THE COURT OF APPEAL

[49/19]

The President
McCarthy J.
Murray J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF

PUBLIC PROSECUTIONS

RESPONDENT

AND

JULIAN FLOHR

APPELLANT

JUDGMENT of the Court delivered on the 12th day of March 2020 by Birmingham P

1. On 25th January 2019, Mr. Julian Flohr was convicted by the Special Criminal Court of the offence of being a member of an unlawful organisation, styling itself the IRA, on 14th August 2016. Subsequently, he was sentenced to a term of two years and ten months' imprisonment on 18th February 2019 which was backdated to 20th May 2018 to take account of time spent in custody while on remand. The appellant now appeals against his conviction.

2. The background to the prosecution, to the conviction, and now this appeal, is to be found in events that occurred on 14th August 2016. On that date, two members of An Garda Síochána, Detective Garda Eamon McDonnell and Detective Garda Ciaran Staid were on a mobile patrol together. Both Gardaí are attached to the Sligo/Leitrim Divisional Drugs Unit based in Sligo. At approximately 10.30pm on that occasion, they were patrolling in the Dromahair area of County Leitrim when they encountered a black Saab. For reasons that were explored at trial, they decided to stop the vehicle. Their efforts to stop the vehicle were delayed and the demeanour of the occupants of the vehicle raised the suspicions of the Gardaí. The vehicle was owned and driven by a Mr. Damien McFadden and the appellant, Julian Flohr, was a front-seat passenger. It appears that one of the Gardaí at least had recognised the driver and car and was aware of Mr. McFadden's involvement in so-called "Republican" activities. Therefore, the presence of this car and driver in a very secluded area at this particular time raised suspicion. Because the demeanour of the occupants of the car, in particular, what appeared to be obvious nervousness, had heightened the level of Garda suspicion, it was decided to search both men under the provisions of the Misuse of Drugs Act 1977. Nothing of significance emerged from that exercise.

3. Gardaí then proceeded to search the vehicle, and in the foot-well behind the driver's seat, they discovered a Spider-Man themed children's backpack. When this was lifted, there was what described as a substantial amount of unexpected weight in it. The backpack was removed from the car and Gardaí looked inside and saw that there was something there with black wrapping and duct tape wrapping with soil on it. The first belief of the Garda who looked into the backpack, his background was in a drugs unit, was that he was dealing with wrapped drugs. The presence of the soil led him to the opinion that the object might have buried and had been waterproofed. The area where the vehicle had been stopped and where this initial search took place was one where there was no street lighting, the search was carried out with the aid of a flashlight and so it was decided to summon assistance and to bring both men and the car in which they had been travelling to Manorhamilton Garda Station, which was the closest station to the stop point, for a more thorough search. At Manorhamilton Garda Station, it emerged that the contents of the bag in question were not drugs, but rather, was a heavy metal object which had the appearance of an explosive device. The Garda station and the surrounding area was evacuated and cordoned off. Arrangements were made for the attendance of an Army Disposal Officer, Captain Jack Higgins, and his evidence established that what was in the bag was not an actual mortar, but an exact replica of a real mortar. The replica was produced by an internationally-recognised manufacturer of armaments and it displayed particular markings which identified to an expert that it was a facsimile of a live device.

4. There were a number of elements to the prosecution case at trial. There was, first of all, the opinion/belief evidence of Chief Superintendent Thomas Maguire, admissible pursuant to statute, that Mr. Flohr was a member of an unlawful organisation. Further, there was the evidence relating to his presence in the vehicle in which a training mortar was being moved from one location to another, apparently on behalf of an unlawful organisation.

5. A large number of grounds of appeal have been formulated. However, the core arguments net down to a contention that there was insufficient conduct on the part of the appellant to support the opinion/belief evidence. It is said that the matters relied upon by the Special Criminal Court as providing support for the belief evidence of Chief Superintendent Maguire could not, as a matter of law or fact, constitute such independent evidence. It is said that the presence of the appellant, nervous as he was, as a passenger in a car owned and driven by someone who would become a co-accused did not offer sufficient independent standalone conduct evidence to support the suggestion that the appellant was a member of the IRA. The other core ground of appeal relates to the opinion/belief evidence of the Chief Superintendent and the assertion of privilege over same.

The Independent Evidence

6. The appellant says that it is trite law that mere presence at a crime scene is an insufficient basis to give rise to criminal liability in common design. It is said that, in effect, the Special Criminal Court fell foul of that principle, in that reliance was placed on the appellant's mere presence in a car where there was a training mortar, but where there was nothing beyond presence in proximity to connect him to that mortar. Counsel

argued that the reliance placed by the trial court on his furtive manner, he sought to conceal his phone as Gardaí approached, was impermissible.

7. In the course of its ruling, the Special Criminal Court had observed:

"[i]n the Court's view, the remoteness of the location from Mr. Flohr's home and the normal base of the car in question [Sligo town] is relevant in considering whether his presence at that time and place was simply an unfortunate coincidence or is, in fact, consistent with the premise of the belief evidence. If the facts were that he was simply found being driven around Sligo town near where he lives, in the car, it might be possible to infer that he was simply receiving a local lift from an acquaintance and that the presence of the mortar was an unhappy coincidence with the belief held by the Chief Superintendent."

It is said that this passage shows that the Court's approach was informed by and infused by belief evidence rather than the seeking out of any genuinely independent supporting evidence. It is said that the reference to "unfortunate coincidence", if taken in conjunction with remarks by the presiding judge in the course of exchanges with counsel about the accused being an unlucky man are redolent of what is described, on behalf of the appellant, as "forbidden cynicism". In that context, the appellant refers to DPP v. Rattigan [2017] IESC 72. In our view, that reference is misplaced. What was in issue in that case was the extent of a trial judge's entitlement to comment when charging a jury and the manner in which comments may be couched. The case provides no support whatever for any suggestion that the prosecution cannot point to the sheer improbability of the facts in issue being explained by coincidence, or the tribunal of fact concluding that an explanation based on chance or coincidence is impossible to believe.

8. On behalf of the appellant, it is argued that the prosecution wrongly contended that Mr. Flohr was in possession of the mortar and that the Court erred in accepting that submission. The appellant places reliance on a number of well-known possession cases, including the Northern Ireland case of R. v Whelan [1972] NI 153, and DPP v. Aaron Foley [1975] 1 IR 267. The appellant argues that while the Special Criminal Court did not formally find that he was in possession of the mortar, that in reality, the members of the Special Criminal Court had effectively concluded that to be the case. Attention is drawn to a passage in the ruling of the trial court of 25th January 2019 at p. 28 where the Special Criminal Court observed:

"[i]n fact, we are satisfied, when one stands back and considers the totality of the evidence of what was revealed on the roadside that evening, that both occupants of the car knew exactly what was concealed in the car, that Mr. Flohr was fully acquainted with the nature and purpose of the journey upon which he had embarked. And, if there is any doubt in the matter, it is resolved by the furtive nature of his behaviour on this occasion."

The appellant protests that this involves a speculative leap.

9. For her part, the Director says there is no question of the appellant having been convicted on the grounds of mere presence in the car. The Director says that the appellant's approach to the question of the Dromahair evidence is fundamentally flawed. She points to the appellant's assertion at para. 61 of the written submissions that the conduct evidence must be standalone proof of membership of the IRA. The Director says there is no requirement for standalone proof. Rather, what is required is that the belief evidence of the Chief Superintendent should be supported by some other evidence that implicates the accused in the offence charged and is independent of the witness giving the belief evidence, relying in that regard on *Redmond v. DPP* [2015] 4 IR 84.

10. It is necessary to consider just how the trial court dealt with the evidence in question, though doing so involves quoting, once more, some passages that have already been referred to:

> "[t]he question then becomes whether the facts surrounding the roadside stop and the subsequent search by Gardaí McDonald and Staid are such as to fulfil the requirement that in relation to the belief evidence put forward in the case against Mr. Flohr, that that belief evidence be substantiated by independent evidence which supports the premise of that belief evidence . . .
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> This supporting evidence must implicate the accused in the offence charged, that is the offence of membership, be independent of the giver of the belief evidence and must, of course, be credible. So far as the question of implication in the offence is concerned, as is pointed out in the context of corroboration by Denham J, as she then was, in *DPP v. Gilligan* [2006] 1 IR 107 at p.140, is sufficient for evidence to be corroborative if 'it tends to implicate the accused in the commission of the offence'. It is thus sufficient if the evidence 'establishes a link which tends to prove that the accused person committed the offence'. We are satisfied that this position provides a correct and precise analogy to the approach of supporting evidence as is required by the Supreme Court decision in Redmond. Therefore, it is not necessarily that the supporting evidence establishes any fact beyond a reasonable doubt and supporting evidence would be sufficiently implicatory if it makes it more probable than not that that the belief evidence is accurate. In any event . . . supporting evidence does not have to prove the case on its own. It is the combination of the supporting evidence and the belief evidence that is crucial. Therefore, Mr. McGrath's [Senior Counsel for the defence] emphasis on whether the evidence is sufficient to prove beyond a reasonable doubt that Mr. Flohr was in possession of the training mortar is misplaced. The probative purpose of the circumstances in which he was found by the Gardaí is not designed to be proof beyond a reasonable doubt of the state of mind in respect of the training mortar found in the car, or indeed as to any other fact beyond the question of his alleged membership of an unlawful organisation. The question, as per the analogous law relating to corroborate evidence, is whether it tends to confirm as correct the belief held by Chief Superintendent Maguire in relation to Mr. Flohr as of the date of these events, thereby supporting that belief evidence. It does not have to prove membership, possession or any other external fact, standing by itself.

We do not have any evidence, one way or the other, as to Mr. Flohr's reason for being in Mr. McFadden's car as that car was being used to transport the training mortar in the backpack. Therefore, we have to consider whether there is an innocent inference to be drawn from the evidence that is available. In our view, the remoteness of the location from Mr. Flohr's home and the normal base of the car in question is relevant to considering whether his presence at that time and place was simply an unfortunate coincidence or is in fact consistent with the premise of the belief evidence. If the facts were that he was simply found being driven around Sligo town near where he lives in that car, it might be possible in those circumstances to infer that he was simply receiving a local lift from an acquaintance and that the presence of the mortar was an unhappy coincidence with the belief held by the Chief Superintendent.

On the evidence actually presented, and the circumstances in which Mr. Flohr was actually found, it is, in our view, very difficult to construct an inference of an unwitting presence, given the time, the remote location, the direction of travel of the car and the undoubted purpose of the driver's journey on this occasion, that is: to move the training mortar from one place to the other.

We do not consider that such an innocent inference is available in respect of the circumstances in which Mr. Flohr was actually found. It is clear from the soil found on the training mortar that it had been buried or concealed in an open location at some time shortly before it was placed in the backpack. The actual time that it was removed from concealment or placed in the pack or the car cannot be known with precision on the evidence, but we doubt that it could have been very long before it was discovered by the Gardaí. We are fully satisfied that this training mortar was undoubtedly in motion from one location to another, being driven by Mr. McFadden, at least on behalf of the IRA at the time of discovery, and that Mr. Flohr was present as a front-seat passenger during the journey for that purpose.

It was pointed out by the Court of Appeal in the Donnelly case referred to above, that this Court is fully entitled, in dealing with these cases, to take account and take stock and use its knowledge and awareness of matters that comes to its attention in the ordinary course of these cases. Given our awareness of the manner in which the IRA normally operates, that is by way of small cell-based structures, we consider it absolutely unlikely that the presence of an innocent abroad would be permitted by that organisation when an object of importance, such as a training mortar, was in motion and in transport in connection with the purposes of that organisation.

There is a further aspect of the evidence that renders an innocent inference unavailable to Mr. Flohr. This is the uncontradicted evidence of Garda McDonnell that he behaved in a furtive manner by concealing his phone when the Gardaí approached the car. It is true, of course, that the phone did not play any part of the investigation or the trial thereafter. But, in our view, the actions of Mr. Flohr are consistent with knowledge on his part that his presence in the car was not simply as a result of taking a life on an innocent basis from Mr. McFadden and that he knew that the likely attention of the Gardaí was

problematic for him on an individual basis. In fact, we are satisfied, when one stands back and considers the totality of the evidence of what was revealed on the roadside that evening, that both occupants of the car knew exactly what was concealed in the car and that Mr. Flohr was fully acquainted with the nature and purpose of the journey upon which he had embarked. And if there could be any possible doubt in the matter, it is resolved by the furtive nature of his behaviour on this occasion . . .

We simply do not accept the degree of coincidence that would be required to find that Mr. Flohr was unwittingly present in these circumstances at the same time that a body of material existed which caused a senior garda of responsible rank and considerable experience to believe that this man was a member of the IRA. Mr. Flohr was either very unlucky or else was actually present in the vehicle which was moving the training mortar from one place to another and was thereby behaving in the precise and exact manner that one would expect from a member of an unlawful organisation.

In our view, the circumstantial evidence revealed by the roadside stop is ample, clear, credible, and independent support of the proposition that the accused was an IRA member at the time."

11. In the view of this Court, the approach of the trial court was careful and focused. There was no question of the Special Criminal Court relying on Mr. Flohr's mere presence in a car. The first reaction of the trial court was to consider whether there was an innocent explanation that was reasonably open to the defendant. The Court had regard to the remote location where the vehicle was stopped, its distance from the usual base of the car, the undoubted purpose of the journey, the moving of the mortar from one place to another and the presence of soil on the mortar indicating that it had recently been buried. The trial court also indicated it was having regard to its awareness of the manner in which the so-called IRA normally operated, leading to regard it as absolutely unlikely that the presence of an innocent abroad would be permitted by that organisation when an object of importance, such as a training mortar, was in motion. In the Court's view, the Special Criminal Court's observation about the improbability of an innocent abroad being permitted to be present while important IRA business was being conducted accorded with reason and common sense and reflected common experience and awareness, and not just the awareness of the experienced members of the court.

12. In this Court's view, the presence of the accused on an occasion when a training mortar was being transported provided cogent evidence, indeed, compelling evidence in support of the membership charge. Indeed, it might be said that the evidence in this case was particularly and unusually cogent. Often it would be the case that the evidence linking an accused to untoward activity may be consistent with what may be described as links to ordinary criminality, as distinct from the criminal activities of an unlawful organisation. Here, the object that was being transported pointed firmly in the direction of subversion and a mission being undertaken by an unlawful organisation.

The Opinion/Belief Evidence

13. We turn now to consider the issues arising in relation to the opinion/belief evidence of Detective Chief Superintendent Thomas Maguire. As the prosecution was about to call its final witness, the defence addressed certain submissions to the trial court and requested that the issue of privilege be determined by another differently constituted division of the Special Criminal Court. In addition, counsel asked the trial court to consider whether the necessary checks and balances were in place to ensure a fair trial in the absence of the DPP independently reviewing the material which underlines the belief evidence. In exchanges with members of the trial court, counsel on behalf of the now appellant accepted that in putting forward the suggestion of a separate division of the Special Criminal Court, that he had a rock to push up a hill. As to the suggestion that the prosecution should be directed to review the material in the possession of the Gardaí, counsel accepted that there was direct authority against him on that point, the case of DPP v. Palmer [2015] IECA 155, but argued that that case had been wrongly decided. The Special Criminal Court regarded the suggestion of convening a differently-constituted version of the court to consider the issue of privilege as novel. The trial court rejected the application not because it was novel, but because it was a point covered by many of the authorities that governed the practice and procedure of the conduct of the Special Criminal Court and they saw no basis for it. The trial court felt that the suggestion would disrupt the unity of the criminal trial, which was something that could be done by statute, but could not be done by a court of limited jurisdiction.

14. The application for the involvement of a differently-constituted court having been rejected, the defence then requested the Special Criminal Court to view the material in the possession of the Gardaí. The trial court acceded to that request, making clear that it was doing so with only two objectives in mind. First, to consider whether a public interest privilege might be asserted, and secondly, to consider whether any innocence at stake issue arose. Having viewed the material, the court indicated that they were fully satisfied that the public interest privilege claim was well-founded, and that as an adjunct to that, they could expressly confirm that there is nothing in the material that could or might assist Mr. Flohr in his defence. The court made clear that its approach would have been entirely different had an innocent at stake issue become apparent from their examination of the material in question. The court added that any unfounded claim of privilege might have had ramifications for the credibility of the witness asserting such a claim. Thus, on 30th November 2018, the prosecution called its final witness, Detective Chief Superintendent Thomas Maguire. Detective Chief Superintendent Maguire explained that he had completed thirty-six years' service, he was heading into his thirty-seventh year of service, and the vast majority of that service had been spent at different ranks in the Special Detective Unit, in excess of twenty-three years. He had served as Detective Chief Superintendent in charge of the Special Detective Unit, as Detective Chief Superintendent in charge of the Garda National Unit of Criminal Investigation, and in August 2017, had transferred to Security and Intelligence as Detective Chief Superintendent. Having given an overview of his career in An Garda Síochána, he then gave evidence as follows:

"[o]n the basis of confidential information available to me, I believe that Julian Flohr of 129, Rusheen Ard, Caltragh in County Sligo, is a member of an unlawful organisation styling itself the Irish Republican Army, otherwise Óglaigh na hÉireann, otherwise the IRA, and he was a member of that unlawful organisation on 14th August 2016 within the State."

The Detective Chief Superintendent confirmed that his belief was not based on any matter discovered at the time of the arrest that the Court had heard of, or any conduct, admissions or statements or replies made by the accused during the course of the investigation of his detention.

15. When cross-examined by defence counsel, the Detective Chief Superintendent indicated that in such cases, he reviewed the available material, he indicated it was not a file, and if he believed the material was sufficient to tender belief evidence, then that is what he would do. He said there had been cases where he had felt the belief was not capable of being formed and where evidence had not been given. He said if there were any question marks in his head over the material available, he would not offer belief evidence. When counsel then put questions, which he made clear he was couching in general terms, the Detective Chief Superintendent responded by saying that he referred to his claim of privilege, that to go beyond that claim of privilege may cause difficulties and threats to life, difficulties that impinge and hamper State security and reveal methodology used in the gathering, analysis and assessment of intelligence. Counsel then addressed the Court, submitting that the questions that he was proposing to ask were questions of the nature that had been approved by the Court of Criminal Appeal in DPP v. Donnelly & Ors [2012] IECCA 78 and by the European Court of Human Rights in Donohue v. Ireland App No 19165/08 (ECHR, 12 December 2015). He also indicated that similar questions had been answered on other occasions by other Chief Superintendents, referring specifically in that regard to DPP v. Kelly [2006] 3 IR 115. Following interventions by members of the trial court, the Detective Chief Superintendent indicated that there were a number of sources available to him, there being more than one. However, when asked whether the sources were human and non-human, he indicated that he was claiming privilege in respect of the sources of his intelligence and explained the reasons for the claim. In our view, rather surprisingly, defence counsel then asked whether there was an informant or civilian included in the sources of the information, and to that question, the Detective Chief Superintendent once more responded by referring to his claim of privilege which in our view was very understandable.

16. Following further debate and discussion, the Special Criminal Court ruled on the matter. It commented that it seemed to the members of the trial court that the Detective Chief Superintendent had answered some of the questions put to him in terms of the number or sources involved, had touched in general terms on his experience and the fact that as part of his work he had dealt with informers. It identified the issues remaining as boiling down to three:

    (i) Whether the sources were human or non-human;

(ii) The question as to whether there were informants or a civilian aspect to this; and

(iii) The question of the method of rating intelligence.

The trial court said that it seemed to it that just because a Chief Superintendent decided to answer a particular question in a particular case, that that was not a precedent for answering that question in every case. The Court was of the view that these cases were fact-specific; that the nature and extent and danger attached to disclosure might very greatly in an individual case. The Court felt that it had a great advantage over and above that which operated in other cases, in that it knew the material in respect of which the privilege claim was being advanced. So, they were not deciding the case on the blind and were not taking somebody at face value and had some context in relation to the claims made in relation to the three issues they had identified. The Special Criminal Court noted that in the Kelly case, the Chief Superintendent had apparently been prepared to say that there were both human and non-human sources. In the present case, they considered the claim an entirely proper and fair claim. The Court added, specifically, that the question of whether there was an informant or civilian aspect is a matter which was very properly the subject of a privilege claim.

17. In the course of exchanges with counsel, the presiding judge indicated that if it was stated that the source of the belief evidence was non-human, that that would indicate to the informed mind certain things, whereas if it the answer was that it was human, it might indicate other things to the informed mind.

18. Reading the cross-examination of Detective Chief Superintendent Maguire, the clear impression that one is left with is that the object of counsel was not to obtain information, but to highlight the extent of the restrictions on the capacity to cross-examine. That is, of course, a perfectly legitimate tactic to engage in(see the observations of O'Donnell J. in Donnelly & Ors. at para. 31 by way of example).

19. Section 3(2) of the Offences Against the State (Amendment) Act 1972 is now a well-established feature of our law notwithstanding that it remains controversial in certain quarters and the subject of some academic debate. It is now closing in on half a century since it first appeared on the statute books. The section and its provision for opinion/belief evidence represented a significant departure from the traditional law of evidence. While undoubtedly a very significant departure, it was confined in nature. It applies only in respect of prosecutions for the offence of membership of an unlawful organisation and only when Part 5 of the Offences Against the State Act is operative i.e. that there has been a declaration by the Government that the ordinary courts are inadequate to secure the administration of justice and a Special Criminal Court has been established. Despite its longevity, given its controversial nature, the provision has been challenged on many occasions. It will be necessary to consider some of those challenges.

20. At para. 75 of his judgment of Redmond v. Ireland, Charleton J commented:

"[p]rosecutions [for membership] are dependent upon the evidence of a Chief Superintendent in order to make the charge of membership of a prescribed organisation viable for prosecutions."

This charge, Charleton J said, is vital to the maintenance of the democratic polity of this country. Hardiman J, with whose judgment the other members of the Supreme Court agreed, specifically agreed with this statement, that the charge is vital to the maintenance of the democratic polity of this country. He did so at para. 28 of his judgment.

21. The courts have long recognised that it is very likely that a Chief Superintendent giving opinion/belief evidence would seek invoke a claim of privilege in these cases. So likely, in fact, that Fennelly J. in the course of his judgment in Kelly, referred to such a claim for privilege as being inevitable.

22. Staying with the case of Kelly, which came before the Supreme Court on foot of a s. 29 of the Courts of Justice Act 1924 certificate, the question certified was:

"[a]re the requirements of Article 38 of the Constitution satisfied where an accused is precluded from enquiring into the basis of the evidence of belief given against him at his trial, pursuant to the provisions of the Offences Against the State Act (as amended) on a charge of membership of an unlawful organisation before the Special Criminal Court."

In dismissing the appeal, the Supreme Court held that a limitation on cross-examination was inherent in the very terms of s. 3(2) of the Act of 1972, which was an Act which enjoyed the presumption of constitutionality. The constitutionality of the section had been previously contested in the case of *O'Leary v. Ireland* [1993] 1 IR 102. There, the basis of the challenge was a contention that the section involved a reversal of the burden of proof and that there was an onus on the accused to disprove his guilt. The plaintiff's argument was rejected on the grounds that the burden of proof had not been shifted. All that had happened was that belief evidence was rendered admissible. Costello J, as he then was, went on to hold that the trial court was then free to attach such weight to the evidence as it saw fit. He went further and said that there was no obligation on the Special Criminal Court to convict the accused in the absence of exculpatory evidence, nor was there any such obligation, even in the absence of the accused giving evidence. The constitutionality of the measure was also considered by the Supreme Court in the case of Redmond v. Ireland. There, the Supreme Court was of the view that the section would not be consistent with the Constitution if it permitted the conviction of a person solely on the basis of opinion evidence, in particular, if privilege was successfully asserted over the material leading to the formation of the opinion. Such would exclude any examinable reality from the case and undermine any potential avenue of challenge to the opinion evidence, subverting the prospect of useful cross-examination by the accused. A constitutional construction of the section required that the belief evidence of a Chief Superintendent be supported by some other evidence implicating the accused in the offence charged, and the said evidence must be seen by the trial court as credible in itself as well as being independent of the witness giving the belief evidence.

23. At para. 76 in Redmond, Charleton J. addressed the two types of evidence, the opinion/belief evidence of the Chief Superintendent and the independent supporting evidence. He commented:

"[a]s to the particular weight to be attached to that belief evidence and the other evidence in the trial, that is a matter for the Court of trial. Such evidence is to be assessed in the context of all of the evidence in the case, whether including testimony from the accused or not. In some cases, evidence other than the belief evidence will be weighed by the Special Criminal Court as very important, while in other trials, that belief evidence assumes prominence. For the avoidance of doubt, there is no order in which each such piece of evidence is to be assessed. It is, in the overall context of the state of admissible evidence at the end of a trial that the Special Criminal Court may convict or may fail to be convinced by an entire body of testimony."

In the course of his judgment, Hardiman J. at para. 32 specifically stated that he agreed with Charleton J. that the relative importance attached to the two types of evidence will, of course, vary between one case and another.

24. An example of a case where the supporting evidence was highly significant is the case of DPP v. Birney & Ors [2007] 1 IR 327, a case which had its origins in the fact that an off-duty Detective Garda noted suspicious activity involving a van near his home at Corke Avenue, Little Bray. He reported his suspicions to the Gardaí. As a result of the call, two Gardaí came to the scene. They found five men in the van, four in the rear, sitting on the floor, and a driver. In the driver's area of the van was a black balaclava and a handset of a portable radio. In the rear compartment was a lump hammer, two pickaxe handles, a torch, eight plastic bags of cable ties, one black balaclava with a single opening for the face, two black balaclavas with three holes for the face, two identical navy blue cloth ties resembling those worn by Gardaí, a sky-blue shirt marked 'Security', a yellow jacket with 'Garda' inscribed on the left breast, gloves, including black woollen gloves and plastic industrial gloves, and three walkie-talkie-type radios. Hardiman J, delivering a judgment of the Court of Criminal Appeal, commented:

"[i]n the present case, it seems to use that the Chief Superintendent's evidence was amply corroborated, both by the failure to answer questions and by the general evidence in the case. The Special Criminal Court correctly concluded that the evidence had to be looked at collectively and not merely in its individual parts. The applicants were congregated together in a van, with the paraphernalia already mentioned, and with the physical marks described [a reference to the fact that some of the men in the van had relevant tattoos, including tattoos with the words 'Óglaigh na hÉireann' and a tattoo of an armalite rifle]. It was conceded that these facts were suggestive of serious criminality. One could indeed go further and say that any reasonable person would be quite satisfied of the criminal nature of their gathering. The role of the Chief Superintendent's evidence was to connect these facts to the specific offence with which these men were charged. The Chief Superintendent's evidence was admissible as evidence that each of the applicants was such a member, and this view is itself quite consistent with the balance of

the evidence. Indeed, it is not merely consistent with it – the balance of the evidence firmly supports and corroborates the Chief Superintendent's belief, based on sources quite apart from the facts of the present case."

25. In *Connolly v. The DPP* [2015] 4 IR 60, the appellant sought and was granted leave to appeal to the Supreme Court to argue that the jurisprudence relating to the belief evidence of a Chief Superintendent under the section was no longer applicable by virtue of the European Convention on Human Rights Act 2003. The Supreme Court, in a judgment delivered by MacMenamin J. with whom the other members of the Court agreed, was of the view that the jurisprudence of the Supreme Court in relation to the belief evidence of a Chief Superintendent was not affected by the enactment of the European Convention on Human Rights Act.

26. Before returning to deal specifically with the complaints specific to the manner in which privilege was dealt with in the present case, it is worth pausing to remind ourselves of the context in which the legislation was enacted. Geoghegan J. in the course of his judgment in Kelly commented at para. 10:

"[i]t is essential to consider the purpose of section 3(2) of the 1972 Act. Prima facie if the Garda Síochána have reliable information that somebody is a member of a prescribed organisation there might be nothing to prevent them marshalling the necessary witnesses to give direct proof of this. However, it is perfectly clear that the legislation has been passed in the context of preserving the security of the State and the legitimate concern that it will not in practice be possible in many, if not most cases, to adduce direct evidence from lay witnesses establishing the illegal membership. Such witnesses will not come forward under fear of reprisal. The Special Criminal Court itself was established to avoid the mischief of juror coercion and intimidation. In relation to all anti-terrorist offences, as a matter of common sense, there would be equal apprehension about intimidation of witnesses. It is a reasonable inference to draw that the subsection was enacted out of bitter experience. It is carefully crafted, ensuring that the belief evidence must come from an officer of An Garda Síochána not below the rank of Chief Superintendent. This is with a view to establishing trust and credibility as far as possible. Counsel for the appellant accepts the concept of informer confidentiality, but any extensive probing in relation to the basis of the information, irrespective of whether names are requested or not, may inevitably undermine the protection of the informer by affording clues to his identity. Even without the statutory provision, informer privilege may involve more than merely refusing to divulge the name of an informer. Surrounding evidence which would be likely or might tend to disclose the identity of the informer would itself be protected by the privilege, in the sense that it may not be allowed to be adduced under cross-examination. I have no doubt that insofar as counsel was limited in his cross-examination of Chief Superintendent Kelly, permission for this limitation was inherent in the subsection itself which enjoys the presumption of constitutionality."

It is of note that the ECHR unanimously rejected as inadmissible the complaint on behalf of Mr. Kelly.

27. At trial and on appeal, the appellant placed particular emphasis on certain passages from Donnelly and Donohue v. Ireland. In Donnelly, at para. 31, O'Donnell J. commented:

> ". . . . It follows from this that in an appropriate case the privilege can be challenged and, if necessary, the court can inspect any documents or other materials. 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, following an intervention from the trial court, it was confirmed that there was more than one source and also confirmed that the witness had experience in dealing with informants as well as rating and analysing intelligence. However, when asked whether he had any personal dealings with any witness who provided information, whether Garda or non-Garda, the Chief Superintendent reiterated that he was claiming privilege in respect of same.

28. In *Donohue v. Ireland*, the European Court of Human Rights ("ECrtHR") was dealing with one of the convictions that arose out of the events at Corke Abbey, Little Bray. Mr. Donoghue was one of those who had dealings with the van, though was not one of those found in the rear compartment of the van. At para. 81 it said the following:

> "[t]he applicant did not challenge, either before the domestic courts or this Court, PK's [Chief Superintendent] view that disclosure of his sources would endanger persons and State security. The Court notes the domestic courts' description of the unlawful organisation in question, the IRA: it was a secretive and violent organisation, one which assiduously sought out and punished police informers through torture and death and one which relied on the inevitable fear of testifying which those methods engendered (paragraphs 46, 47, 49, 50 and 53 above). The admission of belief evidence, combined with the inevitable grant of privilege for the sources of that belief (paragraphs 48 and 54), also provides a crucial tool to overcome the evidential difficulties in prosecuting this particular kind of charge. A charge of 'membership' of such an organisation requires evidence drawn from intelligence necessarily gathered from numerous and varied sources (human and documentary) and over some time. The Court considers these justifications for the grant of privilege - effective protection of persons and State security, as well as effective prosecution of serious and complex crime - to be compelling and substantiated."

29. The ECrtHR was of the view that the Chief Superintendent's evidence could not be considered to have been the sole or decisive evidence surrounding the applicant's

conviction, but observed that his evidence clearly carried some weight in the establishment of the applicant's guilt, and accordingly went on to consider carefully whether there were adequate counterbalancing factors and safeguards in place. The ECrtHR then observed:

". . . that the trial court was alert to the need to approach the Chief Superintendent's evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence."

It referred to the fact that the trial court reviewed the documentary material available to the Chief Superintendent. It noted that the trial court, in considering the claim of privilege, was alert to the importance of the innocence at stake exception, that it confirmed expressly that there was nothing in what it had viewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. The trial court was thus quite vigilant in exploring whether the non-disclosed material was relevant or likely to be relevant to the defence and was attentive to the requirements of justice which weighed the public interest in concealment against the interests of the accused in disclosure.

30. The appellant places particular reliance on what was said at para. 92 of Donohue. There, the ECrtHR commented:

"[w]hile the scope of cross-examination was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent's evidence in a range of ways still remained. Consistently, such evidence could be tested by the defence even if privilege had been granted as regards the sources upon which that opinion was based. As pointed out by the Supreme Court in DPP v. Kelly (paragraph 49 above), the principle is that any restriction on the right to cross-examine is limited to the extent 'strictly necessary' to achieve its (protective) objective. As noted by O'Donnell J in DPP v. Donnelly and Others (paragraph 54 above), the Chief Superintendent's evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on whether he knew or personally dealt with any of the informants and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted and where the cross-examination of these witnesses is hindered or not possible at all. There is, however, no evidence that the present applicant attempted to test the Chief Superintendent's belief evidence in any way other than by asking him to disclose his sources. In this respect, it remains relevant also to note the comment of O'Donnell J in *DPP v. Donnelly* and Others to the effect that an accused may decide not to cross-examine a Chief Superintendent, not because of the constraints imposed by a grant of

source privilege, but for other reasons, including to avoid the risk of unwittingly strengthening the prosecution's case against him."

31. We approach our task of resolving this issue from the perspective that s. 3(2) of the Offences Against the State (Amendment) Act 1972 is an established part of the statute law of the State. We recognise the grim reality that has necessitated such an exceptional measure.

32. We note that it has been specifically recognised on more than one occasion that the section involves an inherent limitation on cross-examination. The fact that the Chief Superintendent would advance a claim for privilege is not at all surprising, as a number of authorities referred to in the course of this judgment have recognised, Chief Superintendents will invariably advance a claim for privilege. We do accept that the claim in this case was advanced in broad terms. Objection was taken to questions which have been answered on previous occasions and objection was taken to answering questions which Donnelly & Ors and Donohoe v. Ireland had suggested provided an opportunity for probing and cross-examination.

33. Nonetheless, we find ourselves in agreement with the trial court that because a question is answered on one occasion does not mean that it will always be answered. The dangers posed by a particular line of enquiry may vary greatly from case to case. Though, in that context, it must be observed that a willingness to answer a question in one case and a reluctance a similar question in another may itself attract interest and speculation. It is the case that what may be almost inconsequential in one case may be life-threatening in another. To offer an example, there may be a Chief Superintendent whose career has brought him into regular contact with very many individuals involved in Republican circles so that a confirmation that a source was personally known to the Senior Garda Officer may not advance matters significantly. On the other hand, there may be a Chief Superintendent whose career to date will have brought them into contact with only a very small number of people moving in such circles. In that situation, an indication that a source was personally known may place all those in that category under suspicion, and so at risk of torture and murder.

34. In this case, the judges of the Special Criminal Court had, at the request of the defence, reviewed the material, and against the background of that review, had decided to uphold the claim to privilege in the terms that it did. It upheld the claim in a case where the other evidence in the case, the supporting evidence, was very significant. We note that the appellant has placed some reliance on the fact that material was not viewed by prosecution counsel. However, in a situation where the material was viewed by members of the trial court, and where they specifically stated that there was nothing in the material to assist the defence and that the innocence at stake exception was not engaged, we do not believe that the fact that the prosecution did not view the material in any way disadvantaged the defence in this case. Had the defence any doubts about the conclusions of the Special Criminal Court having viewed the material, it was open to them

to request this Court to likewise view the material and come to a view in regard to it. No such request was made.

35. In all the circumstances of this case, we cannot conclude that the admission of the belief evidence was unfair, nor can we conclude that the terms on which privilege was claimed and upheld so undermined the belief evidence that no reliance could have been placed on it. We do not consider that the ruling of the Special Criminal Court undermined the fundamental fairness of the trial or rendered the trial unsatisfactory or called into question the safety of the conclusions arrived at by the trial court.

36. Accordingly, we dismiss the appeal.