THE COURT OF APPEAL

Birmingham P.
Edwards J.
Baker J.

Record No: CA244/2017

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

VINCENT BANKS

APPELLANT

JUDGMENT of the Court delivered the 20th of December 2019 by Mr Justice Edwards.

Introduction

1. On the 31st of July 2017 the appellant was convicted by the Special Criminal Court of the offence of Membership of an Unlawful Organisation, to wit an organisation styling itself the Irish Republican Army, otherwise known as Oglaigh na hÉireann, otherwise the IRA, on the 18th of December 2012, contrary to s. 21 of the Offences Against the State Act, 1939 (the "Act of 1939") as amended by s. 48 of the Criminal Law (Terrorist Offences) Act, 2005. He was thereafter sentenced to imprisonment for five years, to date from the 16th of April 2016.

2. The appellant now appeals against his conviction.

Procedural History

3. The appellant was initially charged and returned for trial before the Special Criminal Court in respect of two offences. The first was an offence of Withholding Information, between the 10th of October 2012 and the 20th of December 2012, in relation to the murder of a Northern Ireland Prison Officer, a Mr Black, contrary to s. 9 of the Offences Against the State Act, 1998 (the "Act of 1998") as amended. The second offence concerned the subject matter of the conviction which is now being appealed, i.e., Membership of an Unlawful Organisation to wit an organisation styling itself the Irish Republican Army, otherwise known as Oglaigh na hÉireann, otherwise the IRA, (hereinafter "the offence of membership") on the 18th of December 2012.

4. On the 25th of February 2014, the respondent applied to sever the indictment. There was nothing unusual about this. It is the usual practice to do so in the Special Criminal Court where an accused is charged on the same indictment with the offence of membership and another offence or offences. The reason is that certain categories of evidence (namely belief evidence of a Chief Superintendent pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972 (the "Act of 1972"), and also evidence entitling the court of

trial to draw adverse inferences arising from the accused's failure or refusal to answer material questions, as provided for in s. 2 of the Act of 1998) are only admissible in a trial for the offence of membership. It has long been recognised that proceeding with both types of offences on the same indictment is procedurally unwieldly, and could potentially lead to unfairness to one, or other, or possibly both sides.

5. The respondent's application to sever was not opposed by counsel for the appellant, who indicated that it was a matter for the prosecution and that the defence could not oppose the application. Speaking for the Court, the senior presiding judge remarked in response to this: "*It seems in ease of you, if anything*." The application was acceded to, following which prosecuting counsel informed the Court that it was proposed to proceed with the withholding information charge first and that the count charging the offence of membership would proceed immediately after the judgment of the court in the withholding information case.

6. The withholding information trial proceeded in March 2014 and the appellant was acquitted.

7. During that trial there had been a voir dire, in the course of which there had been a challenge to the arrest of the appellant on the 18th of December 2012. The evidence in regard to the arrest on that date was that the appellant had been arrested on suspicion of withholding information contrary to s. 9 of the Act of 1998 as amended and on suspicion of the offence of membership, contrary to s. 21 of the Act of 1939 as amended. However, there was evidence that the appellant had been arrested previously under s. 30 of the Act of 1939 on the 13th of September 2012. In the circumstances the defence relied on s. 30A of the Act of 1939, as amended, and contended that as the arrest at issue, i.e., the arrest on the 18th of December 2012 was less than three months since the earlier arrest under s. 30, i.e., on the 13th of September 2012, a warrant had been was required under s. 30A, absent which the later arrest was unlawful. The Special Criminal Court agreed and ruled the arrest on the 18th of December 2012 to have been unlawful in so far as it purported to have been made pursuant to s. 30 of the Act of 1939. However, the Special Criminal Court was satisfied that because the appellant was also arrested on suspicion of 'withholding information' contrary to s. 9 of the Act of 1998, as amended, his arrest and detention in connection that that matter had been lawful.

8. Importantly, no evidence was excluded at that trial because of the ruling that the s. 30 arrest on the 18th of December had been unlawful. Moreover, the ultimate acquittal of the appellant on the charge of withholding information had nothing to do with that ruling.

9. After the acquittal, counsel for the prosecution informed the Special Criminal Court that the respondent still intended to proceed with the prosecution for the offence of membership on the 18th of December 2012. This prompted the following exchanges:

> *"Senior Presiding Judge: Well, this is a membership charge where a decision has been made. I'm quite surprised that a decision has been made by the prosecution but we don't think that this case should have any priority. The man's on bail and*

we're certainly not going to disaccommodate people who are in custody because of him. So, we'll give you the first date available.

Prosecuting Counsel: May it please the Court.

Judge (Other): How long will it take?

Prosecuting Counsel: Certainly I would have thought from a prosecution perspective the last trial took over three sitting weeks. So, to be safe if we said six sitting days I'm sure –

Senior Presiding Judge: This Court has made a clear decision. A clear decision and a written decision –

Prosecuting Counsel: I appreciate that fully.

Senior Presiding Judge: -- that the arrest was unlawful.

Defence Counsel: We'd be, on our side, happy with the same panel, my lords.

Senior Presiding Judge: I'm sure you would but –

Prosecuting Counsel: I don't think that would be appropriate.

Defence Counsel: Happy is the wrong words.

Senior Presiding Judge: Well, I think – yes. Sorry, I haven't discussed this with my colleagues but it doesn't seem appropriate, so it doesn't, because we have expressed a trenchant view if you like in the matter.

Prosecuting Counsel: Yes.

Senior Presiding Judge: But you have that under your belt.

Defence Counsel: May it please the Court.

Senior Presiding Judge: So, the registrar is looking for a date now. How long did you say, I beg your pardon.

Prosecuting Counsel: I think to be safe we said six sitting days. So, into a second week.

Senior Presiding Judge: That's – well, that's two weeks when you take judgments and delays into consideration.

Prosecuting Counsel: Exactly and the Court will have to consider it.

Senior Presiding Judge: Yes.

Prosecuting Counsel: Yes and there will be voir dires."

10. The trial on the membership charge, which resulted in the conviction now under appeal, took place from the 6th of July 2017 until the 31st of July 2017, involving a total of fourteen trial days.

Background to the matter

11. The prosecution case against the appellant had three components to it.

12. First, there was reliance on the evidence of Chief Superintendent Gerry Russell, who expressed his belief that Mr Banks was, on the relevant date, a member of the IRA.

13. Secondly, there was evidence of the circumstances which had led to the arrest of the appellant on the 18th of December 2012. We will attempt to summarise that evidence momentarily. Before doing so, however, it is convenient to identify the third component of the prosecution case as involving the fruits of interviews conducted with the appellant whilst he was in detention pursuant to section 30 of the Act of 1939 where the provisions of section 2 of the Act of 1998 were invoked and also of interviews conducted under ordinary legal caution.

14. The circumstances which led ultimately to the arrest of the appellant date back to the 1st of November 2012 when a Mr David Black, a prison officer serving at Maghaberry Prison in Northern Ireland, was shot dead as he was travelling eastbound on the M1 Motorway near Lurgan by the occupants of a passing motor car, a Toyota Camry bearing registration numbers and letters 94 D 50997. A police investigation then ensued, involving both the PSNI in Northern Ireland and An Garda Siochána. The vehicle mentioned was later found burnt out a short distance from the scene of the shooting. Forensic evidence established a connection between the remains of Mr Black and that vehicle.

15. Gardaí established that the Toyota Camry, registration 94 D 5 0997, was registered to a Paul McCann of 176 Rathgar Road, Dublin 6. At least, that was the name and address on the vehicle's registration documents. During their investigations, gardaí called to that address at which there was a residential premises comprised of eighteen flats. They met there with a Mr Larry Flynn, the landlord of those premises. Mr Flynn stated that he had no record of anybody by the name of Paul McCann being a tenant at 176 Rathgar Road, Rathmines, Dublin 6. He stated that he recalled a letter arriving to that address, addressed to a Paul McCann, which letter he thought was from the Department of Transport. He went on to say that he had contacted Detective Sergeant Marilyn Brosnan of An Garda Siochána on the afternoon of the 1st of November 2012 and had given her the letter in question.

16. In the course of their further investigations, members of An Garda Siochána established from vehicle registration records that the vendor of the vehicle to the supposed Mr Paul McCann was a Mr Gerard Hickey who lived at an address in Tallaght. Gardai visited and spoke to Mr Hickey who later gave evidence at the appellant's trial. Mr Hickey testified that he had owned the Toyota Camry, reg no 94 D 50997, and that he had arranged through his daughter to offer that vehicle for sale online. On the 10th of October 2012 he

received a telephone call from a telephone number 085-8328256. He did not recognise the telephone number. However, the caller was a gentleman who was enquiring about the car that was for sale. An arrangement was made for this man to call to Mr Hickey's home later that evening at about 6.30 pm in order to view the vehicle. A man, described by Mr Hickey as wearing a leather jacket and a woollen beanie-style hat, duly called to the house, as per the arrangement. Mr Hickey sold the vehicle to this man for €600, and recounted that this man signed the log book. Mr Hickey gave evidence that the caller wrote the name Paul McCann using his left hand whilst holding the document secure with his right thumb. The log book was then posted to the Department of the Environment in Shannon. The Special Criminal Court subsequently heard evidence that the form in question was recovered from the Department of the Environment in Shannon, and was examined forensically. A fingermark was developed in the course of that examination which was later found to match the right thumb print of the appellant.

17. The appellant was further forensically linked to the Toyota Camry 94 D 50997 via the telephone number provided by Mr Hickey, namely 085-8328256. A Ms Maureen King gave evidence that in 2012 she was employed by the telephone company 'Meteor' and that on foot of a request received from the Crime and Security Division at Garda Headquarters she accessed the Meteor computer to retrieve certain information in respect of telephone number 085 -8328256. Ms King gave evidence that the sales point in respect of the SIM pack for that telephone number was noted from the records as being XtraVision in Tallaght and that the top-up at point of sale was recorded as having occurred on the 10th of October 2012 at 17.40.07. She said she interrogated the incoming and outgoing calls relevant to that number from the 1st of October 2012 to the 12th of October 2012. There were only two calls recorded as having been made by that number, and both were made on the 10th of October 2012. There were no incoming calls. The first call was made and related to the topping up of the telephone at point of sale, and the second call made was to a number ending in 9260, which call was made at 17:44:42. Mr Hickey, the vendor of the Toyota Camry 94 D 50997, gave evidence that this was his telephone number.

18. Gardai then visited Xtra-Vision in Tallaght and viewed CCTV footage recorded there on the 10th of October 2012 at circa 17.40. The recording had captured a man entering Xtra-vision in Tallaght around the relevant time. The CCTV footage was viewed by Sergeant Bergin and Garda Proudfoot. Sergeant Bergin gave evidence that on the 29th of September 2012 he had stopped the appellant while mounting a random checkpoint in order to take a sample of his breath. When he subsequently viewed the CCTV footage from Xtra-Vision in Tallaght he was able to identify the man of interest who had entered the store during the relevant timeframe as being the appellant.

19. As to the movements of the Toyota Camry 94 D 50997, after it had been sold by Mr Hickey, the Special Criminal Court heard evidence from a Ms Philomena Maguire who resides in Carrigallen, Co Leitrim. Ms Maguire told the court below that on the 11th of October 2012 while she was walking from her home in Carrigallen to her workplace she noticed a vehicle parked in a lay by at 8.00 a.m. in the morning. When she returned from work, the vehicle was still there and remained there, on her evidence, until the 31st of

October 2012. She noted that the vehicle was a black Toyota Camry with the registration numbers and letters 94D50997.

20. The appellant was linked to the Leitrim area, and to Carrigallen in particular, in the following circumstances. The court below received evidence from members of the National Surveillance Unit that on the 8th of October 2012 the appellant was observed in a public house in the company of a Mr Lynch, a resident of Carrigallen. On the 9th of November 2012, Garda Charlie Murray went to a pub near Ballinamore, County Leitrim at around 7.30 pm. He saw a Mr Brady from Carrigallen in the pub. This gentleman, who was a mechanic, had previously been spoken to by gardaí in connection with their investigations into the movements of the Toyota Camry 94D 50997. Whilst in the pub, Garda Murray noticed that Mr Brady was joined by two men who were unknown to him. A few moments later, all three men left the bar and the two men who were with Mr Brady got into a green Mazda bearing registration numbers and letters 01WW1960. Garda Murray subsequently viewed photographs of twelve persons at Ballymun Garda Station on the 19th of December 2012 and picked out a photograph as being that of one of the men who had been in the company of Mr Brady in the pub near Ballinamore on the 9th of November 2012. The photograph that he picked out was of the appellant. Further, the green Mazda, reg no 01 WW 1960 was later established to be the property of a Ms Paula Devlin, who is, or was, friendly with the appellant. Later on during the evening of the 9th of November 2012 the green Mazda was captured on CCTV while passing through the M4 tollbooth. The driver was photographed paying the toll and was identified from the photograph as being the appellant.

21. Other evidence adduced concerned a search of the appellant's home at 63C Smithfield Gate, Dublin 7, following his arrest and detention on the 18th of December 2012. In the course of that search a copy of the Evening Herald dated the 2nd of November 2012, and which was therefore some six weeks old, was found open on a page containing a report of the unlawful killing of Mr Black.

22. In the course of their ongoing investigations, gardaí obtained a warrant to search the home of Ms Devlin at Finn Eber Square in North Dublin. During the course of that search, her green Mazda vehicle, reg no 01 WW 1960 was also searched. The vehicle was found to contain a number of items including a book of maps published by the Ordnance Survey of Ireland; and an insurance certificate in the name of Vincent Banks. One page (page 26) of the Ordnance Survey map was torn, and it was established that this page covered an area which includedof Carrigallen, County Leitrim. In the course of a subsequent forensic examination a fingerprint was developed on the torn page which was later shown to match an impression taken from the right thumb of the appellant.

The Grounds of Appeal

23. By his Notice of Appeal the appellant contends that his conviction was unsatisfactory and is unsafe on the following grounds:

    1) That the trial judges erred in law and in fact in holding that Issue Estoppel did not operate in the circumstances of this particular case.

2) That the trial judges erred in law and in fact in finding that there was no unfairness to the appellant in re-opening the findings made about his alleged membership of an illegal organisation made in the trial for withholding information.

3) That the trial judges erred in law and in fact in holding that section 34 of the Criminal Procedure Act 1967 as substituted by section 21 of the Criminal Justice Act 2006 did not apply in the circumstances of this particular case and, in particular, did not have application in respect of an appeal against a determination of the Court made in the trial for withholding information.

4) That the trial judges erred in law and in fact in holding that the arrest of the accused on the 18th December 2012 was lawful and that no arrest warrant was required for that arrest.

5) That the trial judges erred in law and in fact in holding that the offence suspected in September 2012 was not the same offence for which he was arrested in December 2012 and that therefore, the arrest in December 2012 was a lawful arrest.

6) That the trial judges erred in law and in fact in holding in its ruling that the offence of membership in October 2012 with which the accused was charged was not the same offence of membership for which he had been arrested in September 2012.

7) That the trial judges erred in law in admitting the s. 2 interviews into evidence.

8) That the trial judges erred in law in admitting any interviews into evidence.

9) That the trial judges erred in law in refusing to exclude the evidence given by Chief Superintendent Russell in circumstances where the defence's ability to cross-examine and test that evidence was hampered by the assertion of a claim of privilege.

10) That the trial judges erred in law and in fact in holding that the decision in DPP v Farrell did not apply to this case.

11) That the trial judges erred in law and in fact in finding that the evidence did not go beyond the evidence of which the defence were on notice.

12) That the trial judges erred in law and in fact in ruling that it would not be unfair to the accused to admit the evidence of Chief Superintendent Russell.

24. It is convenient to deal with the issues raised in four groups, namely "Grounds 1, 2 & 3 – Procedural Fairness" ; "Grounds 4, 5 & 6 – Lawfulness of the Arrest" ; "Grounds 7 & 8 – the Interviews" and "Grounds 9, 10, 11 & 12 – the belief evidence".

Grounds 1, 2 & 3 – Procedural Fairness

25. It was submitted on behalf of the appellant that as the lawfulness of his arrest for the suspected offence of membership on the 18th of December 2012 had already been determined by the Special Criminal Court, albeit by a differently constituted bench of that

court, in the appellant's trial for the alleged offence of withholding information the court should not permit the prosecution to revisit the issue in any trial to take place thereafter for the offence of membership on the 18th of December 2012.

26. Counsel for the appellant acknowledged the decision of the Supreme Court in *Lynch v Moran* [2006] 3 I.R. 389, which had held that issue estoppel had no role in Irish criminal proceedings. However, he has argued that the decision in that case, where the Supreme Court refused to follow the earlier ruling of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v O'Callaghan* [2001] 1 I.R. 584, which held that issue estoppel as between one criminal trial and another should be regarded as available in Ireland, was predicated upon the unavailability of an appeal mechanism against decisions made during earlier trials. He argued that in the light of new developments in the law, and specifically the availability to the prosecution, following the enactment of s. 34 of the Criminal Procedure Act 1967 ("the Act of 1967"), as substituted by s. 21 of the Criminal Justice Act 2006 ("the Act of 2006") and as amended by s.47 of the Court of Appeal Act 2014 ("the Act of 2014"), of the possibility of appealing against the adverse ruling on the arrest issue to the Court of Appeal, the decision in *Lynch v Moran* should be regarded as having qualified rather than reversed the decision in *O'Callaghan*. The qualification contended for, as we understand it, is that issue estoppel is unavailable where there is no possibility of appealing, but that it is otherwise available.

27. The appellant maintains, and argued before the court below, that in the present case it would have been open to the respondent to have appealed the adverse ruling concerning the lawfulness of the s. 30 arrest in the withholding information trial pursuant of s.34 of the Act of 1967 as substituted by the Act of 2006 and as amended by the Act of 2014; and in the circumstances the prosecution, not having done so, ought not to have been allowed to re-visit the issue in the appellant's trial for the offence of membership, either on the basis that they were estopped from doing so, alternatively on the grounds that to allow them to do so would be procedurally unfair.

28. Counsel for the appellant also alluded in argument in the court below to the separate right of appeal under s. 23 of the Criminal Procedure Act 2010, but appears to have conceded that it was not applicable in the circumstances of the case, stating:

> *"However, that doesn't really apply in a very direct way to our case because the Court will see that an appeal for the DPP only lies in that case, it's at subsection 3, where a ruling was made which erroneously excluded compelling evidence and a direction was given by the Court to find the accused -- where the direction was wrong in law."*

29. The contention of procedural unfairness is advanced on the basis that s.6(3) of the Criminal Justice (Administration) Act 1924 (the "Act of 1924"), which provides for severance of counts on an indictment, was considered in *The People (Director of Public Prosecutions) v BK* [2000] 2 I.R. 199, where the Court of Criminal Appeal described the rationale for separate indictments or trials as being that an accused person should not be unfairly prejudiced. The appellant argues that allowing the respondent to re-visit the

adverse arrest ruling in the trial for the offence of membership unfairly prejudiced the appellant because if the indictment had not been severed the ruling in the appellant's favour would have inured to his benefit in the unitary trial of both offences, resulting in his acquittal on the membership charge as well as on the withholding information charge.

30. The appellant further contends that the authorities of *Lynch* and *O'Callaghan* relate to cases where the verdict had been overturned, retrials ordered and a court conducting the retrial was at large in relation to all issues – i.e., there was no legal finality in respect of the issues before the court. In this case, however, the issue of the lawfulness of the s. 30 arrest had been finally determined and the only reason the respondent was in a position to re-open same was because of her decision to sever the indictment, a mechanism which was not intended to be used to allow the DPP revisit decisions which had previously been decided against her.

31. The respondent submits in reply to these arguments that there is nothing in the Supreme Court's decision in *Lynch v Moran* to suggest that the clear statement therein that *"issue estoppel has no role in Irish criminal proceedings, either in favour of the prosecution or the defence"* is subject to the qualification contended for.

32. Moreover, it was contended that the finality contention does not stand up to scrutiny. The s. 30 arrest was not relevant to the withholding information charge, as the prosecution were contending that the appellant had been lawfully arrested in respect of that on foot of a separate power of arrest. It is true that the panel of the Special Criminal Court that conducted the withholding information trial expressed a view that the s. 30 arrest was unlawful, but their remarks could not represent a final ruling on the issue in circumstances where it was unnecessary for them to have considered the lawfulness of the s. 30 arrest. On the contrary, the only relevant issue that they were required to determine was the lawfulness of the arrest for withholding information, which had been effected on a basis entirely separate to the concurrent arrest of the accused under s. 30 of the Act of 1939 on suspicion of the offence of membership of an unlawful organisation. They were satisfied that the concurrent arrest was lawful. In so far as they expressed a view on the s. 30 arrest, it was unnecessary in the context of the trial before them and would require to be regarded as an *obiter dictum* as that term is understood when used in its loosest sense. (As the Special Criminal Court is a court of limited jurisdiction the doctrine of *stare decisis* is not engaged and so, strictly speaking, it is not entirely apposite to analyse one of its judgments or rulings in terms of *ratio decendi* and *obiter dicta*. Be that as it may, the term *obiter dictum* is frequently used other than in the context of the doctrine of *state decisis* to suggest a non-binding ancillary remark). The respondent argues that it certainly did not determine the arrest issue in so far as any future trial in relation to the membership charge was concerned.

33. The respondent further makes the point that in so far as the appellant complains that, as a consequence of the indictment having been severed, he has now been deprived of the benefit of a ruling in his favour during the course of the trial for the alleged offence of withholding information (i.e. that his concurrent arrest for the offence of membership on

the 18th of December 2012 was unlawful), it is to be noted that no objection was raised by or on behalf of the appellant when the prosecution applied to the Special Criminal Court on the 25th February 2014 to sever the indictment. This implicitly recognised that (for the reasons mentioned earlier in this judgement) it has become the established practice before the Special Criminal Court to sever an indictment where the accused is charged with one or more 'substantive' charges (e.g. possession of explosives/firearms, or in this instance withholding information) together with a 'membership charge'. Invariably, the trial in respect of the 'substantive' charge proceeds first and, depending on the outcome of that trial, the 'membership' trial proceeds thereafter. It was submitted that the appellant's complaint of unfairness in the proceedings is therefore without foundation, particularly in circumstances where he did not oppose the application to sever the indictment.

34. The respondent has further submitted that in circumstances where no relevant admissible evidence was excluded as a consequence of the finding by the Special Criminal Court that the arrest for the offence of membership on the 18th of December 2012 was unlawful; and, furthermore, where that finding had no bearing on the decision to acquit the appellant of the 'withholding information' charge; the court below was correct in rejecting the submission made by Senior Counsel for the appellant that the prosecution, if dissatisfied with the ruling in respect of the arrest for the offence of membership on the 18th of December 2012, ought to have appealed that ruling pursuant to the provisions of Section 34 of the Criminal Procedure Act 1967 as substituted by Section 21 of the Criminal Justice Act 2006.

35. The judges in the court below ruled as follows on these issues:

> *"we accept the prosecution's submission that the decision in Lynch v Moran should be viewed in the context of the decision and the rationale in the decision of DPP v O'Callaghan, which preceded the Lynch v Moran decision. In that particular decision, it was held by Mr Justice Hardiman that there was an entitlement to issue estoppel, but only where it operated in favour of an accused person and the position on the law rested there until the decision in Lynch v Moran. The law now, following the decision of Lynch v Moran, is very clear. There is no issue estoppel in this jurisdiction referable to criminal trials and paragraph 52 of the judgment of Mr Justice Kearns in Lynch v Moran makes that crystal clear and I quote: "Having reached the conclusion that issue estoppel has no rule in Irish criminal proceedings either in favour of the prosecution or the defence, it follows that the appeal herein should be allowed and that the order made by the Circuit Court judge should be quashed." It's quite clear therefore that in quoting Mr Justice Kearns, as he was, that issue estoppel has no role in Irish criminal proceedings and we reject that particular point as raised by Mr Dwyer.*
>
> *For the sake of completeness, we are satisfied that section 34 of the Criminal Procedure Act 1967 as substituted by section 21 of the Criminal Justice Act 2006*

does not appear to us to have application in the circumstances of this particular case and so that that disposes of that first point as raised by Mr Dwyer.

The second point which he raises is regards the issue of fair procedures and Mr Dwyer asserts on behalf of his client that it would be unfair to proceed to determine this particular issue in circumstances where the Special Criminal Court, by way of a differently constituted court, has ruled on this particular issue regarding the validity of the arrest of Mr Banks on a previous occasion.

36. The Special Criminal Court then went on to consider The State (O'Callaghan) v O'hUadhaigh [1977] IR 42 to which they had been referred by counsel for the accused (i.e., the appellant), before concluding:

"We are satisfied that the facts of this particular case, as we have heard in the evidence on the issue, is an entirely different set of circumstances. It is the position that the indictment was severed on the application of the prosecution. The trial proceeded in relation to the charge of withholding information and the membership charge remains extant. In a consideration of the position as put forward by Mr Dwyer that there is a distinction in aspects of the facts and the decision in Lynch v Moran and this particular case, we accept the prosecution's contention that this is an artificial distinction sought to be drawn by Mr Dwyer. It is quite clear that when one looks, I'm going back to deal with the decision in Lynch v Dwyer, it's quite clear that the position is that there is no issue estoppel in criminal proceedings.

In relation to the second aspect of matters and the issue of the fairness of the proceedings, it is the position that the decision of this Court, that is the Special Criminal Court, on a previous occasion was in respect of the offence of withholding information. In that particular trial, we are told that the Court accepted that the two arrests, that is the arrest in relation to withholding of information and the arrest in relation to membership, were severable and proceeded to trial in respect of the withholding of information charge and ultimately to acquit Mr Banks of that particular charge. The ruling, we accept, in relation to the arrest for membership had no bearing on the decision of the Court ultimately regarding the judgment in respect of the withholding of information charge. This particular charge, that is the charge of membership of an unlawful organisation, has not yet been determined, and we're satisfied that no unfairness can be visited upon the accused in proceeding to determine this particular issue and so we reject Mr Dwyer's argument in that particular regard.

Furthermore, we are told that the evidence on the last occasion in respect of this particular issue was limited in relation to the arrest in -- the first arrest, that is the arrest of the 8th of September 2012, was limited to the fact of the arrest in Pearse Street on that particular occasion and no further evidence was adduced. We are satisfied that if it had proceeded to trial, following on the decision of the Court in respect of the offence of withholding information, that the prosecution would have been entitled to adduce additional evidence which would have included further

witnesses relating to the position pertaining to the arrest on that particular date, that is the 8th of the September of 2012.

So, for all of those reasons, the Court is satisfied that there is no possible unfairness to be visited upon the accused man. The fairness of procedures applies equally to the prosecution and to the defence and we are satisfied that there is no unfairness in proceeding to determine this particular issue and so, as I said, we reject both preliminary points raised by Mr Dwyer in this particular context."

37. We find no error in the approach of the Special Criminal Court. That Court was obliged to follow a binding precedent of the Supreme Court that was directly in point, namely *Lynch v Moran*. We find nothing in the decision in that case to suggest that Supreme Court intended that its clear terms should be read differently and be subject to the qualification suggested by counsel for the appellant, should it arise (as has in fact since occurred), that the Oireachtas were to enact a statute creating a right of appeal in favour of the prosecution. In that regard, we note that the Supreme Court's decision in *Lynch v Moran* was handed down on the 23rd of May 2006, while s. 21 of the Act of 2006 which substituted a new s.34 into the Act of 1967 was commenced on the 1st of August 2006. We consider that the Special Criminal Court was bound to follow *Lynch v Moran* which held unequivocally that issue estoppel has no role in Irish criminal law.

38. As regards the fair procedures issue, we are satisfied that no unfairness arises in circumstances where only the withholding charge was being tried before the panel that made the remarks that the appellant seeks to rely upon. Moreover, in the circumstances where the membership charge was not before them, and the validity or otherwise of the s. 30 arrest had no bearing on the withholding information charge in circumstances where the appellant was arrested on a concurrent but different basis in respect of that matter, we agree that the remarks of the panel that tried the appellant on the withholding information charge concerning the s. 30 arrest were not binding in respect of any future trial of the membership charge. They were not binding on the court below, and there was nothing unfair in the prosecution revisiting the s. 30 arrest issue before the court below.

39. We are not therefore disposed to uphold grounds 1, 2 or 3.

Grounds 4, 5 & 6 – Lawfulness of the Arrest

40. At the outset we should set out the terms of s. 30A(1) of the Act of 1939, which provides:

> "Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him, he shall not—
>
> (a) be arrested again in connection with the offence to which the detention related, or
>
> (b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that either of the following cases apply, namely—

(i) further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought,

(ii) notwithstanding that the Garda Síochána had knowledge, prior to the person's release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence."

41. The court of trial in the present case ruled that the arrest of the appellant under s. 30 of the Act of 1939 on suspicion of membership of an unlawful organisation was in fact lawful, notwithstanding that a warrant had not been obtained under s. 30A of the Act of 1939. They did so having carefully analysed the evidence of the circumstances of the arrest which had taken place on the 13th of September 2012, and that in respect of the arrest on the 18th of December 2012. They said:

> *"The fact that an individual is arrested for an offence under section 30 does not automatically mean that an arrest warrant is required for any subsequent arrest pursuant to section 30 of the 1939 Act. We do not consider this matter to be a relevant consideration in our determination on this issue. The decision of DPP v. AB as stated previously is subsequent to the Special Criminal Court's determination regarding the trial of Mr Banks in respect of the charge of withholding information. The Court of Appeal referred to this Court's decision in DPP v. Banks.*
>
> *However, this Court has had the benefit of evidence which was not adduced before the Special Criminal Court in the course of that trial, specifically the evidence relating to Mr Banks's arrest in September 2012. Therefore this Court has obviously additional material to consider which was not previously before the Special Criminal Court and therefore not before the Court of appeal. This material is highly relevant in our determination as to whether as a question of fact the offence for which the accused man was suspected in September 2012 is the same offence for which he was arrested in December 2012 and permits this Court to consider the circumstance which pertained in respect of the first and the second arrest. As stated in DPP v. AB and I quote:*
>
> > *"It is a question of fact whether the membership that was suspected on the previous occasion is the same offence for which the person has been subsequently charged. It cannot be presumed simply because membership is by its nature a continuing condition or state that the offence alleged is the same. One way of approaching the issue is to examine whether the circumstances, facts or events that gave rise to the suspicion on which the*

later arrest was based had happened or come about at the time of the previous arrest. This is a matter of evaluation and judgment by the Court."

Detective Chief Superintendent Maguire has given evidence that the information he had stemmed from the investigation into the murder in Northern Ireland and bore no connection to the arrest in September 2012. It is clear from his evidence that the events of the 8th of September 2012 did not influence the separate investigation which gave rise to Mr Banks's arrest in December 2012. We are satisfied that there was no connection between the two investigations and in fact there could not have been any connection as the events giving rise to the second arrest only came about after the 1st of November 2012. The fact that a fingerprint harvested in the course of the first detention was used in order to identify the fingerprint on the vehicle registration certificate relating to the Toyota Camry is not a relevant or a significant factor. This is standard and proper police work in order to nominate a suspect. The Court therefore is satisfied that there was no need in the circumstances to obtain an arrest warrant for the reasons already stated. There was a new set of circumstances giving rise to new information. We are satisfied on the evidence that the offence suspected on the previous occasion when the accused man was arrested is not the same offence for which he was arrested in December 2012 and it follows, therefore, that the arrest in December 2012 was a lawful arrest."

42. The case alluded to, namely DPP v A.B., refers to the decision of this Court which is more correctly cited as *The People (Director of Public Prosecutions) v A.B.* [2015] IECA 139. This was a case involving another accused, who had been charged with a membership offence in circumstances where he had also been arrested on two occasions under s. 30 of the Act of 1939 on suspicion of membership, in circumstances where the Gardai had not obtained a warrant under s. 30A of the Act of 1939 for the purposes of the second arrest. The *A.B.* case was heard after the withholding information trial in the present case had been heard. In the trial of *A.B.*, the Special Criminal Court followed the view which it had expressed in the trial of the present appellant for withholding information concerning the lawfulness of his second s. 30 arrest. As a result, A.B. was acquitted. The DPP then appealed the ruling leading to the acquittal pursuant to s.34 of the Act of 1967 as substituted and amended, and in doing so referred the following question for determination by the Court of Appeal:

Was the Special Criminal Court correct in its interpretation of s. 30A of the Offences Against the State Act 1939 as inserted by s.11 of the Offences Against the State (Amendment) Act 1998?

43. In answering the question in the negative, the Court of Appeal stated:

"18. It is a question of fact whether the membership that was suspected on the previous occasion is the same offence for which the person has been subsequently charged. It cannot be presumed simply because membership is by its nature a continuing condition or state of affairs that the offence alleged is the same. One

way of approaching the issue is to examine whether the circumstances, facts or events that gave rise to the suspicion on which the later arrest was based had happened or come about at the time of the previous arrest. This is a matter of evaluation and judgment by the Court.

Conclusion

19. The answer to the legal question posed in this reference is that the Special Criminal Court was ***not correct*** *in its interpretation of s. 30A of the Offences Against the State Act 1939, as inserted by s.11 of the Offences Against the State (Amendment) Act 1998."*

44. We have considered the transcripts of the evidence heard at the trial of the appellant for the offence of membership on the 18th of December 2012 in relation to the circumstances of both s. 30 arrests. The evidence was lengthy and detailed, and it is unnecessary to rehearse it for the purposes of this judgment. Suffice it to say that we are satisfied that the findings of fact made by the court of trial were findings that were open to them, and which were supported by the evidence they had heard. Specifically, we are satisfied that the finding of fact that the suspected offence of membership for which the appellant was arrested in September 2012 was not the same as the suspected offence of membership for which he was arrested in December 2012 was one which was supported by the evidence. Furthermore, we are satisfied that the court of trial correctly applied the law as stated by this Court in *The People (Director of Public Prosecutions) v A.B.* [2015] IECA 139 to the facts as they found them. We consider that their ruling that the arrest of the appellant under s. 30 of the Act of 1939 was lawful, and that no s. 30A warrant was required in the circumstances of the case, was entirely correct. Therefore, as we can see no error on the part of the judges in the court below, we are not disposed to uphold grounds of appeal no's 4, 5 & 6.

Grounds 7 & 8 –the Interviews

45. The court of trial received evidence in relation to seven interviews with the appellant in total. Three of these were interviews under ordinary caution. The remaining four were interviews in which the provisions of s. 2 of the Act of 1998 had been invoked.

46. The accused was not separately interviewed in relation to his suspected withholding of information and in respect of his suspected membership of an unlawful organisation. As counsel for the appellant has fairly put it in his written submissions *"[t]he style of questioning was such as to incorporate both offences in the same interview and there was a clear focus in the questioning on the offence of withholding information."*

47. The appellant challenged the admissibility of the fruits of both types of interviews before the Court below. It is appropriate to deal with them separately.

The interviews under ordinary caution.

48. It is important to record two things with respect to these. First, the suspect did not exercise his right to silence by refusing to answer questions or saying, "No comment". Secondly, his approach was to answer the questions asked of him, and his answers were

entirely exculpatory in either explicitly denying allegations of wrongdoing put to him, or in advancing exculpatory explanations or assertions of fact.

49. The use made by the prosecution of these interviews was to assert that the answers given by the suspect, i.e., the appellant, were demonstrably false by reference to other evidence adduced by the prosecution, and accordingly represented lies. The prosecution relied on these lies as evidence tending to corroborate or support the belief evidence of the Chief Superintendent.

50. The judgment of the Special Criminal Court at the end of the trial illustrates clearly the significance of this evidence for the overall case. The Court stated:

> *"The arrest and the interviews: Mr Banks was on the 18th of December 2012 arrested and detained pursuant to the provisions of section 30 of the Offences against the State Act 1939. He was interviewed on a number of occasions. Three interviews were conducted under ordinary legal caution and in four interviews section 2 of the Offences against the State (Amendment) Act 1998 were invoked. The prosecution contend that the accused man told lies in the interviews conducted under ordinary legal caution and that he failed to answer material questions in the interviews where section 2 of the 1998 Act was invoked. As a consequence, the prosecution argue that the Court ought to draw inferences adverse to the accused which it is argued support the evidence of Chief Superintendent Russell. We consider firstly the interviews conducted under the normal legal caution, being interviews numbered 1, 2 and 8. In the first interview, the accused man denied membership of the IRA and any involvement in the organisation. He denied that the name David Black meant anything to him. This denial achieved significance in light of the evidence that a copy of the Evening Herald newspaper was found in his flat on the day of his arrest opened to a page detailing an article on the killing of Mr Black some two weeks prior to that arrest. In interview number 2, he denied all knowledge of a Toyota Camry registration number 94D50997. He denied having access to any other vehicle in the three months prior to his arrest. He could not recall if he was ever in a Mazda registration number 01WW1960. He could offer no explanation for the presence of a brown leather jacket in the vehicle with his name and insurance certificate contained within. Finally when he was asked if he drove that vehicle, that is the Mazda, on the 9th of November 2012 on the M4 at Enfield he responded to the effect, "It doesn't ring a bell." In interview number 8 he was asked about the Evening Herald newspaper dated the 2nd of November 2012 and open to a page with an article regarding the killing of Mr Black. He agreed that there was a chance that he had bought a copy of this paper but he was unaware as to why it was open at that particular page. We are satisfied beyond a reasonable doubt that Mr Banks told lies in these interviews relating specifically to his knowledge of Mr Black, his knowledge and connection to the Toyota Camry, his knowledge and the use of the green Mazda. We have considered whether these were deliberate lies relating to material issues. We have considered whether there is an innocent explanation for the lies in the instant case. In assessing the answers*

given, we do so in light of the evidence adduced on these issues. It has been proven beyond a reasonable doubt that the accused man purchased a Toyota Camry in a surreptitious manner; that he was the driver of the Mazda vehicle on the 9th of November 2012; and that he was identified using the toll booth on that date. Whilst the finding of a copy of the Evening Herald might at first blush seem innocuous, when one examines this in the context of the evidence and, in particular, in light of the answer given by the accused, it becomes more significant. We are satisfied that the lies were deliberate lies and that there is no innocent explanation for the lies and that they are therefore capable of supporting the evidence of the Chief Superintendent."

51. The case made by the defence as to why evidence of what was said during these interviews should not be admitted in evidence is succinctly summarised in the ruling of the Special Criminal Court, following a voir dire on the issue of their admissibility, which stated:

> *"Mr Dwyer, on behalf of his client, challenges the admissibility of the interviews conducted under ordinary legal caution, that is interviews 1, 2 and 8 on the basis, inter alia, that as the accused had been arrested for the offence of withholding information contrary to section 9 of the Offences Against the State (Amendment) Act 1998, an offence of which he was subsequently acquitted by this Court, that given the terms of that section it was unfair to permit the content of these interviews to be admitted into evidence. He submits that the terms of that section do not require any criminal activity per se on the part of the accused in that the section relates "to any other person" and that the person arrested, this is the offence, disclosed information of which he has knowledge regarding "any other person."*
>
> *Consequently, Mr Dwyer submits that the section removes the privilege against self incrimination in that if an accused man discloses information under this section he could incriminate himself and if he does not so disclose he is committing an offence. Therefore, Mr Dwyer submits that it would be grossly unfair where questioned under an offence where a person has been arrested in respect of section 9 of the aforementioned Act for the content of the interviews to be admitted into evidence in respect of the offence of membership of an unlawful organisation.*
>
> *The Court has considered this argument very carefully and it is indeed a novel argument and we observe the following; (1) there is a presumption of constitutionality in respect of the section; (2) the usual caution was administered; (3) the accused knew that he had the right to silence; (4) the accused had been lawfully arrested for two offences, those being the offence of withholding information and the offence of membership of an unlawful organisation; (5) section 30 of the Act permits an individual to be arrested for more than one offence; (6) a person may be interviewed for more than one offence; (7) section 9 creates a criminal offence and it is this offence for which the individual is arrested, that is*

that it is an offence to withhold information which a persons knows or believes might be of material assistance in preventing the commission by another of a serious offence or securing the apprehension, prosecution or conviction of another for such an offence and who fails without reasonable excuse to disclose such information to a member of An Garda Síochána; (8) therefore the offence requires knowledge or belief on the part of the person arrested and indeed the purpose of such offence must be to underline the moral duty of persons in the possession of such information to disclose that information.

It is clear, therefore, that this offence involves the person who was arrested for the offence, the terms of the section make it an offence for an individual with the requisite knowledge or belief to withhold information. The person arrested for an offence has the right to silence and may or may not avail of that right. The decision in DPP v. Matthews 2007 Irish Reports 169 makes it clear that a Court may take into account evidence relating to an offence of which a person has been found not guilty in a subsequent trial for a different offence. Mr Dwyer argues that this is a different situation to that which applied in the Matthews case, in that section 9 of the aforementioned Act gives rise to a different legal situation. However, in the instant case the offences for which the accused was arrested came about substantially as a result of a particular event, that is the killing of Mr David Black on the 1st of November 2012 and so the gardaí were fully entitled to question the accused man on any matter they considered relevant to that event. If both charges had proceeded in the same trial there would have been no reason as to why the evidence could not have been adduced by the prosecution. The Court accepts the prosecution's submissions on this point and so this argument fails."

52. The arguments relied upon by the appellant, and which he re-iterated before us, were very similar to those which subsequently found favour in the High Court in a challenge to the constitutionality s. 9(1)(b) of the Act of 1998 in the case of *Sweeney v Ireland* [2017] IEHC 702. However, shortly before the oral hearing of this appeal the Supreme Court overruled the High Court's judgment in the Sweeney case. There, in *Sweeney v Ireland* [2019] IESC 39, the court held that that s. 9(1)(b) of the Act of 1998 protects the right to silence of any person who does not wish to speak about their own involvement in a crime. As the judgment of Charleton J makes clear, the section protects the right to silence where to speak would incriminate that person. It does not change the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime. What s. 9(1)(b) does do is to compel those, not being participants in the commission of the serious offence under investigation, but who have information about the commission of that offence, and who know or believe that disclosing this information might be of material assistance to securing the apprehension, prosecution or conviction of any other person, to so disclose that information to the police. It does not breach the privilege against self-incrimination, however, because participation by the accused in the crime of interest, or any other relevant crime, means that s. 9(1)(b) does not apply.

53. In this instance s. 9(1)(b) did not apply to the questioning of the appellant during the investigation of his suspected involvement in the offence of membership on the 18th of December 2012, because the appellant was a suspected participant in that crime. It also could not apply to the questioning about his knowledge of the circumstances surrounding the murder of Officer Black, if he was suspected to have been involved in any way in that. The evidence suggests that at point although the appellant was not suspected of being directly involved in that killing, he was suspected of having provided some level of assistance to Officer Black's murderers in terms of having purchased the car that was used by the actual killers and of having delivered it to Carrigallen, Co Leitrim, where it remained until the day before it was used in the killing. While it is true that the appellant had not been arrested on suspicion of being involved in Officer Black's murder, either as a primary or secondary participant, but rather had been arrested on suspicion of withholding information, the correctness or otherwise of the decision to arrest him for, and to later charge with, withholding information is somewhat beside the point in the context of the present appeal, particularly in circumstances where he was acquitted of withholding information.

54. The critical thing is that the appellant's right not to incriminate himself either directly in respect of the offence of membership of which he was suspected, or indirectly with respect to involvement in circumstances potentially bearing on the offence of membership of which he was suspected, was not impacted by the operation of s. 9(1)(b) of the Act of 1998. The privilege against self-incrimination was engaged in so far as the appellant may have been personally involved in any crime. He was so informed and advised of his right to remain silent. He was properly cautioned in terms that *"you have the right to remain silent but anything you do say will be taken down in writing and may be given in evidence."* That was a legally correct statement of the position. Moreover, if the appellant was not suspected of being a participant in any crime, while he would have been under legal compulsion to provide information in his possession concerning the possible involvement of another or others, the obligation to provide such information would not in those circumstances have engaged the privilege against self- incrimination.

55. It is also a matter of significance that the appellant had access to legal advice during his detention and prior to several of his interviews. As was noted by the court below he requested access to legal advice shortly after his arrival in the garda station. The appellant's solicitor attended the garda station shortly thereafter and the appellant consulted with his solicitor at that point, i.e., before any of the interviews were conducted. While it is not relevant under this heading, but will be under the next one, for completeness we should mention at this stage that the appellant's solicitor was informed by gardai during this visit that s. 2 of the Act of 1998 would be invoked during intended interviews with his client and he was requested that the appellant be advised accordingly.

56. We consider that the Special Criminal Court's approach to the legal issues raised was correct and that it discloses no error. In our judgment there was no basis on which the court below would have been justified in ruling out the three interviews that were conducted subject to the normal caution. The appellant could have simply answered "no

comment" to the questions asked of him. That was his entitlement. Moreover, he had had the benefit of access to legal advice. However, he chose to answer the questions put to him and did so by ostensibly telling lies. In circumstances when the prosecution legal team was able to demonstrate by means of other evidence adduced before the court that he had lied, they were entitled to place the reliance which they did on the fact that he had lied.

The interviews where s. 2 of the Act of 1998 was invoked

57. In the remaining four interviews with the appellant in respect of which evidence was given, i.e., interviews 3, 4, 5 and 9, the gardai invoked s. 2 of the Act of 1998

58. Section 2 of the Act of 1998 states:

> 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.

59. The admissibility of the interviews in which s. 2 of the Act of 1998 had been invoked was challenged in the court below in the aforementioned voir dire on the basis:

(i) that in the case of all of the interviews the gardai had failed to explain the full effect of s. 2 in ordinary language;

(ii) that in relation to interview 4, gardai misread s. 2(2), omitting the word “not” from the first clause. It should have been read as commencing: “Subsection 1 shall not have effect unless…”, but it was in fact read to the appellant as stating “Subsection 1 shall have effect unless …”(it is also complained that in that same interview the Garda further confused matters by saying, *"Your failure or refusal cannot sorry, can be used to support other evidence"*); and

(iii) that because s. 2 is an exceptional measure permitting an inroad into the constitutional right of an accused person to remain silent, it ought not to be used where a person is answering questions under ordinary caution, as was the case here.

60. In particular, in relation to (i) it was complained that the purported explanation was no more than a very rapid replication of the section by reference to words actually used in the section and not ordinary language. It was complained that the phrases "drawing an inference", "misleading" or "material to the investigation" were not explained to the appellant in any interview nor was it explained what a false answer actually was. It was suggested that the Gardaí did not explain to him properly that his conduct actually during

the course of the interview could also be held against him nor did they explain relevant court procedures insofar as such court procedures are referred to in section 2(1).

61. Counsel for the appellant referred the court below, and also this court, to the remarks of O'Higgins C.J. in his judgment in the Supreme Court in the case of *The Director of Public Prosecutions v Kemmy* [1980] IR 160 at 164, where he stated:

> *"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof".*

62. The Special Criminal Court ruled as follows following the *voir dire*:

> *"We will now deal with each of these arguments sequentially. Subsection 2 of the Act requires that a detainee be told in ordinary language when being questioned what the effect of a failure to answer any question material to the investigation might be. Failure to comply with that provision will render the section inoperative. The section does not give any definition of the meaning of ordinary language but any explanation given by the gardaí must be such so that the detainee can understand the situation. Whatever language is used it must be understood by the particular detainee. Subsection 4 provides certain definitions. Subsection 4(b) provides a definition of a failure to answer, which includes the giving of any answer that is false or misleading. Therefore, giving an answer which is false or misleading is equivalent to a failure to answer for the purposes of section 2 subsection 1.*
>
> *There is no dispute that the accused had access to legal advice before the Garda Síochána invoked section 2 of the Act. In every interview where section 2 was invoked, the section was read out to the accused man. We will deal with the inaccuracy in interview number 4 presently. Having read the section to him, Mr Banks is informed that the Garda Síochána are withdrawing the caution given to him at the start of the interview and when asked if he understood what was being said to him at that point he replied in interview 3: "I believe I do." In interview 4: "I do." In interview 5: "I think so." And in interview 9: "I believe so."*
>
> *Throughout the interviews, after the relevant portions of the Act are explained to him Mr Banks indicating in one form or another that he understands. Having considered the content of the memoranda of interview and viewed portions of the audio/video recording of the interviews we are satisfied that the gardaí conveyed in ordinary language to the accused what the effect of a failure to answer any question material to the investigation might be, save that he was not informed in ordinary language that the giving of a misleading answer to material questions*

might be treated at trial as being synonymous with a failure to answer such a question. The requirement is to explain in ordinary language to a detainee when being questioned what the effect of such a failure might be. Reference to the effect of such a failure in subsection 2 refers to a failure to answer any question material to the investigation of the offence and the possible consequences as set out in section 2 subsection 1.

As stated by the Court of Criminal Appeal in the decision of Cormac Fitzpatrick and McConnell v. The DPP, the 25th of July 2012 and I quote: "It is for the member of the gardaí to inform the accused in ordinary language as to the general effect of a failure or refusal and it is for the solicitor to advise the accused as to the potential impact in the particular circumstances of his own case." Whilst this was said in the context of sections 18 and 19 of the Criminal Justice Act 1984 as amended, we are satisfied that this applies equally to section 2 of the 1998 Act.

In the instant case, having read the section to the accused, the relevant member of An Garda Síochána then proceeded to explain the section in ordinary language to include the following in each applicable interview: "I must also point out to you that if you give a false answer to a question material to the offence, or if you're silent that this will also be treated as a failure to answer the question." He was not told that if he gave a misleading answer to a material question that this could also be treated as a failure to answer a question. We do not accept the prosecution's contention that the words misleading and false are synonymous. The words are expressed by statute in the disjunctive which supports our view in this regard. We consider the language used by the Garda Síochána in explaining the provisions to the accused was uncomplicated and clear and we reject the arguments made by Mr Dwyer that the Garda Síochána failed to explain in ordinary language the effect of the section to the accused, save that there was no reference when explaining the provisions in ordinary language to the accused that the giving of a misleading answer was equivalent to a failure to answer a material question for the purposes of the section. We now consider the effect this deficiency may have on the interviews where section 2 was sought to be invoked by members of An Garda Síochána. It is important to consider the words of section 2 subsection 1, the relevant portion provides: "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." And this means that the questions and obviously the answers, if any, are to be treated on a singular basis. There may be situations where a material question is not answered, a situation where a false answer is given or a situation where a misleading answer is given. Each question and answer must be considered separately.

A detainee must be told in ordinary language when being questioned what the effect of such a failure might be and therefore it follows he must know what can constitute such a failure. A failure to answer a material question includes the obvious, by remaining silent or stating no comment, but also includes the giving of

a false answer or, in the alternative, a misleading answer. The only deficiency in the explanation, in the view of this Court, was the failure to explain the situation regarding misleading answers. We do not accept that as the Garda Síochána did not include the word misleading when explaining the section in ordinary language to the accused that this means that the entire process was deficient. Therefore, in conclusion, on this argument we are satisfied, as we have stated, that the explanation given by the gardaí in each interview where section 2 was invoked complied with the terms of subsection 2 (a) save that there was no mention of the effect of giving a misleading answer.

The accused man, in the view of this Court, fully understood by virtue of the explanation given to him by the gardaí the possible implications of a failure to answer any question material to the investigation, where that failure included silence or the giving of an answer that was plainly false. The section was properly invoked in respect of those matters. We do not accept that the decision in DPP v. Brian Kenna is authority for the proposition that section 2 cannot be relied upon at all by the prosecution if there is a deficiency in explaining an aspect of the section such as in the present case.

In relation to the second argument made by Mr Dwyer in respect of the failure by Detective Garda Mackey to read the portion of section 2 to the accused man in an accurate fashion, we do not accept the point made by Mr Dwyer that the failure to recite accurately a portion of subsection 2 specifically by omitting the word 'not' in section 2 subsection 2 can have any impact whatsoever on the operation of the section. It is for a Court to decide whether the statutory preconditions have been met and for a Court to decide whether section 2 subsection 1 has effect. In fact, it is utterly irrelevant in the view of this Court to a detainee whether or not he or she is given that particular piece of information.

In relation to the final points raised by Mr Dwyer, the deployment of section 2 and the manner in which this is done by reference to the questions asked and the conduct of the interview is entirely a matter within the remit of the investigating gardaí and we reject this submission also.

63. The respondent has submitted in this appeal that the court below were correct in admitting the s. 2 interviews, and that the court's ruling exhibits no error of principle. We agree. On the basis of the transcript it appears to us that the explanation, while perhaps not perfect in respect of every detail was certainly adequate when viewed in the round. Moreover, the appellant benefitted from legal advice before s. 2 was invoked and his solicitor had been specifically told that it was intended to invoke it, and that his client should be advised accordingly. The key provisions were repeatedly drawn to his attention, with accompanying explanations, at the start of every interview. The appellant repeatedly indicated that he understood. Moreover, the court of trial had the advantage of viewing the video recordings of the interview and so were better placed than us to evaluate the genuineness and sincerity of the appellant's expressions of understanding.

64. While it was regrettable that the terms of s. 2(2) were erroneously misstated in the fourth interview, we agree with the court below that this sub-provision was not something with which the appellant needed to be concerned for evaluating on an informed basis how he would respond to questions asked, knowing that s. 2 had been invoked. We therefore also consider the ruling of the Special Criminal Court on this aspect of the matter to have been correct.

65. We are not prepared in the circumstances to uphold either of grounds 7 or 8.

Grounds 9, 10, 11 & 12 – the belief evidence

66. Cumulatively these grounds challenge the validity of the prosecution's reliance, pursuant to s.3(2) of the Act of 1972, on the evidence of Detective Chief Superintendent Russell ("the D/Ch.Supt") who stated that he believed that the appellant was, on the 18th of December 2012, a member of the IRA. The challenges embrace the contention that for several reasons it was unfair to allow the prosecution to rely on his evidence.

67. Firstly, it is contended that a claim of privilege by the D/Ch. Supt rendered it impossible for that witness to be effectively cross-examined by defence counsel and that it was unfair in the circumstances to allow the prosecution to rely on his evidence.

68. Secondly, it is contended that the evidence of the D/Ch.Supt went beyond that which had been disclosed to the defence. The court below found that the D/Ch.Supt's evidence did not in fact go beyond what had been disclosed, and the appellant further maintains that that finding was incorrect. Further, the appellant contends that if he is right in his contention the evidence of the D/Ch.Supt went beyond that which had been disclosed to the defence then on the authority of the *People (Director of Public Prosecutions) v Farrell* [2014] IECCA 37 it was again unfair in the circumstances to allow the prosecution to rely on his evidence.

69. Thirdly, it is contended that there was a general unfairness, having regard to the overall circumstances of the case, in allowing the prosecution to rely on evidence of the D/Ch Supt's belief.

70. It is appropriate to deal in the first instance with the claim of privilege. The D/Ch.Supt claimed privilege over the material leading him to his expressed belief on the basis of *"risk to life, matters of State security and trade craft and possibility of compromising future garda operations as a result of the disclosing material"*. After some brief cross-examination of the D/Ch.Supt which yielded nothing of substance, the Special Criminal Court was then asked by defence counsel to rule on the legitimacy of the claim of privilege, and the defence contention that if the privilege were to be upheld it would be unfair to allow the prosecution to rely on the belief evidence in circumstances where it could not be effectively cross-examined upon.

71. The Special Criminal Court ruled:

> *"Mr Dwyer, on behalf of his client, indicates that it is he is being put in a very unfair position in that he cannot cross examine the Chief Superintendent effectively*

as regards the basis of his belief unless the claim of privilege as asserted by Detective Chief Superintendent Russell is pierced by the Court. The position is that Detective Chief Superintendent Russell has asserted a claim of privilege in respect of the information in order upon which he now seeks to form the basis of his belief in respect of which he has given evidence before the Court. He claims privilege under a number of heads. In fact, he claims privilege under four separate heads; first of all, the risk to life, secondly state security, thirdly trade craft and methodology and fourthly that if any material is to be disclosed that such could compromise future investigations.

The position is in law that pursuant to section 3 subsection 2 of the 1972 Act as amended that this is admissible evidence per se, that is the belief evidence of a Detective Chief Superintendent and it is the position as stated in numerous decisions from the superior courts that it is the belief which forms the evidence and not the material which led to the belief as given in evidence by a Detective Chief Superintendent in any given case. This does not mean that the defence cannot cross examine. The position is, and it has been stated time and again, but it may place some limitations upon a defendant in cross examination, but it does not mean that cross examination is not possible.

In the decision of DPP v. Palmer, there's an extract from the well known decision of the People DPP v. Donnelly, McGarrigle and Murphy, 2012 IECCA 78 where Mr Justice O'Donnell stated as follows, and I quote certain extracts from that: "The section makes the belief of a Chief Superintendent evidence that an accused was, at a material time, a member of an unlawful organisation, as the cases show 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 to the Court for cross examination."

The Court is satisfied that the claim of privilege is a perfectly legitimate claim of privilege as asserted by Detective Chief Superintendent Russell. It is not the decision as asserted by Mr Dwyer that he can now not cross examine the witness and that he's now rendered in a position effectively where the trial is unfair. So, the Court upholding the claim of privilege as asserted by the witness and we will proceed in those circumstances."

72. We have considered the evidence before the court below, the terms in which privilege was asserted, and the court's ruling. We are satisfied that the basis for claiming privilege was legitimate. The reasons proffered in support of the need to claim privilege were unimpeached and were not disputed in any way. We are satisfied that the Special Criminal Court was therefore correct in upholding the privilege claimed.

73. We have further considered the appellant's claim that in circumstances where privilege was being upheld he was unable to adequately or sufficiently test the expression by the D/Ch.Supt of the opinion the appellant was, on the 18th of December 2012, a member of the IRA. We agree with the court below that this complaint was not made out. This point has been repeatedly litigated in a succession of cases, such as *The People (Director of Public Prosecutions) v Kelly* [2006] 3 IR 115; *The People (Director of Public Prosecutions) v Connolly* [2015] IESC 40 and *The People (Director of Public Prosecutions) v Weldon* [2018] IECA 197, amongst others, and it has been held, as the Special Criminal Court expressly pointed out in their ruling, that an inability by reason of claimed privilege to cross-examine the D/Ch.Supt on the materials on which the belief is based does not imply an inability to cross-examine the witness on any basis. As we said most recently in the *Weldon* case:

> *"It is of course correct to suggest that the use of belief evidence coupled with claims of privilege severely limits the ability of the accused to test and probe by cross examination a witness offering such evidence. This limitation is well known and it has been acknowledged in this case and in many judgments of the Superior Courts. It represents a considerable deficit with potential for unfairness in a system where such issues are ordinarily determined after an adversarial conflict and a full testing of the evidence and the basis for the holding of such a belief. However, belief evidence is not automatically discounted on this basis and such evidence may still be devalued even by limited cross examination."*

74. We consider that the court below was correct in so ruling, and we find no error in its approach. It remained the case, based on *Redmond v Ireland* [2015] IESC 98, that for s.3(2) of the Act of 1972 to be utilised in a constitutionally acceptable way the evidence of the belief of the D/Ch. Supt required to be supported by some other evidence implicating the appellant in the offence charged, and that the appellant could not be convicted solely on the basis of the belief evidence.

75. The court below, having upheld the claim of privilege, and having rejected that there was unfairness in principle in allowing the prosecution to rely on belief evidence where the opportunity to cross-examine as to the material on which it was based was constrained by the claim of privilege, counsel for the appellant proceeded to cross-examine the D/Ch. Supt within the limitations imposed by the claim of privilege. He then revisited the fairness issue just before closing speeches. He submitted that the D/Ch.Supt, during the course of cross-examination, had given evidence which had gone beyond what was disclosed to the defence (in the Book of Evidence and on foot of written correspondence between the appellant's solicitor and the Office of the DPP). When pressed by the court to as to what precisely was the extent of the complaint now being made, Senior Counsel for the Appellant replied:

> *"Yes, he gave evidence, Judges, which would suggest that unlike his assertion – contrary to his assertion that he believed he was a member of the IRA and was on the 18th of December, he went beyond that to say that he – his belief was based*

on a period of time extending before the 18th of December to at least October because he does say it was prior to October. So, what he is doing there, Judges, is he is now revealing to the defence and the Court that his belief is not just limited to that date that he has referred to in his evidence or in his statement, but that his belief extends over a period of not less than three months."

76. Counsel referred the court to the decision in the *People (Director of Public Prosecutions) v Farrell* [2014] IECCA 37, suggesting that it was authority for the proposition that the defence should have been put on notice of everything that the D/Ch.Supt might say in the course of giving evidence, including being cross-examined.

77. The Special Criminal Court rejected counsel for appellants submissions on the following basis:

> *"Very good, Mr Dwyer seeks to ask the Court to disregard the evidence of the Chief Superintendent as Mr Dwyer argues that the evidence went beyond that which was disclosed to the defence and he relies on the decision of DPP v. Sean Farrell, a judgment of Mr Justice Hardiman delivered on the 10th of April 2014. So, Mr Dwyer says that the Chief Superintendent in the course of his cross examination went beyond the material which had previously been disclosed to the defence and, as a consequence, Mr Dwyer argues that the Court should apply the decision in DPP v. Sean Farrell and disregard the evidence of the Detective Chief Superintendent.*
>
> *Now, the position in the case of DPP v. Farrell, in the view of this Court, is entirely different to the position which applies in the instant case. In the Farrell decision there were very specific difficulties which arose in the course of the cross examination in that the Chief Superintendent replied to questions in a manner which could not have been anticipated by the defence and, in particular, appeared to make or to be anxious to make certain statements regarding his particular view of the particular accused man in that trial and in that regard the Chief Superintendent indicating that his belief extended over a 10 year time period. That is a very lengthy time frame. He further went on to say that he was aware of a litany of events in relation to the accused man in which he was involved as a member of an unlawful organisation and he further said that the particular accused, that is Mr Farrell, was involved in many different incidents in his capacity as a member of an unlawful organisation and obviously I'm summarising in that particular respect.*
>
> *In this particular case, any answer to any question came about directly as a consequence of questions asked by the defence in the course of cross examination, whereas in the Farrell decision it appears that undisclosed material was deployed by the witness in response to questions asked in cross examination but was not, in fact, deployed by way of an answer to the question which was asked but in response to questions which had nothing at all to do with the answer which was subsequently given by the witness.*

The answers here in this instance, this Court is satisfied, came about directly as a result of the questions asked. So, it cannot be said to be in any way unfair to the accused man, but furthermore, the questions which the answers which were given to the questions asked do not appear to this court to extend beyond the material which was disclosed to the defence in any event. So, in those circumstances and for those reasons and having carefully considered and viewed the material which was referred to by Mr Dwyer contained at pages 30 and 33 of the transcript of the 24th of July 2017, the Court cannot see that there's any possible unfairness visited upon the accused man or that it falls in any capacity within the terms of the decision in DPP v. Farrell and we do not intend to disregard the evidence of the Chief Superintendent."

78. We have considered the entire transcript of the trial in the court below and have paid particular attention to the transcript of the 24th of July 2017 which contains the evidence given by the D/Ch Supt, including his cross-examination. While we have not been provided by either side with the actual Book of Evidence, there are relevant references to its contents in so far as that extended to a statement or statements provided by the D/Ch.Supt in that transcript. We have found nothing in the material that we have read, or to which we have been referred, to suggest that the finding of fact by the Special Criminal Court which is now complained of, was unsupported by the evidence. The court below found as a fact that the questions asked did not appear to extend beyond the material which was disclosed to the defence in any event, and that view appears to have been supported by evidence to which that court had had regard. In the circumstances the argument based on the Farrell case is prima facie moot. However, for completeness we should say that the basis on which the Special Criminal Court distinguished the Farrell case from the appellant's case appears to us to have been valid and legitimate. The Special Criminal Court was not gainsaying for a moment the existence of a duty of disclosure the rationale for which was described so clearly and succinctly by O'Malley J in *O'Sullivan v Director of Public Prosecutions*, to which we were referred in the appellant's written submissions. Neither are we. Indeed, the obligation in that regard was also alluded to in *Redmond v Ireland*, cited already, where it was held to be a requirement of *"elementary justice"* that *"an accused had the right to be made aware of the material necessary for a proper cross-examination"*. However, the point made by court below was that the evidence of the D/Ch. Supt in the present case which is now complained about, and which is said to give rise to unfairness, was elicited by questions asked of the witness by counsel for the defence. That had not been true in the *Farrell* case. In that case the witness had gratuitously volunteered it, unprompted by any relevant questioning. He had, in the words of Hardiman J., in giving judgment for the Court of Criminal Appeal in *Farrell*, just *"blurted it out uncalled for"*. These are entirely different situations and so, while acknowledging the existence of a generally applicable duty of disclosure, we are in agreement with the court below that the *Farrell* case does not represent authority for the proposition that the prosecution ought to have specifically warned the defence that the D/Ch Supt in forming his belief had relied on material that predated the events at issue in the case, particularly in circumstances where privilege was being claimed over all such material on multiple grounds including matters of State security and trade craft and

possibility of compromising future garda operations. We find no error on the part of the Special Criminal Court in distinguishing the *Farrell* case in the manner in which they did.

79. In our view the court below was also correct in not excluding the belief evidence of the D/Ch Supt on the grounds of general unfairness in the circumstances of the particular case. There was nothing that particularly set this case apart from the numerous other cases in which such a general unfairness argument has been presented and rejected. Any difficulties faced by the defence in coping with the testimony of the D/Ch.Supt by reason of the privilege claimed by him over parts of his testimony, were not so far reaching as to create a real risk of an unfair trial.

Conclusion

80. In circumstances where we have not been disposed to uphold any of the appellant's grounds of appeal, we are satisfied that his trial was satisfactory and that his conviction is safe.

81. We therefore dismiss this appeal.