THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

Record No: 162/2006

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

COLM MAGUIRE

Appellant

JUDGMENT of the Court delivered 23rd April, 2018 by Mr. Justice Edwards .

Introduction

1. The appellant was charged before the Special Criminal Court with the offence of membership of an unlawful organisation, to wit the Irish Republican Army ("the IRA") on the 23rd of August 2005, contrary to s.20(1) of the Offences Against the State Act, 1939 (the "Act of 1939").

2. The appellant's trial commenced on the 4th of July 2006 and concluded on the 17th of July 2006. The Special Criminal Court delivered its verdict on the 25th of July 2006, and convicted the appellant. He was sentenced on the same date to a period of five years imprisonment, with the final year suspended on conditions. The appellant has served the said sentence.

3. The appellant now appeals against his conviction.

The relevant evidence at trial

The Chief Superintendent's belief

4. The Special Criminal Court heard evidence from Detective Chief Superintendent Philip Kelly of his belief that the appellant was, on the relevant date i.e. the 23th of August 2005, and within the State, a member of an unlawful organisation, styling itself the Irish Republican Army, otherwise Óglaigh na hÉireann, also known as the IRA. This evidence was offered pursuant to s.3 of the Offences against the State (Amendment) Act 1972 (the "Act of 1972").

5. The court heard that Detective Chief Superintendent Kelly had been a member of An Garda Síochána for thirty-four years, twenty-eight of which were spent investigating subversive or terrorist crime. His duties included the *"assessment of intelligence in relation to subversive crime"*. His belief was based on confidential and privileged information he had received prior to the 23rd of August 2005. He did not base his belief on any information he obtained during the appellant's detention.

6. In relation to the evidence on which his opinion was based, Detective Chief Superintendent Kelly gave the following evidence:

> *"A. I base my opinion, my lord, on confidential information available to me, in general terms, in general.*
>
> *Q. Does that come from garda sources, or informant sources?*
>
> *A. It comes from both, my lord.*
>
> *Q. And claiming privileges, what interests are you protecting?*
>
> *A. I am claiming privilege on it, my lord, in protecting the life of persons, the lives of persons involved in the security of the State, my lord. It would damage ongoing investigations into subversive activity within the State …"*
>
> *7. Chief Superintendent Kelly was cross examined by the defence in relation to his claim of privilege. He told the court:*
>
> *"I formed my opinion, my lord, over a period of time…*
>
> *During that period, my lord, I would have looked at reports and files concerning the accused, Colm Maguire.*
>
> *Q. Is your belief based upon, as it were documentary sources such as reports, files and undocumented information?*
>
> *A. It is based, my lord, on documented information and some, possibly undocumented as well, my lord. That is not available to me.*
>
> *…*
>
> *Q. And did this information come from persons who were not members of An Garda Siochana?*
>
> *A. That would be correct, my lord, yes.*
>
> *Q. Did you speak to any of those persons?*
>
> *A. No my lord no.*
>
> *Q. Do you know their identities?*

A. I do, my lord, yes.

Q. Do you know whether some or all or any of them have criminal convictions?

A. My lord, no person that I know that supplied information has a criminal

conviction, my lord.

…

Q. The information that you are claiming privilege over, can you tell me about the, the number of pages of reports, the volume of material that you have considered at some time in the past?

A. The volume of information, my lord, it would be quite, quite large, my lord.

…

Q. Now, presumably most of these reports and material you have regard to relate to something like that; activities, associations or conduct of Mr Maguire, would that be fair to say?

A. Not necessarily, my lord, but where it would I would still be very reluctant to, I would be reluctant to disclose, my lord, for obviously if I disclose names or associations in confidential information given to me it would endanger life.

Q. And what I want to suggest to you that you are bypassing a statutory provision of the Act which allows membership to be proved by such matters by coming in here and giving second-hand, hearsay, privileged evidence, that you are asking the court to convict Mr Maguire?

A. As I say, my lord, information available to me, on the most part, didn't – it wasn't about associations or other people.

Q. Okay. For the most part it wasn't – just repeat that?

A. Wasn't about associations as you put it there.

Q. Conduct?

A. I suppose in the broadest sense, my lord, conduct.

Q. Well, are you talking about – you are not – hardly -- talking about writings or incriminating documents are you?

A. No, my lord."

The events of the 23rd of August 2005

8. The court also heard evidence that on the 23rd of August 2005, a Special Detective Unit (SDU) of An Garda Síochána was carrying out an investigation into the activities of the IRA in Dublin and in Limerick, and as part of that investigation were engaged in a surveillance operation in and around Jurys Inn Hotel at Christchurch in Dublin City. Mr Maguire was a person of interest to the Gardaí at the time and the court heard evidence that members of the surveillance team had been tasked *"to enter the Jury's Inn Hotel in Christchurch and try and locate Colm Maguire and observe his movements within the hotel".*

9. The court further heard that at 1.50 pm on that day the appellant was observed by two Gardaí in the café area of Jurys Inn at Christchurch. He was accompanied by a man wearing a plaster cast on one arm, who was later established to be a Mr Patrick Kelly. Twenty minutes later, at 2.10 pm on that day, Mr Maguire left Jurys Inn, leaving behind Mr Kelly. However, he returned a short time later accompanied by another man, who was later established to be a Mr Alan Ryan from Limerick. The appellant and Mr Ryan joined Mr Kelly in the hotel.

10. At 2.20 pm the appellant and Mr Kelly were observed leaving Jurys Inn Hotel together. On this occasion Mr Ryan remained at the hotel. The appellant and Mr Kelly were observed to proceeding to a local laneway nearby, known as Back Lane. At that stage the Garda surveillance team lost sight of the appellant for a short time. It had been noted by the Garda surveillance team that on his way to Back Lane, the appellant was carrying a blue and red rucksack. At about 2.30 pm the appellant, followed some distance behind by Mr Kelly, returned to Jurys Inn Hotel and rejoined Mr Ryan in the café in the hotel. On his return Mr Maguire was still seen to be carrying the blue and red rucksack.

11. The court heard that ten minutes later, at 2.40 pm, Mr Ryan walked out of the hotel and then returned to the hotel almost immediately. Approximately two minutes later, he left in a taxi which was followed by Gardaí to Heuston Station. Shortly after the taxi departed from the hotel, the appellant and Mr Kelly were observed leaving the hotel. At 2.55 p.m. Alan Ryan was arrested at Heuston Station under Section 30 of the Act of 1939 on suspicion of being in unlawful possession of ammunition. He was searched. The court heard that three boxes of 9 mm Luger ammunition were found on his person. In all there were 149 rounds of ammunition.

Lies told by the appellant at interview

12. The court further heard evidence that the appellant was arrested on the 29th of September 2005 by Detective Sergeant Martin Downes, at Ballyfermot, under s 30 of the Act of 1939 in respect of two suspected offences, namely unlawful possession of ammunition on the 23rd of August 2005, and membership of the IRA on the same date. He was subsequently detained at Terenure Garda Station where he was interviewed. In the course of his interrogation the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 (the "Act of 1998") were explained to him in some detail. Moreover, the consequences of a failure or refusal to answer material questions were explained to him in detail.

13. The record of what transpired at the appellant's said interview was put in evidence by the prosecution. The court heard that during the course of being interviewed, the appellant:

(a) consistently denied that he was a member of the IRA;

(b) when questioned about his presence at Jurys Inn on the 23rd of August 2005, stated *"I can't remember being there, and I don't know if I was there"*;

(c) denied any knowledge of the ammunition and denied giving any ammunition to Alan Ryan;

(d) in response to the question *"Do you know Alan Ryan?"* replied *"No"*;

(e) stated that *"… the only time I go to Jurys Inn is to meet friends or family, after the gym or if I am in the area"*;

(f) when asked who he was with at Jurys Inn Hotel on the 23rd August 2005, replied *"I can't remember that date"*;

(g) stated *"I'm not answering any questions until I see a doctor … I have headaches. I have not slept in two nights. I just genuinely don't feel well".*

14. The prosecution's case was that it was manifest from the earlier evidence concerning what the Gardaí had observed in the course of their surveillance on the 23rd of August 2005 that the appellant had lied to Gardaí in the course of being interviewed, e.g., in respect of not knowing Alan Ryan, and in respect of not remembering being in Jurys Inn hotel on the relevant date.

15. Their case was that an inference could reasonably be drawn from his lies that he was in fact a member of the IRA on the date in question and that he was lying to avoid incriminating himself in that regard by his own admissions. Moreover, such an inference could provide independent support for, and thereby corroborate, the belief evidence of the Chief Superintendent.

The Judgment of the Special Criminal Court
16. In its judgment the Special Criminal Court found:

1. The accused was present in Jurys Hotel and its environs in the Christchurch area of Dublin as described by the uncontroverted evidence of members of the Garda Siochana surveillance team on the 23rd August 2005.

2. He there met one Alan Ryan who was found to be in possession of ammunition immediately following that meeting.

3. Although no connection was established between the accused and the ammunition, the Gardai were reasonable in their suspicion of the activities of the accused on that occasion and the questions they asked the accused in relation thereto were material to their investigations within the meaning of s.2 aforesaid [Section 2 of the Offences Against the State (Amendment) Act 1998].

4. The accused did not truthfully answer questions concerning his presence as aforesaid and whether or not he knew the said Alan Ryan.

5. We mention the foregoing line of questions only because, while we believe that the accused was in all likelihood, having regard to the medical evidence and Garda evidence, feigning illness, we must give him the benefit of the doubt in regard to his failure to answer questions after he declared that he was unable to do so.

6. Detective Chief Superintendent Kelly gave his evidence in a forthright and credible manner. While that opinion evidence could never have the same weight as direct evidence of membership (for example an admission or evidence of a fellow member) it was uncontroverted (by any direct evidence given in court) and as a matter of law is capable of being sufficient to sustain a conviction. We are satisfied that the Detective Chief Superintendent holds the opinion that he gave and that that opinion was based upon a serious and independent consideration of the case.

7. The untruthful answers referred to above are capable of amounting to corroboration of the evidence of the Detective Chief Superintendent.

8. [Counsel for the appellant] *made lengthy and cogent submissions on the basis of Article 6 of the European Convention on Human Rights and has distinguished this case from that of the Director of Public Prosecutions v Martin Kelly (the Supreme Court) (unreported 4th April, 2006)* [now in fact reported at [2006] 3 I.R. 115] *in that the Convention was not in force within this jurisdiction on the date of the offence in the Kelly case. Mr. Justice Fennelly, however, did refer at some length to the position under the European Convention and referred to three cases which considered the same. In the course of his conclusions he had the following to say* [quoting O'Flaherty J in Director of Public Prosecutions v Special Criminal Court [1999] 1 I.R. 60]:

> *"78 The essential question to be answered in this case is whether the undisputed restriction on the right of the accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution has been unduly restricted so as to render his trial unfair and his conviction unsafe. I believe that all of the authorities cited from all relevant jurisdictions demonstrate that there is an inescapable obligation on the courts to guarantee the overall fairness of a trial. I also believe that, in our legal system, the right to cross-examine one's accusers is an essential element in a fair trial. This is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system. While there may be derogations for overriding reasons of public interests from normal procedural rights of the defence, these must not go beyond what is strictly necessary and must, in no circumstances, to use the language of Lord Bingham, "imperil the overall fairness of the trial".*
>
> *79 I believe that the claim of privilege made by the Chief Superintendent constituted an undoubted infringement of the normal right of the accused to have access to the material which underlay the belief expressed. To that extent, it constituted a restriction on the effectiveness of the right of the accused to cross-examine his true accusers and it had, for that reason, the potential for unfairness.*
>
> *80 On the other hand, counsel for the prosecutor has pointed to a number of compelling circumstances to justify the course of action which has been adopted. Firstly, the exceptional resort to the evidence of the Chief Superintendent applies only in the case of organisations which, in their*

nature, represent a threat, not only to the institutions of the State, but to individuals who are prepared quite properly to cooperate with the State in securing the conviction of members of such organisations. This makes it possible to justify some restriction on direct access on behalf of the accused to the identity of his accusers. Secondly, the legislature has allowed such evidence to be given by members of An Garda Síochána of particularly high rank, who can be presumed to have been chosen for having high standards of integrity. Thirdly, the procedure applies only while there is in force a declaration that "the ordinary courts are inadequate to secure the effective administration of justice". The offence is a scheduled one; thus the cases will be heard only by the Special Criminal Court, a court now composed of judges who must be presumed to apply only the highest standards of fairness. I also agree with Geoghegan J. that it is relevant that the section enjoys a presumption of constitutionality. Any restriction on the right to cross-examine, which it implies, must be limited to the extent that is strictly necessary to achieve its clear objectives. I believe that the circumstances I have mentioned constitute sufficient justification for its introduction, while, at the same time, demonstrating a concern to respect such necessary limitations.

81 I return to the particular circumstances of the present case. It is of crucial importance that there was quite extensive evidence, other than the evidence of the chief superintendent, which convinced the Special Criminal Court that the accused was a member of the I.R.A. on the relevant date. The court said that it took into account the fact that the chief superintendent had claimed privilege. It did not, on the other hand, explain this remark any further. The court should, in my view, have explained the weight, if any, which it attached to the evidence of the Chief Superintendent, in view of the claim to privilege. However, in the particular circumstances of this trial, I do not think there was any overall unfairness. I do not think that the undoubted restriction on the rights of the accused went further than was strictly necessary to protect other potential witnesses or informants. I do not see how the identity and safety of those other witnesses could have been protected otherwise. Thus, it was, in the literal sense necessary to prevent the defence from learning who they were, which, in turn, made it inevitable that the right to cross-examine would have to be restricted. The matter might be quite different in a case where the evidence of the chief superintendent was the sole plank in the prosecution case, where privilege had been successfully claimed and the accused had given evidence denying the charge. In such a case, there would be a powerful argument based on denial of "In re Haughey" rights.

This Court is further aware that in a judgment of a Court of Criminal Appeal delivered on the 14th of July 2006 (as yet unavailable) [now in fact reported at [2007] 2 I.R. 169] in the case of the Director of Public Prosecutions v Eamon Matthews, Mrs. Justice Macken in delivering the judgment of that court considered the same question at some length and expressly found the judgment of Fennelly J., referred to above, to be of considerable assistance to that court in reaching its conclusions in respect of the application of the Article and, inter alia, [that court] expressed itself to be satisfied that a restriction on the ability to cross-examine the Garda witness in that case arising from his claim of privilege in respect of the underlying sources of information upon which his belief was based did not, ipso facto, on the caselaw, constitute failure to comply with Article 6 of the European Convention on Human Rights as alleged by that applicant. Rather the court found that the issue to be decided was whether, in the context of ensuring the existence of a fair trial, a restriction or limitation is necessary, and is the least invasive step which can be taken to protect the legitimate interest invoked. The court expressed itself to be satisfied having regard to the majority judgment of the Supreme Court in DPP v Kelly, in the context of Article 38 of the Constitution as well as the above analysis found in the judgment of Fennelly J. as to Article 6 of the Convention, that the restriction may be permitted if it is necessary and is the least invasive approach available.

We are satisfied that the Kelly case is very similar to this and, in particular, that it is not a case where we would convict on the evidence of the Detective Chief Superintendent alone.

At the close of the case we were given a copy of Iris Oifiguil dated the 20th June 2006, which gave notice pursuant to section 18 of the Offences Against the State (Amendment) Act 1998, of an extension for 12 months on 15th June 2006. We take notice of that publication and we are satisfied that the Act was in operation at all material times.

Further, whether or not it had been so extended, the Act was in operation at all material times to these proceedings.

We are satisfied, therefore, beyond reasonable doubt, on the basis of the uncontroverted evidence of the Detective Chief Superintendent and on the basis of Section 2 failures as aforesaid that the accused was on the 23rd August 2005 a member of an unlawful organisation as charged."

[un-italicised commentary in square brackets is by this Court]

Grounds of Appeal

17. The appellant's Notice of Appeal contained nine grounds, eight of which were ultimately relied upon. They are as follows:

1. The trial judges erred in fact or/and in law in accepting the evidence offered by Chief Superintendent Kelly, which was based on confidential information received, and formed the basis of a belief that the appellant was a member of an unlawful organisation styling itself the IRA.

2. The trial judges erred in fact or/and in law in failing to explain the weight, if any, that they attached to the evidence offered by Chief Superintendent Kelly of his belief that the appellant was a member of an unlawful organisation styling itself the IRA

3. The trial judges failed to explain in their judgment the process in which they engaged whereby they decided to rely upon the belief of the Chief Superintendent to convict the Appellant in circumstances where the Chief Superintendent claimed privilege over the origins of his confidential information.

4. The trial judges erred in deciding to rely upon the evidence of belief offered by the Chief Superintendent without explaining the weight they attached to the evidence of the Chief Superintendent, in view of the claim to privilege made and attached to the evidence, which was used to convict the appellant.

5. The trial judges erred in fact and/or in law in failing to inquire adequately or at all in to the origins of the confidential information, relied upon by Chief Superintendent Kelly to base his belief that the appellant was a member of an unlawful organisation.

6. The trial judges erred in law or in fact and/or in a mixture of law and fact in drawing adverse inferences, pursuant to s.2 of the Offences Against the State Act 1998, from the manner in which the appellant answered and/or refused and/or failed to answer questions material to membership of an unlawful organisation.

7. The trial judges erred in law and in fact and/or a mixture of both law and fact in failing to address in their judgment of the 25th day of July 2006 submissions of counsel for the appellant in relation to the fact that the prosecution case was closed without proving that the Offences Against the State Act continued to have effect up to and including July of 2006.

8. [Not proceeded with]

9. The trial judges erred in law in failing to have any or any sufficient regard for the decisions of the European Court of Human Rights in the cases of *Kostovski*, *Doorson* and *Vanmechelen*.

Submissions on behalf of the appellant

The appellant's written submissions address grounds 1, 2, 3, 4, 5 & 9 together, and it is proposed to do likewise in this judgment – under the general heading of "The belief evidence". The appellant has then dealt separately with grounds 6 and 7. Again, we will adopt the same approach. Ground 6 relates to "Adverse inference(s), under s.2 of the Act of 1998", while ground 7 relates to "The late admission of evidence that the Act of 1998 was in force during the currency of the trial and at the date of judgment"

The belief evidence

18. The point is made that during the closing address of counsel on behalf of the appellant, he addressed at considerable length and in considerable detail the court's obligations under the European Convention of Human Rights and the European jurisprudence attaching to and flowing from same, including in particular the decisions in *Kostovski v. Netherlands* (1990) 12 EHRR 434 and *Doorson v. Netherlands* (1996) 22 EHRR 330. It was submitted to this Court that the trial court failed to adequately address those submissions in its judgment.

19. It was contended that in *Kostovski v. Netherlands*, the European Court of Human Rights ("the ECtHR") had found that the conviction of the applicant had been based significantly on reports of statements made by anonymous witnesses and in the circumstances concluded that there had been a violation of Article 6(3)(d) of the European Convention on Human Rights and Fundamental Freedoms (1950) ("the Convention") taken in conjunction with Article 6(1) of the Convention. In its judgment, the ECtHR indicated that the admissibility and assessment of evidence were matters to be regulated primarily by domestic law. However, the ECtHR also concluded that the applicant still enjoyed certain entitlements within that framework and that the court of trial had a duty to ensure those entitlements were observed:

> "41. … . As a rule, an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making a statement or at some later stage in the proceedings."

20. Counsel maintained that the ECtHR had held that the accused had not been given this opportunity since, in protecting the identity of sources used by the prosecution, the applicant had been unable to question the witnesses in the case either directly or have someone do so on his behalf. The ECtHR concluded that this had violated his right to a fair trial, and commented:

> "42. … . If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.
>
> 43. Furthermore, each of the trial courts was precluded by the absence of the anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability. The courts admittedly heard evidence on the latter point and no doubt – as is required by Dutch law – they observed caution in evaluating the statements in question, but this can scarcely be regarded as a proper substitute for direct observation."

21. The ECtHR had concluded that the situation during the trial, when taken as a whole was not satisfactory, and stated:

> "43 … . In these circumstances it cannot be said that the handicaps under which the defence laboured were counter-balanced by procedures followed by the judicial authorities."

22. In the subsequent decision of Doorson v. Netherlands, the applicant in that case was convicted of drug trafficking offences on the evidence of witnesses who had testified in his absence. He had no opportunity to cross-examine. However, the ECtHR held that there had been no violation of Article 6(1) in conjunction with Article 6(3)(d) because the court of trial had specifically directed additional attention to the scrutiny of the anonymous prosecution witnesses, unlike in Kostovski where most of the witnesses were not produced at all. The Strasbourg Court outlined the response of the Dutch Supreme Court to the Kostovski judgment, as follows:

> "46. In its judgment of 2nd July, 1990, NJ 1990, No. 692, the Supreme Court considered that it had to be assumed in light of the European Court's Kostovski judgment that the use of statements by anonymous witnesses was subject to stricter requirements than those defined in its case law until then. It defined these stricter requirements in the following rule: such a statement must have been taken down by a Judge who (a) is aware of the identity of the witness, and (b) has expressed, in the official record of the hearing of such a witness, his reasoned opinion as to the reliability of the witness and as to the reasons for the wish of the witness to remain anonymous, and (c) has provided the defence with some opportunity to put questions or have questions put to the witness. This rule is subject to exceptions; thus according to the same judgment, the statement of an anonymous witness may be used in evidence if (a) the defence have not at any stage of the proceedings asked to be allowed to question the witness concerned, and (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial Court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection."

23. Counsel for the appellant in the present case submitted that the decisions of the ECtHR make it clear that it is possible to use anonymous evidence against an accused in certain circumstances, as emphasised in the extract from the judgment in *Doorson*. While acknowledging a requirement to take account of the fact that strictly speaking the evidence given by the Chief Superintendent is not evidence of an anonymous or out of court witness (as noted by O'Donnell J. in *The People (Director of Public Prosecutions) v. Donnelly* [2012] IECCA 78), it was nevertheless submitted that the treatment by the Special Criminal Court of the Chief Superintendent's evidence in this case does not meet the standard of fairness suggested by the ECtHR. It was submitted that the procedure in place is completely inadequate because it fails to ensure that the trial, taken as a whole, is fair.

24. Counsel for the appellant acknowledges that the Kostovski and Doorson line of jurisprudence was considered in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115, but it was submitted that given the nature of the belief evidence offered in the instant case by Chief Superintendent Kelly, the court ought properly to have rejected the belief evidence of the chief superintendent because it involved the reliance on the impugned type of evidence/statements to a decisive extent.

25. It was submitted that when assessing the weight to be attached to the belief evidence offered in any given case the court must be in a position to objectively decide how much weight, if any, should be attached to it.

26. The trial court in the present case found that the Chief Superintendent "gave his evidence in a forthright and credible manner … and that that opinion was based upon a serious and independent consideration of the case." It was submitted that the trial court applied the wrong test. At no stage was the forthrightness or credibility of the Chief Superintendent impugned or challenged, but rather what was in issue was the accuracy of the information upon which the belief was based and consequently the reliability of the belief, ie the opinion, offered by the Chief Superintendent to the Court, and the ability to test same.

27. It was further submitted that the fact that the Chief Superintendent honestly believes what he is saying, and that he is forthright and credible, is not necessarily any guarantee as to the accuracy of the information he has, particularly in circumstances such as exist here, where that court has only the most vague outline as to the nature and quality of the source or sources of the information, and concerning the information itself, on which the Chief Superintendent has relied.

28. The appellant acknowledges that the decision in *The People (Director of Public Prosecutions) v. Mathews* [2007] 2 I.R. 169] is not helpful to the case that he is advancing. He seeks to distinguish it on the basis that it related to an objection to the admission of the belief evidence because of its effect on cross-examination and its potential to infringe the right to a fair trial guaranteed by Article 6 of the ECHR. The appellant however seeks to make a different and perhaps subtler point in which he is not objecting to the admission of the evidence per se but rather to the subsequent use of it, or the attaching of weight to it, by the Court where it is principally relied upon to found the conviction.

29. He also seeks to distinguish *The People (Director of Public Prosecutions) v. Maguire* [2008] IECCA 67 on the basis "that in that case the court of trial gave greater consideration as to the weight to be attached to the belief evidence and is therefore to be distinguished from the appeal herein." He further maintains that *The People (Director of Public Prosecutions) v. Donnelly* [2012] IECCA 78, and the case of *Connolly v Director of Public Prosecutions* [2015] IESC 40, neither of which ostensibly supports the case that he is making, are "distinguishable on the facts from the case herein."

Adverse inference(s), under s.2 of the Act of 1998

30. Section 2 (1) of the Act of 1998 provides:

> *"2.—(1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure."*

31. Moreover, s. 2 (4) b sets out;

> *"(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly."*

32. The evidence in issue in this context involves the questions and answers from the 3rd interview conducted with the appellant at the Garda station on the 30th September 2005 – over a month after the alleged offence. It was the prosecution's case that the questions asked, which concerned the events of the 23rd of August 2005, were material to the offence under investigation, namely whether the appellant was a member of an unlawful organisation, to wit the Irish Republican Army ("the IRA") on the 23rd of August 2005, contrary to s.20(1) of the Act of 1939.

33. It is pointed out on behalf of the appellant that throughout his interviews the appellant denied membership. Moreover none of the answers that he gave in relation to the events at Jurys Inn hotel contained a denial that he was there on any particular day. He said that he did not know an Alan Ryan.

34. It was submitted with reference to paragraphs 1-4, and 7, of the Special Criminal Court's findings of fact, and its ruling based on those findings, (all recited at paragraph 16 above) that a striking and fatal feature of the Special Criminal Court's finding is that at no point does it in fact state that it is drawing an inference from what it has found to be untruthful answers, let alone what that inference is. It therefore failed entirely to take an explicitly mandated step required before acting on the basis of s. 2.

35. We were referred to submissions made to the court of trial by counsel for the appellant, which were again adopted for the purposes of this appeal. In particular, counsel had made the following submissions to the Special Criminal Court:

> *"In relation to the issue of Jurys itself, a reading of all of the questions doesn't lead you to say that Mr Maguire has falsely denied being in Jurys. In fact, none of the answers that he gave in relation to Jurys contain a denial that he was there on any particular day.*
>
> *Because as the court has seen from the answers, he says that he goes there a lot. Now, as far as the 23rd of August is*

concerned, the court obviously knows that this is questioning which is taking place five weeks or more later, five weeks or more after the event of the day in question and in terms of an Accused person, either positively agreeing that he was there or falsely denying that he was there, the answers to the Jurys questions insofar as relates to at present, my lord, can't, having regard to those facts be the subject matter of an inference by the court.

Now, insofar as the phone call[s] from his phone or to his phone in connection with Alan Ryan are concerned, the court has that dilemma that I mentioned earlier. If he was in possession of the phones, at 2 pm, 14.01, my lord, or whatever the time, how is it that the surveillance guards aren't able to say, "I saw him either making or taking calls on three occasions while he was there or while we were watching him". Or better still, play a tape from inside the hotel to show him doing that.

Now, insofar as the answers are concerned the court giving itself a Lucas warning has to ask, could there be other possible explanation for his attitude in relation to the questions? Other than, other than guilt of membership? And obviously the most — I mean, there is a variety of them, but that he simply didn't like the police or didn't want to cooperate with the police. The possibility is that he may well have been aware that there was some criminal enterprise about which he had seen some part of it but wanted to maintain his right to silence either for himself or was unwilling to contribute information to the Gardai in relation to others. And the court ought not to lose sight obviously of Mr Kelly in this.

And the court will recall the question[ing] of Mr Maguire in relation to Mr Kelly. And there was obviously a reluctance on his part to identify Mr Kelly, because it's suggested to him, not only was this the man that you were with in the hotel, but you were stopped with him that night. What motive can the court say existed for that? Can the court rationally draw a conclusion that his failure to confirm that he was with Mr Kelly on any occasion related to an alleged membership of the IRA? Or simply a desire not to make it perhaps easy for the police to have more information and perhaps information that might be damaging to Mr Kelly?

And suppose you had been in a hotel, in a public place and you found out afterwards that a man that had been sitting at the table, had been found to have possessed ammunition, when he is arrested half an hour later or 20 minutes later. You might not want, simply for that fact, you might not want to be known to either have been in his company or associated with him in any way at all, without it being either an admission of any wrong doing on your part or without it being regarded as clearly evidence of membership or denial solely constructed to conceal a membership.

So as far as the questioning concerning the events are concerned, the court has a pattern of the answering of questions up to 5 o'clock. The issue being that, do the answers that he gave in that period, insofar as they either relate to Jurys or Mr Ryan or Mr Kelly, do they only bear an inference that he was lying about a material matter in order to conceal the truth about his membership of the IRA? In my submission, the court couldn't be satisfied to the required standard that that was the case."

36. It was submitted that the trial court did not apply the proper test in circumstances where it had arrived at a position where it was satisfied that the appellant had given answers which were *untruthful*.

37. It was submitted that having so found, the Special Criminal Court should then have moved on to consider what inference, if any, was to be drawn and whether any adverse inference so drawn was proper in all of the circumstances. In this regard the Court should have had regard to circumstances where a person may well be inclined to tell an untruthful version of events to the police when in custody, and the safety of a *Lucas* type direction should apply. The issue of the *Lucas* direction had been raised by counsel for the appellant and the decision of Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Brady* [2005] JILL-CCA 050501 was brought to the court's attention.

38. It was submitted that there is nothing in the judgment upon which this Court could satisfy itself that the trial court had indeed applied such a direction to the facts of the instant case. The Special Criminal Court should have definitively stated in its judgment that it had drawn an inference and what that inference was. Then it should have stated that it had addressed its mind, in its capacity as a jury to the possibility that the accused had been untruthful for a reason other than purported membership of the IRA and had expressly rejected that possibility, thus finding that the proper inference to draw was one adverse to the appellant, and consistent only with his guilt, while at the same time being inconsistent with any other rational hypothesis.

The late admission of evidence that the Act of 1998 was in force during the currency of the trial and at the date of judgment.

39. Finally, it was submitted that the prosecution closed their case having failed to demonstrate the applicability in force of the provisions of s. 2 of the Act of 1998 for the purposes of the trial which took place from the 4th to the 25th of July 2006. In contrast the prosecution had specifically and quite correctly put into evidence the relevant copy of An Iris Oifigiúil showing the extension of s. 2 to cover the period of the s. 2 questioning in September 2005. There was no evidence adduced before the court prior to the prosecution case closing covering the extension of the operation of the provision beyond 30th June 2006.

40. It was submitted that in order for the trial court to operate the inference provisions in s. 2 it must be satisfied by evidence that at the time when asked to draw an inference the provision is in fact operative. The provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 by virtue of section 18 *"cease to be in operation on and from the 30th day of June 2000 unless a resolution has been passed by each House of the Oireachtas resolving that that section should continue in operation."* Subsection (2) makes provision for continuation by way of resolution of both Houses. While Acts of the Oireachtas shall be judicially noticed by virtue of section 13 of the Interpretation Act 2005, it was submitted that this does not pertain with regard to Dáil and Seanad resolutions.

41. The prosecution case having closed without adducing this proof and defence counsel having made his closing submission – *inter alia* on this defect in the prosecution case – the prosecution then re-joined on this issue, making an extensive further submission and at that point handing in to the court the issue of An Iris Oifigiúil promulgating the passing of the required resolution by the Dáil and Seanad for the period covering 30 June 2006 to 30 June 2007. It is submitted that the trial court erred in allowing this to be done and in receiving the official promulgation of the required resolution at that point, long after the prosecution case was closed.

Submissions on behalf of the respondent

The belief evidence

42. In response to the submissions on behalf of the appellant, counsel for the respondent relies principally upon the decision of the Supreme Court in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115, and in particular refers us to the judgment of Fennelly J which specifically considered the ECtHR's judgments in the *Kostosvski*, *Doorson* and *Van Mechelen* cases. Having considered this jurisprudence, *inter alia*, Fennelly J went on to say:

> *"78 The essential question to be answered in this case is whether the undisputed restriction on the right of the accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution has been unduly restricted so as to render his trial unfair and his conviction unsafe. I believe that all of the authorities cited from all relevant jurisdictions demonstrate that there is an inescapable obligation on the courts to guarantee the overall fairness of a trial. I also believe that, in our legal system, the right to cross-examine one's accusers is an essential element in a fair trial. This is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system. While there may be derogations for overriding reasons of public interests from normal procedural rights of the defence, these must not go beyond what is strictly necessary and must, in no circumstances, to use the language of Lord Bingham, 'imperil the overall fairness of the trial'.*
>
> *79 I believe that the claim of privilege made by the Chief Superintendent constituted an undoubted infringement of the normal right of the accused to have access to the material which underlay the belief expressed. To that extent, it constituted a restriction on the effectiveness of the right of the accused to cross-examine his true accusers and it had, for that reason, the potential for unfairness.*
>
> *80 On the other hand, counsel for the prosecutor has pointed to a number of compelling circumstances to justify the course of action which has been adopted. Firstly, the exceptional resort to the evidence of the Chief Superintendent applies only in the case of organisations which, in their nature, represent a threat, not only to the institutions of the State, but to individuals who are prepared quite properly to cooperate with the State in securing the conviction of members of such organisations. This makes it possible to justify some restriction on direct access on behalf of the accused to the identity of his accusers. Secondly, the legislature has allowed such evidence to be given by members of An Garda Síochána of particularly high rank, who can be presumed to have been chosen for having high standards of integrity. Thirdly, the procedure applies only while there is in force a declaration that "the ordinary courts are inadequate to secure the effective administration of justice". The offence is a scheduled one; thus the cases will be heard only by the Special Criminal Court, a court now composed of judges who must be presumed to apply only the highest standards of fairness. I also agree with Geoghegan J. that it is relevant that the section enjoys a presumption of constitutionality. Any restriction on the right to cross-examine, which it implies, must be limited to the extent that is strictly necessary to achieve its clear objectives. I believe that the circumstances I have mentioned constitute sufficient justification for its introduction, while, at the same time, demonstrating a concern to respect such necessary limitations.*
>
> *81 I return to the particular circumstances of the present case. It is of crucial importance that there was quite extensive evidence, other than the evidence of the chief superintendent, which convinced the Special Criminal Court that the accused was a member of the I.R.A. on the relevant date. The court said that it took into account the fact that the chief superintendent had claimed privilege. It did not, on the other hand, explain this remark any further. The court should, in my view, have explained the weight, if any, which it attached to the evidence of the Chief Superintendent, in view of the claim to privilege. However, in the particular circumstances of this trial, I do not think there was any overall unfairness. I do not think that the undoubted restriction on the rights of the accused went further than was strictly necessary to protect other potential witnesses or informants. I do not see how the identity and safety of those other witnesses could have been protected otherwise. Thus, it was, in the literal sense necessary to prevent the defence from learning who they were, which, in turn, made it inevitable that the right to cross-examine would have to be restricted. The matter might be quite different in a case where the evidence of the chief superintendent was the sole plank in the prosecution case, where privilege had been successfully claimed and the accused had given evidence denying the charge. In such a case, there would be a powerful argument based on denial of 'In re Haughey' rights."*

43. We are reminded that in the present case, as in the *Kelly* case, the appellant did not give evidence at his trial.

44. This Court's attention was also drawn to the Supreme Court's decision in *The People (Director of Public Prosecutions) v. Connolly* [2015] IESC 40, where that court had been asked, pursuant to s. 29 of the Courts of Justice Act 1924, to consider the question:

> *"Is the jurisprudence of the Supreme Court, as enunciated in People (DPP) v. Kelly [2006] 3 I.R. 115, in relation to belief evidence of a Chief Superintendent, pursuant to s.3(2) of the Offences Against the State (Amendment) Act, 1972, still applicable, having regard to the European Convention on Human Rights Act, 2003."*

45. In responding to this question, MacMenamin J, giving judgment for the Supreme Court, stated:

> *32. On the 30th July, 2012 the Court of Criminal Appeal delivered its judgment in DPP v. Donnelly & Ors. [2012] IECCA 78. This judgment was referred to earlier. In DPP v. Donnelly & Ors. [2012] IECCA 78, O'Donnell J., speaking for the Court of Criminal Appeal, explained very fully the manner in which s.3(2) OASA may be analysed. He did so in the following terms:*
>
> > *"26 First, it is noteworthy that the evidence pursuant to s.3(2) can only be given in relation to one category of offence, that is membership of an unlawful organisation. For the reasons set out in Kelly and Redmond , those organisations determined to be unlawful organisations pursuant to the Act of 1939 are cell based, secretive, and violent organisations which invest considerable resources in the enforcement of secrecy about the membership of such organisations, and do so by torture, death, and by the inevitable fear that those methods engender. Membership is normally a continuing state of affairs, rather than a single activity, and is accordingly more susceptible to belief evidence of a senior garda officer, based on a variety of sources over a period of time, than if such evidence was admissible in respect of a single criminal activity. Whatever the justification, it is certainly the case that such belief evidence is only admissible in respect of membership of an unlawful organisation."*
>
> *O'Donnell J. continued:*
>
> > *"27 The section makes the belief of a Chief Superintendent evidence that an accused was at a material time a member of an unlawful organisation. As the cases show, it does not make that evidence conclusive or preclude it from being challenged, tested or contradicted. For present purposes, it is important however, that it is the belief of the Chief Superintendent which is evidence, and not the material upon which that belief is based. Thus, the*

section does not involve the giving of hearsay evidence where the relevant evidence is that of a person who is not available in court for cross-examination. Nor is it akin to the giving of evidence by an anonymous witness. Here, the relevant evidence is the belief of a Chief Superintendent, who is identified and gives his or her evidence in open court. It is to be anticipated that the belief of such a senior officer in the gardaí will be based on a variety of sources: technological, electronic, and human, including information supplied by informants. But even in cases where the evidence of the Chief Superintendent is based upon the direct statements provided to him or her by an informant or informants, the court is not asked to act upon the hearsay statements of such informants: rather it is the belief of the Chief Superintendent based upon such informants which is the evidence. The formation of that belief would normally involve the application of the Chief Superintendent of his or her experience in dealing with informants and in dealing with illegal organisations and where relevant, in assessing the significance and value of diverse pieces of information and intelligence. Accordingly, where evidence is given pursuant to s.3(2) it is not the case that the court is asked to act upon either the evidence of anonymous witnesses or witnesses who are out of court and not available for cross-examination. Accordingly, any analysis based upon Doorson and Al-Khawaja should take account of this structural distinction."

33. In the last sentence of the passage just cited, O'Donnell J. was referring to other judgments of the ECtHR which addressed hearsay evidence as being the sole and decisive evidence against a defendant. There the ECtHR observed that such procedures would require sufficient counter-balancing factors, including the existence of strong procedural safeguards, and held that in the absence of such safeguards, there had been violations of Article 6.1, in conjunction with Article 6.3 of the Convention. The reference to Doorson v. The Netherlands (Case 20524.92) (1996) 22 EHRR 330, and Al-Khawaja and Tahery v. The United Kingdom (Case 26766/05) (2011) 54 EHRR 23, therefore, relate to circumstances in which evidence was admitted from witnesses who were not present in court, not available for cross-examination, and in some circumstances whose testimony was accepted under provisions of anonymity. The European Court of Human Rights considered that in such a situation Article 6 was breached if such evidence is the sole or decisive evidence in a sense as is likely to be determinative of the outcome of the case."

46. MacMenamin J then went on to consider the judgment of the ECtHR in the case of *Donohoe v Ireland* (Application No: 19165/08) [2013] ECHR 1363 (12th December 2013), recording that, having noted the circumstances in which the Chief Superintendent had given evidence before the Special Criminal Court, and adverting to the additional counter-balances which had been taken into account by the trial court, the ECtHR had then observed:

"88. … at the outset, that the trial court was alert to the need to approach the Chief Superintendent's evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence as a result of its decision upholding that claim. It proceeded to adopt a number of measures having regard to the rights of the defence.

Firstly, the court reviewed the documentary material upon which (Chief Superintendent) sources were based in order to assess the adequacy and reliability of his belief. While the Court does not regard such a review, in itself, to be sufficient to safeguard the rights of the defence (Edwards and Lewis v. the United Kingdom, cited above, § 46), it nevertheless considers that the exercise of judicial control over the question of disclosure in this case provided an important safeguard in that it enabled the trial judges to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed material (see McKeown v. the United Kingdom, no. 6684/05, § 45, 11 January 2011).

Secondly, the trial court in considering the claim of privilege was alert to the importance of the 'innocence at stake' exception to any grant of privilege. It confirmed, expressly, that there was nothing in what it had reviewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. The trial court was thus vigilant in exploring whether the non-disclosed material was relevant or likely to be relevant to the defence and was attentive to the requirements of fairness when weighing the public interest in concealment against the interest of the accused in disclosure (see, mutatis mutandi, Jasper v. the United Kingdom, cited above, § 57). The Court considers that if the applicant had any reason to doubt the trial judges' assessment in this regard he could have requested the appeal court to review the material and to check the trial court's conclusions. However, he chose not to do so.

Thirdly, in coming to its judgment the trial court stated, specifically, that it had expressly excluded from its consideration any information it had reviewed when it was weighing the Chief Superintendent's evidence in the light of the proceedings as a whole. It further confirmed that it would not convict the applicant on the basis of PK's evidence alone and that it required his evidence to be corroborated and supported by other evidence.

The Court further notes that, in advance of taking its intended procedural steps, the trial court informed the applicant and his co-accused of its intentions as regards its procedures and it afforded them an opportunity to make detailed submissions inter partes which they did (see, a contrario, Edwards and Lewis v. the United Kingdom).

89. In addition to the above measures taken by the trial court to safeguard the rights of the defence, the Court also considers that there existed other strong counterbalancing factors in the statutory provisions governing belief evidence.

90. In the first place, as noted above, providing belief evidence involves a complex intelligence gathering and analytical exercise. Section 3(2) (of the Offences Against the State Act, 1939) therefore requires that those doing so must be high-ranking police officers and, moreover, they are generally officers with significant experience of such organisations and in gathering and analysing relevant intelligence (paragraphs 51 and 53 above). In the present case, PK was the Head of the Special Detective Unit concerned with State security and monitoring subversive organisations and had such pertinent professional experience as to lead the SCC to state that it was difficult to envisage any other person in the State more relevantly informed …

91. In addition, the Chief Superintendent's evidence is not admitted as an assertion of fact but as the belief or opinion of an expert. It is not, therefore, conclusive and, indeed, it has no special status it being one piece of admissible evidence to be considered by the trial court having regard to all the other admissible evidence …

92. The Court further notes that while the scope of cross-examination was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent's evidence in a range of ways still remained. Consequently, such evidence could be tested by the

defence even if privilege had been granted as regards the sources upon which that opinion was based. As pointed out by the Supreme Court in DPP v. Kelly …, the principle is that any restriction on the right to cross-examine is limited to the extent 'strictly necessary' to achieve its (protective) objective. As noted by O'Donnell J in DPP v. Donnelly and Others …, the Chief Superintendent's evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on whether he knew or personally dealt with any of the informants; and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted …, and where the cross-examination of these witnesses is hindered or not possible at all."

47. MacMenamin J. had then continued:

"36. In light of the findings, the Court of Human Rights considered that the proceedings in their entirety were fair. The weight of the evidence, other than the belief evidence alone, combined with the counter-balancing safeguards and factors, was sufficient to conclude that the grant of privilege as to the sources of the Chief Superintendent's belief did not render the applicant's trial unfair. It followed, therefore, that there had been no violation under Article 6 of the Convention.

37. Thus, insofar as ECHR jurisprudence was engaged, the ECtHR judgment addressed the original question posed by the Court of Criminal Appeal. The jurisprudence of the Supreme Court, as enunciated in DPP v. Kelly [2006] IESC 20, in relation to the belief evidence of a Chief Superintendent, was, therefore, 'still applicable' (see the certificate of the Court of Criminal Appeal referred to earlier). I would point out that the question of ECHR compatibility, in this context, must be seen in the light of Murray C.J.'s observations in McD v. PL [2009] IESC 81, to the effect that:

> *'… the role of the Convention as an interpretative tool in the interpretation of our law stems from a statute, not the Convention itself, and can only be used within the ambit of the Act of 2003.'*

(See also the observations of O'Donnell J. in DPP v. Donnelly & Ors. [2012] IECCA 78 to the same effect).

On this basis, it can be safely concluded that the question sought to be raised in the expanded grounds of 23rd January, 2009 were (sic) fully answered both by the judgment in DPP v. Donnelly & Ors. [2012] IECCA 78, and in the ECtHR judgment in Donohoe v. Ireland (Application No.19165/08) [2013] ECHR 1363 (12th December, 2013).

48. In the light of this jurisprudence the respondent has submitted to this Court that the Special Criminal Court, in receiving and assessing the 'belief evidence of D/Chief Superintendent Philip Kelly in the course of the appellant's trial correctly applied the legal principles identified by the Supreme Court in the Kelly and Connolly cases. During the course of the trial, a considerable amount of discussion had been engaged in between the bench and counsel for both the prosecution and defence as to the weight to be attached to the evidence of D/Chief Superintendent Kelly. Ultimately, the Court, having quoted extensively from the judgment in Kelly, expressed the view that it was satisfied *"beyond reasonable doubt, on the basis of the uncontroverted evidence of the Detective Chief Superintendent and on the basis of s. 2 failures as aforesaid that the accused was on the 23rd August 2005 a member of an unlawful organization as charged"*.

49. In so far as the appellant now contends that there was a failure on the part of the learned trial Judges *"to inquire adequately or at all into the origins of the confidential information relied upon by Chief Superintendent Kelly"*, no application was made by or on behalf of the appellant during the course of the trial for the trial judges to conduct such an examination.

50. In *The People (Director of Public Prosecutions) v Palmer* [2015] IECA 153, the Court of Appeal expressly accepted the respondent's submission *that "... the Director of Public Prosecutions has no role in assessing the evidence of a Chief Superintendent"* and that *"there is no requirement in the statute* [the Act of 1972] *that there would be any add-on that the opinion should be verified, checked or analysed by the Director of Public Prosecutions or anyone else."*

51. It was submitted that the trial court carefully considered the submissions of senior counsel for the appellant as to the compatibility of the procedures before the Special Criminal Court in relation to the receipt and assessment of belief evidence of a Chief Superintendent (pursuant to s. 3(2) of the Act of 1972) with the provisions of Article 6 of the Convention. The Special Criminal Court judges were correct in their view that they were bound to follow the decision of the Supreme Court in the Kelly case.

Adverse inference(s) under s.2 of the Act of 1998

52. Counsel for the respondent submitted that it is apparent from the judgment of the Special Criminal Court that the trial judges carefully considered the submissions of senior counsel for the appellant concerning the application of the provisions of s. 2 of the Act of 1998 but ultimately were satisfied beyond reasonable doubt that *"the accused did not truthfully answer questions concerning his presence* [in Jurys Inn Hotel and its environs] *... and whether or not he knew ... Alan Ryan".* The trial judges gave the appellant the *"benefit of the doubt"* in excluding from their consideration the appellant's failure to answer 'material questions' following his declaration of illness. Although not expressly stated in their judgment, it was submitted that it is clear that the trial judges excluded from their consideration any possibility that the appellant had been untruthful for some reason other than his guilt in respect of the offence charged.

The late admission of evidence that the Act of 1998 was in force during the currency of the trial and at the date of judgment

53. It was submitted on this issue that, having regard to the extensive discussion between the bench and senior counsel for the appellant (during the course of the defence closing submissions) and, following due consideration of the submissions of counsel for the prosecution, the trial judges adequately dealt with this issue in their judgment wherein they stated:

"At the close of the case we were given a copy of Iris Oifigiúil dated 20th June 2006, which gave notice pursuant to s.18 of the Offences Against the State (Amendment) Act 1998 of an extension for 12 months on the 15th June 2006. We take notice of that publication and we are satisfied that the Act was in force at all material times. Further, whether or not it had been so extended the Act was in operation at all material times to these proceedings."

The Court's Decision

Grounds Nos. 1-5 & 9 – complaints re the belief evidence

54. This was not a case where the Special Criminal Court was being asked to rely on the testimony of anonymous persons who were unavailable for cross-examination. Rather it was being asked to rely on the evidence of D/Chief Superintendent Kelly as to his belief that the appellant was on the 23rd of August 2005 a member of a specified unlawful organisation.

55. D/Chief Superintendent Kelly was available for cross-examination and was indeed cross-examined. While it is true that he claimed privilege as to his sources, there remained scope for cross-examination of him and some testing of his evidence. Moreover, it was not a case where the witness baldly stated his belief and provided absolutely no other information. On the contrary, it emerged in the course of D/Chief Superintendent Kelly's evidence (i) that his belief was based on multiple sources, (ii) those sources were both Garda and non-Garda sources, (iii) that the information he considered was both documented and undocumented, (iv) that the sources concerned had no criminal convictions, (v) that the D/Chief Superintendent was very experienced, (vi) that the D/Chief Superintendent formed his belief over time, and (vii) that as part of the process which led to the formation of his belief he had consulted certain files and records concerning the appellant.

56. Further, this was not a case in which the sole plank in the prosecution's case against the appellant was the belief of the D/Chief Superintendent, and in which the appellant had given evidence in his own defence denying membership.

57. The circumstances of the present case are readily distinguishable from those in the *Kostosvski*, *Doorson* and *Van Mechelen* cases. Moreover, those cases were expressly considered in the judgment of Fennelly J in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115, who held that in the circumstances of that case the undoubted restriction on the rights of the accused to cross-examine did not go further than was strictly necessary to protect other potential witnesses or informants. We believe that to be true in the present case also, and do not believe there the appellant's trial was unfair.

58. In arriving at this conclusion, we have considered the criticism that the judgment of the Special Criminal Court does not expressly state what weight the court was placing on the evidence of D/Chief Superintendent Kelly, noting that in the *Kelly* case Fennelly J had stated that the trial court should have explained the weight, if any, which it attached to the evidence of the Chief Superintendent. In this case, the Special Criminal Court concluded that:

> *"Detective Chief Superintendent Kelly gave his evidence in a forthright and credible manner. While that opinion evidence could never have the same weight as direct evidence of membership (for example an admission or evidence of a fellow member) it was uncontroverted (by any direct evidence given in court) and as a matter of law is capable of being sufficient to sustain a conviction. We are satisfied that the Detective Chief Superintendent holds the opinion that he gave and that that opinion was based upon a serious and independent consideration of the case."*

59. While for completeness in setting forth its reasons the Special Criminal Court might usefully have added the words *"and therefore are prepared to attach significant weight to it"*, at the end of the last sentence of the short passage just quoted, it is nevertheless clearly implicit from the words actually spoken that that was in fact their view. The trial judges had clearly weighed and evaluated the D/Chief Superintendent's evidence. Having done so they expressed themselves satisfied that the D/Chief Superintendent had given credible evidence, that his belief was honestly held, and that he had given it serious consideration. There was, as pointed out already at paragraph 55 above, a clear evidential basis for the conclusion that the D/Chief Superintendent's opinion was a considered one. Moreover the trial judges clearly had in mind the *Kelly* decision, and the express reference to the fact that the belief evidence *"was uncontroverted (by any direct evidence given in court) and as a matter of law is capable of being sufficient to sustain a conviction"*, indicates their awareness of Kelly, and a consciousness on their part that the circumstances obtaining here, as was also the case in Kelly, would permit them to rely upon and indeed afford significant weight to the D/Chief Superintendent's belief. Indeed, the Special Criminal Court goes on later in it's judgment to quote at length from the judgments in the *Kelly* case, and in particular from the judgment of Fennelly J in that case.

60. While it might have been better if the Special Criminal Court had stated expressly that it believed it could do so in the circumstances of the case, the fact that they did not do so was not fatal in the *Kelly* case, and equally here, in our view, it ought not to be regarded as fatal.

61. This Court is not satisfied to uphold any of the grounds of complaint advanced under this heading, namely Grounds of Appeal Nos. 1-5 & 9, respectively.

Ground No 6 - Adverse inference(s), under s.2 of the Act of 1998

62. It is true that the judgment, although it sets out the facts as found by the Special Criminal Court, and in particular the fact that the appellant did not truthfully answer questions concerning his presence at Jurys Inn Hotel on the 23rd of August 2005, and whether or not he knew Alan Ryan, does not go to state in express terms what were the inferences that the court was prepared to draw from this. We are satisfied, however, from the judgment considered in its entirety that it is manifest that the Special Criminal Court was prepared to draw the inferences that that he was in fact a member of the IRA on the date in question and that he was lying to avoid incriminating himself in that regard by his own admissions.

63. Having carefully considered the transcript of the evidence that was before the Special Criminal Court we are satisfied that there was a reasonable basis for the drawing of such inferences.

64. While the Special Criminal Court would have had to have regard to the possibility that the appellant might have lied for reasons other than because he was guilty of the offence of which he was suspected, and in effect to have given itself a Lucas warning, we consider that it may reasonably be inferred that the court in fact did so. The basis for such an inference arises in circumstances where the trial judges had been specifically asked by defence counsel to give themselves a *Lucas* warning, where defence counsel had specifically drawn the decision of Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Brady* [2005] JILL-CCA 050501 to the attention of the trial judges, where the prosecution had not demurred in respect of defence counsel's suggestion, where the trial court had not indicated any unwillingness to do so or that they considered the request to be in any way inappropriate or unreasonable, and where they had retired to consider their verdict immediately after defence counsel's remarks.

65. Again, it might have been better if the Special Criminal Court's judgment had specifically alluded to the fact that, before arriving at their decision, they had, in effect, given themselves a *Lucas* warning and considered the possibility that the appellant had told lies for reasons other than because he was guilty of the offence of membership. However, the desirability that there should have been a recording of these steps in their decision making process arises purely in the interests of transparency, and not because of any

concern on the part of this appellate court that, in the circumstances of this case, the trial court might have overlooked or discounted the necessity to proceed on the basis of a Lucas warning.

66. We further agree with counsel for the respondent that it is of significance that the Special Criminal Court expressed itself as *"giving the benefit of the doubt"* to the appellant in respect of answers given by him after he had claimed illness. It is indicative of care on the part of the trial court in their weighing of the evidence, and of their concern to exhibit fairness towards the appellant.

67. In the circumstances, we are not disposed to uphold Ground of Appeal No 6.

Ground of Appeal No 7 - The late admission of evidence that the Act of 1998 was in force during the currency of the trial and at the date of judgment

68. We are satisfied that the Special Criminal Court was entitled in the legitimate exercise of its discretion to receive evidence of compliance with a technical proof of this sort at any time up until the delivery of its judgment. The defence was not prejudiced in any significant way. Even though evidence of it had not yet been adduced before the trial court, the defence legal team could scarcely have been unaware that the Dáil and Seanad had in fact passed the necessary resolution, that notice of the resolution had been promulgated in an issue of An Iris Oifigiúil, and that the Act of 1998 was indeed in force at all material times. If there had been a genuine reason to doubt any of these things it would have been an entirely different matter. The failure to adduce the necessary evidence as to a matter of purely technical proof before closure of the prosecution case was down to nothing more than inadvertence. Once the oversight had been adverted to by the prosecution, or drawn to their attention, the prosecution was still obliged to adduce the necessary evidence, and they were in a position to do so, and with the leave of the court in fact did so. We are satisfied that it was an entirely proper exercise of judicial discretion to allow it to be done belatedly and at the point that it was done.

Conclusion

69. This Court, not having seen fit to uphold any of the appellant's grounds of appeal, dismisses the appellant's appeal against his conviction.