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Supreme Court of Ireland Decisions

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Judgment

Title:	Redmond -v- Ireland & anor
Neutral Citation:	[2015] IESC 98
Supreme Court Record Number:	293/2009
High Court Record Number:	2006 5362 P
Date of Delivery:	17/12/2015
Court:	Supreme Court
Composition of Court:	Denham C.J., Hardiman J., McKechnie J., MacMenamin J., Charleton J.
Judgment by:	Charleton J.
Status:	Approved
Result:	Appeal dismissed
Details:	Judgment also by Judge Hardiman

Judgments by	Link to Judgment	Concurring	Dissenting
Hardiman J.	Link	Denham C.J., MacMenamin J., McKechnie J.	Charleton J.
Charleton J.	Link		

An Chúirt Uachtarach

The Supreme Court

Record number: 2006/5362 P

Appeal number: 293/2009

Denham CJ
Hardiman J
McKechnie J
MacMenamin J
Charleton J

Between

Thomas Redmond

Plaintiff/Appellant

and

Ireland and the Attorney General

Defendant/Respondent

Judgment of Mr Justice Charleton delivered on Thursday the 17th day of December 2015.

1. Section 3(2) of the Offences Against the State (Amendment) Act 1972 renders admissible in evidence the belief of a Chief Superintendent of An Garda Síochána that a person accused of the criminal offence of membership of the self-styled Irish Republican Army, is a member of that proscribed organisation. Testimony of what a witness has seen or heard, or evidence from an expert as to opinion, is admissible in the ordinary way in criminal trials; but not what a witness believes. This exception to the rules of evidence is confined solely to that charge of membership. The plaintiff/appellant Thomas Redmond, having been convicted on that charge asserts that this section of the Act of 1972 infringes the Constitution. Essentially, it has been argued on his behalf that the guarantee of a fair trial on a criminal charge, as set out in Article 38 of the Constitution, is violated by reason of this evidential exception. Particular issues in relation to the substitution of special advocates with a limited brief have been argued on behalf of Thomas Redmond. Of more concern is an issue cast aside in the appeal: the validity of a conviction on such belief evidence alone. This conviction was not on that basis. Nevertheless future cases are of concern. The State as respondent to this appeal does not agree that the subsection has any constitutional infirmity. In the High Court, the claim of Thomas Redmond was rejected by McMahon J, [2009] IEHC 201, from which judgment this appeal has been taken. This decision affirms the judgment of the High Court. In doing so, the view is taken that the subsection complies with Article 38 of the Constitution where such belief evidence is supported by other evidence from the totality of which evidence the court of trial may be satisfied of the guilt of the accused beyond reasonable doubt.

Precedent decisions

2. It might first be usefully commented that challenges to the operation of the relevant section of the Act of 1972 have been mounted before and on a variety of grounds. As O'Donnell J, speaking for the Court of Criminal Appeal, commented in *The People (DPP) v Donnelly & Others* [2012] IECCA 78 at para. 23:

The provisions of s.3 of the Act of 1972 have been the subject of repeated judicial consideration in the 40 years since the enactment of that provision. Among the most important of these decisions are: *O'Leary v. Attorney General* [1993] 1 I.R. 102 in which Costello J. in the High Court rejected a challenge to the constitutionality of the provision; *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 in which the Supreme Court unanimously concluded that the requirements of Article 38 of the Constitution were satisfied in a case in which the Chief Superintendent gave belief evidence and claimed privilege on the sources of his belief; *D.P.P. v. Binéad and Donohue* [2007] 1 I.R. 374, in which this Court concluded that where belief evidence under s.3(2) of the Act of 1972 was admitted and there was a claim for privilege in respect of the underlying facts, materials or sources which led to the belief, the trial was not unfair in circumstances where the court had ruled that it would not convict without support of uncorroborated evidence of that belief; and *Redmond v. Ireland* [2009] 2 I.L.R.M. 419 in which the Court concluded that s.3(2) was not unconstitutional or contrary to the E.C.H.R.

3. While a challenge based on Article 6 of the European Convention on Human Rights has not been proceeded with on this appeal, apparently due to the European Convention on Human Rights Act 2003 not being in force at the relevant time, the jurisprudence of the European Court of Human Rights is also of assistance in terms of applying a rigorous analysis to the challenge mounted by Thomas Redmond. Of particular relevance is the reasoning in the judgment in *Donohoe v Ireland* (Application No 19165/08, decision of 12th December, 2013).

Background

4. On the 1st October 1999, two premises under the control of Thomas Redmond were searched by gardaí pursuant to a warrant. These properties were at 10 The Grove, County Wexford and at The Gatepost, County Wexford. A few days later, arms dumps were uncovered in the same county: one at Kilallen, Castlebridge, was discovered on 4th October, and another at Shelmalier Commons was found on the 5th October. In consequence of what was found within his properties, Thomas Redmond was arrested and was later charged with membership of an unlawful organisation contrary to s. 21 of the Offences against the State Act 1939, as amended by s. 2 of the Criminal Law Act 1976.

5. Thomas Redmond was tried on an indictment that specified that as of the date of the search of his premises he was a member of an unlawful organisation styling itself the Irish Republican Army, or the IRA, or Óglaigh na hÉireann. After a trial before the Special Criminal Court lasting approximately a week, he was convicted of this single offence, the three judges of the court delivering a written judgement dated 22nd April, 2002. In essence, the Special Criminal Court accepted the evidence of a Chief Superintendent that Thomas Redmond was a member of the self-styled IRA. On the basis of the evidence of the Chief Superintendent, the court was prepared to convict. The final written reasoning, however, was to convict based on that evidence and on the supporting forensic evidence against Thomas Redmond. He then appealed that conviction to the Court of Criminal Appeal, which affirmed the conviction in a judgement dated the 24th February, 2004. He then sought the necessary leave to appeal this decision to the Supreme Court under the then existing constitutional provisions for appeal pursuant to s. 29 of the Courts of Justice Act 1924, claiming that such second appeal should be granted because there existed a point of law of exceptional public importance. On the 8th July, 2004, the Court of Criminal Appeal refused to grant a certificate for leave to appeal to the Supreme Court. Thomas Redmond then issued a plenary summons in November 2006, seeking the declaration of unconstitutionality, the sole relief

claimed on this appeal. The matter came on for hearing in the High Court by way of oral evidence and submissions over five days before McMahon J, who rejected the claim for the declaration by written judgement dated the 30th April, 2009. From that High Court judgment, this appeal was heard in October 2015.

Facts and arguments as to unconstitutionality

6. In considering this appeal, it is to be noted that none of the facts as found by the Special Criminal Court in the criminal trial, or as found by the High Court on the plenary hearing of the challenge to the constitutionality of the particular section of the Act of 1972, have been challenged. The approach taken by the defence at the trial before the Special Criminal Court is also relevant. Specifically, it was conceded by the defence, on behalf of the accused, that the Chief Superintendent giving evidence that Thomas Redmond was a member of this unlawful organisation was not lying. Furthermore, no application was made for discovery of any materials that might underlie that officer's belief. While it may be that such materials attracted privilege where the source was an informer, the privilege there being that of the informer, a procedure exists according to the existing case law for the examination of such material, initially, by counsel for the prosecution, and if the defence so requests, by the court of criminal trial itself in order to ensure that no such material gives rise to the innocent at stake exception to any claim of privilege. Nor was any challenge made where a claim of privilege was asserted by the Chief Superintendent as to his sources of information. Finally, no claim was made by the defence before the court of criminal trial that any procedure involving a special advocate should be applied related to the reception of the evidence by the Chief Superintendent as to his sources. Thomas Redmond, as the accused in that criminal trial, did not give evidence in his own defence, which, of course, is his right.

7. The Special Criminal Court noted that much of the trial of the proceedings before that court consisted of a detailed ballistic examination of the materials found at the two premises of Thomas Redmond in County Wexford and a comparison of those materials with the weaponry and paraphernalia found at the two arms dumps in that county. The Special Criminal Court, following a consideration of the relevant evidence, found that much of what was found on the two properties of Thomas Redmond consisted of "items that would be found in engineering workshops throughout the world and are items which have a myriad of innocent uses." While the court found that "many of these items could have been adopted to form component parts of firearms or ammunition … it would be stretching imagination beyond acceptable limits … to conclude beyond reasonable doubt that the majority of these items had been put to that use." Two items, however, were found by the court not to have possible innocent uses. As the gardaí arrived to search the premises of Thomas Redmond at The Grove, County Wexford, he was observed to have thrown an object from a rear window by Detective Garda O'Driscoll. The court of criminal trial made the following finding of fact in relation to this object:

> Insofar as the metal object which Detective Garda O'Driscoll saw the accused throw from a rear window of the premises of … The Grove, County Wexford, on the 1st of October is concerned, the Court heard evidence from Detective Garda Shane Henry, who is attached to the ballistics section of the Garda Technical Bureau and who the Court accepts is an expert in the field of ballistics, that, having examined that object, it was his opinion that it had been processed from a piece of metal similar to metal cut-offs which he had found on the 1st of October 1999 on the ground outside a workshop located on the accused's premises at Forth Commons, Co. Wexford. In this regard,

> Garda Henry said it was clear from an inspection of the said object that it had been partly worked upon in the sense that it had been subjected to drilling and that the ends had been flattened. Moreover, Garda Henry expressed to the view that, in its present state, that object is a housing mechanism which is an internal part of an improvised grenade. In this regard, in the course of his evidence, Detective Garda Henry described in detail the component parts of this metal object and he explained how, in his view, it comprised the housing mechanism for the internal part of an improvised grenade; pointing out that it fitted into a warhead and is part of the firing mechanism for the warhead. Detective Garda Henry referred to drawings which he had found at the arms dump at Kilallen which he said were sketches of an improvised grenade launcher which is divided into two parts; the first part being the launch tube and the breach for the firing mechanism and the other part being the trigger housing and shoulder stock assembly. Detective Garda Henry said that the object … logically fits in such an assembly and he then referred to what he described as an improvised spigot grenade launcher, which was also found at the arms dump at Kilallen, into which the metal object fitted because the threading to both was identical. … Detective Garda Henry was adamant that, in his opinion, that metal object was component part of a grenade; a view which the Court had no difficulty in accepting because it seems to the court that it defies logic and reason that, if the said metal object had been in the accused's possession for the purpose of innocent use, he would have thrown it out of his window within minutes of a group of members of the Garda Síochána coming with search warrant to search as house. In the view of the Court, that fact, coupled with detective Garda Henry's opinion with regard to the purpose for which the said object had been processed leaves the Court in no doubt whatsoever that it was intended as a component part of a grenade.

8. As to the other object, found in a family car that was attributed to the possession of Thomas Redmond, the Special Criminal Court held as follows:

> Insofar as the improvised firing pin which, on the 1st day of October 1999, members of the Garda Síochána had found in the boot of a red Citroen car located at [the premises of the accused] is concerned, detective Garda Henry gave evidence that the said improvised firing pin was the same as firing pins found in improvised weapons found by members of the Garda Síochána as the arms dumps located at [Kilallen] and at Shelmalier, Co. Wexford. … In addition, while … the Court is not satisfied, notwithstanding the evidence … given by Garda Henry and Sgt Ennis that, individually, a large number of the fruits of the searches of the accused's premises at … The Grove and The Gatepost are likely to have been adapted to form component parts of firearms or ammunition, collectively, these finds, when compared with what was at the arms dumps located at Kilallen and Shelmalier remove from the realm of what might have been considered suspicion of a connection between the accused and these arms dumps and, in the view of the Court, converts that suspicion into a belief beyond reasonable doubt. In other words, it goes beyond what might be considered mere coincidence.

9. The other aspect of the case in respect of which Thomas Redmond was convicted before the Special Criminal Court was the evidence of Chief Superintendent Michael Murphy, admissible by virtue of s. 3(2) of the Act of 1972. He gave evidence to the effect that it was his belief that Thomas Redmond was as of the date of his evidence and as of the 1st of October, 1999, a member of the unlawful organisation styling itself the Irish Republican Army, otherwise the IRA or Óglaigh

na hÉireann. It was submitted to the court of criminal trial that accepting as the sole evidence in the case the belief of a Chief Superintendent that an accused was a member of an unlawful organisation would amount to unfairness. The Special Criminal Court did not accept this proposition but carefully reasoned thus:

> At the same time, the Court recognises that it is not entitled to be guided by the evidence of a Chief Superintendent given in accordance with the provisions of section 3(2) of the Act of 1972 merely because the Chief Superintendent gives verbal expression to a particular belief. Before a Court can decide that a conviction of an offence [of membership of an unlawful organisation] is justified by the evidence of a Chief Superintendent given in accordance with the provisions of section 3(2) of the Act of 1972, the Court must assess the credibility of that Chief Superintendent and, in the light of that assessment, must conclude beyond reasonable doubt that he is a credible person and worthy of belief. Furthermore, although … where a person accused of an offence [of membership of an unlawful organisation] gives sworn testimony denying that charge and contradicts that of a Chief Superintendent, the Court has to accept that "*the value and cogency to be attached to the expression of the Chief Superintendent's belief is very much diminished*", it does not follow that the accused person is under any obligation to give evidence and neither is the Court entitled to draw any inferences which are unfavourable to the accused arising from his failure to give evidence. In this regard, the Court recognises and acknowledges that, unless and until the Court determines otherwise, Thomas Redmond is cloaked with a presumption of innocence; a presumption which entitled him to remain silent throughout the investigation of the offence which is alleged against him subject certain statutory exceptions which are not relevant to this case and a presumption which entitles him to remain silent throughout the trial of these proceedings without that silence being held against him. The Court also accept that in accordance with the decision by this court on the 3rd day of May 2001 in a case of The Director of Public Prosecutions v Dermot Gannon, the results of an investigation into the alleged offence cannot be relied upon to support the belief of a Chief Superintendent that an accused person is a member of an unlawful organisation but, again, the Court notes that, in that case, the Court concluded that it is entitled to rely on the unchallenged opinion evidence of a Chief Superintendent with regard to membership of an illegal organisation. In that regard, while it was suggested to Chief Superintendent Murphy under cross-examination that the second statement which he made was choreographed by his legal advisers and by the member of the Garda Síochána who is in charge of the investigation for the purpose of avoiding the consequence of the decision in Gannon's case, the Court does not accept that that was so and, in particular, it accepts without reservation Chief Superintendent Murphy's assertion that he was not aware of the decision in Gannon's case at the time that he made a second statement and, indeed, did not become aware of it, until he was subjected to cross-examination in the course of these proceedings.
>
> Arising from the foregoing, the Court confirms that it paid very careful attention to the demeanour and body language of Chief Superintendent Michael Murphy; both while he gave his evidence in chief and while he was subjected to a rigorous cross-examination by counsel for the defence. In the view of the Court, while it was somewhat surprised by the Chief Superintendent's assertion that he

> made a second statement with regard to the prosecution against the accused without referring to the first statement which he had made, he presented to the Court as a truthful person; so much so, that the Court was quite satisfied beyond any reasonable doubt that Chief Superintendent Murphy firmly believes that Thomas Redmond is and was at all material times hereto, a member of the IRA. Moreover, the Court rejects the submission of counsel for the defence that the provisions of section 3(2) of the [Act] of 1972 necessarily requires that the must be examinable reality to the sworn testimony of a Chief Superintendent of the Garda Síochána whereby he expresses the opinion that a person is a member of an unlawful organisation before the Court is entitled to act on foot of that testimony.

10. At the end of the written judgement of the Special Criminal Court, the reasons for conviction were summarised not simply on the basis of belief evidence but on a consideration of the overall body of evidence:

> In the light of the foregoing, the Court is quite satisfied by the forensic evidence which it heard from Detective Garda Henry and from Detective Sgt Ennis that the object which the accused threw from the window at … The Grove, Co. Wexford on the 1st of October 1999 shortly after members of the Garda Síochána commenced to search these premises and the improvised firing pin which was found in the red Citroen car which the accused was accustomed to driving, and the other items referred to established beyond any doubt that the accused had associations with firearms which, in the view of the court, bears out Chief Superintendent Murphy's opinion that he is a member of an unlawful organisation.

11. The later plenary action in the High Court, asserting the unconstitutionality of s. 3(2) of the Act of 1972, involved the calling of evidence on both sides. In submissions and in evidence, it was asserted on behalf of Thomas Redmond that where a Chief Superintendent testifies that he believes that an accused is a member of the self-styled IRA and, in addition, asserts the privilege of the informers or informer on which that information is based, the accused is put at particular disadvantage. A Chief Superintendent could be taken in by bogus information from an informant, it is asserted, and would therefore, in that context, present as having the demeanour and integrity of an honest and reliable witness. The informant himself, or herself, will never give evidence and thus, it is claimed, an accused could be convicted on evidence which the Special Criminal Court does not have the chance to confront face-to-face and which could be unreliable or malicious. The argument advanced by Thomas Redmond was said to be best encapsulated in a passage from the concurring judgment of Fennelly J in *The People (DPP) v Kelly* [2006] 3 IR 115 wherein the Supreme Court affirmed the compatibility of a claim of privilege with fair trial in these precise circumstances. Fennelly J stated, at p. 135:

> The Chief Superintendent merely states that he is of the belief that the accused is a member of an unlawful organisation. That type of evidence is, in itself, a novelty. Under the normal rules of evidence, only expert witnesses are permitted to give evidence of opinion or belief and even then not on simple questions of fact. The Chief Superintendent may, no doubt, be regarded as an expert in his allotted field. That, however, is not the real problem. The real problem is that, where privilege is claimed, as it inevitably is, the defendant does not know the basis of that belief. He does not know the names of the informants or the substance of the allegations of membership. Without any knowledge of these matters, the accused

> is necessarily powerless to challenge them. Informants may be mistaken, misinformed, inaccurate or, in the worst case, malicious. None of this can be tested.

12. It should be remembered, however, that the procedures before the Special Criminal Court allow an accused to seek discovery in advance of relevant materials. Where there are documents recording meetings with informers, or information from informers otherwise noted or recorded, the prosecution would be obliged to claim privilege in respect of these. That privilege cannot stand, however, if anything in the material gives rise to a reasonable doubt as to the guilt of the accused or, in other words, nondisclosure puts the assertion of innocence in peril; *DPP v Special Criminal Court* [1999] 1 IR 60, at p. 83. Such documents would not be given to the accused in the event of their pointing to the innocence of the accused. Rather, prosecution counsel would, in the role which O'Flaherty J characterises as being that of "ministers of justice", scrutinise the documents as to the innocence at stake exception and report their findings to the defence; *DPP v Special Criminal Court* at p. 87. There are basically only two possible reports of such scrutiny: firstly, that innocence has not imperilled by anything within the materials; and, secondly, if it is that the prosecution will not proceed with the charge because the privilege of the informer is not theirs to waive. The defence are, in addition to scrutiny by the prosecution, within their rights to seek to ask the court of three judges sitting as the Special Criminal Court to look at the documents themselves, and to rule if innocence is anywhere supported therein.

13. On behalf of Thomas Redmond, however, it is asserted that this safeguard is not satisfactory. Even though it is accepted on his behalf that judges can read documents and not have regard to them as evidence as to whether the prosecution have proved the charge beyond reasonable doubt, in other words not be prejudiced thereby, that procedure is asserted to be unsatisfactory. On behalf of Thomas Redmond it is argued that even if the court looked at the documents in the possession of the Chief Superintendent, the judges themselves could just as easily be misled by unreliable informants. Essentially, it was claimed on this appeal that without confrontation with the informant to assess the reliability of his information that the accused was a member of the self-styled IRA, a trial would be fundamentally unfair and contrary to Article 38.1 of the Constitution. The appointment of a special advocate, apart from and in addition to defence counsel, it is claimed for Thomas Redmond, would make that situation better but not perfect. In fact it was conceded on behalf of Thomas Redmond that the special advocate procedure would not save the impugned subsection from unconstitutionality. A special advocate would not be entitled to communicate any interaction he might have with the informer to the accused, thus undermining lawyer-client confidentiality and trust. The scope for cross-examination on the basis of the special advocate's reports to ordinary defence counsel would be limited, it is claimed, and would certainly be less than that which would apply in an ordinary criminal trial. Thus the system as it now is, and the system as it might be reformed to incorporate special advocate procedures would both fail, Thomas Redmond argues, to secure a fair trial. It might be further commented that the privilege of an informer would be infringed were he or she obliged to be reveal his or her identity to such a special advocate.

The ostensible necessity for the subsection

14. Before the High Court in the plenary action and before this Court on appeal, argument on both sides addressed the backdrop against which the impugned section of the Act of 1972 was introduced and which continues today. McMahon J summarised the evidence which he accepted in the High Court in that regard thus:

> Detective Superintendent O'Sullivan testified that he had served in

An Garda Síochána for thirty-two years and had spent over twenty years and involved in the investigation of subversive crime. His responsibilities are State security, the gathering and analysis of intelligence and the investigation of subversive crime within the jurisdiction. Referring to the increased activities and attacks of the IRA in the 1930s he explains the necessity for the introduction of the Offences against the State Act in 1939. The IRA was declared to be an unlawful organisation and that suppression order still continues in this jurisdiction. In detailed evidence to the court gave a brief history of the IRA and the emergence of a breakaway faction in around 1969, now known as the Provisional IRA. Having outlined the objectives of the IRA, he gave a description of the treatment meted out to people who are suspected of assisting police investigations, which included interrogations and torture and sometimes resulting in executions. The fact that it is an oath bound secret organisation divided into cells creates problems for the gardaí making it very difficult to infiltrate the organisation and gather evidence to prosecute member volunteers. The organisation is very energetic and trying to identify members of the public who provide information to the police and are very assiduous in collecting evidence including closely examining books of evidence to identify any such persons. If anyone is identified in this manner it usually results in serious torture or death. This represents a serious problem for the gardaí who bring prosecutions before the ordinary courts where witness and jury intimidation are not unknown. In 1972 the Government introduced an amendment to the Offences against the State Act 1939. Section 3(2) of this Act seeks to address the difficulties which confronted the law enforcement agencies in these situations. The witness also gave evidence that there are only about 69 members of the force of Chief Superintendent status or higher who can give evidence under [this provision]. In fact, he testified that only 17 or so have the relevant experience to give such evidence in practice.

The threat continues today. In 1994, the leadership of the Provisional IRA adopted a policy of cessation of military operations. This caused unrest with some hardliners and after the October Convention in 1972, for these policy matters were discussed within the republican movement, a breakaway group styling itself "32 County Sovereignty Committee" (subsequently the "thirty-two County Sovereignty Movement") was established. It was from this grouping that the "Real IRA" was born. This group is committed to securing its objectives by physical force and was strongly opposed to the political process favoured by the Provisional IRA. Subsequently, a campaign of violence throughout Ireland and the United Kingdom was carried out by this group. Detective Superintendent O'Sullivan gave details of the threat which this group represented for the State and the institutions of the State. He gave direct evidence of the many investigations into the activities of the IRA in which he was involved and declared that a common feature in all of these investigations is the presence of fear, intimidation and the threat of reprisals. As a result witnesses have refused to give evidence in court, even when they have initially made statements to the gardaí. When asked by counsel for the State, "Has it (ie section 3(2)) been an important tool in terms of prosecuting at obtaining convictions in respect of alleged offences of membership of subversive organisations, such as the Provisional IRA and the other variants of the IRA?" the witness replied "Yes, Judge. In the last number of years it has been of

> enormous help to An Garda Síochána in endeavouring to combat the threat posed by the IRA, and I believe if it were not there we would not have succeeded in counteracting that threat". He went on to say that the threat is an ongoing one and that without section 3(2) the hands of the police would be tied in their efforts to combat terrorism and the threat posed by the IRA.

15. To the evidence briefly referred to and the arguments summarised above, it might be added that the self-styled IRA has purported to carry out a campaign of sadistic violence and terrorism with the ostensible aim of achieving a united Ireland on behalf of all of the people of this island both before and after the Act of 1972 was passed. There has been no mandate for this. Dissent from the decision to cease violence in 1994 continues to pose a real threat of igniting further civil conflagration within this island. As this Court has previously commented, through the judgment of Geoghegan J at p.121 in *Kelly*, the legislative backdrop enables "a reasonable inference … that the subsection was enacted out of bitter experience."

High Court judgment

16. In the High Court, McMahon reasoned thus that the impugned section was in conformity with constitutional guarantees:

> At the end of the day, what is significant about s. 3(2) is that it merely makes admissible, evidence of what is the Chief Superintendent's belief. The court does not have to accept it, much less convict on it. Its abnormality in that regard is recognised in the system by the reluctance of the D.P.P. to proceed on such evidence only, as well as the reluctance of the Special Criminal Court to convict on it only. Its frailty is well highlighted by the defence in this case: the material on which the Chief Superintendent bases his belief is hidden from the accused and his legal advisors. Insofar as informers are involved, there is no opportunity offered to the accused to test their motives, their history, their integrity or what private agendas they may have. They are shadows, or "ghosts", as counsel for the defence describes them, with whom the accused cannot engage. To that extent, the accused is certainly placed at a disadvantage and has to engage in the normal adversarial process, labouring under a handicap. Nevertheless, when such evidence is admitted, the weight given to this evidence, alone or combined with other evidence is a matter for the trial court. In assessing the weight, in deciding how this piece of untested evidence feeds into the trial court's decision, the court will, no doubt, bear in mind the unusual nature of this evidence and all the weaknesses it has, as evidence being unavailable to, and untested and unchallenged by, the defence. Many judges, for these reasons, might well deem such "bare" opinion evidence insufficient to convict and may, if that is the only evidence before the court, say that the State has failed to prove its case beyond reasonable doubt. That is what happened in *The People (D.P.P.) v. Binéad* [2007] 1 I.R. 374.
>
> > "By ruling that it would not convict without supportive or corroborative evidence of that belief, the trial court clearly recognised the disadvantage which flows from and accrues to the defence in a trial, from the admission of such belief evidence with an accompanying claim to privilege which may limit, in a particular case, the ability to test fully by cross-

> examination the underlying material facts leading to that belief."
>
> I am not willing to say, however, that it could never be sufficient. The circumstances of each case will differ and that is why so much responsibility is, at the end of the day, placed on the trial court.
>
> It is also important to note that the Chief Superintendent gives his evidence in open court. The court has the obligation and the opportunity to assess the honesty of that belief. This belief evidence can be subjected to cross-examination. The court can examine, if it considers it necessary, the material on which the belief is based admittedly, out of sight of the accused, and make its own assessment as to whether it is sufficient to support the belief. (*Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60; *The People (Director of Public Prosecutions) v. Binéad* [2007] 1 I.R. 374, at 396).
>
> Contrary to the argument advanced by the plaintiff, I do not accept that there is a presumption that the Chief Superintendent is telling the truth. The accused can challenge the privilege. He can cross-examine the Chief Superintendent (perhaps a risky tactic in many cases) and he can give evidence himself. Fennelly J. speculates that if the accused gives evidence to that effect that he is not a member of the relevant organisation, it would be very difficult to convict him on the Chief Superintendent's "bare" evidence, and I agree. Finally, an appeal lies from the Special Criminal Court's decision to the Court of Criminal Appeal and, in some limited circumstances, on an exceptional point of law to the Supreme Court.
>
> For all these reasons, and given the ongoing threat that the named organisations still present to the security of the State, I am not satisfied that s. 3(2) is unconstitutional or, indeed, contrary to the Convention on Human Rights.

17. The challenge cannot be seen in isolation either from the facts as found by the trial judge or from the context in which the impugned section is set.

The legislative and constitutional context

18. Article 40.6 of the Constitution guarantees, "subject to public order and morality", liberty for the exercise of the "right of the citizens to express freely their convictions and opinions" and of the "right of the citizens to form associations and unions." Whereas laws regulating the manner in which the rights to form an association or a union may be passed, under Article 40.6.2º such laws may not contain any "political, religious or class discrimination." Therefore, proscribing an organisation as unlawful only accords with the constitutional guarantee of fundamental rights of association, where the purpose of that organisation or its methodology constitutes an attack upon the public order of the State. In nature, the State is Christian and democratic. According to the Preamble to the Constitution the people of Ireland enacted the Constitution "seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations." Article 1 of the Constitution affirms the "inalienable, indefeasible, and sovereign right" of the Irish nation to choose its own form of government and "to determine its relations with other nations". Ireland, thus, has but one government and one

military. While the island on which we live is divided into two jurisdictions, the text of the Constitution makes clear that any move towards unity must accord with the nature and fundamental doctrine of the State. In particular, Article 3 provides:

> It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

19. Any invocation of the Constitution by the Oireachtas within the text of legislation is highly unusual. In the context of outlawing an association of citizens, s. 18 of the Act of 1939 clearly set out both the legislative framework for proscribing an organisation as unlawful and the legislative purpose for such an enactment. Section 18 provides:

> In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations, it is clear by declared that any organisation which -
>
> (a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or
>
> (b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or
>
> (c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or
>
> (d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or
>
> (e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal or other unlawful means, or
>
> (f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of any local taxation,
>
> shall be an unlawful organisation within the meaning and for the purposes of this Act, and this Act shall apply and have effect in relation to such organisation accordingly.

20. This section does not have automatic effect by virtue of having been passed by the Oireachtas. Instead, it is dependent on the Government, under s. 19 of the Act of 1939, being "of opinion that any particular organisation is an unlawful organisation". Where that is so, a declaration may be published proscribing the

organisation as unlawful. In the history of the State, the only organisation in respect of which the Government has been of that opinion is the organisation falsely styling itself the Irish Republican Army, or the IRA, or Óglaigh na hÉireann, of which the offshoots of the Continuity IRA or Real IRA continue to be under that proscription. Any such declaration that an organisation is to be outlawed may, under the legislation, be challenged before the High Court which, upon hearing evidence, may under s. 20 of the Act of 1939, overturn the declaration of the Government, subject to appeal in the ordinary way. It is an offence under s. 21 of the Act of 1939, to be a member of such an unlawful organisation. Section 21 provides:

> (1) It shall not be lawful for any person to be a member of an unlawful organisation.
>
> (2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall—
>
> > (a) on summary conviction thereof, be liable to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment, or
> >
> > (b) on conviction thereof on indictment, be liable to imprisonment for a term not exceeding two years.
>
> (3) It shall be a good defence for a person charged with the offence under this section of being a member of an unlawful organisation, to show—
>
> > (a) that he did not know that such organisation was an unlawful organisation, or
> >
> > (b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and dissociated himself therefrom.
>
> (4) Where an application has been made to the High Court for a declaration of legality in respect of an organisation no person who is, before the final determination of such application, charged with an offence under this section in relation to that organisation shall be brought to trial on such charge before such final determination, but a postponement of the said trial in pursuance of this sub-section shall not prevent the detention of such person in custody during the period of such postponement.

21. Article 38.1 of the Constitution in prohibiting trial on any criminal charge "save in due course of law" requires the application of basic principles of justice to the criminal process; *State (Healy) v Donoghue* [1976] IR 325, at p. 335 per Gannon J. In terms of the many cases opened on this appeal, the most apposite explanation as to the basic elements of the guarantee to every accused of a fair criminal trial is to be found in the judgement of Costello J in *Heaney v Ireland* [1994] 3 IR 593, at

p. 605-606, where he said:

> It is an Article coached in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. These basic principles may be of ancient origin and part of the long established principles of the common law, but they may be of more recent origin and widely accepted and other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, or charged a second time with the same offence, the principle that an accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at his trial, or all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article. Furthermore, the Irish courts have developed a concept that there are basic rules of procedure which must be followed in order to ensure that an accused is accorded a fair trial and these basic rules must be followed if constitutional invalidity is to be avoided.

22. On this appeal the State have not argued that a trial which includes evidence of belief under s. 3(2) of the Act of 1972 infringes the prohibition in Article 38.1 but is somehow excused by reason of the serious nature of the threat to the existence and authority of the State which an unlawful organisation represents. A real and substantial risk that an unfair trial will result in consequence of a legislative provision is not to be regarded differently from situations where trials have been prohibited on judicial review, or stopped by the trial judge, due to causes such as extreme delay, or other forms of serious prejudice such as the loss of vital evidence of genuine help in establishing the innocence of an accused. All such analyses are, in any event, fact dependent.

23. Where there is a real and substantial risk of an unfair trial due to either delay in prosecution or adverse publicity or the absence of witnesses or the loss of evidence, which defect or defects could not be cured by appropriate rulings and directions of the trial judge and by other actions to make the trial process fair, the trial should be prohibited; see *Nash v DPP* (Supreme Court, unreported, 29 January 2015) at paras. 14 and 15. While the community has the right to be protected from the recurrence of crime and while the substance of this right must embrace the detection and prosecution of offenders, any ruling as to where the balance of fairness has been overstepped in legislation must take into account the nature of the threat involved which the offence seeks to prohibit, the responses open to an accused facing such a charge and whether the danger of unfairness complained of is, on the one hand, real or, on the other hand, unsubstantiated. Where it is demonstrated, however, that the admission of particular categories of evidence takes a criminal trial out of the core guarantees of the rights of a person accused of crime and presumed to be innocent, legislation enabling that step cannot conform to Article 38.1 establishing that trials shall "be in due course of law". In the balance of rights as between the community and the accused, demonstrated unfairness in consequence of the admission of particular categories of evidence will mean that the community's right to ensure that offences are prosecuted must yield to the constitutional requirement that such prosecutions embrace due process; see *B v DPP* [1997] 3 IR 140 *per* Denham J.

24. The Constitution, it must be remembered, always contemplated that threats to the State such as those represented by the various iterations of the self-styled IRA could occur. Thus, Article 38 derogates from the ordinary rule that criminal charges

should be tried in the ordinary way either by judges in courts of summary jurisdiction or by a judge sitting with the jury where the charge was serious. Article 38.3.1º provides:

> Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

25. In that context, s. 3(2) of the Act of 1972 is operative only while Part V of the Offences Against the State Act 1939 is in force. Only where the Government makes a declaration in accordance with Article 38.3.1º of the Constitution can Part V of the Act of 1939 be operative. The structure and organisation of those special courts before which alone a charge of membership of an unlawful organisation can be tried, of which the only one is the Special Criminal Court, are a matter of law under with Article 38.3.2º. Under the now current Rules of the Special Criminal Court 1972, the trial bench will consist of three judges from the three jurisdictions in which crime is tried in the State, namely the High Court, the Circuit Court and the District Court. Such judges are likely to be criminal law experts. Decisions as to conviction or acquittal are given by way of written ruling, in contrast to the declaration of a verdict of guilty or not guilty by a jury in the ordinary way or, exceptionally, where it may be necessary to have an answer to a question from the jury as posed by the trial judge.

Operation of the section

26. No comment is made hereby as to civil proceedings or as to the admissibility of opinion or belief evidence where the standard of proof is that of probability. These comments are confined to criminal charges in the context of Article 38.1 of the Constitution. It is established that proof beyond reasonable doubt of the offence of membership of an unlawful organisation is not otherwise available save through the reception of evidence from a Chief Superintendent that the accused is in that officer's belief a member of an unlawful organisation. It is also clear that the proscribed unlawful organisation constitutes a usurpation of the authority of the State and remains a threat to the entire community. Any source of evidence as to membership of that secret terrorist organisation cannot come, as in the ordinary way, from witnesses to the commission of crimes or from surviving victims of crime. The evidence as accepted by McMahon J establishes that were any person to leave the self-styled IRA and turn State's evidence against his or her comrades, the result would probably be murder. Hence, the source of evidence in these unique circumstances can only be from the expertise of a small number of very senior police officers who are tasked with the role of intelligence in order to penetrate this closed and retributive sphere. No other criminal charge carries, or could ever be predicted to carry, those unique challenges. As may readily be appreciated, other crimes may be opportunistic or planned, spontaneous or organised, but such crimes leave physical signs in their wake or can be testified to by those unfortunate enough to be their victims or by those who have otherwise relevant evidence to give. Membership is the only crime in respect of which such belief evidence may be given; and rightly so. The unique set of challenges and dangers which this necessary prohibition represents is not reproduced or echoed in any other criminal offence. Any endorsement of constitutionality from this Court cannot therefore be adopted as a precedent for use in relation to any other area of criminal evidence or procedure. Further, it is in the context of it being open for an accused to defend himself or herself against the charge and the multiple safeguards available, that the impugned section of the Act of 1972 must be judged.

Safeguards

27. Through any claim of privilege on any kind of criminal charge, the normal entitlement of an accused to see all evidence relevant to a charge is infringed. This does not mean that the result is necessarily an unfair trial. In many other areas, it is necessary to use confidential information to forward police investigations and a prosecution may, for instance, be initiated in consequence of a complaint by an informer. The withholding of such information from the defence does not render a trial unfair. Through the invocation of a challenge, the accused may require first the prosecution and then the judge, if it is a jury trial, or judge where it is a summary offence tried without a jury, or judges, where the Special Criminal Court is the court of trial, to examine the documents in question with a view to scrutinising whether the innocence at stake exception should overrule the privilege. As the Supreme Court stated *per* Geoghegan J in *Kelly* at p. 121, the section of the Act of 1972 impugned in these proceedings authorises the giving of evidence about the basis for the Chief Superintendent's belief but not to the extent that it interferes with or defeats a legitimate plea of privilege: "As the normal rights of an accused are being infringed, it would seem to me that there must be a constitutional requirement that such limitation be kept to a minimum."

28. As a matter of the development of the common law, some categories of evidence are subject to a warning by the trial judge to the jury of the dangers of acting on such evidence alone. Such categories include visual identification and accomplice to crime evidence. While there is no requirement in the Act of 1972 that the belief of the Chief Superintendent be corroborated, or be supported by, other external evidence to that belief, it is clear that over the decades of the operation of the section, a practice has developed in the office of the Director of Public Prosecutions that such a charge should not be brought without supporting evidence. While in the past it has seemed possible that such evidence alone might ground a conviction for membership of the self-styled IRA, it is also clear that any bench of judges in the Special Criminal Court proposing to adopt such a course would be cognisant of how serious a step this would be. While it does not assist to decide that a formal warning should be recorded in any such judgment of the Special Criminal Court dependant only on such belief evidence, what matters is that this step would have been regarded as extraordinary. As Geoghegan J noted in *Kelly* at p. 122:

> It has been the practice apparently of the Special Criminal Court not to convict on the belief evidence alone. In my view, that practice is commendable though not absolutely required by statute. There may be exceptional cases where the Special Criminal Court in its wisdom would be entitled to convict on the belief evidence alone. Equally commendable is the practice of the Director of Public Prosecutions of which the court has been informed, not to initiate a prosecution based solely on the belief evidence. These self-imposed restrictions by the Special Criminal Court and by the Director of Public Prosecutions are with a view to ensuring a fair trial. In this case, there was plenty of outside evidence and it was well within the discretion of the Special Criminal Court to convict the appellant for the reasons given by the Court of Criminal Appeal.

As is apparent, both in *Kelly* and in this case, there was supporting evidence. It is inappropriate to comment thereon as the weight to be attached to evidence depends on the building blocks of the prosecution case, any challenge or evidence offered by the accused and how such evidence fits into the particular factual matrix of any case. Peculiarly, this is a matter for the court of trial. Weighing the evidence in the context of the particular building blocks of the prosecution case, in the

context of any matter pointed to by the accused and in the light of any evidence offered by the accused, is a matter of considering whether when the tribunal of fact retires it comes to the conclusion that there is evidence there to convict on that charge or whether proof beyond reasonable doubt is lacking.

29. In terms of how it may operate, only on a charge of membership of an unlawful organisation, only in the context of a declaration by the Government that the ordinary courts are inadequate to secure the effective administration of justice, only before a bench of three professional judges in the Special Criminal Court, only where a written ruling explains the acceptance or rejection of that evidence, the impugned section of the Act of 1972 is bounded by safeguards which point to its exceptional nature and which support the guarantee of a trial in due course of law in Article 38.1. Whereas, in argument on this appeal on behalf of Thomas Redmond, it has been asserted that the very small number of gardaí with the necessary rank to give such evidence may be deceived, it is significant that on the evidence before McMahon J, rank is not of itself regarded as sufficient without the officer possessing also the necessary experience. The nature of that expertise and experience may, of course, be challenged through cross-examination on behalf of the accused. As Geoghegan J commented in *Kelly* at pp. 120 to 121:

> It 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 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.

30. It was further urged on behalf of Thomas Redmond that cross-examination was so restricted by the section as to neutralise this important aspect of fair procedures as a defence safeguard. This is not so. The experience and expertise of even a Chief Superintendent claiming privilege can be challenged, and challenged with effect, where the underlying facts are exposed as grounding the belief in an officer of insufficient standing. The life choices and activities of the accused as not supporting membership of the self-styled IRA can be put to such a witness by the defence. Such questions have the potential to undermine belief evidence as may

evidence of denial by the accused or other relevant defence evidence. That senior officer, further, is constricted not to hold back evidence with the purpose or effect of taking the defence unawares. In *The People (DPP) v Cull* [1980] 2 Frewen 36, an appeal in respect of a conviction for membership of the self-styled IRA, evidence served prior to the trial only referred to the belief of the Chief Superintendent. When the accused came to give evidence, material not disclosed through pre-trial service of documents by the prosecution was put to him. This was regarded by the Court of Criminal Appeal as irrelevant and prejudicial. It is inherent in the section that the rights of the accused be respected by proper disclosure to the accused in advance of the trial. In this, a trial for membership of an unlawful organisation is no different to any other criminal trial. At p. 42, Gannon J commented:

> The provisions of Part II of the Criminal Procedure Act, 1967, requiring that an accused person be informed of the nature and substance of the evidence intended to be offered in support of the charge preferred against him, form part of the essential requirements of a fair trial. From the transcript and the submissions on behalf of the Director of Public Prosecutions in this Court it seems that at the time the statements of evidence were furnished to the applicant for his trial, facts concerning his conduct of the nature indicated in section 3(1) of the 1972 Act were known to the Garda Síochána and had been known for sufficient time to have had it determined whether evidence thereof could be offered in support of the charge. From the submissions made it seems that such evidence as was available would not fulfil the requirements of sub-section (1) of section 3 of the 1972 Act, and that no reference was made in the statement of evidence furnished to the applicant to such facts on the grounds that to do so would be prejudicial to the defence of the accused upon his intended trial. Having been then excluded upon such grounds, matters of that nature should not have been put to the applicant for the first time in the course of his cross-examination. It appears from the transcript that the Special Criminal Court disapproved of the introduction of these matters in this manner. But it appears to this Court that the prejudicial effect was such that the Special Criminal Court found in these matters a basis for a disbelieving the denial by the accused of membership of the illegal organisation alleged.

31. It is also claimed on behalf of Thomas Redmond that where supporting evidence indicating membership of the self-styled IRA is coupled with the belief evidence of a Chief Superintendent, the accused must thereby be advised by counsel for the defence not to give evidence. This, however, ignores the fact that the right of an accused to give evidence is inherent in the criminal trial process. That right was first conferred in England in 1898 in the Criminal Evidence Act of that year but was not passed in respect of Ireland until independence in 1924 with the Criminal Evidence Act of the same year. In considering whether to give evidence or not, an accused is in no different a position on being prosecuted for membership of an illegal organisation than being prosecuted for any other crime. Advice or not, the final decision as to giving evidence or merely testing the prosecution case is one for the accused. That choice will depend upon a myriad of factors, perhaps the most important of which is the degree to which the accused can confront or deny the prosecution case. It is clear from the decision of the Special Criminal Court that the ordinary rule applicable to every criminal trial that no inference is to be drawn from the failure of an accused to give evidence was applied when Thomas Redmond chose not to enter the witness box. That choice was his. The fact that the prosecution had produced supporting evidence to the belief of the Chief Superintendent is simply a circumstance of the trial and not in any way attributable to any constitutional infirmity in the impugned section.

32. It has also been suggested on behalf of Thomas Redmond that there is a presumption that any Chief Superintendent giving evidence is, firstly, truthful and, secondly, reliable. That is incorrect. While Fennelly J in the *Kelly* case suggests that p. 135 that a court of trial was entitled to assume that an officer of the rank of Chief Superintendent would give evidence of his belief that an accused person was a member of an unlawful organisation only when he had satisfied himself of this fact beyond reasonable doubt, this is no more than saying that the Special Criminal Court is entitled to enquire into such a factor and that the accused is entitled to cross-examine in that regard. Insofar as it has been suggested on behalf of Thomas Redmond that thereby some kind of onus is put upon an accused person when charged with membership of an unlawful organisation, this is completely misplaced.

33. This Court in the *Kelly* decision made it clear that there is no special status to such evidence. Furthermore, there is not the slightest indication in the Act of 1939 or otherwise in the Act of 1972 that any presumption, evidential or substantive, has been created. In terms of other legislation, it is clear that in appropriate circumstances presumptions which reverse the ordinary burden of proof may be created through clear words or may already exist at common law. Examples of the latter are the presumption that a person committing a crime is not insane and that an offender intends the natural and probable consequences of their action. Such presumptions can be rebutted and as regards the latter presumption, the burden is on the prosecution to show that it has not been rebutted. There is no such thing as an irreversible presumption against an accused in criminal law; *DPP v Ennis* [2011] IESC 46. There is no such presumption here. Geoghegan J in *Kelly* made this plain when, at p. 122 of the report, he stated:

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

34. Indeed, it has been commented by this Court in *The People (DPP) v Connolly* [2015] IESC 40, at para. 37, and by the European Court of Human Rights in the case of *Donohoe v Ireland* that courts of trial are alert to the need for caution. That is their function. Individual circumstances will vary but, for example, in that case before the European Court of Human Rights at para 88 of the decision it was commented:

> … [T]he trial court was alert to the need to approach the Chief Superintendent's evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence as a result of its decision upholding that claim. It proceeded to adopt a number of measures having regard to the rights of the defence.
>
> Firstly, the court reviewed the documentary material upon which [the Chief Superintendent's] sources were based in order to assess the adequacy and reliability of his belief. While the Court does not regard such a review, in itself, to be sufficient to safeguard the rights of the defence … It nevertheless considers that the exercise of judicial control over the question of disclosure in this case provided an

> important safeguard in that it enabled the trial judges to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed material … .
>
> Secondly, the trial court in considering the claim of privilege was alerted to the importance of the 'innocent at stake' exception to any grant of privilege. It confirmed, expressly, that there was nothing in what it had reviewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. …
>
> Thirdly, in coming to its judgement the court stated, specifically, that it had expressly excluded from its consideration any information it had reviewed when it was weighing the Chief Superintendent evidence in the light of the proceedings as a whole. It further confirmed that it would not convicted the applicant on the basis of [that evidence] alone but that it required his evidence to be corroborated and supported by other evidence.

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

35. In prosecutions for membership of an unlawful organisation, as in every other case, the overall fairness of the trial is within the command of the judges of the court of trial. Unfair trials are not acceptable under the Constitution. Every trial is subject to an appeal system and, in that regard, the comments of O'Donnell J in the *Donnelly* case at para. 20 are apposite:

> This Court accepts that the statutory provisions in issue are significant alterations to the common law and together with the privilege which normally attaches to the identity of informers and indeed to methods of information gathering, make more difficult the task of defending persons accused with the offence of membership of an unlawful organisation in particular. However, a fair trial whether pursuant to Article 38 of the Constitution or Article 6 of the Convention is not necessarily to be understood as a trial in which a defence is facilitated. The question at all times is whether a trial under such conditions is fair. Nevertheless the Court accepts that the provisions of s.3 of the Act of 1972 and s.2 of the Act of 1998 require careful scrutiny. Even where it is accepted that the statutory provisions whether individually or cumulatively do not offend at the level of principle, there remains in any given case an issue as to the fairness of the individual trial.

36. In terms of the fairness of belief evidence, it was correctly noted by the Court of Criminal Appeal in the *Donnelly* case that such testimony was being applied not to a single individual act in the past, such as murder or sexual violence, but only to the kind of continuing state of affairs where such a belief can rationally and securely build up over time. As O'Donnell J stated at para. 26:

> [I]t is noteworthy that the evidence pursuant to s.3(2) can only be given in relation to one category of offence, that is membership of an unlawful organisation. For the reasons set out in Kelly and Redmond, those organisations determined to be unlawful organisations pursuant to the Act of 1939 are cell based, secretive, and violent

> organisations which invest considerable resources in the enforcement of secrecy about the membership of such organisations, and do so by torture, death, and by the inevitable fear that those methods engender. Membership is normally a continuing state of affairs, rather than a single activity, and is accordingly more susceptible to belief evidence of a senior garda officer, based on a variety of sources over a period of time, than if such evidence was admissible in respect of a single criminal activity. Whatever the justification, it is certainly the case that such belief evidence is only admissible in respect of membership of an unlawful organisation.

Gathering such evidence is, as the European Court of Human Rights, observed in *Donohoe v Ireland* at para. 90 "a complex intelligence gathering and analytical exercise." It continues over time and the analysis to which it must be subjected is likely to challenge error.

Special advocates

37. The concession on behalf of Thomas Redmond that some form of limited role for a special lawyer in examining documents on behalf of the accused would not cure the argued-for unconstitutionality of the impugned section, means that only a brief comment is required on this issue. In some jurisdictions where restrictions are placed on persons in the context of immigration or national security, a special advocate may be appointed in order to secretly examine the papers which point to the concerns of the authorities and to make representations on behalf of the restricted person. An example is *Zaoui v Attorney General (No 2)* [2005] NZSC 38. A case in Canada where a specially authorised lawyer subject to a rigorous background check was similarly engaged was *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.Akin to this, in relation to what appears to be combatant detention, or more properly the suspicion of enemy status, certain elaborate procedures have been engaged in the United States of America; see *Hamdi v Rumsfeld* 542 US 507 (2004). In our neighbouring jurisdiction other procedures have been applied; Secretary of State for the *Home Department v MB* [2008] 1 AC 440. Cases on control orders in that jurisdiction include Secretary of State for the *Home Department v MB* [2008] AC 440 and Secretary of State for the *Home Department v AF* [2009] UKHL 28. In the latter, the three appellants were subject to control orders involving significant restriction of liberty under s. 2 of the Prevention of Terrorism Act 2005 on the ground that the Secretary of State had reasonable grounds for suspecting that the appellant involved in terrorism-related activity. The decision of the European Court of Human Rights on 19th February, 2009 in *A and others v United Kingdom* (Application No 3455/05) was also canvassed extensively. All such cases were not in the context of a criminal conviction but, rather, the placing of administrative restraints on liberty, subject to judicial overview. The origin of any such cases in the Commonwealth is neither here nor there.

38. In the High Court in *Director of Public Prosecutions v Special Criminal Court* [1999] 2 IR 60, Carney J made it clear that it is fundamental to the relationship of accused and defence counsel in the context of representation in a criminal case that open communication be untouched. In that case, the Special Criminal Court had made an order that documents withheld by the prosecution should be disclosed to the legal representatives of the accused Paul Ward but not to Paul Ward himself. This, Carney J held, at p. 75, undermined Article 38.1 of the Constitution because, as he said, "it does not seem to me that there would be a trial in accordance with constitutional justice if any … legal representatives did not enjoy the full lawyer-client relationship with their client, but were under an obligation to keep secrets from him." On appeal to this Court, that point was accepted, O'Flaherty J pointing out that such disclosure would destroy informer privilege and would remove from

an accused the right to conduct his own defence; see p. 84.

39. It has not been argued that this decision was wrong and should be departed from in accordance with the established test laid down by this Court as a matter of general principle, in non-constitutional matters, that a prior decision of the Supreme Court should be followed by that Court unless it is demonstrably wrong and it is in the interests of justice to depart from the previously held position; *Mogul v Tipperary (North Riding) County Council* [1976] IR 260, and as to constitutional issues see *Jordan v Minister for Children and Youth Affairs & ors* [2015] IESC 33, O'Donnell J at para. 63.

Real issue

40. All of this argument on behalf of Thomas Redmond has been very much beside the point and speculative. A plain reading of the impugned subsection of the Act of 1972 makes it clear that belief evidence is admissible within the safeguards so carefully constructed by the legislature around the operation of the provision. Article 38 in guaranteeing that a trial on a criminal charge be in "due course of law" addresses both substantive and procedural minimum standards and in doing so enforces the fundamental rule that where reasonable people within the community with a complete knowledge of the facts might reasonably doubt that an accused had committed a crime, that accused should be acquitted. Further, it has been acknowledged in several decisions that where a prosecution consists of the bare evidence by a Chief Superintendent that an accused is a member of an unlawful organisation and where the accused counters this by giving contradictory evidence, the possibility a conviction in those circumstances would be very much undermined. In addition, the practice over decades both by the prosecuting authorities and by the Special Criminal Court establishes, to a degree, the reasoned basis upon which the initiation and condemnation of accused persons on the charge of membership of the self-styled IRA is founded. Prosecutions are dependent upon the evidence of a Chief Superintendent in order to make the charge of membership of a prescribed organisation viable for prosecution. This charge is vital to the maintenance of the democratic polity of this country. But, over decades now such belief evidence has been supported by some other evidential circumstance whereby, analysed together, that evidence may be characterised as collectively sufficient to establish the liability of the accused to be convicted, whether defence evidence has been given or not. The several statements as to the practice within the Special Criminal Court in approaching such belief evidence and the rightful reluctance of that court to convict where belief evidence stands alone, supports the constitutionality of the impugned subsection in admitting such belief evidence at trial in the context of the safeguards which the charge attracts. Among those safeguard is that the belief evidence should not stand alone but that the charge should otherwise be supported by some other piece of evidence, or some admissible circumstance, which supports the charge. On the current case law, that support would be independent of the belief evidence. Of course, all evidence should be credible, as Hardiman J states in his judgment.

41. While the categories of evidence calling for a warning to be given to a jury, or to be self -administered in the case of the District Court or the Special Criminal Court, that it is dangerous to convict on particular classes of evidence without corroboration are not closed, misstatement of case law in argument on that complex context is a real danger. With the necessary backdrop of Article 38 of the Constitution, the Oireachtas in enacting subsection 3(2) of the Act of 1972 was merely adding to the categories of evidence which might support a particular charge in a particular context. In so doing, they were not undermining the Constitutional guarantee of substantive fairness in the ultimate result of a criminal

trial. Consequently, where the belief evidence of a Chief Superintendent that the accused is a member of an unlawful organisation is supported by some other evidence relevant to the charge, the constitutional guarantee is supported. As 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 the trial that the Special Criminal Court may convict or may fail to be convinced by an entire body of testimony. The judgment at trial in this case, indeed, while exemplary in its approach in terms of the summary cannot be regarded in any way as setting down any particular methodology. The assessment of and weight to be attached to evidence is a matter for the judges at trial. There is no legal formula in that regard.

Comment

42. At the end of his judgment in the High Court, McMahon J notes that issues as to declarations as to the rights of the accused before the Special Criminal Court on a charge of membership of an unlawful organisation were not decided by him because of his rejection of the first issue raised on behalf of Thomas Redmond. There was some unfortunate confusion in arguing this case for Thomas Redmond as to what might yet be in the case, notwithstanding the manner in which it was argued on this appeal.

43. Cases can occur where points are so completely insubstantial as to not require individual ruling in the High Court in the context of issues that have been seriously argued. It is also correct that issues of damages may be left over where liability is decided against a litigant. Where, however, two or more issues of substance are raised and the first is decided against an applicant or plaintiff, it might be borne in mind that it assists the appeal process for the judge that determines to dismiss the case, to also give a view as to any other substantial points that were argued in the High Court and which might later be sought to be argued on appeal. Naturally, given the dismissal of a central point of substance, any subsequent ruling on points that were argued in addition may be concise.

Conclusion

44. There is no presumption of special merit attaching to the evidence of a Chief Superintendent in giving evidence of his or her belief on a trial of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act 1939 that an accused is such a member. There is nothing in the text of s. 3(2) of the Offences Against the State (Amendment) Act 1972 which establishes any element of favouritism towards such evidence or which in any way reverses the ordinary standard and burden of proof. Nor does any decision of this Court or any other court. Such belief evidence is merely admissible evidence. As such, it may be rejected, contradicted or challenged in the ordinary way. Article 38.1 of the Constitution establishes "due course of law" as a standard of fairness which guarantees that criminal trials are conducted as a rigorous examination of the prosecution proofs and that guilt is not pronounced unless the proof of the accused's guilt is established beyond reasonable doubt within the context of fair procedures. The impugned provision does not offend against that constitutional guarantee where such belief evidence is part of a body of evidence. That is what happened in this case. No guarantee within Article 38 is offended where such belief evidence is supported by some other piece of evidence or circumstance which

supports the charge. The impugned subsection applies only: before the Special Criminal Court; where a written ruling is given explaining the reasons for relying on such evidence; on an offence of membership of an unlawful organisation; where the Government has made a proclamation that the ordinary courts are inadequate to secure the effective administration of justice; where the accused may in the ordinary way give evidence; where privilege may be claimed as to sources which are confidential, as in any other case, but which privilege is subject to review by the court of trial; where the nature of the offence charged is continuing, allowing a belief to build up over time; where that belief may be challenged; and may be the subject of rebutting evidence by the accused.

45. The Oireachtas has chosen to alter the rules of evidence only in respect of a particular offence within a particular legal context and in which both common sense and experience demonstrate would make practical proof otherwise impossible in practical terms. It is only within that context that the section should be analysed as meeting the standard of fairness in criminal trials which is guaranteed by Article 38.1 of the Constitution.

46. The claim on behalf of Thomas Redmond that s.3(2) of the Offences Against the State (Amendment) Act 1972 is unconstitutional is therefore dismissed.