state security, protection of life and property and ongoing operations. He was not prepared to reveal where his sources came from and upon what his beliefs were based. In the court's judgment, it was accepted that his belief evidence was based on confidential information available to him and not based on any conduct or statements made during the investigation nor upon the attendance of the appellant of the funeral of the late Alan Ryan in 2012, a man who had a conviction before the Special Criminal Court for unlawful activity connected to the same unlawful organisation. The Chief Superintendent also stated that his opinion evidence was not based on DNA evidence.

8. The court referred to s. 3(2) of the Offences Against the State (Amendment) Act, 1972, which states:

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

The court considered the Supreme Court case of *Redmond v Ireland* [2015] IESC 98 which held that the interpretation of s. 3(2) of the 1972 Act is that there is a requirement that belief evidence be supported by other credible independent evidence.

9. The court accepted the belief evidence and was satisfied that there were no issues surrounding the arrest of the appellant pursuant to s.30 of the Offences Against the State Act, 1939, nor were there issues surrounding the circumstantial evidence provided by the prosecution. The court held:

'The Court has weighed and evaluated the various strands of evidence set out above and has concluded that all strands of evidence relied on by the Court as outlined above point only in the direction of guilt. On the totality of this evidence, it cannot discern a reasonable possibility consistent with the proposition that the accused is innocent of the charge of membership of an unlawful organisation. None of the individual components would perhaps be enough on their own to convict the accused of this offence but the combination identified by the Court above together with the particular weight of the DNA evidence is sufficient to convince this Court that it is proper to convict the accused of the single offence on the indictment.'

Personal Circumstances

10. The appellant was born in August 1971, making him 47 years of age. He was 46 years old when convicted. He is originally from Kilbarrack, County Dublin but was living in Trim, County Meath when arrested. He had previously worked as a taxi driver, and a floor and carpet fitter. He has no previous convictions.

Sentence

11. The court imposed a headline sentence of six years but reduced by one year due to the mitigating factors of the appellant's previous good character, consideration of his future prospects, and the appellant's approach to the trial. It was pleaded in mitigation that the appellant had a long history of consistent employment and that he has been law abiding until he appeared before the court at the age of 46.

12. A further year was suspended on the conditions that the appellant enter into a bond of €300 to keep the peace and to be of good behaviour while in prison and for two years post release.

Grounds of Appeal

13. Counsel for the appellant in their submission put forward the following grounds of appeal:

14. The trial court erred in that it:

(i) misdirected itself in law and in fact in holding that the refusal by the Chief Superintendent to provide details underlying his belief as to membership of an unlawful organisation was irrelevant to the weight to be given to that opinion.

(ii) erred in law and in fact in holding that the failure of the Chief Superintendent to address explanations given by the accused in relation to alleged associations or activity was irrelevant to the weight to be given to the belief evidence of the Chief Superintendent.

(iii) erred in law and in fact in holding that the relevance of denials by a suspected person is confined to the deployment of such matters to challenge the accuracy or weight of the belief of the Chief Superintendent, and by impliedly holding that there was an obligation on an accused person to put these matters to the Chief Superintendent in cross examination.

(iv) erred in law and in fact in confusing the finding that the Detective Chief Superintendent honestly and genuinely held a belief as to membership with their obligation to assess the appropriate weight to be given to that belief in the circumstances of the case.

(v) erred in law and in fact in holding that the Court could attach no weight to answers given by the Accused in interview in 2012 and 2014 in which he denied membership of the IRA and in further holding that these denials could be nullified by failure of the Accused to explain certain matters.

(vi) erred in law and in fact in holding that belief evidence given by the Chief Superintendent could have been devalued by cross examination in circumstances where there was a complete and absolute refusal by the Chief Superintendent to give even the most general details in relation to the basis for his belief whereby he effectively insulated himself from cross examination.

(vii) erred in holding that witnesses had identified the number plate produced in court as the item to which they had previously dealt with when, in fact, they had merely identified their signatures on an associated form.

(viii) erred in law and in fact and misdirected itself in holding that there was an obligation on the defence to put to two different witnesses the fact that the number plate recovered from the scene of the explosion and the number plate in court appeared to be materially different and in holding that there was an obligation to seek comment from the prosecution witnesses in relation to same.

(ix) erred in holding that there were only two inferences available to the court in relation to the significant and material differences between the number plate photographed at the scene and the number plate produced in court and, further, misdirected itself in holding that there was no reasonable possibility that Chloe Holland had swabbed an object different to the one produced in court.

(x) erred in law and in fact in speculating that the appearance and makeup of the number plate had undergone change as a result of forensic tests when there was no evidence whatsoever in the course of the trial to support such a finding.

(xi) erred in law and in fact in finding that the concessions made by the expert for the prosecution that the DNA found on the number plate could have arrived by primary, secondary or tertiary distribution and that it was not possible to say what type of cellular material the DNA trace comprised of was irrelevant and not important, and in further finding that the presence of DNA on the number plate put the accused in sufficient proximity to the activities of an unlawful organisation to provide independent and credible support for the opinion of the Chief Superintendent.

(xii) erred in law and in fact in finding that the admissibility of the DNA evidence was not affected by the fact that the laboratory staff member who activated the process by which the swabs were analysed for DNA was not produced to give evidence by the prosecution and that the chain of evidence in relation to the swabs containing DNA material was incomplete.

(xiii) misdirected itself in law and in fact in finding that the presence on the Appellant's phone of a photograph of Alan Ryan with a certain legend was evidence only open to the inference that the Appellant identified himself with the opinions and activities of the said Alan Ryan.

(xiv) misdirected itself in law and fact in holding that the presence of the photograph on the Appellant's phone served to eliminate the possibility that the finding of the DNA on the false number plate was coincidence.

(xv) erred in holding that the said photograph constituted an incriminating document in relation to an unlawful organisation within the meaning of the provision of Section 24 of the Offences Against the State Act 1939 and that the possession of this photograph was evidence of membership by him of that organisation in October 2014.

(xvi) erred in fact in finding that there were two further photographs on the Accused phones which showed him in company with two other individuals who had criminal convictions for membership of the same unlawful organisation. No such evidence was given in the course of the trial.

(xvii) erred in law and in fact in finding that the photographs on the accused's mobile phone relied upon by the prosecution constituted evidence of association capable of corroborating the belief evidence of the Chief Superintendent.

(xviii) erred in fact in finding that the accused elected to retain a photograph of Alan Ryan on his phone.

(xix) erred in law and in fact in finding that the evidence of observations and activities of the accused on the 18th of January 2013 was corroborative evidence of association, in circumstances where this evidence was not probative and was not described in any detail whatever in the judgment of the Court.

(xx) erred in fact in holding that the explosive device in question was housed in a vehicle that had been stolen in Dublin some days earlier.

(xxi) erred in law in the manner in which it approached the concept of circumstantial evidence.

(xxii) erred in law and in fact in holding that the arrest of the Appellant pursuant to Section 30 Offences Against the State Act 1939 for the offence of membership of an unlawful organisation was lawful in circumstances where no application had been made to court for a warrant to support such an arrest.

(xxiii) erred in law and in fact in holding that forensic samples were lawfully taken from the Appellant during the course of his detention pursuant to Section 30 of the Offences Against the State Act, 1939.

(xxiv) erred in law and in fact in failing to direct a verdict of not guilty at the conclusion of the prosecution case.

Submissions of the Appellant:

15. The appellant submits that the court erred in law in its holdings surrounding the failure of the Chief Superintendent to provide any explanation of the basis of his belief evidence, in the weight the court attached to the belief evidence, and in the manner in which the appellant's denials of membership were considered when questioned in 2012 and 2014. The court outlined the difficulty in determining the weight to be attached to denials of unlawful membership in interviews:

'There is always a difficulty in attaching weight to such out of court assertions as they are unsworn and, more importantly, not subject to probing and cross-examination in the same way as sworn testimony in court. The Court attaches no weight to interview answers in this case because it has other evidence relating to such assertions made by the accused which nullify the potential value of material of this kind.'

16. The appellant submits that the court erred in law in holding that no weight could be attached to answers given by the appellant in interviews in which he denied membership of an unlawful organisation. It is submitted that by stating that there is always a difficulty in attaching weight to denials of membership, the court is adopting a fixed policy on the issue, which has an obvious influence on the court's consideration of the statements.

17. The appellant submits that vehicle registration plate that was produced at trial was materially different to the number plate photographed at the scene of the explosion and that no evidence was given to explain this inconsistency. The appellant submits that the evidence surrounding the registration number plate was unreliable.

18. On day 6 of the trial, James Forbes, the lead Police Service of Northern Ireland (PSNI) Exhibits and Disclosure Officer in relation to the explosion in Newry gave evidence. He explained that in April 2010 he collected certain exhibits, DNA swabs, from the laboratory at Forensic Science Northern Ireland. The following day, he placed the swabs in storage at Ladas Drive, a PSNI station, for transporting to Forensic Science Service in England. On day 7, Sally Hill, a forensic scientist from the Forensic Science Service laboratory which received the swabs, gave evidence about the method of delivery of the DNA swabs. She explained that the usual method of delivery would be via courier and that paperwork would be signed to affirm continuity of travel. She confirmed that the paperwork in relation to the swabs was not signed for, and that this was unusual. At trial, counsel for the defence described this as a "serious flaw". The court ruled:

'The Court believes that in this day and age the absence of a courier who brought the item from the North of Ireland to the laboratory in the north of England or indeed the absence, because we have the oversight evidence of Ms Hill, of the person who actually performed the physical task of putting the swab into the puncher which begins the process, the mechanical analysis of the physical exhibit to produce the representation which is the DNA profile. The Court does not consider that either of those items are necessary nor does it consider that the admissibility of the DNA evidence is in any way affected by those matters.'

The appellant submits that the court erred in finding that the matters raised in the direction application, including in particular the question as to the integrity of the DNA evidence which was said to have been the source of the DNA evidence against the appellant were essentially matters of weight for the court.

19. Evidence of material on the appellant's mobile phone was produced at trial, including a photograph of the late Alan Ryan, who had previously been convicted in the Special Criminal Court. The court addressed this in the following manner:

'... the Court discounts what Mr Hartnett accurately described as the mawkishly sentimental memorial material in relation to the late Alan Ryan.. the Court does not take the same view of the retention on this mobile phone of a photograph of the deceased Alan Ryan with the legend quote, "Heroes are the people who do what has to be done when it needs to be done regardless of the consequence." This is not material expressing sadness on the passing of an acquaintance or memorialising that fact and in the view of this Court is not open to any other meaning but that the possessor of this material identify themselves with the opinions and activities of the deceased in question.'

20. The appellant submits that this inference by the court was made in error. The appellant refers to s.2 of the Offences Against the State Act, 1939, which defines an "incriminating document" as:

'a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation'.

21. The appellant submits that there was no evidence to suggest that the photographs in question were incriminating documents or that the photographs were evidence open to the inference made by the court. Moreover, of the three photos, the first was correctly ignored by the court. The second and third however were. In relation to the third photo the court ruled ;

"Similar observations apply in relation to two further photographs found on the accused's phone whereby he was photographed in company with two other individuals who have criminal convictions for the same unlawful organisation. It may well be that the legitimate bounds of friendship might include one person who happened to be a member of an unlawful organisation. But, evidence of association with a number of such persons begins to take on a different complexion. Now, once again whilst this might not be in itself sufficient to satisfy the Court beyond reasonable doubt that the accused was a member of an unlawful organisation, when taken in conjunction with the other evidence it likewise supports the conclusion that the belief evidence is correct and that the DNA evidence is not the product of random coincidence."

22. The appellant submits that the court erred in failing to follow the direction application from the defence and in its consideration of the integrity of the DNA evidence. It is submitted that it has not been clearly established how the DNA evidence which was said to have linked the appellant with the explosion in Newry is corroborative with the belief evidence of membership of an unlawful organisation relied on at trial. The appellant submits that no jury of tribunal or fact properly charged could safely convict on the evidence provided in this case.

Submissions of the Respondent:

23. In relation to grounds of appeal 1-6, the respondent submits that the court was well placed to assess the credibility of the belief evidence of Chief Superintendent Kirwan and that it was entitled to accept or reject the belief evidence accordingly. It is submitted that the Chief Superintendent is an experienced, highly ranked officer who is in a position to provide such evidence.

24. The respondent submits that the nature of the information that the Chief Superintendent's belief evidence was based upon gave rise to a well-founded claim of privilege. The court was entitled to accept or reject the witnesses' reasoning for claiming privilege over the nature of his sources.

25. Regarding grounds of appeal 3,4 and 5, the respondent submits that the fact that the appellant denied being a member of an unlawful organisation, the I.R.A, in 2012 and 2014 is not in itself of material value in the assessment of whether or not he was in fact a member. As to whether the Chief Superintendent's belief evidence as to membership was honestly and genuinely held, the court accepted "beyond reasonable doubt the veracity of Chief Superintendent and the fact that he holds the belief in relation to the accused on the limited basis outlined in evidence". The respondent submits that this point was well considered by the court and was not in error.

26. On grounds 7-10, the respondent submits that the only relevant question surrounding the vehicle registration number plate was whether the number plate examined by the relevant experts at the time they examined it is the same number plate which had been removed from the scene of the explosion in Newry. The respondent does not accept the appellant's argument that it was not the same registration number plate. It is submitted that the court was correct in deciding that there was no reasonable possibility that the registration number plate that was swabbed for DNA evidence was a different number plate to the one produced as evidence in court.

27. In relation to grounds 11-12, concerning DNA evidence, the respondent submits that the court was correct in ruling that there was no reason giving rise to doubt over the results of the forensic analysis of the DNA evidence. The court held that the handling of the DNA evidence did not give rise to reasonable doubt over the integrity of the evidence.

28. Grounds 13-18 relate to material found on the accused's phone, including a photograph of Alan Ryan, deceased, with a legend which was held to be an incriminating document within the meaning of the provisions of s. 24 of the Offences Against the State Act, 1939, a photograph of his brother Vincent Ryan, and of Philip Forsyth. The court took the view that the possession of the photograph, along with the imposed legend on the photograph of Alan Ryan, could only be construed in a way to show that the possessor, the appellant, identified himself with the views and activities of the aforementioned individuals. Therefore, the court held that such documentation could be seen as independent evidence to support the belief evidence of the Chief Superintendent of unlawful membership.

29. S. 24 of the Offences Against the State Act, 1939, provides as follows:-

'On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said charge.'

Thus, no error can be identified in this regard.

30. Ground 19 concerns the activity of the appellant on the 18th of January 2013, where he is said to have travelled in a vehicle with Declan Smith to the Red Cow Inn. The appellant had been questioned about his meeting with Declan Smith and whether he met him in the capacity of an I.R.A member. The appellant made no reply to this.

31. The court found the observation evidence in relation to this interaction to be corroborative evidence of association. It is submitted that the court made no error in this regard. No injustice was caused to the appellant as there was sufficient other evidence considered by the court to convict.

32. Ground 20 concerns the theft of the vehicle involved in the Newry courthouse explosion. The appellant contends that the court erred in holding that the explosive device used was kept in a vehicle that was taken from a residential area in Dublin days or weeks before the bombing. It was heard in evidence that the vehicle was taken from outside a residential property in the early hours of the 2nd of January 2010. The appellant challenges the finding that the bombing in Newry took place "days" after this, as the explosion took place some seven weeks later on the 22nd of February. The respondent submits that this is beside the point, and that the material fact is that the vehicle in which the explosive device was stored bore a false registration number plate which in fact belonged to a different vehicle entirely.

33. Ground 21 concerns the courts approach to circumstantial evidence. The respondent argues that the court was correct in its approach and relies upon the judgment in *DPP v Cahill* [2001] 3 IR 494, where the Court of Criminal Appeal stated:

'The law was More acceptably stated by Pollock C.B. in *R v Exall* (1866) 4 F. an F. 922 at p. 929 as follows:-

'There may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but.... Taken together may create a conclusion of guilt with as much certainty as human affairs require or admit of.'

The respondent submits that the circumstantial evidence was considered properly by the court and that no error occurred in this regard.

34. Ground 22 concerns the appellant's arrest under s.30 of the Offences Against the State Act, 1939. The appellant argues that s.30A prohibits subsequent arrests of a person for membership without a warrant by reason that the offence of membership is a "continuing offence". The respondent submits that the correct approach is to "examine whether the circumstances, facts or events that gave rise to the suspicion on which the later arrest was based had happened or come about at the time of the previous arrest" (*DPP v AB* [2015] IECA 139). The respondent notes the statement of the trial court that "it was the evaluation and judgment of this Court that the matters are entirely separate and distinct, so that the prohibition on the second arrest mentioned in the section does not arise in the sense of being required to be judicially mandated by a warrant of the District Court". Thus, the respondent argues that there was no error in that regard.

35. Ground 23 concerns the forensic samples taken from the appellant. The samples were authorised to be taken by Detective Superintendent Thomas Maguire under s.2(4) of the Criminal Justice (Forensic Evidence) Act, 1992. The appellant contends that the samples were not lawfully taken due to issues of authorisation.

36. The court made reference to the Supreme Court case of *DPP v Damache* [2012] IESC 11 in reference to the balancing of rights between the accused with the interests of the state. The court held that authorisation was properly exercised and the respondent argues that there was no error in this regard.

37. Ground 24 of appeal concerns the court's ruling in relation to the direction application. At trial, the court applied the legal test as referred to in *DPP v J.R.M.* [2015] IECA 65 concerning the Galbraith principles, where it was stated:

'.. even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.'

38. The respondent argues that a jury or tribunal of fact properly charged could convict on the evidence presented in this case and the same is true *mutatis mutandis* for the Special Criminal Court.

Decision

39. The conviction of the appellant was based upon a combination of evidence. There was before the court the opinion of Chief Superintendent Peter Kirwan that the appellant was a member of an unlawful organisation. He stated his belief was based on confidential information available to him. It was not based upon any conduct or statements made by him during the course of the investigation nor upon the appellant's attendance at the funeral of Alan Ryan. There was supporting evidence of DNA swabs linking the appellant with the registration plate found on the car that contained the bomb. There was also supporting evidence of the presence of three photos on the appellant's iPhone linking him, the Court found, with two other men who had been convicted for membership of the same unlawful organisation.

40. With regard to the Chief Superintendent's belief evidence, this was provided for under the provisions of s. 3(2) of the Offences against the State (Amendment) Act 1972 which provides as follows;

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

41. This category of evidence is required to be supported by other credible independent evidence. See *Redmond v. Ireland* [2015] IESC 98 where the Supreme Court held that the belief evidence of a Chief Superintendent must be supported by other evidence that implicates the accused in the offence charged, is credible in itself and is independent of the witness giving the belief evidence. It was held by the Supreme Court that;

"(i) That a constitutional construction of s. 3(2) of the Act of 1972 required that the belief evidence of a Chief Superintendent Garda be supported by some other evidence implicating the accused in the offence charged, which other evidence must be seen by the trial court as credible in itself, and had to be independent of the witness giving the belief

evidence.

(ii) That s. 3(2) of the Act of 1972 would not be consistent with the Constitution if it permitted the conviction of a person solely on the basis of opinion evidence, in particular if privilege was successfully asserted over the material leading to the formation of the opinion. Such would exclude any examinable reality from the case and undermine any potential avenue of challenge to the opinion evidence, subverting the prospect of useful cross examination by the accused.

(iii) That elementary justice required that a person who was liable to some sanction or imposition, based on how a factual issue was resolved before a body, tribunal or committee obliged to proceed in accordance with natural justice, was entitled to confront his accusers and to cross examine them or have them cross examined. To that end, an accused person had the right to be made aware of the material necessary for a proper cross examination. In the case of a trial in which evidence was admissible pursuant to s. 3(2) it was inevitably the case that this material would be withheld by the invocation of privilege. Deprivation of the potential to cross examine on the witness's previous statements could hamper and possibly subvert the right to cross examine.

(iv) That s. 3(2) of the Act of 1972 did not attempt to require a court of trial to place any particular weight upon the evidence before it or to interpret it in any particular way. The interpretation of the belief evidence and the other evidence in the trial was a matter for the court of trial as the relative importance attached to the two types of evidence would vary between one case and another."

42. Thus there must be supporting evidence capable of convincing the court beyond any reasonable doubt that an accused is guilty of the charge of membership of an unlawful organisation. No presumption of special merit attaches to the evidence of such a witness. This is a very special evidential provision and one that must therefore attract the closest scrutiny by the court. The ability of an accused to challenge his accuser is greatly diminished by s. 3(2) and the court should examine with great care the evidence proffered by the court in support of such evidence. The judgment of the Special Criminal Court herein expressed this view very clearly starting at p.2 of the judgment delivered on the 15th December 2016;

"It is of course correct to suggest that the use of belief evidence coupled with claims of privilege severely limits the ability of the accused to test and probe by cross examination a witness offering such evidence. This limitation is well known and it has been acknowledged in this case and in many judgments of the Superior Courts. It represents a considerable deficit with potential for unfairness in a system where such issues are ordinarily determined after an adversarial conflict and a full testing of the evidence and the basis for the holding of such a belief. However, belief evidence is not automatically discounted on this basis and such evidence may still be devalued even by limited cross examination. The recognised potential unfairness of a trial where defence counsel is hampered in this way is met by the requirement that a trial in due course of law must firmly exclude the possibility that an accused could be convicted solely on such belief evidence. These deficits and the potential unfairness must be overcome by the production by the prosecution of credible evidence independent of the evidence of belief that implicates the accused in the alleged offence of membership. Therefore there must be objective support for the expressed belief extending beyond a simple finding by a court that it is honestly and genuinely held by the officer in question. Consequently there must be a combination of belief and other supporting evidence that leaves a court with no reasonable possibility other than that the accused was a member of an unlawful organisation on the relevant date."

This Court fully endorses that outline of the law relating to belief evidence.

43. In this case the supporting evidence was as noted above. Firstly the Court accepted the DNA evidence taken from the registration plate on the car that carried the bomb linking it to the DNA profile of the accused. In the light of this Court's finding later on it will not be necessary to go into the grounds of appeal relating to the DNA evidence any further at this point.

44. The next strand dealt with by the Special Criminal Court was the evidence found on the accused's mobile phone. There were three photos to which the Special Criminal Court referred. The first of these contained somewhat sentimental memorial content relating to the late Alan Ryan. The Court discounted that. The Court did however take into account the other two. The first of these was of Alan Ryan but this one was accompanied by the legend "heroes are the people who do what has to be done when it needs to be done regardless of the consequences". This was regarded by the Court as evidence of the accused's support and association with the late Alan Ryan who was notable only for his conviction for membership of an unlawful organisation arising out of his participation in a subversive training camp. The Court's finding in respect of this evidence was as follows;

"Of course, taken on its own this material would not be sufficient to convict the accused of membership of an unlawful organisation. But, the Court is completely satisfied that possession of this document is independent support for the opinion of the Chief Superintendent that the accused was a member of an unlawful organisation and that this membership subsisted at the time when the phone was taken in October 2014. Approval in the foregoing terms of the person and activities of the late Alan Ryan also serves to eliminate any remaining notion that the finding of DNA matching that of the accused on a false number plate placed on a vehicle used to house a bomb detonated by an unlawful organisation was a sort of unfortunate coincidence. On a quite separate statutory basis the Court is also entitled to conclude that this material constitutes an incriminating document in relation to the unlawful organisation in question within the meaning of the provisions of s. 24 of the 1939 Act, the possession of which by the accused is *prima facie* evidence of membership by him of that organisation in October 2014. The Court sees nothing to the contrary on the body of evidence before us."

We agree with the Special Criminal Court in this finding and upon its significance in the combination of evidence and that it is further support for the belief evidence of Chief Superintendent Kirwan.

45. However, we consider the third piece of evidence ultimately is the crux of this appeal. In relation to this photo, the Special Criminal Court found as follows;

"Similar observations apply in relation to two further photographs found on the accused's phone whereby he was photographed in company with two other individuals who have criminal convictions for membership of the same unlawful organisation. It may well be that the legitimate bounds of friendship might include one person who happened to be a member of an unlawful organisation. But, evidence of association with a number of such persons begins to take on a different complexion. Now, once again whilst this might not be in itself sufficient to satisfy the Court beyond reasonable doubt that the accused was a member of an unlawful organisation when taken in conjunction with the other evidence it likewise supports the conclusion that the belief evidence is correct and that the DNA evidence is not the product of random coincidence. The Court takes the same view of the evidence relating to the association and activities of the

accused disclosed by the various officers who observed and described the activities of the accused at various locations and times on the night of the 18th January 2013.”

This finding is regrettably factually incorrect. There was in fact just one photo including the two men in question. This photo is of Vincent Ryan and Philip Forsyth. The accused is not in the photo. Moreover neither of these two were convicted of membership of an unlawful organisation. In a case where a combination of belief evidence, DNA evidence and two different photos such as herein is involved, it is difficult to know which particular piece of evidence is conclusive and which is not. The structure of the conclusion is hard to reliably disassemble because the weight of each piece of evidence is difficult to gauge. The Court recognised this difficulty in the final paragraph of its decision where it stated;

“The Court has weighed and evaluated the various strands of evidence set out above and has concluded that all strands of evidence relied on by the Court as outlined above point only in the direction of guilt. On the totality of this evidence, it cannot discern a reasonable possibility consistent with the proposition that the accused is innocent of the charge of membership of an unlawful organisation. None of the individual components would perhaps be enough on their own to convict the accused of this offence but the combination identified by the Court above together with the particular weight of the DNA evidence is sufficient to convince this Court that it is proper to convict the accused of the single offence on the indictment.”

46. Extracting one of the key strands from the totality of the evidence leaves a substantial gap in the reasoning of the Court. For this reason we consider that the conviction is unsafe and we must allow the appeal.