THE COURT OF APPEAL

Ryan J.
Birmingham J.
Edwards J.

Record No: CA 346/2012

Bill No: SC002/2012

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Robert Nolan

Appellant

Judgment of the Court delivered on the 27th day of July, 2015 by Mr. Justice Edwards

Introduction
1. The appellant was tried before the Special Criminal Court from the 30th October to the 2nd November 2012 in respect of a single count that on the 11th of January 2012 he was a member of an unlawful 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).

2. On the 14th of November 2012, the Court delivered a reserved judgment in which it convicted the applicant of the charge. On the 11th of December 2012, he was sentenced by the court to three and a half years imprisonment to date from the 1st of October 2012.

3. The appellant now appeals against his conviction only.

The evidence before the Special Criminal Court
4. On January 11th 2012 two members of the armed response unit of An Garda Síochána were on patrol in the Hyde Road area of Limerick City in a marked armed response unit vehicle when they encountered a Ford Mondeo motor car and, having followed it for a short distance, decided to stop it. At Beechgrove Avenue the Gardaí activated their blue lights and the Ford Mondeo stopped in response thereto. The Garda vehicle drew alongside the Ford Mondeo and a conversation ensued between the Garda seated in the front passenger seat of the Garda vehicle and the driver of the Ford Mondeo.

5. The driver of the Ford Mondeo correctly identified himself as a Mr Dermot Gannon and specified his address. Mr Gannon had been previously convicted by the Special Criminal Court of membership of an unlawful 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. The appellant was sitting in the front passenger seat of the Ford Mondeo.

6. Sergeant Ryan, the senior officer in the Garda vehicle and the driver thereof, was in possession of certain information, namely that the said Mr Gannon was a person who had access to firearms. Sergeant Ryan formed a suspicion that a firearm was to be found in the Ford Mondeo vehicle. Having closed the window of the Garda vehicle, he so informed his colleague, Garda Canny. He then reversed the Garda vehicle to allow his colleague to get out of it, following which he also got out of the Garda vehicle and approached the Ford Mondeo. Mr Gannon was out of the vehicle at this stage and speaking to Garda Canny at the rear of it. The appellant was still seated in the front passenger seat at this point. Garda Canny then instructed the appellant to get out of the car which he did. Sergeant Ryan then invoked the power to search the Ford Mondeo under s. 30 of the Offences Against the State Act 1939 and found a Webley Revolver within a brown paper bag located under the front passenger seat. Dermot Gannon immediately admitted that he was responsible for the weapon.

7. Dermot Gannon was subsequently charged with, and was convicted of, being in possession of the said weapon in suspicious circumstances. The appellant was never accused of possession of the firearm or ammunition.

8. The appellant was arrested under s. 30 of the Offences Against the State Act, 1939 and was taken to Roxboro Road Garda Station in Limerick where he was detained. The appellant had access to legal advice during his detention and prior to several of the nine interviews conducted with him while he was detained. The contents of the written records of interviews one to five, inclusive, and seven to nine, inclusive were agreed as between the prosecution and the defence prior to their being placed in evidence before the Court. Interview six contained nothing of evidential value and was not placed in evidence.

9. In the course of the first six of his interviews the appellant acknowledged being in the car at the time that it was stopped by the Gardaí, and that it was being driven by Dermot Gannon. He accepted that the Webley revolver had been found in the car but claimed to have been unaware of its presence there and to have no knowledge of it. When asked to account for his movements, and specifically why he was in the car he said that, having received a call from Dermot Gannon on his brother's mobile phone, he had met up with Gannon and had come to Limerick with him for the spin. He said that he had no money and it was just to kill a few hours. He further acknowledged also being in Limerick earlier that week having travelled down from Dublin on Sunday evening the 8th of January 2012 and having returned on Monday the 9th of January 2012. He claimed, *inter alia*, he did not know where he had stayed on that occasion or with whom, that he did not know when exactly on the Monday he had returned to Dublin, that he could not recall what car he had travelled in, and that he could not in fact recall the journey back to Dublin. He claimed that while in Limerick on the Sunday night he had been drinking heavily with Dermot Gannon and "a fellow by the name of Noel", amongst others. They were in a pub called "Fox's", and another pub the name of which he could not recall. He went back "to some house" after closing and the following morning met up with Dermot Gannon again. When it was put to him that the Mondeo vehicle had been purchased by Dermot Gannon on the Monday, and that he had been present, he stated, "I could have been. I don't remember. I want to say for the tape I had no part in purchasing that car". When it was put to him that he returned to Limerick on the Wednesday morning, with Dermot Gannon as a back up, to commit a shooting with the gun, he denied it, stating "No, I knew nothing about that gun". He further denied any knowledge of the key to a stolen silver Volkswagon Polo vehicle that had been found on the person of Dermot Gannon at the time

of his arrest. When it was put to him that "there was a car to be collected and that was why there was two of you", he responded "That's not true". The appellant further claimed he was in fact unable to drive, although he did have an expired provisional licence that was "out about a couple of years"

10. The provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 (hereinafter the Act of 1998) were invoked by the interviewing Gardaí during the appellant's final three interviews. The focus of these interviews was specifically upon his suspected membership of an unlawful organisation. In particular, and by way of examples, the following questions, *inter alia*, were asked, and were answered as hereinafter indicated:

(Interview 7)

Q. What was your business in Limerick yesterday?

A. On the advice of my solicitor I have nothing to say.

Q. Do you have an explanation for being in Limerick yesterday?

A. On the advice of my solicitor I don't have anything to say.

Q. You were arrested yesterday in the company of Dermot Gannon in the Limerick area for the unlawful possession of a firearm. We now intend to question you about the membership of the I.R.A., the Irish Republican Army, do you understand?

A. Yes.

Q. How do you know Dermot Gannon?

A. I've nothing to say on the advice of my solicitor.

Q. Do you know that Dermot Gannon is a convicted member of the I.R.A and served a prison sentence for membership?

A. I have nothing to say on the advice of my solicitor.

Q. I put it to you that you and Dermot Gannon were on an I.R.A operation yesterday am I right?

A. That's incorrect.

Q. What were you doing with Dermot Gannon?

A. I've nothing to say on the advice of my solicitor.

Q. Prior to your arrest yesterday will you give me an account of your movements?

A. On the advice of my solicitor, no comment.

Q. When did you get into this car?

A. No comment on the advice of my solicitor.

Q. Where did you get into this car?

A. No comment on the advice of my solicitor

Q. What I.R.A operation were you involved in in the Limerick area with Dermot Gannon?

A. I wasn't involved in an I.R.A operation.

Q. Have you any innocent explanation for being in Limerick yesterday if not on an I.R.A operation?

A. I have nothing to say on the advice of my solicitor.

Q. When did you arrive in Limerick?

A. Nothing to say on that matter on the advice of my solicitor.

Q. When were you last at your home in Ballyfermot?

A. I've nothing to say on that on the advice of my solicitor.

Q. These are material questions and your failure to answer them may have consequences for you at your trial, do you understand?

A. Yes.

Q. Again I ask you what were you doing in Limerick yesterday if not on an I.R.A operation?

A. No comment on the advice of my solicitor.

(Interview 8)

Q. Were you present when the car was purchased?

A. I don't know anything about the purchase of that car.

Q. Did you accompany Dermot Gannon when that car was purchased?

A. On the advice of my solicitor no comment.

Q. Do you know Dermot Gannon? He is the chap that was arrested with you?

A. On the advice of my solicitor no comment.

Q. I put it to you that you knew Dermot Gannon in your capacity as a member of the I.R.A?

A. I'm not a member of the I.R.A.

Q. How then do you know Dermot Gannon?

A. On the advice of my solicitor no comment.

Q. How then do you explain your association with Dermot Gannon a person convicted in the Special Criminal Court of I.R.A membership?

A. On the advice of my solicitor no comment.

Q. Do you recall a gun being found in the car you were travelling in on Wednesday?

A. On the advice of my solicitor no comment.

Q. This gun was found under your seat. Do you accept that?

A. No comment on the advice of my solicitor.

Q. What were you doing in the Beechgrove Avenue area of Limerick on Wednesday in the company of Dermot Gannon in motor car 01 D 68847 a green Ford Mondeo if not on an I.R.A operation?

A. On the advice of my solicitor no comment.

Q. These are material questions and your failure or refusal to answer them may have consequences for you at your trial, do you understand?

A. Yes.

Q. Why are you refusing to answer material questions?

A. On the advice of my solicitor.

(Interview 9)

Q. Did you use your phone ever to contact Dermot Gannon?

A. On the advice of my solicitor I have nothing to say.

Q. Why were you away from home without your mobile?

A. On the advice of my solicitor I have nothing to say.

Q. I put it to you that you did not bring your phone because you were afraid that Gardaí could track you, when you were involved in I.R.A operations?

A. On the advice of my solicitor I have nothing to say.

Q. When were you last in Portlaoise Prison?

A. I have nothing to say.

Q. Did you ever go and visit prisons in Portlaoise Prison?

A. No comment.

Q. Can you give me an account of your movements from Sunday to Wednesday when you were arrested?

A. On the advice of my solicitor I have nothing to say.

11. At the appellant's trial, the prosecution contended that the appellant had refused to answer material questions that were put to him in the course of those interviews, and by virtue of his failure to answer material questions put to him that the Court was entitled, and ought properly, to infer that he had been unwilling to do so because he knew that his answers would not stand up to probing and scrutiny. This was a substantial component of the prosecution case.

12. The prosecution also relied on the evidence of Detective Chief Superintendent Kevin Donohue, who expressed his belief that the appellant was a member of an unlawful organisation, namely the Irish Republican Army, otherwise Óglaigh na hÉireann, otherwise the IRA. The Chief Superintendent asserted that the belief that he held was independent of the investigation undertaken in relation to the appellant's arrest on 11th of January 2012.

13. The prosecution submitted, *inter alia*, that support and corroboration for the belief expressed by the Detective Chief Superintendent was to be found in the suggested adverse inference which, they contended, the Court was entitled, and ought properly, to draw from his refusal to answer material questions that had been put to him, as well as the general circumstances in which the appellant had been encountered upon being stopped and detained, including that he had been travelling in the front passenger seat of a vehicle being driven at the time by a convicted IRA member, and that a concealed firearm had been found under his seat.

Remarks of the presiding judges

14. In their judgment convicting the appellant, which was delivered by Butler J, the Special Criminal Court made the following observations *(inter alia):-*

> "Evidence of a number of Gardaí, of Garda members in charge of the Garda station, established that the accused had the benefit of legal advice from two solicitors, including a consultation with his solicitor who had been advised in advance of the intention to further question the accused having invoked the provisions of section 2 aforesaid. 3) The interviews: the accused was interviewed nine times in all and evidence was given in respect of all save the sixth interview. Initially he was interviewed under the normal caution. In the course of those interviews, he denied membership of an unlawful organisation and he gave answers to all questions. In the seventh, eighth and ninth interviews, however, the normal caution was withdrawn in each case and section 2 aforesaid was invoked. In the course of each interview, section 2 was read and was fully explained to Mr Nolan in ordinary language.
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> The seventh interview commenced at or about 2211 hours on the 12th of January 2012. After preliminary questions and answers section 2 was invoked, read and explained and that explanation was repeated on a number of occasions. The accused indicated that he understood the explanation and the section. Initial questions concerned alleged membership of the IRA, and he answered the same, denying membership. Thereafter he was asked a number of questions, including the following: "Do you know Dermot Gannon?" "Do you know that Dermot Gannon is a convicted member of the IRA and served a prison sentence for membership?" "What were you doing with Dermot Gannon?" "Prior to your arrest yesterday, will you give me an account of your movements?" "When did you get into this car?" "Where did you get into this car?" "Prior to your arrest, when were you last with Dermot Gannon?" "Will you account for your activities yesterday, to include your presence in a green Ford Mondeo 01D68847 being driven by Dermot Gannon, a person convicted of IRA membership, and the finding of a firearm and of a key belonging to a stolen Polo car, registration 10G23397?" To all of the foregoing, the accused failed to give an answer, other than saying words to the effect that on the advice of his solicitor he was not making any comment. Dispersed throughout the interview were questions concerning IRA membership and alleged possession of the firearm in question, to which Mr Nolan did give answers denying IRA membership and knowledge of the firearm.
>
> Interview eight commenced the following day at 9.47 am. Again, this interview commenced with general questions, which were answered, after which the initial caution was withdrawn and section 2, aforesaid, was read and explained in some detail. Mr Nolan indicated that he understood the section and the explanation. He was asked a number of questions relating to the car in which he was stopped, its purchase, and alleged membership of the IRA, all of which he answered. Again, however, he was asked a number of questions relating to his association with the said Dermot Gannon and the gun in the car and refused to answer the same on the advice, he said, of his solicitor.
>
> The ninth and final interview commenced on the same day on the 13th of January 2012 at or about 11.48 am. Again, he was asked routine questions, which he replied to, and once again the original caution was withdrawn and section 2 was invoked. He indicated that he understood the same. When questioned under section 2 he denied membership of the IRA and repeated that denial a number of times. However, when asked why did he stay in Limerick, he refused to answer, stating that the refusal was on the advice of his solicitor.

15. The Special Criminal Court concluded that the questions which the appellant had refused to answer, when s. 2 was invoked, were material and that inferences could legitimately be drawn therefrom, stating:-

> "Mr Nolan failed or refused to answer a large number of questions which were clearly material questions within the meaning of section 2 aforesaid. The accused was interviewed three times pursuant to section 2. He was cautioned thereunder and in every case when asked if he understood the caution he replied in the affirmative. When asked if there was any aspect of the caution that he did not understand or that was unclear to him, he replied no. At no stage did he claim that he was confused and, when asked if any clarification was required, he did not seek any. In the main, the questions which the accused failed to answer concerned his movements and his presence in Limerick in a car with a convicted member of the IRA. Under caution he had previously given answers in relation to some of these matters. The Court found many of these answers to be, as a matter beyond reasonable doubt, incredible. For example, his explanation that he had travelled to Limerick in circumstances "for a spin". The Court cannot, of course, draw any inference from answers given, or any failure to answer, other than when section 2 was invoked, and we do not do so. However, the fact that such questions were not answered when cautioned under section 2 is, in our view, significant. The questions were, in the circumstances of the case, clearly material questions, and the accused failed to answer the same. His statement, not in evidence but in interview, that he was refusing to answer on the advice of his solicitor, does not in the circumstances constitute a reason for not answering material questions. This Court is satisfied that the accused's failure to answer these questions was wilful, deliberate and calculated. The Court is satisfied beyond doubt on the evidence that the section was explained to him on a number of occasions by the Gardaí in the course of the interview and that independent legal advice was available to him. The Court is satisfied that he understood the section and the implications thereof. The Court is satisfied that it is entitled to draw an inference that the accused was a member of the IRA from his failure to answer these questions.

16. An issue in this appeal relates to the evidence of Detective Chief Superintendent Kevin Donohue, and specifically whether the belief of the Chief Superintendent that the appellant was a member of the IRA was admissible and whether there was sufficient support for or corroboration of that opinion evidence. In regard to this, the judgment of the Special Criminal Court commented as follows:-

> "Chief Superintendent Kevin Donohue gave evidence that he held the rank of Detective Chief Superintendent with responsibility for the Special Detective Unit, which position he said he held since December 2009. Before that he said he was Detective Chief Superintendent in charge of Security and Intelligence at Garda Headquarters and had been a member of An Garda Síochána since 1982. Asked did he, in his capacity as Chief Superintendent, have any views in respect of Mr Nolan, he replied: "Indeed I do, Judge. I'm of the belief that Robert Nolan is a member of an unlawful organisation, namely

> the IRA, also known as the Irish Republican Army, also known as Óglaigh na hÉireann." Later in his direct evidence he said that Mr Nolan was born in 1967, and he said in relation to his belief that he held the belief on the 11th of January 2012. The Chief Superintendent said that he did become aware that the accused was detained and that there was an investigation, but he said that his belief was entirely independent of any matters relating to that organisation."

17. The judgment of the Special Criminal Court recapitulated all of the evidence adduced from the Chief Superintendent and comprehensively outlined the cross-examination that had taken place. It subsequently informed the parties that:-

> "The Court has had the opportunity to assess the evidence of Chief Superintendent Kevin Donohue and to take into account his demeanour in giving that evidence before the Court. We are satisfied that he is a person of the highest integrity and has a great deal of experience in this field. We accept that he holds the belief which he expressed about the accused's membership of the IRA. The Court is very conscious of the fact that where confidential information is relied on and where there is a claim of privilege, the accused is not, nor are his legal advisers, in a position to challenge that information in any way. We must also weigh the fact that although the accused did not give evidence in relation to the allegation, as was his right, he did consistently deny membership during the course of the interviews referred to above. In the circumstances, the Court will not in this case proceed on the basis of that belief alone in the absence of some form of independent corroboration."

18. Having considered the totality of the evidence adduced, the Special Criminal Court concluded that the belief of the Chief Superintendent was capable of being corroborated by the inference which could be drawn pursuant to s. 2 of the Act of 1998. The Court expressed its decision as follows:-

> "We are satisfied that the belief of the Chief Superintendent is not only an honest belief but is a solid belief based upon his experience and his knowledge of the accused, and that this belief is strongly corroborated by the failure of the accused to answer the said material questions. We therefore convict the accused of membership of the IRA on the 11th of January 2012.

Grounds of appeal

19. The appellant appeals against his conviction on the following six grounds:-

> (1) The Court erred in law in holding that there was sufficient evidence to convict the applicant.
>
> (2) The Court erred in law in holding that, pursuant to s. 2 of the Act of 1998, it was entitled to draw an inference that the applicant was a member of the IRA.
>
> (3) The Court having held that it was entitled to draw an inference that the applicant was a member of the IRA pursuant to s. 2 of the Act of 1998, did not proceed to consider that it was proper to do so.
>
> (4) There was insufficient evidence from the applicant's interviews with the Gardaí for the Court to properly infer that the applicant was a member of the IRA pursuant to s. 2 of the Act of 1998.
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> (5) The Court held that the opinion evidence of the Superintendent required to be corroborated. There was no evidence to corroborate the evidence of the Superintendent. Therefore there was insufficient evidence before the Court to convict the applicant.
>
> (6) The opinion evidence of the Superintendent was inadmissible.

Submissions of the appellant

20. It is submitted by the appellant that the entitlement to draw inferences from a failure to respond, under s. 2 of the 1998 Act, which applies only insofar "as appears proper", was not available to the Court in the present case. It is argued that the appellant had given lengthy accounts of his whereabouts and had denied membership of the IRA in his initial interviews and that, as the Court had not rejected those accounts, it was not open to the Court to draw the inference that the appellant was a member of the IRA.

21. The appellant sought to distinguish the circumstances in the present case from those in *People (Director of Public Prosecutions) v Donnelly* [2012] IECCA 78 where the Court of Criminal Appeal considered it appropriate to draw inferences from the silence of the accused persons who had said little in the interview save for bare denials of membership. The appellant referred this Court to the judgment in that case where it was said, at para 41, that:-

> "The Court is entitled to take account of the fact that apart from the formal denial by Mr. Donnelly and Mr. McGarrigle, the accused men made no effort to challenge the assertion that they were members of an illegal organisation, or offer any explanation for their conduct. Furthermore, the manner in which they responded, or failed to respond, was itself something which the court was entitled to take into account. This was not a case where the men had cooperated with the Gardaí but simply refused to answer some individual question, or had given some answers but which the Gardaí considered evasive or unsatisfactory: on the contrary the refusal to answer was complete and comprehensive."

22. The appellant also seeks to rely on *People (Director of Public Prosecutions) v Devlin* [2012] IECCA 70 (unreported Court of Criminal Appeal, July 6, 2012). The Court of Criminal Appeal quashed the appellant's conviction in that case on the basis that there had been no failure by the appellant to provide an account for items that were found to be in his possession at the time of arrest. The statutory provision in dispute was s. 18 of the Criminal Justice Act 1984 (as inserted by s. 28 of the Criminal Justice Act 2007) which allows inferences to be drawn from a failure to give an account for any objects, substance or mark, or any mark on any such object that was on a person, in or on his or her clothing or footwear, otherwise in his or her possession, or in any place in which he or she was during any specified period. The appellant in that case was convicted of possession of a pipe bomb. At the time of his arrest, he was also in possession of bolt cutters, insulating tape and gloves. In response to several of the questions put to the appellant during his interviews, he repeatedly denied possession of explosives. When asked if he was aware that there was an explosive device in his vehicle he replied "no". In relation to possession of the bolt cutting knife and insulating tape, he stated that these items had been in his jacket since the last time that he had worn it. The appellant in the present case cites an excerpt from the judgment of the Court of Criminal Appeal, which quashed the conviction, where Fennelly J, giving judgment for the Court, stated (at para 38):-

> "It is not at all clear, on the evidence, that the appellant failed to account for the most important two items. Section 18, subject to observation of the procedures it lays down, permits evidence to be given of the "failure or refusal" of a person to account for, inter alia, an object that was "in or on his or her clothing and footwear" or "otherwise in his or her possession…" That provision does not apply where an account of any kind has been given".

The appellant in the present case argues that, in his initial interviews, he provided the Gardaí with a detailed account of his movements and that his failure to respond to questions in subsequent interviews should be considered in that context.

23. The appellant further argues that there was insufficient evidence in the interviews from which it could have been inferred that he was a member of the IRA.

24. It was submitted that the Court could have inferred from the appellant's silence that he wished to disguise non-subversive criminality, an inference which is not probative of IRA membership.

25. Alternatively, it was submitted that the Court, having held that it was entitled to draw an inference that the appellant was a member of the IRA pursuant to s. 2, did not consider it appropriate to do so.

26. In relation to the firearm which the Gardaí discovered in the vehicle in which the appellant was travelling, the appellant submitted that the evidence presented during the trial was not sufficient to justify any connection being made by the Court between the appellant and the firearm. In particular, the appellant argued that his failure, in the ninth interview, to account for being a passenger in the vehicle did not leave it open to the Court to draw any inference relating to himself and the firearm.

27. In addition, it was submitted by the appellant that in the absence of evidence of paramilitary paraphernalia or republican sympathies, the Court was not justified in drawing the inference that the appellant was a member of the IRA.

28. The appellant argues that there was an "insufficient link" between what he describes as his failure to answer questions in relation to his co-accused and his alleged IRA membership, and that this connection amounted to mere speculation rather than a legitimate inference.

29. The appellant submits that the evidence in this case was scant and was insufficient to overcome the hurdle of admissibility. In particular, the appellant argues that the evidence of the Chief Superintendent should not have been admitted in circumstances where the Chief Superintendent claimed privilege to cut off virtually every line of cross-examination or probing with respect to the basis for his expressed belief, a factor which, it was contended, made the appellant's trial unfair as he was prevented from challenging this evidence.

Submissions of the respondent

30. The respondent has submitted that the questions which the appellant refused to answer were material questions in the context of the investigation of the suspected offence. The respondent relies specifically on the fact that in interviews 7, 8, and 9, respectively, the appellant refused to give any account of his movements on the day of the offence or to offer any information in relation to his association with Dermot Gannon or the gun that was found in the vehicle. The respondent asks this Court to note that the Gardaí gave a detailed explanation to the appellant concerning s. 2 of the Act of 1998 and it's effect, namely that failure to answer any question material to the investigation of an offence under s. 21 of the Offences Against the State Act 1939 could result in a Court, or a jury, drawing such inferences from the failure as appeared proper; and that the failure could, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence. The respondent contends that the interviewing Gardaí were correct to invoke s. 2 of the Act of 1998 in circumstances where in his earlier interviews the appellant had provided vague, unsatisfactory and insufficient information concerning his movements and other matters material to the investigation then being conducted.

31. The respondent submits that it is clear from the evidence adduced, and in particular the records of interviews 7, 8 and 9 with the appellant, that the appellant was fully aware that the questions being put to him were material and that adverse inferences could be drawn from his failure to respond. Similarly, the respondent submits that the appellant's responses during those interviews indicate that he made a deliberate choice, based on the advice of his solicitor, not to answer questions on particular issues which were relevant to the investigation. The respondent contends that, in these circumstances, the Special Criminal Court was correct to find that it both could, and should, draw adverse inferences from the appellant's failure to respond to material questions during the interviews.

32. The respondent relies on *People (Director of Public Prosecutions) v Binead* [2007] 1 IR 374 where the Court of Criminal Appeal rejected the appellant's contention that adverse inferences were invalidly drawn by the Court in respect of similar types of questions. The respondent also relies on *People (Director of Public Prosecutions) v Donnelly and others* [2012] IECCA 78 (unreported, Court of Criminal Appeal, 30th July 2012), a case in which the Court of Criminal Appeal had upheld the drawing of adverse inferences where there had been a failure to answer material questions of a type similar to those asked in the present case.

33. The respondent has submitted that the appellant has incorrectly interpreted the effect of s. 2 of the Act of 1998 as only permitting a primary inference to be drawn that the appellant was a member of the IRA. According to the respondent, the primary inference capable of being drawn in this case was that the appellant had chosen not to answer material questions concerning his suspected membership of an unlawful organisation because he did not have responses that would stand up to scrutiny. The respondent cites several English and E.Ct.H.R cases, in that regard, which have established the effect of a failure to respond to questions, namely that; "silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination*", (R v Cowan* [1996] QB 373; *R v Condron* [1997] 1 WLR 827; *Condron v UK* (2001) EHRR 1; and *Beckles v UK* (2003) 36 EHRR 162). However, counsel for the respondent further submitted that the availability of that primary inference would in turn have justified the Special Criminal Court in drawing, in the circumstances of the appellant's case, the further and secondary inference that he was a member of the IRA.

34. Furthermore, the respondent contested the appellant's assertion that the evidence of Detective Chief Superintendent O'Donohue was inadmissible, asserting that the Chief Superintendent's evidence was both given, and was cross-examined upon, appropriately. According to the respondent, the only matter to be determined by the trial court in relation to the Chief Superintendent's belief was the weight to be attached to such evidence and, in that regard, the respondent argues that the trial court correctly weighed the evidence and ascertained that it required to be supported or corroborated by other evidence. Counsel for the respondent cites the Court of Criminal Appeal's judgment in People (D.P.P.) v Donnelly and others, para. 27, to support his client's view that s. 2:-

> "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".

35. In sum, counsel for the respondent has submitted that the Special Criminal Court correctly considered that the appellant's failure to answer material questions justified them in properly drawing the inferences that he had deliberately chosen to do so because he was unable to provide responses that would stand up to scrutiny, because he was in fact a member of the IRA on the date in question. The respondent argued that these inferences were capable of supporting, and corroborating in that sense, the evidence of the Chief Superintendent. Consequently, the respondent submitted that in all the circumstances of the case the Special Criminal Court was correct in convicting the appellant.

Analysis
36. It seems to this Court that grounds (1) to (4), respectively, can be conveniently grouped and dealt with together; as can grounds (5) and (6), respectively.

Grounds (1) to (4)
37. First, this Court must consider whether, pursuant to s. 2 of the Act of 1998, the trial court was entitled to draw, and, secondly, in the circumstances of the case properly drew, an inference that the applicant was a member of the IRA from his refusal to answer questions during the final three interviews that were conducted whilst the appellant was in Garda custody.

38. Section 2 of the Act of 1998, as amended by s. 31 of the Criminal Justice Act 2007, and by s.10 of the Criminal Justice Act 2011, is in the following terms:

"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 a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 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 or mainly on an inference drawn from such a failure.

(2) Subsection (1) shall not have effect unless—

(a) the accused was told in ordinary language when being questioned what the effect of such a failure might be, and

(b) the accused was informed before such failure occurred that he or she had the right to consult a solicitor and, other than where he or she waived that right, the accused was afforded an opportunity to so consult before such failure occurred.

(3) Nothing in this section shall, in any proceedings—
(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.

(3A) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, an answer to the question concerned was first given by the accused.

(3B) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(3C) References in subsection (1) to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967 for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(4) In this section—

(a) references to any question material to the investigation include references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period,

(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.

(5) This section shall not apply in relation to failure to answer a question if the failure occurred before the passing

of this Act."

39. Counsel for the appellant has placed much reliance on the fact that, as noted by the Special Criminal Court, in the early interviews conducted with the appellant he did purport to give some account of his movements, actions, activities and associations. It is contended that in circumstances where some account was given, albeit not in interviews where s.2 of the Act of 1998 had been specifically invoked, no adverse inference can be fairly drawn against the appellant on the basis of an alleged failure to answer material questions. While this Court agrees that regard must be had to the entire fruits of any questioning or interrogation of a person in the position of the appellant in assessing whether there has been a failure to answer material questions when s. 2 has been invoked, it rejects any suggestion that simply because at one point in the questioning or interrogation process some account is given as to a person's movements, actions, activities or associations during a relevant period, that s.2 of the Act of 1998 can never validly be invoked thereafter within the same process regardless of how vague, non-specific, partial, incredible or indeed false the account given may have been; alternatively that if s. 2 has been validly invoked that the respondent cannot legitimately contend that there has been a failure to answer a material question in relation to any matter to which the account given earlier may be relevant. That simply could not be the case, and the Court is satisfied that it was not the intention of the Oireachtas, particularly in circumstances where s. 2(4)(a) refers to requests requiring an accused to give a "full" account of his movements, actions, activities or associations during any specified period, and where s. 2(4)(b) includes within the definition of failure to answer the giving of an answer that is false or misleading.

40. In every case where s. 2 of the Act of 1998 has been invoked it is a question of fact for determination by the court of trial as to whether, taking into account the entirety of any questioning or interrogation of the accused, there has been a failure to answer material questions as to the accused's movements, actions, activities or associations during any specified period.

41. The decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Devlin* [2012] IECCA 70 (Unreported, Court of Criminal Appeal, 6th July 2012) upon which the appellant relies is clearly distinguishable in circumstances where it was not concerned with the same statutory provision as the one at issue in this case. The Devlin case was concerned with s.18 of the Criminal Justice Act 1984 as inserted by the Criminal Justice Act 2007, which permits adverse inferences to be drawn in certain circumstances from an accused's failure "to give an account, being an account which in the circumstances at the time clearly called for an explanation from him" in respect of any object, substance or mark, or any mark on any such object, that was on his person, in his clothing or footwear, otherwise in his possession, or in any place in which he was during any specified period. While there are some superficial similarities between this provision and s. 2 of the Act of 1998 they are not identical in wording, form or substance. In particular, the Court of Criminal Appeal held that section 18 of the Criminal Justice Act 1984 had to be construed, on its particular wording, as being inapplicable "where an account of any kind has been given." The wording of s. 2 of the Act of 1998 is markedly different and does not require to be so construed. On the contrary, once s. 2 of the Act of 1998 is validly invoked, it is a matter for the tribunal of fact to assess whether there has in fact been a failure or refusal to answer a material question or questions, even where some account is then given or has previously been given. A court would be entitled to so hold if it considered that the account given was false and untrue, or if true only partial, or insufficiently specific, or incredible.

42. In the present case, the Special Criminal Court specifically considered the answers given by the appellant in his earlier interviews in considering whether he had failed or refused to answer material questions put to him after s. 2 of the Act of 1998 was invoked for the purposes of interviews seven, eight and nine. It concluded *"[t]he Court found many of these answers to be, as a matter beyond reasonable doubt, incredible. For example, his explanation that he had travelled to Limerick in circumstances "for a spin". The Court cannot, of course, draw any inference from answers given, or any failure to answer, other than when section 2 was invoked, and we do not do so. However, the fact that such questions were not answered when cautioned under section 2 is, in our view, significant. The questions were, in the circumstances of the case, clearly material questions, and the accused failed to answer the same."* This Court considers that these were findings that were legitimately open to the court of trial to make on the evidence before it, and as such they are unassailable.

43. The Special Criminal Court having concluded that the appellant had failed to answer material questions, it was then required to consider what inferences were capable of being drawn from the failure identified, and whether such inferences ought properly to be drawn in the circumstances of the case.

44. The appellant denied membership of the IRA throughout his questioning and interrogation. He also denied having any knowledge of the firearm or the key to a stolen car which was found in the possession of Mr Dermot Gannon, the co-accused. Besides these denials, the appellant's responses to the overwhelming majority, if not all, of the material questions that were posed to him in the interviews in which s. 2 of the Act of 1998 had been invoked were to the effect that the appellant had no comment to make on the advice of his solicitor.

45. As noted in the judgment of the Special Criminal Court, the appellant had received adequate independent legal assistance, having met with two different solicitors on a number of occasions between his interviews. It is clear from the record of the final three interviews that the provisions of s. 2 of the Act of 1998 were read to the appellant. They were explained to him in detail and in plain language, and on several occasions, during these final three interviews and the appellant affirmed his understanding of the section and the consequences that might flow from a failure or refusal to answer a material question. In particular it was made clear to the appellant that the application of s. 2 of the Act of 1998 was limited to proceedings for an offence of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act 1939, and that, where s.2 of the Act of 1998 had been invoked, any answers given by him to questions regarding his suspected membership of an unlawful organisation could not be used in a prosecution brought against him for any other offences.

46. In the circumstances the court of trial was entitled to conclude, as it appears to have done, that the failure by the appellant to answer material questions was deliberate and conscious, and that it was not explicable on any neutral or benign basis. On the contrary, it was ostensibly a fully informed and independent decision based upon the conscious exercise of a choice. The Special Criminal Court was, in this Court's view, entirely justified in characterising it as *"wilful, deliberate and calculated"*. Moreover, it was a choice exercised in the specific context of a focussed interrogation concerning his suspected membership of the IRA, and it is a matter of some significance that in that context he was unwilling to re-iterate answers previously given when questioned in a more general context, or to elaborate or amplify what he had said previously. It was therefore open to the Court to infer that that the appellant had chosen not to answer material questions concerning his suspected membership of an unlawful organisation because he did not have responses that would stand up to scrutiny, and that he was in fact a member of the IRA. The Special Criminal Court expressed itself as being satisfied that it was *"entitled to draw an inference that the accused was a member of the IRA from his failure to answer these questions"*, and in then proceeding to draw that inference was clearly further satisfied that it was proper so to do. This Court is satisfied that in the circumstances of this case there is no tenable basis on which it can be reasonably contended that it would have been improper for the Special Criminal Court to have drawn the inference that it did.

47. The mere fact that the appellant had consistently denied membership of an unlawful organisation, which denials were taken into account by the Special Criminal Court, would not in and of itself have rendered the inference of membership of the IRA improper, particularly in circumstances where the appellant on a fully informed basis had consciously and deliberately refused to give a full account of his movements, actions, activities and associations during the period under scrutiny. The wilful, deliberate and calculated responses of the appellant in the context of his interrogation during interviews seven, eight and nine which he knew to be specifically focussed on his suspected membership of the IRA not only entitled the Special Criminal Court to draw the inference that he was in fact a member of the IRA but rendered it entirely proper that it should do so.

48. The suggestion advanced by counsel for the appellant that his attitude was perhaps explicable by a wish not to incriminate himself in other respects does not stand up to critical analysis in circumstances where he was expressly told that any answers given by him to questions regarding his suspected membership of an unlawful organisation could not be used in a prosecution brought against him for any other offences. Moreover, the suggestion that he might not have wished to inform on his co-accused is not tenable in circumstances where he had already furnished certain details concerning his knowledge of, and association with, Dermot Gannon in his earlier interviews but refused to reiterate or confirm those details in the interviews in which s. 2 of the Act of 1998 was deployed.

49. Approaching the evidence in this case in the same manner adopted by this Court in its recent judgment in *The People (Director of Public Prosecutions) v Derek Palmer*, [2015] IECA (unreported, Court of Appeal, 20th July 2015) the Court is of the view that the Special Criminal Court considered the questioning of the accused carefully and arrived at a conclusion which is unchallengeable on appeal. There is no basis for suggesting that the Special Criminal Court was mistaken in its assessment, or that the process was flawed, and this Court finds no basis on which it would be entitled to interfere with the considered judgment of the Special Criminal Court on this matter. The Court therefore rejects grounds of appeal (1) – (4) inclusive.

Grounds (5) and (6)
50. The appellant also bases his appeal on the contention that the opinion evidence of Chief Superintendent Kevin Donohue ought not to have been admitted in all the circumstances of the case. The Chief Superintendent's opinion evidence was adduced pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972 (as amended by s. 4 of the Act of 1998) which provides as follows:

> "(2) 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."

51. The basis on which it is contended that the Chief Superintendent's evidence ought not to have been admitted is that there was an inherent unfairness in doing so, amounting to a denial of due process, in circumstances where, as a result of the Chief Superintendent claiming privilege in respect of the information in his possession on which he based his belief, it was impossible for counsel for the accused to conduct any meaningful cross-examination of the Chief Superintendent or to test the cogency and validity of the belief expressed.

52. The Chief Superintendent had asserted privilege on the following basis:

> "Primarily, Judge, the claim of privilege is made in respect of the preservation of life and state security in that regard, probably to a lesser degree in respect of compromising current or future garda operations."

The Chief Superintendent's claim of privilege was upheld by the Special Criminal Court.

53. The appellant relies on the following passage from Costello J's judgment in *O'Leary v Attorney General* [1993] 1 I.R. 102, where he described the effect of the relevant section in these terms:

> "What this section does is to make admissible in evidence in certain trials statements of belief which would otherwise be inadmissible. The statement of belief if proffered at the trial becomes 'evidence' by virtue of this section in the prosecution case against the accused. Like other evidence it has to be weighed and considered and the section cannot be construed as meaning that the court of trial must convict the accused in the absence of exculpatory evidence. The accused need not give evidence, and he may ask the court to hold that the evidence does not establish beyond a reasonable doubt that he is a member of an unlawful organisation. Should the court agree he must be acquitted."

The appellant submits that in circumstances where the evidence cannot be tested, there can be no proper assessment of the weight capable of being attached to it, such that the prejudicial effect of it must inevitably outweigh its probative value. That being so it ought to have been ruled inadmissible.

54. In response to the appellant's argument that the opinion evidence of Chief Superintendent Kevin Donohue was inadmissible, the D.P.P. relies on *People (Director of Public Prosecutions.) v Donnelly and others* [2012] IECCA 78 (unreported, Court of Criminal Appeal, 30th July 2012). Evidence of the belief of a Chief Superintendent that the appellants in *Donnelly* were members of an unlawful organisation was admitted as evidence. The trial court had held that the inferences which were drawn from the appellant's refusal to answer questions, pursuant to s. 2, corroborated the evidence of the Chief Superintendent. On appeal the appellants challenged, *inter alia*, the admissibility of the Chief Superintendent's opinion evidence and the claim of privilege that the Chief Superintendent relied upon in respect of the identity of his informants and the sources of his information. As in the present case, the appellants argued that their trial was unfair as they had been afforded no opportunity to test the evidence of the Chief Superintendent.

55. In reviewing the judgment of the Special Criminal Court, the Court of Criminal Appeal noted at para. 5 that:-

> "The court accepted the belief evidence of Chief Superintendent O'Sullivan. It acknowledged that such evidence leaves the defence in a position where they could not test or challenge it in that privilege is claimed in respect of sources. It was for this reason that the court observed that in cases such as this, where it accepts the belief evidence of the Chief Superintendent, the court will not act on the belief evidence alone in the absence of some form of independent corroboration. In relation to the interviews, the court was satisfied that in each of the cases the accused had failed to answer questions pursuant to s.2 of the Offences Against the State (Amendment) Act 1998. The court was satisfied that the failure of the accused to answer material questions was "such as would entitle the court to draw inferences and be treated as or capable of amounting to corroboration of other evidence in this case".

56. The Court of Criminal Appeal also noted that the statutory provisions in issue (i.e., s. 3 of the Offences Against the State (Amendment) Act 1972) were:

> "significant alterations to the common law and together with the privilege which normally attaches to the identity of informers and indeed to methods of information gathering, make more difficult the task of defending persons accused with the offence of membership of an unlawful organisation, in particular. However, a fair trial whether pursuant to Article 38 of the Constitution or Article 6 of the Convention is not necessarily to be understood as a trial in which the defence is facilitated. The question at all times is whether a trial under such conditions is fair."

57. Accordingly, the Court of Criminal Appeal held that the provisions of s. 3 of the Act of 1972 required careful scrutiny. Following such scrutiny, and a review of the jurisprudence of the Superior Courts in respect of those provisions, including *O'Leary v Attorney General* [1993] 1 I.R. 102; *The People (Director of Public Prosecutions) v Martin Kelly* [2006] 3 I.R. 115; *The People (Director of Public Prosecutions) v Binead* [2007] 1 I.R. 374 and *Redmond v Ireland* [2009] 2 I.L.R.M. 419, the Court concluded that the opinion of the Chief Superintendent, pursuant to the aforementioned section, was admissible in the circumstances of that case.

58. In so holding, O'Donnell J giving the judgment of the Court, remarked (at para 31):

> "Even where such privilege is upheld, it does not follow that the evidence of a chief superintendent cannot be tested. The credibility of any witness is not dependent solely on the material which that witness seeks to adduce in evidence in chief. On the contrary, credibility can be challenged on any issue collateral to the particular testimony. Furthermore, as the Supreme Court expressly held in Kelly in rejecting a submission made on behalf of the Director of Public Prosecutions, the evidence of a Chief Superintendent under s.3(2) can be explored and tested in a number of ways, such as whether the belief is based upon one or more sources of information, whether in the case of a human informant the Chief Superintendent is personally aware of the identity of the informant and has dealt personally with him or her, and whether as in this case, the witness has experience in dealing with such informants and rating and analysing their evidence. In this case it must be said that the evidence of the Chief Superintendent was impressive. This highlights a difficulty with this area of argument. There are many reasons why the defence will not seek to probe the evidence of a Chief Superintendent, even though that is entirely permissible at law. Defence counsel may wish to submit that the evidence of the chief superintendent is bare evidence to which a court should attribute little weight, or indeed make submissions such as that in the present case, namely that the inherent restrictions on the capacity of counsel to cross-examine rendered the particular trial unfair. In either case, such a strategy could be undermined, and indeed the case against the accused unwittingly strengthened, by detailed cross-examination. Accordingly, it cannot be assumed that because in any given case counsel does not cross-examine extensively, that extensive cross-examination is not possible. In *D.P.P. v. Martin Kelly* the Supreme Court unanimously concluded that the interaction of s.3(2) evidence and a claim of privilege did not itself render a trial unfair and contrary to Article 38 of the Constitution. In this case, this Court is satisfied that the combination of those provisions in the present case was not a breach of the fair trial rights of the accused, whether guaranteed directly by Article 38 of the Constitution, or indirectly in the present context, by Article 6 of the Convention of the E.C.H.R."

59. This Court has revisited the topic most recently in *The People (Director of Public Prosecutions) v Derek Palmer* [2015] IECA (unreported, Court of Appeal, 20th of July 2015). The grounds of appeal raised in that case were similar to those in the present case. The first challenge was to the admissibility of the belief evidence of a Detective Chief Superintendent, who had said in evidence that his belief was based on confidential information in respect of which he was asserting privilege. He refused to answer any questions about the sources of his information, and the Special Criminal Court had upheld his claim of privilege.

60. This Court emphasised, in relation to s. 3, that:-

> "the evidence is of the belief of the Chief Superintendent that the accused is, or was at the relevant time, a member of an unlawful organisation. It is not hearsay evidence as to what other people have said. The belief of this senior officer is itself the evidence that is before the Court. That belief is, of course, grounded in information that the officer has obtained from a variety of sources and he will be expected to have brought his experience, training and judgment to bear on the evaluation of material that he has had available to him. […]
>
> Section 3(2) [of the 1972 Act] is clear and unequivocal. It was considered and analysed in detail by the Court of Criminal Appeal in *D.P.P v Donnelly & Ors.* The statement of the Chief Superintendent that he believes that the accused was, at a material time, a member of an unlawful organisation is evidence that the person was then such a member. If any doubt remained as to the applicability *of D.P.P v Donnelly & Ors.,* it has been removed by the recent Supreme Court decision in *D.P.P. v Connelly* [2015] IESC 40.
>
> There is no provision in the sub-section for the consideration of the material on which the officer's belief is based by the Director of Public Prosecutions or another agency. It is not the belief of the D.P.P. Neither is it the Chief Superintendent's belief as approved or authorised or evaluated by the Director… [The] ground of appeal and the submissions supporting it, (contesting the fairness of the claim of privilege), suffer from the misunderstanding that the evidence before the Court is of the officer passing on hearsay information. The distinction may at first sight appear to be a fine one between a belief based on confidential information from a variety of sources, on one hand, and reporting information provided by others, on the other hand. However, as *Donnelly's* case makes clear, the distinction is an important one for a proper understanding of the section and how it operates. The Court in that case also highlighted the evaluative role of the officer giving the evidence and the fact that it is a person of very senior high rank in the Garda Síochána who has particular and relevant experience".

61. In this case there is no new point not already canvassed in *Donnelly and Others*, or *Palmer*, or before the Supreme Court in the recent case *People (Director of Public Prosecutions v Connolly)* [2015] IESC 40 (unreported, Supreme Court, 26th March 2015). While the Chief Superintendent's claim of privilege rendered it difficult for the defence to test the belief evidence there were still aspects that were capable of being pursued in cross-examination, and, as pointed out by the European Court of Human Rights in *Donohoe v. Ireland* (Application No.19165/08) [2013] ECHR 1363 (12th December, 2013), cited at length by MacMenamin J in *Connolly*, the statutory provisions themselves have features built into them intended to counterbalance any procedural unfairness that might arise. These are described in paragraphs 90 to 92 inclusive of the judgment of the E.Ct HR in *Donohoe*. The Court, therefore, must reject the appellant's submission that the evidence of the Chief Superintendent was inadmissible. The Court also rejects the appellant's argument that the claim of privilege made by the Chief Superintendent rendered the admissibility of his belief evidence unfair and unjust.

62. Finally, the Court must consider the appellant's claim that there was no evidence to corroborate the opinion evidence of the Chief Superintendent, (ground 5).

63. The Special Criminal Court ruled in accordance with its general practice that it would not proceed on the evidence of the Chief Superintendent alone in the absence of some form of independent corroboration. In so ruling the Special Criminal Court was clearly not referring to corroboration in the special legal sense discussed in *R v Baskerville* [1916] 2 K.B. 658 but rather in the more commonly understood sense of evidence that in some way tends to support the charge. The Court found such corroboration in inferences arising from the appellant's failure to answer material questions, in circumstances where s. 2 of the Act of 1998 had been invoked.

64. The Special Criminal Court was entitled to do so in the following circumstances. In *Donnelly,* the Court of Criminal Appeal addressed the relationship between s. 2 of the Act of 1998 and s. 3(2) of the Offences Against the State (Amendment) Act 1972. It had been argued, *inter alia*, on behalf of the appellants that inferences arising from a failure to answer material questions could not corroborate the belief evidence of a Chief Superintendent. It noted that s. 2 of the Act of 1998 specifically provides that the failure to answer questions may, on the basis of the inferences to be drawn, be treated as corroboration. Accordingly, it affirmed the decision of the court of trial in that case, i.e., the Special Criminal Court, to the effect that inferences drawn pursuant to s. 2 were capable of amounting to corroboration for the purposes of s. 3(2) of the 1972 Act. In giving judgment for the court in *Donnelly*, O'Donnell J stated (at para. 38) :-

> "It does not appear to this Court that the reference to such evidence being 'capable of amounting to corroboration' amounts to a requirement that such evidence be capable of satisfying the test for corroborative evidence before it can be accepted. On the contrary, such evidence is deemed by statute to be capable of amounting to corroboration, so that in such cases where corroboration is required as a matter of law or practice, it is capable of being supplied by inferences being drawn pursuant to the relevant statutory provisions."

65. Consequently, in *Donnelly* the Court of Criminal Appeal accepted a submission on behalf of the D.P.P. that inferences to be drawn from the appellants' failure to respond to material questions could corroborate belief evidence given by a Chief Superintendent in that case pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972. In *Palmer*, this Court rejected similar arguments to those canvassed previously in *Donnelly*, and affirmed and reiterated the view taken by the former Court of Criminal Appeal that inferences drawn from a failure to answer material questions could constitute corroboration of belief evidence adduced from a Chief Superintendent, and held that in Mr Palmer's case such inferences did in fact corroborate the Chief Superintendent's evidence.

66. There is no basis for materially distinguishing the circumstances of the present case from the cases of *Donnelly* and *Palmer* respectively. Equally there is no basis for believing that the Special Criminal Court erred in its application of relevant legal principles or in its consideration and assessment of the belief evidence of the Chief Superintendent.

67. The Court therefore rejects grounds of appeal (5) and (6), respectively.

Conclusion

68. This Court is satisfied that the appellant's trial was satisfactory and that his conviction can be regarded as safe.

69. In the circumstances the Court dismisses the appeal.