THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 81

Birmingham J.
Sheehan J.
Edwards J.

No. 2016/253

C McD

PLAINTIFF/APPELLANT

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of the Court delivered on the 31st day of January 2017 by

Mr. Justice Birmingham

1. This is an appeal from a decision of the High Court dated the 27th April, 2016 (MacEochaidh J.) refusing to direct the release of the appellant pursuant to article 40.4.2 of the Constitution. That decision also held that s. 2A of the Bail Act 1997 ("the Act of 1997"), was not unconstitutional and accordingly declined to refer the issue of the constitutionality of the statutory provision in issue to the Court of Appeal pursuant to Article 40.4.3 of the Constitution. There is in fact some disagreement between the parties about the extent of the issues that were before the High Court and by extension about the parameters of this appeal.

2. The background to the present appeal is that the appellant stands charged with murder. In summary the case that the prosecution seek to mount is that on the 12th June, 2015, a male person, the prosecution contend it was the appellant/applicant ("the appellant"), dressed as a female and wearing a woman's wig, shot dead one Keith Walker as he arrived at a pigeon club in Clonsilla in a black Toyota Avensis. Of note is that vehicle was normally used by another male, JO'C. As Mr. Walker exited the vehicle, the male dressed as a female walked towards him and opened fire with a submachine gun. Eighteen shots were discharged hitting the victim. The prosecution theory is that Mr. Keith Walker was an unintended victim, that it was a case of mistaken identity. The gardaí launched an investigation immediately and very soon thereafter in possession of a warrant went to a residential premises in Co. Meath. Among the occupants of the house were CMcD, the appellant. According to evidence from garda witnesses during the course of a subsequent bail hearing, he only had undergarments on, comprising a pair of woman's leggings, and the gardaí who entered noticed a cut over his eye and what they believed to be make up on his face. They viewed this as significant because they were in possession of a witness statement from someone who had met the apparent gunman, without the wig but still in the female clothing and carrying a bag, and that witness had also referred to this individual as having make up on his face and also having a cut over his eye. In these circumstances CMcD was arrested at approximately 6.15 a.m. on the 13th June. As is usual a great amount of CCTV footage was harvested which captured the gunman on screen at various stages. The prosecution contend that on one particular piece of footage from a Lidl supermarket the gunman can be seen without the wig and gardaí who viewed this footage will contend that that was CMcD. In follow up searches, a number of days later the wig was found as well as the firearm.

3. The prosecution will seek to adduce evidence that DNA taken from the wig that was located matches that of the accused, and that DNA recovered from disposable gloves also located at the same place also matches that of CMcD. Firearm residue found on the wig was closely similar to firearm residue found on the bullet cartridges recovered at the scene of the murder. The same was true of firearm residue found on the disposable glove.

4. The appellant was charged with the murder and sought bail. On 9th July, 2015, bail was refused by Moriarty J. Thereafter, the appellant brought a fresh application for bail, as by statute he was entitled to do, and a further bail hearing took place before Butler J. on 17th December, 2015. On that occasion, bail was opposed on traditional O'Callaghan grounds, and on grounds under s. 2 of the Act of 1997. In the course of the hearing the Court heard opinion evidence adduced in reliance on s. 2A of the Act of 1997 (inserted by s. 7 of the Criminal Justice Act 2007 ("the Act of 2007")) from Chief Superintendent Patrick Clavin in support of the s. 2 objection. It is useful to look at that bail hearing in greater detail, but it should be noted at this stage that central to the prosecution objection to bail was a contention that if the appellant was granted bail that he would seek to continue with his planned assassination and would in fact carry out the murder of the individual who had been the intended target on 12th June, 2015.

5. The bail hearing took the usual form with Detective Sergeant Tallon, one of the investigating team, outlining the background to the offence with which the appellant was charged and summarising the evidence against him. Sergeant John O'Donovan dealt with the issue of previous convictions and informed the Court that C.McD had a total of sixty four previous convictions from both the District Court and the Circuit Court recorded between 1999 and 2012, thirty six of which were committed while he was on bail. On twenty three occasions bench warrants had been issued in respect of Mr. McD. Sergeant O'Donovan advanced objections on O'Callaghan grounds stating his view that based on the seriousness of the charge, the weight of the evidence, the likely sentence on conviction and the fact that warrants had issued in the past in respect of Mr. McD that the garda belief was that he would not turn up for trial if admitted to bail. The Sergeant also indicated, in support of the objection under s. 2 of the Act of 1997 that he had concerns that the appellant would commit further serious crimes if he was to remain at liberty, given the appellant's history of committing crimes while on bail. He indicated that a Chief Superintendent could go further than that.

6. In cross-examination, it emerged that the most recent warrant that had issued was in 2008 and that since then there had been other occasions when Mr. McD was before the court, had been admitted to bail and had answered his bail. The Sergeant agreed with the proposition put to him that drug taking was a feature of Mr. McD's offending in the past and he accepted that Mr. McD was making strides to address his drug addiction.

7. Chief Superintendent Patrick Clavin was then called on behalf of the prosecution. Given the centrality of his evidence to the issues that now arise on this appeal it is appropriate to review that evidence in some detail.

8. The Chief Superintendent indicated that he had been involved in policing for just short of 34 years. He had served in Lucan which was in Dublin Metropolitan Region (DMR) West between 2007 and 2011, and during the period 2011/2012 he had served as a Superintendent in Blanchardstown. He was then promoted, following which he had served as a Chief Superintendent in Garda Headquarters between 2012 and 2015. More recently he had been appointed to his present position as the Chief Superintendent in Blanchardstown. He explained that one of his roles included maintaining an overview of the activities and anticipated activities of those involved in significant criminality in his division. He said that he had various means of doing that. He received intelligence reports, briefings, attended conferences and held regular management meetings. He said that the area for which he had responsibility was a busy part of Dublin and that lots of serious matters occurred there and that they spent a lot of their time trying to prevent people from killing each other in the area. From time to time he was in receipt of confidential information in respect of criminality. He was experienced in receiving and assessing confidential information and then deploying his resources in the light of what he was aware of in the particular situation.

9. In terms of the present investigation he was the relevant Chief Superintendent and had been briefed in relation to it from when the incident happened, attending daily conferences in connection with the case for at least seven to fourteen days. He had made a number of orders, granting extensions under s. 50(3)(c) of the Act of 2007 in respect of the appellant and also two other suspects. He had also made District Court applications under, s. 50(3)(g)(i) and (h)(i) of the Act of 2007which resulted in a seven day detention in respect of the accused and two others being authorised. He told the Court that a source had nominated another suspect DG as being the person who had organised the intended murder of JO'C.

10. He said he was 100% certain that the deceased, Mr. Keith Walker was an unintended victim. In response to prosecution counsel he said that the source was a confidential source and that he would be claiming privilege over the identity of that source. He was in a position to assess the credibility of the source and to place that information in context.

11. Asked why did he believe there was an attempt by DG to kill JO'C, he said that he was aware from his time as a Superintendent in Lucan and in Blanchardstown, and later as Chief Superintendent in Blanchardstown, that there was an ongoing bloody feud between JO'C, DG, and another brother (whose initials are also DG), and that they had been trying to kill each other and that they continued to plot to kill each other. The Chief Superintendent stated that he did not believe that the appellant knew the unfortunate victim from Adam. The appellant's connection with DG was that they had shared a cell together in prison and the Chief Superintendent expressed a belief that the accused was under an obligation to carry out the murder for DG. He explained that he had an ongoing concern having regard to the accused's obligations to DG and in circumstances where JO'C had not been killed that either DG would proceed to have JO'C murdered or, and he was equally concerned about this, that JO'C would have DG murdered. He said he was concerned about associates linked to both groups and was taking the matter so seriously that since October he had deployed a dedicated armed patrol in the Blanchardstown and Mulhuddart area on a daily basis.

12. Confirming that he was aware of the terms of s. 2A of the Act of 1997, he then stated:-

> "It is my belief that the refusal of the application is reasonably necessary to prevent the commission of further offences, namely the murder by CMcD."

13. Asked whether he appreciated that the section was a draconian provision, he said that he certainly did and that in the light of that he had satisfied himself to the highest level of probability in arriving at his stated belief.

14. In the course of cross-examination, and in response to a question about the fact that the garda concern was a long-standing one, the Chief Superintendent indicated that he had specific information that there was going to be an attack on Christmas Day and that he was taking daily steps to try to stop these people from murdering each other. He did not dissent from the proposition that DG had the wherewithal to attempt to carry out the murder of JO'C regardless of what happened in court and regardless of Mr. McD's status. He did not accept the suggestion that there was no obligation on Mr. McD to cause any harm to JO'C.

15. The defence did not call evidence and the Court then heard submissions from counsel on either side. Counsel for the prosecution submitted that the Court had heard strong evidence that the appellant had committed the offence, albeit that he recognised the presumption of innocence applied, and that even people facing a case in which the evidence against them was strong were presumptively entitled to bail. He referred to the evidence of previous convictions and the appellant's history of offending while on bail and turned to the evidence specific to the feud. He asked the Court to take the view that the Chief Superintendent's evidence was both admissible and, in the context in which it had been given, worthy of being afforded significant weight. He suggested that that evidence, viewed in the light of and in conjunction with all of the other evidence adduced, was sufficient to justify the Court in concluding that a refusal of bail was reasonably necessary to prevent the commission of further serious offences.

16. Counsel on behalf of the appellant sought in the first instance to address the O'Callaghan objection and said that if that were the only objection that the €20,000 independent surety that was available would deal with that, particularly in circumstances where a trial date had been fixed for July 2017. In terms of the further objection under "s. 2 *simpliciter*", as he put it, he submitted that if the previous record was looked at more closely, most of the previous convictions committed while on bail were in relation to less serious matters. In other cases drug addiction would have been a factor, and that was no longer in issue. He felt that what he characterised as the "ordinary" objections under s. 2 of the Act of 1997 could be dealt with by way of conditions and financial terms.

17. Counsel categorised what he referred to as "the s. 2A objection" as highly unusual in as much as the Chief Superintendent's evidence was directed to another individual not before the Court. Without intending to be pedantic, it was incorrect to characterise what occurred as a "s.2A objection" because 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. Be that as it may, counsel went on to submit that it would be very difficult for the Court to conclude that Mr. McD would kill a particular person if granted bail, in circumstances where he was happy to provide an undertaking to the Court that he would do no such thing and happy to stay away from that individual and from any places or areas or associates of that individual to be specified by the State's authorities. He concluded by reminding the Court that if the appellant was refused bail he would be in custody for in the region of two years awaiting trial. It is the case that a trial date has been fixed for 19th July, 2017.

18. The trial judge then gave his ruling as follows:-

> "Mr. McD is charged with murder in particular circumstances where a male was dressed up in women's clothing, concealing a lethal submachine gun and eighteen shots were fired at the victim, eighteen times. There is – of course he has a

presumption of innocence, but there is quite a body of evidence against him. The fact that there is no forensic evidence in relation to the make up is fairly weak when there is actually eye witness evidence in relation to the make up, but he has a presumption of innocence, but the evidence is strong.

There is an objection both under O'Callaghan and s. 2, including s. 2 as amended by s. 2A. By way of background he has 64 previous convictions, 36 of them whilst he was on bail. A number of these were in the Circuit Criminal Court: the convictions include 9 unlawful takings, 3 handling of stolen property, attempted robbery, a firearms matter and an escape: all significant in terms of the O'Callaghan objection. However, it is not impossible that the O'Callaghan objection could be met by conditions and by a sum. I don't think the sum in question would be sufficient and it would have to be an independent surety, so I am not going to refuse on O'Callaghan.

There is a s. 2 *simpliciter* and, in that respect, Sergeant John O'Donovan gave evidence in relation to convictions whilst on bail and I have always felt it isn't quite sufficient to show that he has committed offences whilst on bail. There should be evidence in relation to why he might commit further serious offences and, through no fault of Sergeant O'Donovan's he is not in a position to give this, save by looking at the history. However, then we have Chief Superintendent Clavin. He has given detailed evidence. First of all, he gave – not first of all, but in the course of his evidence, he made an objection under s. 2A and expressed an opinion that the refusal of bail was necessary but it was not a bald opinion by any means. He is a person who has been 34 years in the gardaí. He has been a Chief Superintendent since 2013 and he gave evidence of his experience and the use of intelligence and he made it quite clear that he has a source or sources, in this matter, in respect of whom he claimed privilege and no questions were asked in relation to that, quite properly, because the privilege would have been upheld in those particular circumstances, but he finds the gardaí, as is often the case, trying to prevent citizens from slaughtering each other and other people perhaps getting injured in the interim, but essentially he has given evidence of a feud – I call it: he didn't call it a feud – between criminal elements and he has given evidence to the effect that his intelligence satisfies him to the highest level of probability that the applicant is under an obligation to a named person DG, to carry out the murder of the intended victim in this case. In those circumstances, I have to balance his undoubted right to liberty with this chance of harm and the evidence, I believe, is very high in that regard and I feel I must refuse under s. 2, including as amended – as added to by s. 2A, but it is an ordinary s. 2 refusal as well because I am quite satisfied on his evidence that there is a probability of further serious offences. I do agree that it is very focused and it does not relate to the previous offending in particular. So s. 2 refusal.

19. On the 17th December, 2015, as we have seen, Butler J. refused bail under s. 2 of the Act of 1997 on grounds that the Court was satisfied that such refusal was reasonably considered necessary to prevent the commission of a serious offence by the appellant . Then, on the 16th February, 2016, an application for an inquiry into the legality of the appellant's detention was moved before Noonan J. in the High Court pursuant to Article 40 of the Constitution. It would appear that it was indicated by counsel at that stage that it was proposed to invoke article 40.4.3 for the purpose of challenging the constitutionality of both s. 2 and s. 2A of the Act of 1997. Noonan J. opened an inquiry and directed that the respondent should certify the grounds for the appellant's detention and the matter was made returnable for the following day. The matter was then adjourned as the parties sought a copy of the digital audio recording ("the DAR") record of the bail hearing before Butler J. on the 17th December, 2015. On the 18th February, 2016, Noonan J. directed the appellant to serve more elaborate pleadings setting out in greater detail the appellant's case as to why the provisions in controversy are said to be unconstitutional. A plenary summons and statement of claim was served and a defence was delivered on the 26th February, 2016.

Claim and points of defence

20. The defendants / respondents ("the respondents") have asserted that during the course of the High Court inquiry, the appellant clarified that he was only challenging the detention on the basis that s. 2A of the Act of 1997, as amended, was unconstitutional. The respondents protest that while there is reference to s. 2 of the Act of 1997 in the submissions to this Court, the constitutionality of that section was not challenged in the High Court. The appellant says that that is not so, that the issues in relation to s. 2 of the Act of 1997 were live in the High Court and that he is entitled to raise these issues again on appeal. What is certainly clear is that the arguments and counter arguments presented in the High Court were mainly focussed on the challenge to s. 2A of the Act of 1997 and it is certainly true that the challenge to s. 2A has dominated the present appeal.

The statutory provisions in issue

21. Subsections (1) and (2) of Section 2 of Act of 1997 provides as follows:-

> "(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.
>
> (2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning –
>
> (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,
>
> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,
>
> (c) the nature and strength of the evidence in support of the charge,
>
> (d) any conviction of the accused person for an offence committed while he or she was on bail,
>
> (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,
>
> (f) any other offence in respect of which the accused person is charged and is awaiting trial,
>
> 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.

22. Section 2A of the 1997 Act provides as follows:-

"(1) Where a member of the Garda Síochána not below the rank of chief superintendent, in giving evidence in proceedings under s. 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.

(2) Evidence given by such a member in the proceedings is not admissible in any criminal proceedings against the applicant.

(3) The court may, if it considers that publication of evidence given by such a member under subs. (1) or of any part of it may prejudice the accused person's right to a fair trial, by order direct that no information relating to the evidence or that part, or to any examination of the member, be published in a written publication or be broadcast.

(4) The court, when making an order under subs. (3), may specify the duration of the order and may at any time vary or set aside the order as it sees fit and subject to such conditions as it may impose.

(5) Subsection (2) of s. 4 applies in relation to the hearing of the evidence of the member and subss. (4) to (7) of that section apply in relation to a contravention of sub. (3) of this section, in each case with the necessary modifications.

(6) Nothing in this section is to be construed as prejudicing the admission in proceedings under s. 2 of other evidence of belief, or of evidence of opinion, whether tendered by any member of the Garda Síochána or other person.

(7) Nothing in this section limits the jurisdiction of a court to grant bail."

The section 2 issue

23. In a situation where the people in a referendum provided that where an application for bail is made by a person charged with a serious offence, the 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 the person, the appellant accepts that there can be no challenge to s. 2(1) of the Act of 1997. However, his criticisms centre on subss. (2)(c) and (2)(f) of that Act, being:

"(2)(c) The nature and strength of the evidence in support of the charge and

(2)(f) Any other offence in respect of which the accused person is charged and is awaiting trial."

24. The appellant says that these sub-sections infringe impermissibly the presumption of innocence. The appellant acknowledges that the strength of the evidence was historically a matter to be considered and this was specifically recognised in the case of *The People (Attorney General) v. O'Callaghan* [1966] IR 501, but says that that was logical because the stronger the evidence that one faced, the greater the temptation to flee. However, the appellant says that there is no logical connection between the fact that the evidence in respect of the offence charged is strong and the issue of whether further serious offences will be committed. Again, so far as subs. (2)(f) is concerned the appellant says the fact that somebody has been charged with an offence is wholly irrelevant. If an individual has been charged with another offence he enjoys a presumption of innocence in relation to it and the fact of being charged ought to be regarded as entirely irrelevant.

25. In my view, the arguments advanced in relation to subss (2) of s. 2, and in fairness to the appellant, they have not been the subject of any great attention, have ignored the fact that the court's consideration of whether serious offences will be committed in the future is triggered by the fact that the appellant has been charged with the offence in respect of which he seeks bail. There may be many people in society about whom there are grave concerns that they will commit serious offences, and there may indeed be people in respect of whom it would be possible to put before the court cogent, perhaps even compelling, evidence to that effect, whether by way of opinion/belief evidence or otherwise, but that is not the point. The court is required to consider whether the refusal of bail is necessary in order to prevent the commission of further serious offences only because the applicant has been charged with the individual offence which is the subject of the bail application. While of course the court looks to the future in the context of a bail application which is objected to on s.2 grounds, it is nonetheless the case that the offence charged is right at the heart of the exercise and it is no more than common sense that the court should, and will, take into account the nature of the offence charged, the nature of the evidence in respect of it and the strength of that evidence. Indeed, it may often be in the interests of an applicant for bail that this should happen. If the offence charged while serious enough to come within the terms of the statute is not a really serious offence, and if the available evidence appears thin or even tenuous, then obviously that is a matter to which the court should have regard and which the applicant for bail would very much want the court to have regard to.

26. So far as subss. (2)(f) of s. 2 is concerned, there is no suggestion that the appellant has been charged with any other offence, and to that extent, he is here seeking to rely on a *ius tertii*. In a situation where he has not been charged with any other offence and where nobody is suggesting that another charge is a relevant consideration that is not a ground on which the appellant can rely.

27. However, the real focus of attention on this appeal, and it appears the situation was the same in the High Court, has been in respect of s. 2A which deals with evidence that may be adduced from a Chief Superintendent in support of a s.2 objection. In the written submissions the appellant has helpfully summarised the main grounds of challenge as follows:-

(i) The section renders a bail hearing unfair and breaches the principle of audi alterem partem. The legislation cannot conform to Article 38.1 of the Constitution establishing that trials shall be 'in due course of law'.

(ii) The section gives rise to an impermissible interference with the presumption of innocence. The facts of this bail application graphically bear this out. The section impermissibly abandons normal rules of evidence and allows a Chief Superintendent give hearsay evidence as to matters within his knowledge or belief.

(iii) The section constitutes a disproportionate interference with an applicant's constitutional rights. The section fails to comply with the stricture that a law should impair a constitutional right to the least extent reasonably possible. No safeguards have been inserted to minimise the effects of this significant statutory intervention. Bail may be refused under s. 2 solely on the basis of the evidence of a Chief Superintendent. (emphasis in original)

(iv) The section breaches the principle of égalité des armes. It is an entirely pro prosecution measure. The prosecution can call the belief evidence which now has this elevated status. The defence cannot. Even if the defence had secured

evidence from a Chief Superintendent, they would be prevented from calling evidence that refusal of the bail application was not reasonably necessary to prevent the commission of a serious offence. That is because this one sided measure only permits belief evidence to be admitted where the witness wants to say refusal of bail is reasonably necessary. It is not permitted where the witness wants to say the opposite.

(v) The section fails to take account of the fact that confidential informants may be mistaken, misinformed, inaccurate or malicious. A section which permits a person to be imprisoned for two years or more on the basis of unsworn testimony from unnamed informants who may be mistaken, misinformed, inaccurate or malicious, is a section which fails to respect basic constitutional rights.

(vi) Unlike the Chief Superintendent's opinion evidence in a membership trial, belief evidence under s. 2A can be given in the generality of cases, not limited to paramilitary trials in the Special Criminal Court. All that is required is that the accused is charged with an offence that carries imprisonment of five years or more. This covers most indictable offences.

28. The reference at para. (vi) to evidence from a Chief Superintendent in the course of a case involving a charge of membership of an unlawful organisation is interesting. Indeed, both sides, though particularly the appellant, have paid much attention to the jurisprudence that has developed in relation to unlawful organisation membership trials. At one level it is understandable that that should be so, in circumstances where the language of s. 2A of the Act of 1997 mirrors that of s. 3(2) of the Offences Against the State (Amendment) Act 1972 and indeed there can be little doubt but that s. 2A of the Act of 1997 was modelled on the earlier section. However, that should not obscure the fact that the context of a bail application is very different to that of a membership trial. In the case of a trial for the offence of membership of an unlawful organisation, the court is concerned with an alleged existing fact. The person before the court either is or is not a member of an unlawful organisation as charged. Either side has the opportunity to adduce evidence to establish as a fact the proposition for which they contend. It is true that the willingness of unlawful organisations to intimidate, and indeed to murder, can cause difficulties for the prosecution in putting before the court evidence which they might wish to adduce and, no doubt in recognition of that as far back as 1972, legislation was enacted which made a significant change to the ordinary rules of evidence in so far as such trials were concerned.

29. The situation is quite different in the context of a bail application and more particularly in the context of a bail application where there is an objection pursuant to s. 2 of the Act of 1997. Any bail application is about predicting what will happen in the future. Will the person before the court, if admitted to bail, turn up for his trial? Will he abscond? Will he interfere with witnesses? The members of An Garda Síochána who must decide, in the first instance, either to consent to bail or to object to bail, are in the business of looking to the future and predicting what will happen in particular eventualities. More directly relevant is the fact that the judge deciding on the bail application is likewise looking to the future and forming an opinion on the basis of the information available to him as to what is likely to occur on a future occasion. The situation is not really any different where s. 2A of the Act of 1997 is relied upon for the purpose of adducing evidence of the belief of a Chief Superintendant in support of a s. 2 objection. The gardaí, in deciding to object, do so on the basis of a belief that if the applicant for bail is admitted to bail he will re-offend, and that the commission of further such offences can only be prevented by denying bail.

30. Again, in any case where s. 2 is invoked, regardless of whether or not s. 2A evidence has been utilised, if the judge hearing the application refuses bail, he (or she) will be doing so because the court is satisfied, i.e., has formed the belief, that if the applicant is admitted to bail he is likely to commit a further serious offence or offences, and that denying bail is necessary to prevent the commission of such offence or offences.

31. At the risk of stating the obvious, seeking to predict what will happen in the future is by no means confined to bail applications and the criminal justice system. For any number of reasons, people may have to make a judgment as to how the economy is likely to fare over a particular period in the future or to how a particular industry will develop. In such a situation, it is not uncommon that individuals will seek out the opinion of an individual with particular experience and expertise in the area.

32. At a more mundane level, the opinions of persons with experience, expertise and in particular a track record of successful predictions are eagerly sought in the case of major upcoming sporting events. Closer to home, in the course of the sentencing phase of criminal proceedings, it is very common for probation officers, forensic psychologists and others to express their views, or to state their beliefs about the likelihood of re-offending. Indeed, one could imagine that in the context of a s. 2 objection, there might be scope for asserting and indeed adducing evidence admissible as expert testimony under the ordinary rules of evidence that given the presence of particular factors the risk of future offending was exceptionally high, or alternatively, that because of the presence of positive indicators that such a risk was remote.

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.

34. As a post-1937 statute, the Bail Act of course enjoys a presumption of constitutionality. Moreover, one cannot ignore the fact that the legislation follows on from and was designed to give effect to the will of the people expressed in a referendum, though it is the case, and sight should not be lost of this, that s. 2A was not introduced in the immediate aftermath of the referendum. 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.

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.

36. One argument that was advanced, which has its origin in the decision in Damache, suggested that if there was to be evidence from a Chief Superintendent that it should come from a Chief Superintendent who is separate from the investigation.

37. For my part I find that argument surprising and indeed fundamentally misconceived. Unlike a Superintendent issuing a warrant pursuant to s. 29 of the Offences Against the State Act, 1939, which section was declared unconstitutional in *Damache v The Director of Public Prosecutions* [2012] 2 IR 266, the Chief Superintendent giving evidence of his belief as to what will happen in the future is not exercising a quasi judicial role and the view he forms will not be determinative of the issue. The notion that a Chief Superintendent, with an intimate knowledge of an investigation, and a deep knowledge of the applicant for bail, should be precluded from expressing a belief, but that a Chief Superintendent with no direct knowledge of matters would be allowed to do so, strikes me as bordering on the absurd.

38. The appellant further submits that to the extent that s. 2A of the Act of 1997 abrogates or modifies the long established common law rules of evidence rendering opinion evidence by an non-expert inadmissible, it constitutes a measure that is disproportionate to any legitimate aim being pursued. It is said that the Chief Superintendent's belief, without more, will be enough to show that a refusal of the application is reasonably necessary for the purpose of preventing the commission of a serious offence. It is said that appropriate balancing safeguards are absent. These might have included:

> (i) a requirement that a special application should be made to the bail judge for leave to call the belief/opinion evidence;
>
> (ii) a requirement that the prosecution must first demonstrate that they have exhausted their efforts at securing evidence from witnesses who will give their evidence viva voce; (I would comment that the Chief Superintendent does in fact give his evidence viva voce and is amenable to being cross-examined. Moreover, hearsay evidence can be objected to, although it may suit the applicant not to do so.)
>
> (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; (I have already expressed my views on this proposition.)
>
> (v) a requirement that bail could not be refused solely on the basis of the belief evidence of the Chief Superintendent.

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.

40. Perhaps the most substantial argument advanced is that the section should not permit refusal of bail solely by reference to the belief of the Chief Superintendent. Again the argument here owes much to recent jurisprudence in the context of the offence of membership of an unlawful organisation, and in particular to the decision of the Supreme Court in *Redmond v. Ireland* [2015] IESC 98, which upheld the constitutionality of s. 3(2) of the Offences Against the State (Amendment) Act 1972, but indicated that the section would have been repugnant to the Constitution if it permitted an accused to be convicted *solely* on the basis of the belief evidence. The present argument is advanced on twin bases. It is said in the first place that the outcome in the present case was indeed determined *solely* by reference to the evidence of Chief Superintendent Clavin. Secondly, and as a fallback position, it is argued that if, contrary to the appellant's primary contention. bail was not in fact refused solely by reference to the evidence of Chief Superintendent Clavin, the Court should in any event take the opportunity to follow the lead of the Supreme Court and go on and declare that if the situation were otherwise and bail was being refused solely on belief evidence that this would be unacceptable and indeed would be unconstitutional.

41. For my part I am in complete agreement with the High Court judge that, as he put it, *"it is certain that the s. 2A evidence was by no means the only evidence offered to support the contention that bail should be refused because of the prospect of the commission of a murder by the appellant if released"*. This was emphatically not a case of bare opinion or bare belief. On the contrary, the Chief Superintendent put the murder that had occurred firmly in the context of an ongoing feud, and explained in some detail why the gardaí had the fears that they had. In the circumstances the defence were in a position by cross examination, by

submission, and by calling evidence had they wished to do so, to challenge the basis for the fears expressed by the State's witnesses, and the conclusion that had been formed that the refusal of bail was necessary to prevent the commission of further serious crimes, and more specifically to prevent the murder of JO'C. So for example, counsel was able to probe in cross examination the fact that DG had the capacity to carry out, or to have carried out the murder of JO'C, irrespective of whether CMcD was in custody or at liberty. It was open to him to argue that, insofar as the gardaí were strongly of the view that CMcD was intent on fulfilling the obligation that he had undertaken and on carrying through on the plan to murder JO'C, his client would be in a very difficult position indeed if there was a further attack targeted at JO'C, whether successful or unsuccessful, as his client would have been nominated as a prime suspect in advance, and that in those circumstances, the prospect of him carrying out a successful attack, which would have to involve an ability to mount an escape, was very remote.

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.