THE COURT OF APPEAL

Record No. 226/2017

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

MICHAEL CONNOLLY

APPELLANT

JUDGMENT of the Court delivered on the 26th day of June 2018 by Mr. Justice Mahon

1. Having pleaded not guilty the appellant was tried by the Special Criminal Court over a period of fourteen days commencing on the 9th May 2017 and was, on the 1st June 2017, convicted of one count of being, on the 16th day of December 2014, a member of an unlawful organisation, to wit, an organisation styling itself the Irish Republican Army otherwise Óglaigh na hÉireann, otherwise the IRA, contrary to s. 21 of the Offences Against the State Act 1939 as amended by s. 48 of the Criminal Justice (Terrorist Offences) Act 2005. The appellant was sentenced on the 9th May 2017 to a term of imprisonment of three years to date from the 5th April 2017. The appellant has appealed his conviction.

2. On the date in question, the 16th December 2014, the appellant was seen in the company of a co-accused who was on that day found to be in possession of improvised explosive devices. The appellant was arrested and detained and refused to answer questions in relation to his alleged membership of the IRA in the context of questioning pursuant to s. 2 of the Offences Against The State (Amendment) Act 1998.

3. Twenty one grounds of appeal have been notified to this court. For convenience, and having regard to the approach adopted in the appellant's written submissions, these grounds have been grouped together under the following headings:-

(1) Grounds 1 to 9 and 17:

The trial court's refusal to examine privileged documentation grounding belief evidence pursuant to s. 3(2) of the Offences Against The State (Amendment) Act 1973.

(2) Grounds 10 to 13:

Belief evidence of Assistant Commissioner O'Sullivan.

(3) Ground 14:

Error as to fact.

(4) Ground 15:

Flawed circular approach to the evidence by the trial court.

(5) Ground 16:

Conclusions regarding accused's attitude to section 2 questioning.

(6) Ground 18:

Mobile phone evidence (seizure of evidence).

(7) Ground 19:

Failure to withdraw case at close of prosecution case.

(8) Grounds 20 and 21:

Absence of evidence that conduct on the 16th December 2014 connected to IRA membership and verdict against weight of the evidence.

The trial court's refusal to examine privileged documentation

4. Section 3(2) of the Offences Against The State (Amendment) Act 1972 (as amended) provides as follows:-

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

5. This is commonly referred to as belief evidence in membership prosecutions. In this case such evidence relating to the appellant was given by Assistant Commissioner Michael O'Sullivan. He gave evidence that it was his belief that on the 16th December 2014 the appellant was a member of an unlawful organisation. He stated in the course of his direct evidence:-

> *"..On the basis of confidential information available to me I believe that Michael Connolly born on the 20th of May 1971 of 64 Grange Park, Dundalk is within the State a member of an unlawful organisation styling itself as the Irish Republican Army otherwise known as Óglaigh Na hÉireann otherwise known as the IRA. And I believe that he, Michael Connolly, was a member of that organisation on the 16th of December 2014. I do not base this belief on any matter discovered during or subsequent to his arrest or on any statement, admissions or information in the course of his detention or this investigation."*

6. In the course of cross examination, Assistant Commissioner O'Sullivan said that the material or documentation on which he relied had come into his possession following the retirement of a colleague, Detective Chief Superintendent Kirwin.

7. A claim of privilege in respect of the said material was maintained. Prior to the commencement of these proceedings, in response to a request for access to that material by the appellant's solicitor the claim of privilege was made for the first time in the course of the following written response to that request:-

> *"We are advised that Assistant Commissioner Michael O'Sullivan will be giving his statutory belief that Michael Connolly, 64 Grange Drive, Dundalk, County Louth is a member and was a member of an unlawful organisation styling itself as the Irish Republican Army otherwise Óglaigh Na hÉireann, otherwise the IRA on the 16th of December 2014 and will be making a claim of privilege in respect of his belief based on all the material in his possession and based on the following grounds (a) protection of life (b) the material relates to the security of the State (c) if the content of the material became known it might facilitate the commission of further offences or alert persons or illegal organisations are ongoing or future garda operations, (d) the material would likely be of assistance to members of unlawful organisations and criminals by revealing the methods employed in combating crime and terrorism. We confirm that this statement of evidence has been forwarded to you under cover of Notice of Additional Evidence dated the 20th April 2017."*

8. Further cross examination of Assistant Commissioner O'Sullivan brought repeated claims of privilege by him in relation to the material on which he based his belief of the appellant's membership of an unlawful organisation.

9. Mr. Hartnett SC, counsel for the appellant, sought to challenge the claim of privilege made by the Assistant Commissioner. In the course of an exchange between himself and the trial court, Mr. Hartnett stated:-

> *"..you have to rule on this and you have to rule, keeping in mind that there must be fairness in the trial. And if this Court is going rule that, as is usual, somebody can get into the witness box and repeat the mantra that is repeated in every case, "I will not answer any questions whatsoever, even in the most general of terms, and that's good enough for us." Well, that is bringing the matter further down the road and it is an effective deprivation of cross examination and a fair trial. As I say, this is a very preliminary matter and we accept that of course issues of privilege may arise, that if there is documentation on the file from an informer, clearly we cannot see it, that it may have consequences but we cannot see it. Possibly if there is - well, there must be other examples. That is not what we are addressing at the moment. We are addressing a bland, general refusal to answer any questions in relation to collateral matters, whether the integrity and credibility of this opinion can be examined; that is why I quoted from the decision as given by the Court of Appeal in Donnelly."*

10. Mr. Hartnett went on to further state:-

> *"..the question arises, and I ask it rhetorically, do I have the right to cross examine? And I think the answer to that must be yes. Is the witness entitled to claim privilege in relation to some matters? The answer to that must be yes. The question arises here, does the question of privilege arise, that this Court must examine whether the question of privilege can arise in relation to a simple question as to for how long, over what period of time these observations or materials exist. In no way could that be a breach of privilege. He, the witness refuses to answer whether some of the material on the file comes from observations by the SDU, as opposed to "bobbies on the street" ordinary guards. Again, I ask on what basis - he who claims privilege in relation to that - how can that be privileged? I ask rhetorically, how can that be privileged?"*

11. Miss Murphy BL on behalf of the respondent stated:-

> *"Well, just very briefly, I think it's very unfair to characterise the evidence of the Assistant Commissioner as a bland assertion of privilege. He made specific references to specific concerns that he had, and that's why he claimed privilege on those specific questions…In fact, he made specific references to concerns about information being used by a small oath-bound society, that this information could have consequences for concern individuals, or for methodology in relation to the investigation that was carried out."*

12. On Day 8 of the trial, an initial ruling was given by the trial court. It stated:-

> *"..The most recent issue of this trial is narrow and concerns whether the Court ought to compel further answers to various questions posed by Mr Hartnett to Assistant Commissioner Michael O'Sullivan in relation to his belief that the accused was a member of an unlawful organisation in circumstances where the assistant commissioner has asserted various forms of the public interest privilege over the matters which Mr Hartnett has sought to explore….*
>
> *As the issue of fairness of trial is central to this submission it is important to locate Mr Hartnett's cross-examination in*

the full legal context. The evidence in the case is the belief of the assistant commissioner and the evidence does not consist of the material upon which that belief is based. Obviously, in ordinary circumstances, the cross-examiner faced with admissible evidence of belief or opinion would be entitled to challenge the validity or accuracy of such evidence by reference to the nature, strength and depth of the material underpinning the said conclusion. Consequently, it is well recognised that claims of public interest privilege over the underlying material represents a considerable limitation for defence counsel in a system where guilt is determined pursuant to an adversarial contest."

13. In the course of its lengthy ruling the trial court analysed the type of information sought in the course of cross examination of the Assistant Commissioner and in respect of the privilege claimed in respect of it. In the concluding portion of the ruling it stated:-

> *"Firstly in this case, the Court is satisfied that the circumstances are such as to give rise to a valid claim for privilege. Secondly, the evidence of the assistant commissioner was in fact subject to extensive probing on collateral issues. As a result, we know that the information is based on more than one source of information. We also know that the assistant commissioner has no personal knowledge of matters or personalities contained in the information leading to the formation of his belief. Consequently, we also know that although the assistant commissioner has considerable experience in the techniques of evaluating intelligence information, he did not have the benefit of applying those techniques to sources comprising live informants, if such sources there were."*

14. The trial court ruled that the privilege claims by Assistant Commissioner O'Sullivan were *"valid and reasonable"*. Leave was extended to Mr. Hartnett to raise further submissions on the topic as he saw fit and as the trial progressed.

15. Shortly thereafter, Mr. Hartnett again returned to the issue. He said:-

> *"Now, the reason I opened that to the court is because I have asked that counsel for the prosecution in this case, be given sight of this documentation so that, as minister for justice in the case, counsel could form a view as to whether there was material relevant to innocence, or relevant, should we say. And I have been informed that that is refused to counsel for the prosecution. So, that option is unfortunately not available in this case. And this of course being a case where the judges are the jury, there remains the difficulty of allowing the judge or judges to see the material in question because of potential prejudicial effect, which cannot really be examined by the defence. But in view of the refusal to allow counsel for the prosecution to see these matters, we're left in a position where we have to ask that this Court view the material in question, in order to see whether there is a valid claim for privilege, or to see if there is material that is not privileged, or to see whether there is material which would be relevant to the innocence-at-stake exception. Now, I have to say we do that with grave reservations, because this - the three judges here - are not only judges of the law and the judges of whether something is privileged or not, but they're also the judges of fact, and of course also in the light of the Court's ruling this morning which I suppose is in effect a ruling that privilege applies…"*

16. Ms. Murphy BL duly confirmed to the trial court that permission from the gardaí for her as prosecution counsel to view the documentation had been refused, citing *"issues of security both kind of personal and national.."*. This stance was the subject of exchanges between counsel for both parties and the trial court judges, and was specifically referred to by Hunt J. on Day 11, (page 1), when he observed that:-

> *"…Ms Murphy informed the Court that the gardaí were not willing to permit prosecution counsel to survey that material for that purpose, citing security and safety reasons…".*

17. The trial court noted that Mr. Hartnett had applied to it to direct prosecution counsel to read and evaluate the material, are, as it termed *"…a less preferably alternative, that the court itself should review the material in relation to privilege issues with the Ward decision and the principles in mind"*. The trial court specifically noted the *"prosecution is apparently amenable to the court following the latter course"*.

18. In relation to the issue of the documentation being viewed by prosecution counsel, the trial court ruled as follows:

> *"In relation to the issue regarding the Assistant Commissioner having considered the two cases that were opened we are of the view that we will not direct the prosecution or any of its agents to examine the material used by the Assistant Commissioner for the purpose of forming his opinion. That then gives rise to the issue as to whether the Court should examine the material. The Court appears on the basis of those authorities to have a discretion in relation to the matter and (it) has decided to exercise its discretion by not examining the material in question. That is the position as of now.. So, obviously that decision might be revisited depending on what twists and turns the case may take after this.."*

19. The trial court was again pressed to itself view the documentation. Mr. Hartnett confirmed that he was *"asking the court to examine it"*. He said:-

> *"And we were asking the Court to adjudicate on the privilege claimed because we say that that is the function of the Court and we were saying that when it comes to a claim of privilege and adjudication that the prosecution does not have a discretion in the matter and we were also making the case that the prosecution were not objecting to that process in this case."*

20. The trial court ruled, again, that they were *"..not looking at the material underlying his assertion and the formation of his opinion"*. Later, on Day 10 of the trial, the trial court again raised the issue when its presiding judge, Hunt J., remarked:-

> *"One further question has been asked of the Assistant Commissioner and we have to take into account whether that changes our view in terms of potentially inspecting the underlying belief material, so we also have to decide that before anything..else happens."*

21. On the following day of the trial, a further lengthy ruling was made by the trial court on the issue. It declined *"to invite the Director, her counsel or anybody else to carry out an inspection or evaluation of the material relied upon by the Assistant Commissioner informing the belief that he has offered to the Court"*. The trial court went on to state as follows:-

> *"That leaves open the question as to whether in substitution for such an exercise, the Court should carry out its own review of this material in order to decide whether any of it should be disclosed to the defence or whether it discloses an "innocence at stake" issue."*

The trial court declined to examine the material itself. In the course of giving its reasons for so doing it stated:-

> *".. In this case, the material in question is intelligence material which may come from disparate sources and may be in various forms. This Court individually and collectively has as little experience as the Director of Public Prosecutions or prosecution counsel or indeed any other counsel in evaluating and assessing such information. The Court is far less equipped than a senior and experienced police officer to understand the individual pieces of information, place them in context and draw the threads together in an appropriate fashion so as to thereby measure and evaluate the opinion offered by the assistant commissioner. The Court has concluded that this is not an exercise which it would be helpful to indulge in in this case."*

And

> *"..Once again, the more recent decision of the Supreme Court in Redmond v. Ireland has had an important effect on this trial. The result of that case is that the opinion of the assistant commissioner has absolutely no decisive effect in this trial, no matter how genuinely and profoundly it is held by him…Consequently, the significance and importance of the belief evidence in such a case is necessarily diminished by the absolute and unvarying requirement for independent confirmation that this Court has referred to in its previous ruling on this matter.. With that in mind, the Court does not feel that an inexpert and out of context analysis of intelligence material is likely to add anything to the ultimate requirement that the belief evidence be substantiated and confirmed by extrinsic evidence unequivocally indicating that the assistant commissioner's belief is correct in relation to the accused as of the date in the indictment and inconsistent with any other reasonably possible hypothesis…"*

22. A verdict of guilty was pronounced in the course of a lengthy and detailed judgment of the trial court on Day 14 of the trial, delivered by its presiding judge, Hunt J. It is clear from same that the *belief* evidence of the Assistant Commissioner was a significant contributing factor to the guilty verdict although, and in accordance with established *jurisprudence* the *belief* evidence was supported by other important evidence independent of it. The following extracts from the trial court's judgment is illustrative of the extent to which the belief evidence featured in the trial court's decision:-

> *"..The Court has exercised its discretion in the conduct of this trial not to examine the confidential intelligence material examined by the Assistant Commissioner prior to reaching the conclusion that he offered to the Court in the course of his evidence. In adopting this stance, the Court was influenced by the requirements set out by the Supreme Court in their Redmond decision that the belief evidence of an officer of or above the rank of Chief Superintendent be supported by some other evidence that implicates the accused in the offence charged, which is seen by this Court as credible in itself, and is independent of the witness giving the belief evidence.*
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> *… However, having considered all matters put to the Assistant Commissioner in the course of cross-examination, the Court accepts beyond a reasonable doubt the veracity of this witness and the fact that he holds the belief that he expressed in relation to the accused on the basis outlined in his evidence. The Court also accepts his assertion that he formed this belief on materials of the type and of the proportions set out in his evidence. The Court believes that he applied himself to his task in the careful manner required by the case law that the Court has already alluded to on a number of occasions during this trial, and the Court is able to conclude beyond reasonable doubt that the Assistant Commissioner honestly and genuinely holds the belief that the accused was a member of the IRA on the date in question, and that this belief is based on a range of confidential material in the possession of An Garda Síochána, and on his careful review and assessment of that material. It does not have a reasonable doubt as to the existence of the belief offered and held by the Assistant Commissioner.*
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> *.. In order to convict the accused, the Court must be satisfied beyond reasonable doubt that there is credible objective support underpinning the Assistant Commissioner's belief evidence in relation to the accused. The Court must be satisfied that the prosecution has produced a combination of belief and other supporting evidence that leaves the Court with no reasonable possibility other than a conclusion that the accused was a member of an unlawful organisation on the relevant date, or should I say the unlawful organisation in question…"*

23. The final two paragraphs of the trial court's judgment were as follows:-

> *"The Court has reviewed the entirety of the evidence and has not found any fact or consideration in the conduct or inference evidence which is inconsistent with the premise of the belief evidence. On the contrary, the other two strands of evidence relied upon by the prosecution, taken in combination with the belief evidence, are of such weight as to point surely and inevitably to the conclusion that there remains no reasonable possibility consistent with the proposition that the accused was not acting as an IRA member on the morning in question. The bare repeated denials of membership at interview do not give rise, in the view of the Court, to a reasonable possibility that the events of that morning are explicable on some other basis.*
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> *In carrying out this overall survey of the evidence, the Court has remained cognisant of the continuing and evolving duty mentioned by the Supreme Court in W as to the exercise of its discretion not to review the materials referred to earlier in this trial. In view of the conclusion that membership is sufficiently and unambiguously established by the combined weight of the belief, conduct and inference strands of the evidence, the Court sees no reason to revisit the decision not to inspect the material relied upon by Assistant Commissioner O'Sullivan for the formation of his belief evidence. Accordingly, the Court therefore convicts the accused on the single count on the indictment."*

Discussion

24. The justification for maintaining secrecy and confidentiality of material and documentation on which a senior officer of An Garda Síochána bases his or her *belief* evidence requires little explanation. A claim of privilege in respect of such material by no means constitutes an automatic right of privilege. It will be a matter for the trial court to adjudicate on such a claim when made. In doing so the trial court will take on board various considerations including the protection of life (and in particular the lives of persons who have provided information to the gardaí and may be continuing to do so), the need to maintain secrecy in relation to ongoing criminal investigations, the protection of undercover garda operations and various other matters.

25. In *D v. NSPCC* [1978] AC171, Lord Diplock remarked as follows:-

> *"The rationale of the rule as it applies to police informers is plain. If theiridentity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal."*

26. In the course of the various arguments made on behalf of the appellant in relation to the issue of privilege and submissions made also on behalf of the respondent, a number of Superior Court judgments were referred to in some detail, and it is appropriate that a number of these decisions now be examined closely.

27. Belief evidence pursuant to s. 3(2) of the 1972 Act is clearly admissible in evidence in a prosecution for membership of an unlawful organisation. The constitutionality of that section was confirmed by the High Court (Costello J.) in *O'Leary v. The Attorney General* [1993] 1 IR. 102. It is now the accepted position however that belief evidence on its own will be insufficient to justify a conviction of membership. In *DPP v. Kelly* [2006] 3 I.R. 115, Geoghegan J. stated (at p. 122):

> *"It has been the practice apparently of the Special Criminal Court not to convict on the belief evidence alone. In my view, that practice is commendable though not absolutely required by statute. There may be exceptional cases where the Special Criminal Court in its wisdom would be entitled to convict on the belief evidence alone. Equally commendable is the practice of the Director of Public Prosecutions of which the court has been informed, not to initiate a prosecution based solely on the belief evidence. These self imposed restrictions by the Special Criminal Court and by the Director of Public Prosecutions are with a view to ensuring a fair trial."*

28. Commenting on a judgment delivered by Keane C.J. in *DPP v. Redmond* (Unreported, Court of Criminal Appeal, 24th February 2004), Geoghegan J. stated:-

> *"I agree with the view taken by the Court of Criminal Appeal in this case that the balancing of the conflicting rights and interests can only be determined by the court of trial. The Chief Superintendent's belief has no special status but is merely a piece of admissible evidence. As the Court of Criminal Appeal pointed out, although the Special Criminal Court was entitled to take into account the fact that the Chief Superintendent refused to identify the basis of his belief, it was also entitled to take into account the fact that the accused made a false statement to the gardaí and the other corroborating evidence of other witnesses particularly the evidence of Mr. David Mooney which was accepted."*

29. In his judgment in *Redmond v. Ireland* [2015] 4 I.R. 84, Charleton J. commented:-

> *"No guarantee within Article 38 is offended where such belief evidence is supported by some other piece of evidence or circumstance which supports the charge. The impugned subsection applies only: before the Special Criminal Court; where a written ruling is given explaining the reasons for relying on such evidence; on an offence of membership of an unlawful organisation; where the Government has made a proclamation that the ordinary courts are inadequate to secure the effective administration of justice; where the accused may in the ordinary way give evidence; where privilege may be claimed as to sources which are confidential, as in any other case, but which privilege is subject to review by the court of trial; where the nature of the offence charged is continuing, allowing a belief to build up over time; and where that belief may be challenged and may be the subject of rebutting evidence by the accused."*

30. Section 3(2) of the 1972 Act (as amended) was considered and analysed in detail by the Court of Criminal Appeal in *DPP v. Donnelly, McGarrigle & Murphy* [2012] IECCA 78, and more recently by the Supreme Court in *DPP v. Connolly* [2015] IESC 40.

31. In the instant case what is at issue is not the belief evidence of the Assistant Commissioner or its admission into evidence but rather the refusal of the trial court to view the material which Assistant Commissioner O'Sullivan claimed to base that belief for the purposes of determining whether the privilege claimed in respect of it was justified in relation to all or some of that material.

32. Understandably there will be reluctance on the part of an accused person facing a prosecution for membership of an unlawful organisation based on, *inter alia*, the belief evidence of a senior garda officer, to seek to disclose the content of such material on which such belief is based to judges who are also the trial adjudicators and thus risk contaminating their minds. However, it is a long established practice that claims of privilege in both civil and criminal cases are the subject of adjudication by the trial judge. The practice is based on the assumption and indeed the general acceptance that professional judges are quite capable of being exposed to such material and at the same time, where appropriate, excluding it from their minds when arriving at a decision on the substantive issues in a trial.

33. Authority in support of a practice for the review by the Special Criminal Court of materials in respect of which privilege is claimed in s. 3(2) cases is to be found in *DPP v. Binead* [2007] 1 I.R. 374 and the judgment of the Court of Criminal Appeal in the same case, [2006] IECCA 147.

34. In the Special Criminal Court in Binead the court itself applied the procedure of inspecting the documentation in respect of which the claim of privilege was made. The Court of Criminal Appeal approved this approach and rejected the argument that the accused was exposed to prejudice by the arbiter of fact reviewing potentially prejudicial material which was denied to the accused. In delivering the judgment of the Court of Criminal Appeal Macken J. said:-

> *"Turning now to the question whether the trial court did not guarantee a fair trial by itself reviewing the material furnished to it by the Chief Superintendent as is contended for on behalf of Kenneth Donohue, this court is also satisfied that the trial court did not in the present case, by carrying out such a review, infringe the right to a fair trial. The trial court followed the very full discretion vested in it according to the decision in Ward v Special Criminal Court, supra. The Supreme Court, in that case, dealt very fully with the question of the long established principle of informer privilege and the exception to it based on "innocence at stake." Of particular assistance in the judgment of O'Flaherty is the following extract, which followed on from the analysis of the jurisprudence and the adoption of Canadian jurisprudence in which it is stated that "the right to disclosure is not to trump privilege":*
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> > *"They must both be accommodated and prosecution counsel has a key role in this concord. However, when it comes to a stage where there is any doubt on the matter, it will be essential to get the ruling of the trial judge. Sometimes the matter will be straightforward. No doubt, judges allow claims of privilege in routine cases day in and day out without ever examining any documents. Other cases - this may be one - will be more complicated and then the judge or judges (as in the case of the Special Criminal Court) will examine the documents. However, I do*

not think trial judges should feel that they have any obligation to look at documents in every case."

In the present case, the trial court, on reviewing the material, concluded that there was nothing in it which would in any way assist either of the accused in proving their innocence, and found that the material constituted a good basis for the belief of the Chief Superintendent. Both findings clearly come within the ambit of the phrase "material which might be of assistance to a defendant". If the trial court had found otherwise on either of these issues, it would undoubtedly have held differently… Further, while counsel for Kenneth Donohue accepts that the European Court of Human Rights has itself reviewed files, he contends that that court considers that the court dealing with guilt or innocence cannot itself carry out any monitoring or investigative role. It is not at all clear from the case law of that Court that any of the judgments relied upon by counsel in this case deal with the issue of a claim to privilege based on a threat to life or to the ongoing security of the State, as here. None appears to deal with a situation where the investigative role in criminal matters, as in this jurisdiction, is not dealt with by a judge, unlike the position in many civil law jurisdictions. The position is particularly different where judges sitting without a jury, such as in the Special Criminal Court, have long experience in removing from their consideration material or evidence which may have been admitted in error, or opened to them, even inadvertently, or which has otherwise come to their attention. A typical example exists every time a trial court, and not just the Special Criminal Court, conducts a voir dire, a trial within a trial. There is the prospect that matters involved in the voir dire, even vexatious or potentially damaging matters may have to be banished from the judge's mind as the case progresses, and judges do so meticulously and without difficulty every day. If they fail to do so, an appeal mechanism exists to remedy this.

35. In *Ward v. Special Criminal Court* [1999] 1 I.R. 60, Carney J. remarked:-

"The Special Criminal Court will examine the forty statements concerned and determine whether any of them might help the defence case, help to disparage the prosecution case or give a lead to other evidence. On the basis of this examination, the Special Criminal Court will determine which, if any, of the forty statements concerned should be disclosed to the defence.

The members of the Special Criminal Court are all experienced in the criminal law, both as judges and practitioners. They have heard from counsel for the prosecution an opening speech in relation to the facts of the case. I am satisfied that they will be able to identify whether any of the statements concerned would help the defence case, would help to disparage the prosecution case or give the defence a lead. I am satisfied that counsel for the notice parties residual misgivings of possible prejudice from the court not been privy to his client's instructions are at the minimum theoretical level of prejudice. This being so, they must yield to the risk to life as deposed by the Assistant Commissioner Hickey."

36. It should be noted that *Ward* was not concerned with belief evidence and was not a membership case. The facts in the case concerned the murder of Veronica Guerin and the issue of privilege claimed in respect of statements made in the course of the garda investigation.

37. In the course of the judgment of the High Court in Ward, Carney J. quoted with approval the following passage from the judgment of Costello J. (as he then was) in *Director of Consumer Affairs v. Sugar Distributors Limited* [1991] 1 I.R. 225 when he said at p. 229:-

"When a claim is made, as it has been in this case, that it is not in the public interest that relevant documents in the Director's possession should not be inspected, the court should examine the documents. If satisfied that they form part of a complaint made to the Director by a member of the public that a breach of the restrictive practices legislation or orders made thereunder has occurred inspection should not be allowed unless the court concludes that the documents might tend to show that the defendant had not committed the wrongful acts alleged against him.

I have followed this course in this case. The disputed documents were all documents forwarded to the Director as part of a complaint made by ASI International Foods Ltd. that breaches of restrictive practices legislation had occurred. They do not tend in any way to show that the defendant was not guilty of the wrongdoing alleged against it. I will therefore not allow their inspection."

38. The issue of *belief* evidence found its way to the European Court of Human Rights in 2013 in the case of *Donohoe v. Ireland* (App no 19165/08) ECtHR 12/12/2013. In that case the applicant complained under Art. 6 of the Convention of Human Rights that his trial was unfair because of the non disclosure of the sources of the belief evidence of a Chief Superintendant without adequate counterbalancing measures. The ECtHR considered that the judicial review of the source materials to access their adequacy and reliability provided a safeguard in that case. Paragraph 88 of the decision states as follows:-

"The Court observes, 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 PK's 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, at 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..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".

39. In his judgment in *Redmond* Charleton J. referred extensively to the decision in *Donohue*. Immediately before doing so he stated:-

> *"Indeed, it has been commented by this court in Connolly v. Director of Public Prosecutions [2015] IESC 40, [2015] 4 I.R. 60, at para. 39, and by the European Court of Human Rights in the case of Donohoe v. Ireland..that courts of trial are alert to the need for caution. That is their function. Individual circumstances will vary but, for example, in that case before the European Court of Human Rights at para. 88 of the decision it was commented.."*

40. Having quoted para 88 of the ECtHR decision, Charleton J. commented:-

> *"This passage acknowledges the safeguards that are inherent in Article 38.1 of the Constitution and which experience indicates are considered by the Special Criminal Court with special caution in the application of the impugned section of the Act of 1972."*

41. He went on:-

> *"In prosecutions for membership of an unlawful organisation, as in every other case, the overall fairness of the trial is within the command of the judges of the court of trial. Unfair trials are not acceptable under the Constitution.."*

42. The importance of the counter balancing safeguards as noted by the EHCtR in Donohoe were emphasised by McMenamin J. in his judgment in *Connolly* when he said, at para 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."*

43. At the risk of been repetitive, one of the counter balancing safeguards identified in *Donohoe* was that:-

> *"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..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.."*

44. In his book *The Criminal Process*, Professor O'Malley provides the following commentary (at p. 699):-

> *"...They have held that a court may confidentially review the disputed material without necessarily compromising the right to a fair trial. Indeed, it is noteworthy that in R v. H. the leading English authority on the matter, the House of Lords referred to the Irish approach as reflected in DPP v. Special Criminal Court as "principled but pragmatic".* ("They" is a reference to the Irish Courts.)

45. In circumstances where a court itself conducts an inspection of the material in question in order to ascertain whether the claim of privilege is appropriate the decision of Keane J. (as he then was) in *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458 (at 469) provides helpful guidance. He said:-

> *"..the court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendants' case or fairly lead to an enquiry which may have either of those consequences. In the case of the second public interest, the various factors set out by Mr. Liddy (the prosecutor) must be given due weight. Again, as has been pointed out in the earlier decisions, there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down. Thus, information supplied in confidence to the gardaí should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue, and the authorities to that effect, notably Marks v. Beyfus (1890) 25 QBD. 494, remain unaffected by the more recent decisions, as was made clear by Costello J. in Director of Consumer Affairs v. Sugar Distributors Ltd. [1991] 1 I.R. 225. Again, there may be material the disclosure of which may be of assistance to criminals by revealing methods of detection or combatting crime, a consideration of particular importance today when criminal activity tends to be highly organised and professional. There may be cases involving the security of the State, where even disclosure of the existence of the document should not be allowed. None of these factors - and there may, of course, be others which have not occurred to me - which would remove the necessity of even inspecting the documents is present in this case."*

46. The Supreme Court decision in *Murphy v. Dublin Corporation* [1972] I.R. 215 is also authority for the contention that there may be a responsibility on a court to examine materials to decide whether the inspection or refusal of inspection would do least harm to the public good. *Murphy* related to an issue concerning the compulsory purchase of lands in Dublin pursuant to the provisions of the Housing Act 1966. In his judgment, Walsh J. said:-

> *"Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution. Power to compel the attendance of witnesses and the production of evidence is an inherent part of the judicial power of government of the State and is the ultimate safeguard of justice in the State. The proper exercise of the functions of the three powers of government set up under the Constitution, namely, the legislative, the executive and the judicial, is in the public interest. There may be occasions when the different aspects of the public interest "pull in contrary directions" - to use the words of Lord Morris of Borth-y-Gest in Conway v. Rimmer [1968] AC 910,955. If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail. It is for the court to decide which is the superior interest in the circumstances of the particular case and to determine the matter accordingly. As the legislative, executive and judicial powers of government are all exercised under and on behalf of the State, the interest of the State, as such, is always*

involved."

It is of course important to bear in mind the civil context of the Murphy case. This was specifically acknowledged by Walsh J. in the course of his judgment when he remarked:-

> *"A case such as the present one is far removed from the considerations which would apply in matters concerning the safety or security of the State…"*

47. In *Evidence In Criminal Trials*, Heffernan and Ni Raifertaigh say, at p. 779/780:-

> *"The Irish procedure for asserting claims of informer privilege incorporates certain safeguards of which the European Union has approved, namely, it assigned to the trial court a supervisory role and enables the defence to make submissions and participate up to the point of revealing the protected information. Indeed, one might go further and predict that the European Court would look favourably on the approach endorsed by the Supreme Court in Ward v. Special Criminal Court and the procedure applied by the Special Criminal Court in People (DPP) v. Binead and Donohue whereby privileged information in documentary form was submitted to the court so that it could pursue and independent assess the cogency of the claim for confidentiality.*
>
> *The conundrum is embodied in the typical case where the confidential information is not reduced in writing and the Irish courts respond to the assertion of privilege by restricting the defence's right to cross examine the witness. Irish practice stop short of the kind of counter balancing procedures utilised in English practice such as special advocates and the questioning of witnesses by the judge in chambers. In the absence of an equivalent procedure, the compatibility of Irish law and practice with Article 6 may remain a complicated and contested issue which the jurisprudence of the Superior Courts have not entirely laid to rest. One relatively simple reform that could be considered is that a differently constituted Chamber of the Special Criminal Court would consider the basis for the Chief Superintendent's opinion pre trial, so that at least the ultimate finder of fact is not the same panel of judges as the judges who have seen the material relied upon by the Chief Superintendent. This might also be considered in conjunction with the use of a procedure akin to the U.K. model of special advocate so that at least some advocate has the role of challenging the strength of the information upon which the Chief Superintendent's opinion is based. Such changes would of course require legislation, however."*

48. The reasons given by the trial court in the instant case for their decision not to review the material in question included the following:-

> (i) The trial court *individually and collectively has as little experience as the DPP or prosecution counsel or indeed any other counsel in evaluating and assessing such information*;
>
> (ii) the trial court was *far less equipped than a senior and experienced police officer to understand the individual pieces of information, place them in context and draw the threads together in an appropriate fashion so as to thereby measure and evaluate the opinion offered by the assistant commissioner*;
>
> (iii) the trial court did not feel that and *an inexpert and out of context analysis of intelligence material is likely to add anything to the ultimate requirement that the belief evidence be substantiated and confronted by extrinsic evidence unequivocally indicating that the assistant commissioner's belief is correct in relation to the accused…*

49. The trial court however, consisting of three experienced criminal judges did have, individually and undoubtedly collectively, a wealth of experience in the evaluation and assessment of evidence in both civil and criminal cases and especially in the latter. While they were not police investigators or professional information gatherers and by definition less skilled than those trained in that work, they were nevertheless both individually and collectively experienced in almost all aspects of information analysis in the context of criminal proceedings and the administration of justice. Importantly also they were, individually and collectively, legally and judicially trained. Judges are frequently, both on the civil and criminal side called upon to evaluate, analyse and assess information and evidence relating to the most complex of subjects and often in circumstances where their past experience or exposure in dealing with such issues is very limited or indeed non existent. Many such instances arise in relation to information or material in respect of which privilege is claimed under one heading or another. A perceived or suspected lack of expertise in the subject matter to be reviewed is not itself a reason for a refusal to embark on the task, although conceivably it could trigger a decision to abandon the process following its commencement or qualify its outcome.

50. The right to request the trial court to view the documentation or material in question was undoubtedly available to the appellant. The right to request same has not often been exercised in the past and is probably unlikely to be frequently exercised in the future for obvious reasons. A trial court is not bound to conduct a review of such material simply because it is asked to do so. It has a discretion whether or not to do so, but must exercise that discretion judicially. In *Ward v. The Special Criminal Court* [1999] (Supreme Court) 1 I.R. 60, O'Flaherty J. said:-

> *"No doubt, judges allow claims of privilege in routine cases day in and day out without ever examining any documents. Other cases - this may be one - will be more complicated and then the judge or judges (as in the case of the Special Criminal Court) will examine the documents. However, I do not think trial judges should feel that they have any obligation to look at documents in every case. That is why prosecuting counsel's role is so critical. While the prosecution cannot appear to be a judge in its own cause, it is common case that the role of counsel for the prosecution is very different to the role of counsel for the defence. The role of counsel for the defence is always to put the prosecution to the proof of its case and seek by every fair and just means for the acquittal of their client. By contrast, counsel for the prosecution has an overall responsibility to assist in ensuring a fair and just trial…*
>
> *…I would, however, vary Carney J.'s judgment to this extent. I would remove any direction to the Special Criminal Court as to whether the members of the court should examine some or all of the documents in debate. I would repose to the court's full discretion how the trial is conducted and, in particular, to decide this matter. The judges may ask anew whether there is any point at all in looking at the documents in the second and third category. But I reiterate that the decision is for the members of the Special Criminal Court. It needs to be emphasised, however, that the duty that will devolve on the members of the court will be a continuing one as the trial develops and evolves. The members of the court will be astute, no doubt, to monitor the situation throughout."*

51. It is again relevant to note that *Ward* was not a membership case (see earlier reference to the facts of that case).

Conclusion
52. The court is satisfied that in the particular circumstances of this case the reasons provided by the trial court for rejecting the request made on behalf of the appellant for the court itself to examine the documentation or material were insufficient to justify their refusal to do so. In arriving at this decision the court is particularly cognisant that the belief evidence given by the Assistant Commissioner and its acceptance by the trial court contributed in a significant manner to the verdict of guilty and conviction of the appellant.

53. Accordingly, the court will allow this ground of appeal. In these circumstances, it is unnecessary for the court to engage with the other grounds of appeal save to comment that none of them appear meritorious. The court will proceed to hear counsel on the question of whether or not there should be a re-trial.