

[UNAPPROVED]

[NO REDACTION NEEDED]



**THE COURT OF APPEAL**

[278/19]

[279/19]

Neutral Citation No: [2021] IECA 342

**The President**

**Edwards J.**

**Kennedy J.**

**IN THE MATTER OF A SECTION 23 APPEAL**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**AND**

**RK**

**RESPONDENT**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**AND**

**LM**

**RESPONDENT**

**JUDGMENT of the Court delivered (electronically) on the 21<sup>st</sup> day of December 2021  
by Birmingham P.**

1. From October to December 2019, the respondents stood trial in the Special Criminal Court charged with the offence of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939, as amended by s. 48 of the Criminal Justice (Terrorist

Offences) Act 2005. On 5<sup>th</sup> December 2019, day 36 of the trial, the Special Criminal Court acceded to an application to exclude the belief evidence of a Chief Superintendent that each accused before the Court was, on the date charged on the indictment, a member of an unlawful organisation, the evidence of which was tendered pursuant to s. 3(2) of the Offences Against the State Act 1972 and, in consequence, directed verdicts of not guilty.

2. The Director of Public Prosecutions has, pursuant to s. 23 of the Criminal Procedure Act 2010 (as amended), brought a “with prejudice” appeal against those acquittals. The Director seeks from this Court: (i) an order quashing the acquittals by direction of the court of trial; (ii) an order determining that the court of trial erred in law in excluding “compelling evidence” within the meaning of s. 23(14) of the Criminal Procedure Act 2010; and (iii) an order directing that the respondents be retried for the offence in respect of which acquittals by direction were ordered. The notice of appeal focuses on what is contended to have been an erroneous exclusion of the evidence of Detective Chief Superintendent Howard given pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972, to the effect that he believed that each of the accused was, at the material time, a member of an unlawful organisation. It is contended that the evidence referred to constituted compelling, reliable evidence of significant probative value and as such, when taken together with all the other evidence adduced in the proceedings concerned, it was evidence upon which the court of trial could reasonably have been satisfied beyond reasonable doubt as to the guilt of the accused in respect of the offence charged.

3. The respondents have each resisted the application brought by the Director. In addition, the Irish Human Rights and Equality Commission (“IHREC”) sought, and was granted, leave to participate in the appeal proceedings as an *amicus curiae*. In fact, for reasons which will become apparent, this Court has not, with all due respect, been greatly assisted by the intervention of the IHREC.

### **The evidence of Chief Superintendent Howard**

4. The charges faced by the respondents arose out of the investigation into the murder of Mr. Peter Butterly, which occurred at the Huntsman Inn, Gormanston, County Meath, on 6<sup>th</sup> March 2013. In addition to presenting other evidence, the prosecution sought to adduce evidence of the belief of Detective Chief Superintendent Howard, Head of the Special Detective Unit (“SDU”), that each of the accused before the court of trial was, on the date charged on the indictment, a member of an unlawful organisation. Initially, there was an objection to the Chief Superintendent giving evidence, and it was asserted that the prosecution “must establish that all of the materials relied on are in fact privileged.” However, Chief Superintendent Howard was in fact called to give evidence, and in the course of his evidence, he stated that it was his belief that each accused before the Court was a member of an unlawful organisation “styling itself the Irish Republican Army (otherwise known as Óglaigh na hEireann, otherwise the IRA)”, and that each was a member of that unlawful organisation within the State on 6<sup>th</sup> March 2013.

5. When giving evidence on 21<sup>st</sup> November 2019, the Chief Superintendent said that he wished to clarify that he did not take into account any of the events leading up to the murder of Mr. Butterly or events on the day of the murder, nor did he take into account the subsequent investigation in relation to the murder of same. Similarly, he said he did not take into account the fact that both respondents were observed with, or associated with, individuals who had been convicted of a scheduled offence before the Special Criminal Court. Moreover, he stated that he did not take into account any matter discovered arising from the arrest of LM on 9<sup>th</sup> April 2013, or any matter arising at the time of RK’s arrest on 6<sup>th</sup> March 2013. He stated that he was totally satisfied beyond a reasonable doubt as to the accuracy and reliability of the material upon which he based his belief in relation to both of the then accused.

6. Prosecution counsel referred to the fact that a letter had been sent by solicitors on behalf of LM asking for all documentation and other materials, in whatever form, which in any way formed the basis of, was relevant to, or touched on his belief that LM was a member of an unlawful organisation as set out in the statement of evidence. The Chief Superintendent was asked what his attitude was to disclosing such material, and he responded as follows:

“[T]he IRA are a guerrilla army. They are based on secrecy. They engage in murder, intimidation and it’s – I’m basically, I have serious concerns for the protection of life and property and I’m claiming privilege on the basis of protection of life and property. I also want to protect ongoing and future operations and obviously the security of the state, Judges, in relation to an unlawful organisation such as the IRA.”

7. Prosecution counsel said to the witness that he been asked what the nature of the sources of the confidential information referred to in the statement was, and what his attitude was to that, and the witness responded:

“Again, Judges, I have serious concerns if I was to divulge the nature and content of the material upon which I base my belief, that there would be a serious issue in relation to protection of life. So, on that basis, I’m claiming privilege in relation to the protection of life and property and to protect ongoing and future operations as well as the security of the State.”

8. Prosecution counsel then explored with the witness what his attitude was to other requests for information. It was said to him that he had been asked whether sources were human or non-human and what his attitude to that was. Again, the witness responded by saying:

“Again, Judges, I’m claiming privilege in relation to the material that I reviewed on the basis of the protection of life and property, the security of the state and to protect ongoing and future operations against the Irish Republican Army.”

**9.** Counsel said that the witness had been asked whether the sources were Garda or otherwise, and what his attitude to that was, and the witness responded:

“Again, Judges, I’m claiming privilege in relation to the material that I reviewed and upon which I base my belief for the same reasons as I’ve explained.”

**10.** Counsel asked about the fact that if the sources were human, would the witness identify the persons and provide details of any convictions they might have, and again, the witness responded:

“Judges, again I would have serious concerns for the protection of life if I was to divulge the content and nature of the material that I reviewed and I’m claiming privilege for the reasons I’ve outlined.”

**11.** The witness was reminded that he had been asked if there were registered or non-registered covert human intelligence source participants, and what his attitude was to that request. To this, the witness responded:

“Judges, I haven’t confirmed whether there is or there isn’t a covert human intelligence source, but I’m claiming privileges in relation to the material upon which I base my belief and I certainly would have serious concerns for the protection of life, security of the state and to secure ongoing and future operations against the Irish Republican Army.”

**12.** It was put to the witness that he had been asked to confirm if any immunity from prosecution or other benefits had been given to any person or persons, and what his attitude was to that. Once more, he responded:

“Again, Judges, I’m claiming privilege in relation to the material that I reviewed and upon which my belief has formed on the basis of the protection of life and property, and to secure the State, as well as to ensure that ongoing and future operations against the IRA are not compromised.”

**13.** Counsel reminded the witness that he had been asked for the contents of the information supplied by such sources and asked what his attitude was to that, and he responded in like manner, saying:

“Again, Judges, I haven’t confirmed what the sources are, but I am claiming privilege in relation to the material that I reviewed for the reasons that I have already outlined.”

**14.** Counsel then turned to the fact that the witness had also been asked to confirm on what date he was asked by the investigation team to review materials (as described in the statement), and to provide copies of any documents, including memos, emails, letters, *etc.* in relation to the request from the investigation team. The witness responded by saying that it was his recollection that he was approached by Detective Sergeant Boyce around 1<sup>st</sup> December 2017 with a request from the investigation team to review material in his possession and in the possession of An Garda Síochána in relation to both accused. The request was made orally to the witness – there were no emails, memos or letters, nor was there anything by way of a written request.

**15.** The witness was reminded that he had been asked who compiled the materials for the purpose of the review undertaken by him, and the witness said that he was again claiming privilege in relation to the material that he reviewed on three grounds: the protection of life and property, public interest privilege in relation to the security of the State, and to protect ongoing and future operations. He was asked in what format were the materials provided to him for review, and in response to that, he said that he had clarified that the material was not prepared specially for the review and that the materials were in paper format.

**16.** The witness had been asked whether any scoring or rating system had been deployed or marked on the materials prior to the materials being provided to him; he responded by saying that he had not indicated the sources of the material, but he was claiming privilege in relation to the material that he had reviewed and upon which he formed his belief on the basis of the

protection of life and property, public interest in relation to the security of the state, and to protect ongoing and future operations against the IRA. The witness said that he had indicated that there had not been any scoring or rating system used by him when assessing the materials.

**17.** Counsel recalled that the witness had been asked whether all materials reviewed were obtained lawfully by An Garda Síochána, and his response to that was, “I answered, yes, they were lawfully obtained, Judges”. Counsel’s final question was to ask whether the materials were capable of being reviewed by the court of trial for the purpose of examining the claim of privilege which had been made, to which the witness responded, “[y]es, Judges, if I’m directed by the Court to produce the material upon which I base my belief, I’ll certainly provide the Court with the material.”

**18.** When the direct evidence of the Chief Superintendent concluded, instead of proceeding to cross-examine (as would be the norm) defence counsel addressed issues of privilege by way of submission. Counsel protested at the breadth of the claim for privilege and pointed out that questions to which there had been objections in this case had been answered in others. In debate with members of the court of trial, there was focus on the decision in *DPP v. Martin Kelly* [2006] IESC 20 where there had been a reference to the date on which the Chief Superintendent formed his belief, and the case of *Donohue v. Ireland* (App. No. 19165/08) (Unreported, European Court of Human Rights, 12<sup>th</sup> December 2013), where there had been reference to the fact that the material available to the Chief Superintendent on which he based his opinion included both human and non-human sources.

**19.** Exchanges between counsel and members of the court of trial addressed the role, if any, for the Director and for prosecution counsel. Following these, on 22<sup>nd</sup> November 2019, the Court made the now-familiar observation that what the Court had to consider was the belief evidence of the Chief Superintendent, and not the underlying material, stressing that it was the

belief of the Chief Superintendent that is evidence by statute, and not the material upon which that belief is based.

**20.** The Court drew a distinction between what had been in issue in the case of *DPP v. Palmer* [2015] IECA 153 which had considered the question as to whether the DPP should review the Chief Superintendent's belief and, for that purpose, have accessed the underlying material, and what they saw was a different question in the case before them, which was as to whether the principles outlined in *Ward v. The Special Criminal Court* [1991] 1 IR 60 applied to the underlying material of a Chief Superintendent, this being in the context of consideration of issues relating to privilege and disclosure. The Court said that it failed to see why an exception should be made regarding the duties of prosecution counsel in relation to disclosure. While it was the belief of the Chief Superintendent which was the evidence in the case, the Court failed to see how the underlying material was not a relevant consideration for the prosecution to ensure that claims of privilege over relevant material were properly claimed. If the Court had the ultimate task of ensuring that privilege was properly claimed, then prosecution counsel must have a role in this. That exercise was viewed by the Court as another safeguard in terms of the operation of s. 3(2) of the 1972 Act.

**21.** The duty on prosecution counsel, which the Court had identified, might not arise in every case, according to the Court, but on the facts of the particular case where Detective Superintendent Howard had indicated that he based his belief on the underlying material, a duty arises on prosecution counsel to view the material and to ensure that the disclosure process has been properly attended to in the specific case.

**22.** The Special Criminal Court next sat on 27<sup>th</sup> November 2019. The transcript records that when the Court sat, counsel for the prosecution stated that he wished to acquaint the Court with the following position:



“That An Garda Síochána has communicated with the Director, indicating that Assistant Commissioner O’Sullivan, no doubt in conjunction with the Commissioner, has indicated that An Garda Síochána has given careful consideration to the issues at hand and has made a decision in relation to the material on the basis of which the Chief Superintendent’s opinion was based, belief was based, that it has identified potential consequences that arise from what is requested in a narrow sense in terms of the current trial, but also on a broader, national level in terms of the security of the State.

They state that the Garda Síochána Acts 2005 to 2015 reflect the position of An Garda Síochána as a unified police and security service, and that as provided for in section 7 of the Acts, the overall function of An Garda Síochána is to provide policing and security services for the State with seven objectives, one of which is protecting the security of the State. That section 3A of the Acts sets out the security services to be provided to the State as the following:

- (a) Protecting the security of the State, including, but not limited to the following:
  - (i) Preventing, detecting and investigating offences under the Offences Against the State Acts 1939 to 1998, the Criminal Law Act 1976, the Criminal Justice (Terrorist Offences) Act 2005, and the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.
  - (ii) Protecting the State from espionage, sabotage, unlawful acts that subvert or undermine or are intended to subvert or undermine, parliamentary democracy or the institutions of the State.
  - (iii) Acts of foreign interference that are, or are intended to be, detrimental to the interests of the State and are clandestine or deceptive or involve a threat to any person, whether directed from, or committed or intended to be committed within the State or not.

- (b) Identifying foreign capabilities, intentions or activities within or relating to the State that impact on the international wellbeing or economic wellbeing of the State and
- (c) Cooperating with authorities in other states and international organisations aimed at preserving international peace, public order and security.

Regarding the trial itself, An Garda Síochána has serious concerns about exposing individual members of the prosecution team to information gleaned from secret and sensitive sources and the intelligence produced from such information.

Subversive groups and organised crime gangs go to great lengths to infiltrate An Garda Síochána, identify trade craft operated by An Garda Síochána, and most of all, identify covert human intelligence sources who have a relationship with individual members of An Garda Síochána and pass information leading to valuable intelligence. There is no doubt that if it becomes commonly known that Senior or Junior Counsel prosecuting in terrorism or serious organised crime cases have access to sensitive information, including that emanating from covert human intelligence sources, it would put those Senior or Junior Counsel in extremely vulnerable positions to being intimidated, or worse, by terrorist or organised criminal groups. Members of the Bar have been assaulted or intimidated previously, and we in An Garda Síochána have had to put particular preventative measures in place to ensure their safety.

An Garda Síochána, in its role as a security service, has developed strong links with other security services, particularly those with whom we share common threats to national security. Intelligence is shared on a trust basis between services with various caveats preventing or restricting its further disclosure. It must be remembered that intelligence gathering is not primarily intended to lead to prosecutions and convictions, but rather, preventing serious security threats from materialising. This is an essential relationship given our vulnerabilities at national level and our isolated location. If An

Garda Síochána was now to embark on a policy of disclosure of sensitive and secretive intelligence – or secret intelligence shared with this organisation on a trust relationship outside that of complying with the obligation to or oversight judges appointed, our oversight judges appointed by Government, then An Garda Síochána risks losing access to that intelligence and losing the relationships which are so important to protect the security of the State and our citizens from the various forms of terrorists phenomena highlighted above.

Having carefully considered the decision of the Court and examined in detail the potential issues that could arise if the file were to be made available to prosecuting counsel to view, regrettably, the DPP's Office is told I am to inform you that An Garda Síochána does not wish to make the file available as requested for the reasons I have stated.”

**23.** Counsel then commented that it was the position of the Director that it was the case that An Garda Síochána would not make available the relevant material. Counsel continued that he should say that the Director also agrees with the security concerns, because he did not want to look as though he was hiding behind anything that arose, and he was obliged to tell the Court that that is the position consequent on the Court's ruling.

**24.** At that point, counsel went on to make further reference to *Donohue*, but more particularly to the judgment of the Court of Criminal Appeal therein (*DPP v. Donohue* [2007] IECCA 97). Defence counsel took the view that a ruling had been made by the Court, which the Director was not complying with, and in the circumstances, that the evidence of Chief Superintendent Howard could never be considered admissible.

**25.** Having taken time to consider the matter, the Court ruled on the developing situation on 28<sup>th</sup> November 2019. In the course of that ruling, the Court commented that the accused were not prejudiced by the failure of the prosecution to carry out their disclosure duties, as

envisaged in the *Ward* case, as the Court could not and must not have any regard when carrying out its role as judges of fact to any material which it viewed when determining the issue of privilege. The Court observed that it consists of professional judges who must and will put any prejudicial material out of mind when acting as judges of fact. The Court observed that the task of ensuring that privilege was properly claimed over the material and that nothing that should be disclosed remained undisclosed would be carried out by the Court. The Court was now fully conversant with the issues in the case as the prosecution case was drawing to a close. The Court added, however, that it was open to being dissuaded from the course of action it was proposing by the defence. The defence did in fact object to the Court reviewing the documents, and as such the evidence was reviewed by neither the prosecution nor the Court.

**26.** It is of some significance, in the context of what was to subsequently transpire, that the Court observed that they did not receive evidence regarding the serious concerns of the Assistant Commissioner, which were set out in letter form, and that, accordingly, there was no evidential basis before the Court for what was set out in the letter from the Assistant Commissioner to the Director. The Court clarified that, in its ruling on the previous Friday, it had never indicated a requirement that junior counsel in the case would review the material, or indeed, that the material would be reviewed by both senior counsel, and further commented that the concerns expressed on behalf of the Director regarding conflicts of interest arising for counsel could be met by reverting to the practice that applied in the Special Criminal Court many years ago, when counsel for the prosecution undertook not to defend in cases before that Court.

**27.** On 2<sup>nd</sup> December 2019, the Chief Superintendent was then cross-examined in some detail by Senior Counsel for each of the accused. On a number of occasions, specific claims for privilege were challenged and rulings from the Court were sought. These included claims relating to whether the sources available to the Detective Chief Superintendent were human or

non-human, and the period of time which the information available to the Detective Chief Superintendent covered. In this Court's view, very understandably, the claims for privilege were upheld and we would have regarded any other ruling as highly surprising. It takes little imagination to see how a subversive organisation would be assisted by confirmation as to whether or not there were sources within it providing information to An Garda Síochána, or assisted by confirmation that information was available to the Gardaí from non-human sources, be that eavesdropping surveillance, or the result of telephone tapping.

**28.** Following the close of the prosecution case, both defence legal teams made what might be described as a rolled-up or hybrid application. In the first instance, this was to exclude the evidence of Detective Chief Superintendent Howard, and in the alternative, if the evidence was admitted, a submission that no weight should be attached to it, or if there was to be any weight attached, it would be so little that a directed verdict of not guilty would follow.

**29.** When replying, prosecution counsel was pressed by members of the Court as to what the consequences of excluding the evidence of the Detective Chief Superintendent would be, *i.e.* whether the prosecution would still contend that there was sufficient evidence to convict. When pressed, counsel indicated that that would be the prosecution position, but it must be said, and indeed this was the subject of comment by the Court, that the reply lacked conviction, and the stage was set for the Court ruling on the basis that if the evidence was excluded, or if absolutely no weight was to be attached to it, the prosecution would fail.

**30.** The Court took time to consider the matter, and ruled on the morning of 5<sup>th</sup> December 2019. The Court explained that it was ruling on two issues which had been argued together, the first relating to the admissibility of Detective Chief Superintendent Howard's evidence regarding his belief that the accused were members of the IRA on 6<sup>th</sup> March 2013, and the second issue being an application for a direction. As to the first issue, it was said that the defence argued that Detective Chief Superintendent Howard's evidence was inadmissible on

two bases. They said that an issue of unfairness arose in the trial which rendered the evidence inadmissible, and they further said that whatever the probative value of his evidence might be, it was outweighed by its prejudicial effect.

**31.** In its ruling, the Court began by referring to the statutory provision relating to the belief evidence of a Detective Chief Superintendent, pointing out that the section, s. 3(2) of the Offences Against the State Act 1972, creates a statutory exception to the rules of evidence and renders what would otherwise be inadmissible opinion evidence, admissible. It permits evidence of belief that the accused committed the crime to be given to the trial court. The Court said it was clearly an exceptional statutory measure, and is one which had been the subject of very many challenges before our courts and the European Court of Human Rights. The Court referred to the decision in *Redmond v. Ireland* [1992] 2 IR 362, which had indicated that in order for the section to be regarded as constitutional, it was required that the belief evidence of the Chief Superintendent be supported by some other evidence implicating the accused in the offence charged which the trial court viewed as credible in itself, and independent of the witness giving the belief evidence.

**32.** The Court referred to *Kelly*, saying that in that case, the Supreme Court found that the section authorised the giving of evidence about the basis of the Chief Superintendent's belief. The Special Criminal Court referred to and quoted from the decision of the Court of Criminal Appeal in *DPP v. Donnelly* [2012] IECCA 78. The Court commented that the prosecution in the instant case had asserted that the evidence of belief of a Chief Superintendent was admissible *per se*, pursuant to s. 3(2) of the Act of 1972, but the Court said that this clearly cannot be the case following on from the analysis of *Donnelly* because questions of fairness are not matters for a jury to consider – they are for trial judges acting as judges of law.

**33.** Accordingly, the Court said that it could and should consider whether an issue of fairness arises with respect to the evidence of Chief Superintendent Howard. Then, with respect

to the issue of fairness, the Special Criminal Court quoted again from O'Donnell J. in *Donnelly*, who had said:

“Even where such privilege is upheld, it does not follow that the evidence of a [C]hief [S]uperintendent cannot be tested. 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.”

**34.** The Court then turned to the facts of this case as they related to the Chief Superintendent's belief. The Court said that the facts of this case were that Detective Superintendent Howard had formed his belief regarding each of the accused in December 2017, having reviewed material relating to each of them. They quoted him as saying he was satisfied beyond reasonable doubt as to the reliability of that information and in relation to his belief; that is as far as the evidence went with respect to his belief. His belief was not formed because of personal knowledge of the accused or because of his experience and knowledge of investigating and monitoring subversives. The Court said that Detective Chief Superintendent Howard was relatively new to the SDU, having taken over there as Chief Superintendent in August 2017. He had not served in that division of An Garda Síochána prior to that, and on the evidence, had very limited involvement with subversive crime investigations prior to his appointment to the SDU. The Court pointed out that Detective Chief Superintendent Howard had then proceeded to claim privilege over the material which he had considered and upon

which he based his belief. His claim of privilege, the Court noted, was based on the protection of life, and public interest immunity in protecting Garda methodology and future Garda operations.

**35.** In a significant passage, the Special Criminal Court commented that the normal rules which relate to the disclosure of documentation were not complied with in the case, despite a court ruling that prosecution counsel would review the material to ensure that all material disclosable had been disclosed and that privilege was properly claimed over the material at issue. An Garda Síochána had refused to provide the documentation to the Director so that the task could be carried out, citing security concerns. Accordingly, the Director could not carry out the task, though the Director had indicated that even if she had the relevant documentation, she agreed with An Garda Síochána relating to security concerns.

**36.** The Court commented that no evidence was called relating to the specific concern of permitting eminent prosecution senior counsel to review the material, rather, a letter was read into the court record. The Court said that Detective Chief Superintendent Howard had asserted a wide claim of privilege over the material he considered.

**37.** The Special Criminal Court had been asked to rule on two specific claims, which was whether the sources were human or non-human, and the period of time covered by the material under consideration. The Court reiterated that, having heard evidence in relation to the reasons for claiming privilege, the Court had upheld the privilege asserted in respect of both issues. The Special Criminal Court said that the height of Detective Chief Superintendent Howard's evidence in the case is that he is firmly of the view that the material considered by him establishes that the accused are members of an unlawful organisation. As privilege had been claimed on a very wide basis, the defence was, in effect, unable to challenge that assertion. There was no evidence before the Court as to whether there was a variety of sources contained in the material, the nature of the sources, or the length of the time the material covered. The



Court said they knew nothing of the considerations which Detective Chief Superintendent Howard applied to the material which was unlike some other cases where evidence of belief had been given by a Chief Superintendent. It was clear from analysis of some of the cases which had been referred to in the course of the trial, that wider information had been provided to the defence in similar prosecutions *e.g.* information as to whether a source is human or non-human; and if human, whether the source relates to Garda sources or not, whether there is more than one source, when the Chief Superintendent formed the belief, or the time period covered by the information.

**38.** The Court contrasted the information that had been made available in the case of *DPP v. Maguire* [2008] IECCA 67, referring also to the very extensive experience of the Detective Chief Superintendent who was offering belief evidence in that case. The Court said that the evidence of belief in this case amounts to the “bare assertion of belief” of the Chief Superintendent that the accused were members of the IRA, with privilege then claimed over all other matters. The Court said that this equated with what the Supreme Court said in *Kelly* could not be a constitutional interpretation of s. 3(2) of the Act of 1972, as the basis of the belief could “not, in reality, be inquired into”.

**39.** The Court had upheld the claim of privilege in respect of two specific pieces of information in respect of which the defence had sought a ruling, but maintaining privilege to the extent claimed had the effect of the accused’s counsel being unable to cross-examine in any meaningful way. The Court stated that it wished to reiterate that while the prosecution was completely within their rights to claim privilege to the extent they did, the extent of the claim can have consequences in a particular case. In the case before the Court on these particular facts, the reality was that the accused were not in a position to cross-examine in any effective manner. The Court did not see this as a weight issue, as it would be if it were the case of a jury

assessing the evidence of the Chief Superintendent, but rather, that this was a fairness issue with respect to fair trial rights, pursuant to Article 38 of the Constitution.

**40.** The Court went on to say that there were other worrying aspects with respect to the opinion of the chief prosecution witness. The Court referred to the fact that a prosecution witness, who was in the witness protection programme, had indicated in a discussion with a handler in March 2019, that the accused, LM, was not a member of the IRA and that he did not know RK. The witness, Mr. David Cullen, was centrally involved in the events surrounding the murder of Mr. Butterly, which formed the background to the prosecution. He had been charged with murder, but subsequently pleaded guilty to a firearms charge, having indicated that he would give evidence against other persons involved in the murder. In relation to LM, his statement was not brought to the attention of Detective Chief Superintendent Howard until the trial was underway, and even then, not in a formal way.

**41.** The Court indicated that while the views of a civilian, who has indicated that he is not a member of the IRA (although another Chief Superintendent was of a different view with respect to that issue), on whether a person they know is a member of the IRA, may not be of relevance in the general run of things, that cannot be the case when the civilian is involved in what the prosecution say was an IRA operation. The Court observed that it might well be that, had the assertion been made known to Detective Chief Superintendent Howard, he would still have remained of the view that LM was a member of the IRA. However, the Court said that it was expected that in the serious business of a Chief Superintendent forming and giving evidence of belief on what is an exceptional statutory basis, care and prudence would be exercised in the endeavour.

**42.** Detective Chief Superintendent Howard had agreed that this should have been brought to his attention as it could have gone to the very core of his belief, or may have proved LM to be innocent of the charges. The Court recalled that while Detective Chief Superintendent

Howard was permitted by the Court to give evidence on re-examination, this information did not change his belief with respect to LM. Further, the Court heard nothing of any analysis conducted by him on foot of the information, any considerations which he took into account, or how he balanced this information with the material on which he had already based his opinion. Analysis of that type was expected by the Court to ensure that the Detective Chief Superintendent took proper consideration of all the information that was available to him so as to ensure that the Court could rely on the belief evidence.

**43.** In the operative part of its ruling, the Court stated:

“Accordingly, on the basis that the defence could not conduct any meaningful cross-examination, in light of the broad nature of the privilege claim asserted, and in light of the deficiencies highlighted regarding the information of David Cullen, the Court is of the view that an issue of fairness arises for each of the accused with respect to the admission of the Chief Superintendent’s evidence into the trial. The Court therefore finds that evidence inadmissible in the trial proper.”

**44.** The Court then turned its attention to whether, without the evidence of Detective Chief Superintendent Howard, the prosecution could survive a direction application on the grounds gleaned from *R v. Galbraith* [1981] 1 WLR 1039, and firmly concluded that it could not.

### **The issues on appeal**

**45.** In a situation where it was not possible for the prosecution to review the material that had been available to the Chief Superintendent, the Special Criminal Court indicated that it would do so for the purpose of confirming whether or not privilege had been properly claimed. However, the defence objected to that course of action, and in the face of that objection, the Court said that it would not look at the file. In the course of the appeal before this Court, the Director has contended that, given that the defence prevented the trial court from reviewing the

material, it was necessary to proceed on the basis that there had been a well-founded claim of privilege, and insofar as the opportunity to cross-examine was curtailed, the defence position was protected by reason of the fact that the accused could not be convicted solely on the basis of the belief evidence of the Chief Superintendent.

**46.** The appellant's position is that the trial court erred in concluding that the evidence of Detective Chief Superintendent Howard should not be admitted. The appellant has identified three factors as having influenced the trial court to come to the conclusion that it did, these being the alleged inexperience of the Chief Superintendent, a claimed failure in disclosure linked to the breadth of the claim for privilege, and a view that what was in issue was a bare assertion of belief.

*The alleged inexperience of Chief Superintendent Howard*

**47.** It is against that background that one has to consider the actions of the Special Criminal Court in declining to admit the evidence of the Chief Superintendent, insofar as the Court would seem to have been influenced in part by the alleged inexperience of Detective Chief Superintendent Howard, in that he had relatively recently been appointed by the policing authority to the rank of Chief Superintendent and had been assigned by the Garda Commissioner to take charge of the SDU only on 29<sup>th</sup> August 2017. However, what cannot be gainsaid is that at the time of trial, he held the rank in An Garda Síochána, which, by statute, permitted him to express his belief as to whether those before the Court were members of the IRA. By statute, his belief evidence was evidence.

**48.** While his time in the SDU was limited, the evidence before the Court was that Chief Superintendent Howard had considerable experience in analysing intelligence. In that regard, it is of note that in this case, unlike in some others, where an accused might be personally known to him, and indeed, known over very many years, Detective Chief Superintendent Howard was offering his belief evidence following a perusal of documents. It might be said

that this worked both ways when it came to consideration of the relevance of the previous experience and career path of the Chief Superintendent. While, unlike in some other cases that have come before the courts, he did not have personal knowledge of those before the courts, and it is the case that in some other cases, Chief Superintendents have been able to point to a lifetime of experience combatting subversion, either as members of specialist units serving at different ranks, or while serving in particular divisions where combatting subversion was a particular priority. On the other hand, the fact that what was involved here was a review on the papers, arguably meant that his lack of personal knowledge was less significant and that more relevant was his experience in analysing intelligence.

*Failure in disclosure and breadth of privilege claim*

**49.** It is undoubtedly the case that the Special Criminal Court would have been much happier if the material available to the Chief Superintendent had been reviewed by prosecution counsel. It is also apparent that once An Garda Síochána took the view that it would not make the material available to prosecution counsel and was supported in that position by the Director, that the Court would have wished to have had evidence as to the basis of Garda concerns. Had an evidential foundation been laid for concerns – such as the imperilling of international cooperation, or the threats to identifiable counsel – that could arise, this very well might have proved highly significant and influential from the perspective of the Court.

**50.** While a claim for privilege is not at all unusual in the context of belief evidence – a fact that has been specifically recognised on a number of occasions by appellate courts – it is, in this Court’s view, to be expected that the extent of a claim for privilege may vary from case to case. There may be situations where a Chief Superintendent would be comfortable answering particular questions in one case, but would have a fundamental objection to answering similarly-framed questions in another case. That observation is subject to the qualification that a preparedness to answer questions of a particular type in one case, and an unwillingness to do

so in another, might itself be of considerable interest to subversive organisations and might put them on enquiry in relation to certain matters.

*The admissibility of the belief evidence*

**51.** The respondents have taken the position that the trial court was correct in excluding the evidence of Chief Superintendent Howard, but that even if the Court was incorrect, the evidence of the Chief Superintendent did not, in the circumstances of the case, constitute compelling evidence within the meaning of s. 23(14) of the Criminal Procedure Act 2010.

**52.** As already indicated, the Court found itself required to rule on a rolled-up or hybrid application, one aspect of which was that the belief evidence of the Chief Superintendent should not be admitted into evidence, and the second leg being a contention that if the evidence was not admitted, that an acquittal by direction should follow. The first argument, that in relation to admissibility, was based on two sub-grounds: that the belief evidence should not be admitted on general grounds of fairness; and, that little, if any, weight should be attached to it and that whatever probative value it had was significantly outweighed by its prejudicial effect.

**53.** The appellant before this Court has taken the position that the evidence of the Chief Superintendent was admissible *per se* by statute and that there was no basis for excluding the evidence as a result of the invocation of the fairness doctrine. The appellant also says that the notion of the Court, as a matter of discretion, excluding evidence where its prejudicial effect was greater than its probative value, had no application to belief evidence of a Chief Superintendent. They say that notion of balancing the probative effect and the prejudicial impact typically arises in a situation where evidence might, on one view, be admissible as having crossed the relevancy threshold, but would not in fact be admitted because of a danger that impermissible use of it would be made by jurors as triers of fact, or where there would be a risk that the triers of fact would afford the evidence a significance which it did not deserve in the context of the case.

**54.** The appellant says that such considerations do not arise in cases such as the present one. The evidence of a Chief Superintendent is tendered for one reason only: because by statute, it is evidence that the accused before the Court was, on the date referred to by the Chief Superintendent, a member of an unlawful organisation. The evidence then has to be weighed and assessed. It is urged that the question of prejudice exceeding probative value does not arise. While the evidence is prejudicial, in the sense that all evidence called by the prosecution in any trial is prejudicial because it is designed to disadvantage the accused, there is no question here of it being prejudicial over and above its probative value.

**55.** The Director's position on appeal was expressed with greater directness, firmness, and clarity than had been the case before the trial court. Indeed, this led to one member of this Court, in the course of exchanges with counsel for the prosecution, asking why, if the Director's position was correct, and the evidence was admissible and to be admitted *per se*, had there been a *voir dire* directed to the question of whether the evidence should be admitted, and why were such *voir dire*s a common feature of membership trials. Pressed by members of the Court, counsel was prepared to go so far as to say that this, as in so many other cases, was a case where one should never say never. He said that he accepted that there might be cases so extreme, where the proposed evidence would not be admitted, but rather would be excluded on grounds of fairness. He said he found it hard to imagine what those circumstances would be.

**56.** In its ruling of 5<sup>th</sup> December 2019, the court of trial addressed the question of how admitting the belief evidence should be considered. The Court was of the view that while questions of weight would, in the normal course of events, be matters for a jury – and in the case of a trial before the Special Criminal Court, be a matter for the judges of the Court in their capacity as jurors – that questions of fairness would, in the ordinary course of events, be for the trial judge, and in the case of a trial before the Special Criminal Court, be a matter for the members of the Special Criminal Court in their role as judges of law.

**57.** The decision of the Court in this case to address the issue through the prism of fairness, and so to exclude the evidence, would seem to have been a departure from the normal practice of the Special Criminal Court. We do not totally exclude the possibility that there might be a case when such an approach would be justified; however, one has to have regard to the wording of s. 3(2) of the 1972 Act which is unqualified. It states that when an officer of the relevant rank, in giving evidence, states that he believes that the accused was, at a material time, a member of an unlawful organisation, the statement shall be evidence that he was then such a member. It seems to us that the language of the section goes beyond rendering potentially admissible what would otherwise be inadmissible. The expectation has to be that when a Chief Superintendent has belief evidence to offer, ordinarily, it will be admitted in evidence.

**58.** In this Court's view, the fact that privilege was claimed and upheld was not a basis for excluding the evidence. In our view, it would have been more in accordance with the established practice had the evidence been admitted and then the Court proceeded to consider what weight, if any, to be attached to it; a very broad claim of privilege may impact negatively on the weight to be attached. However, while that might be so, we see no basis for excluding the evidence of Detective Chief Superintendent Howard and we are satisfied that the decision of the trial court in that regard saw it falling into error.

**59.** In this case, in the course of its ruling, the Special Criminal Court had commented that, arising from *Donnelly*, the following requirements regarding the operation of s. 3(2) of the 1972 Act are inferred:

- (i) "...that permitted pursuant to section 3, subsection 2 is admissible *per se*, the trial court has a duty to ensure that belief evidence in a particular trial does not create an unfairness for the accused";
- (ii) "the evidence of belief is given by a chief superintendent who is experienced in such matters";



(iii) “the belief formed by the chief superintendent that an accused was a member of an unlawful organisation is based on a variety of sources over a period of time.”

**60.** While not wishing to state the position in absolute terms and for all cases, because it may be that there will be some very exceptional cases where different considerations apply, it would seem to us that, in general, the proper approach is to admit the evidence and then to ask the question whether there are circumstances present which would render it unfair to the accused to attach any (or any significant) weight. Again, we do not agree with the trial court’s suggestion that the belief evidence of only some, but not all, chief superintendents is to be admitted in evidence, if that indeed was the position of the trial court. The background, experience, and career path of an individual chief superintendent providing belief evidence may be highly relevant when it comes to assessing the weight to be attached. That relevance can go both ways. There are a number of examples where trial courts, and indeed, appellate courts have been impressed when chief superintendents have been able to point to a long career combatting subversion. However, there may be other cases where the defence would be able to point to an absence of directly relevant career experience, suggesting that less weight should be attached than might otherwise have been the case.

**61.** In this case, the Detective Chief Superintendent offering the belief evidence had been relatively recently promoted to that rank and had only recently been assigned to the SDU, not previously having served in that section. On the other hand, it might be argued that since, in this case, the belief evidence was being offered following a perusal of documentation, a lack of a track history in the SDU might not be as significant as it would be in other cases. One way or another, we are quite satisfied that Detective Chief Superintendent Howard was qualified by statute to express the belief that he did, and there was no reason for his evidence to be excluded on that score.

**62.** This Court also has some doubts about the statement in absolute terms by the trial court that the belief of a chief superintendent that an accused was a member has to be based on a variety of sources over a period of time. Again, at one level, that appears to set a threshold for admitting the evidence provided for by statute, which is not to be found in the statute. Of course, there will be cases where the belief evidence is based on a variety of sources over a period of time and where the prosecution will draw comfort from being able to establish that fact. Conversely, if that cannot be established to the satisfaction of the Court, or if the Court is not in a position to infer that that is the situation, then that may impact negatively on the extent to which any (or any significant) weight will be attached to the belief evidence. However, in the view of the Court, there is no absolute requirement to establish as a prior condition for admitting the evidence that the belief is based on a number of sources over a period of time.

### **The Supreme Court judgment in *DPP v. Cassidy***

**63.** The views we have expressed in the preceding paragraphs, which we formulated in the aftermath of the hearing of the appeal, have not been altered as a result of the delivery of the Supreme Court decision in the case of *DPP v. Cassidy* [2021] IESC 60 where the judgment was delivered by O'Malley J.; indeed, quite the contrary. We draw attention to the fact that at paragraph 5, O'Malley J. commented:

“It is necessary to emphasise that it is the belief evidence itself that constitutes evidence under the section and not the factual grounds for the belief. Thus, belief evidence will always be admissible, and the trial court will not examine the validity of the belief by applying the administrative law concept of reasonableness, or by reference to its detailed factual or logical basis. However, the court may for a variety of reasons conclude that, in a particular case, a greater or lesser degree of weight should be

attached to the belief. It is in that context that much of the debate about the impact on fair trial rights arises.”

64. At para. 140 and subsequent paragraphs, O’Malley J. had certain observations to make in relation to the impact of a claim of privilege. She commented:

“140 [...] What matters, in this appeal, is the impact of the claim of privilege on the fairness of this trial.

141. There is no doubt that the privilege claimed was, for all practical purposes, about as broad as can be envisaged. As the court of trial acknowledged, counsel for the defence did not even make limited headway in cross-examination. If the belief evidence had been the only evidence in the case, then, even without the binding authority of *Redmond*, it would seem to me that the trial court would have had to find that it would be unsafe to convict.

142. However, the solution to the problem is not, in my view, to exclude other admissible evidence or to decline to apply relevant legislation as some form of counterbalance. The Constitution requires the trial courts to ensure that trials are fair, but the way to deal with potential unfairness is to focus on its source – in these cases, the belief evidence. Since the effect of a broad claim of privilege is to insulate that evidence from a cross-examination that might demonstrate that the belief is wrong, the appropriate course of action is to attribute significantly reduced weight to the belief and to require correspondingly strong supportive evidence. I think, therefore, that it is appropriate to say that if there is a very wide claim of privilege, there will be a correspondingly greater need for strong supportive evidence that clearly did not form part of the basis for the belief. It will of course remain necessary to disregard any individual piece of evidence for that purpose, if it is unclear to the court whether it was or was not the basis, or part of the basis, for the belief.

143. This was the approach taken by the trial court in the instant case. The judgment makes it clear that, in view of the breadth of the privilege claim and the effect thereof on the defence ability to cross-examine, the strength of the supporting evidence had to be high on the scale. It found that standard to have been met and I see no reason to disagree. [...]"

65. We would draw attention to one other section of the *Cassidy* judgment which confirms and reinforces our view that the trial court went too far in stating that belief evidence had to be based on a variety of sources over a period of time. At para. 124 and subsequent paragraphs, O'Malley J. commented:

"124. In this context, there is one sentence in the judgment of the Court of Appeal that requires further examination. At paragraph 35 the Court stated that it was 'well settled that the belief of a Chief Superintendent must be based on matters external to the evidence in the trial'. This might appear to be a logical application of the double counting rule. However, I think that it may be a reflection of a misunderstanding of the purpose of the rule, which is to prevent inadvertent reliance by the court on evidence as supportive if in fact that evidence was the basis for the belief, support for which was required. If such inadvertent reliance were to happen, it could appear superficially (but wrongly) that the *Redmond* principles were satisfied, and the prosecution case would seem considerably stronger than it actually is. It does not necessarily follow from this that the Chief Superintendent must know something that the court does not.

125. To illustrate the issue, I will put forward an entirely hypothetical (and very unlikely, but not entirely inconceivable) scenario. Gardaí raid a house in which they suspect that a meeting of members of an unlawful organisation is taking place. Nearly all of those present have previous convictions for membership, but there is one man who turns out to be completely unknown to the force and there is no intelligence

pertaining to him. Nonetheless, he is found to be in possession of a highly incriminating document relating to the organisation, and a recording taken by a surveillance device demonstrates that he was taking an active role in the meeting. He refuses to answer any questions about his presence in the house, or his association with the others present, or about the purpose of the meeting, or about the document.

126. What would be the consequence if, at that man's trial, a Chief Superintendent stated his belief that the man was a member of the organisation, but made no claim of privilege and made it clear to the court that he did not in fact possess any information other than that which had been adduced in evidence? The court would, obviously, be compelled to accept that the belief was based on the totality of evidence before it and not on anything external to the trial. But it would, I think, defy both principle and common sense to suggest either that the belief evidence should not be admitted – the statute makes it admissible – or that the circumstantial evidence was not independent and supportive of the belief, or that inferences could not be drawn from the refusal to answer questions. Neither would it be correct to say that the belief added nothing to the evidence already before the court, since the belief would probably still be the only direct evidence of membership as opposed to some other offence such as assisting an unlawful organisation. The weight to be attached to the belief, as always, would be a matter for the court of trial.

127. I accept that this may be a very unlikely scenario, but the applicable principles must be capable of operating in any given case including a hypothetical one where the court has, in fact, all of the information that the Chief Superintendent has. It seems to me therefore that the double counting rule applies only, as it did in the cases giving rise to it, where the court cannot know whether or not particular elements of the evidence before it formed the basis of the belief.”

### **The submissions from the IHREC**

66. The submissions of the IHREC identify an issue in the appeal as to whether belief evidence can be ruled inadmissible where a broad claim of privilege has been upheld, and say that a key aspect of that legal issue is whether the availability of a review of the Chief Superintendent's file by a trial court is sufficient, or whether there is a separate requirement for the Director and prosecuting counsel to review the material grounding the belief evidence. In written and oral submissions, the IHREC has taken the view that significant safeguards over and above the possibility of a review by the trial court are required. They focus on the traditional view of the role of prosecution counsel as Minister for Justice.

67. So far as prosecution counsel is concerned, the IHREC is prepared to accept that there may be some distinction to be drawn in terms of sensitivity and safety concerns between the type of material at issue to be reviewed by counsel in the *Ward* case, and material or information which underlies belief evidence. However, they draw attention to the fact that Charleton J. in his judgment in *Redmond* had not made any reference to the existence of such a distinction.

68. Turning to deal with the question of the trial court, this Court finds itself in the difficult position, and we imagine that the IHREC must likewise have found itself in a similar position, in that we do not know exactly what material was available to the Chief Superintendent, either in this case, or in cases generally. We might make the preliminary observation that the enthusiasm for the prosecution having a role in reviewing the available material has increased on the part of defence legal teams, and some others, as difficulties in allowing prosecution counsel perform that role have emerged. In this case, as we have seen, what was involved was a document review. If the documents could have been made available to prosecution counsel and/or the directing officer in the Office of the DPP, there would have been no difficulty in

having the papers reviewed, though, as we know, that was not acceptable. However, there may be other cases where the Chief Superintendent does not base his belief on the contents of a single file or files. There may, for example, be cases where the Chief Superintendent bases his opinion on direct contact with a source or sources within subversive groups, or it may be the situation that the Chief Superintendent relies in whole or in part on information provided to him by colleagues in other police forces or intelligence services. In such cases, a review of the files may be of limited value.

**69.** The form and content of the files may also be very significant in considering what level of review is realistic. For example, one could imagine a situation where much or all of the material on file was relatively innocuous, such as reports from collators, records of attendances at protests or funerals, and the like. There would not seem to be any great difficulty in having such material reviewed, and, as illustrated by *Connolly v. DPP* (Unreported, Special Criminal Court, 12<sup>th</sup> April 2021), such a review could be of value in ensuring that there was no question of double counting and that evidence pointed to as independent of the belief evidence of the Chief Superintendent was, in fact, independent. On the other hand, one could imagine a situation where a file expressly disclosed the identity of a high level source within a dissident republican group, or the identity of somebody who was a source providing information for partner intelligence services or police forces. Conceivably, a file might refer to the fact that one or other of those services had inserted an agent inside the dissident republican group. Information of that nature is so sensitive, and the threat to life of the individual involved would be so grave, that it would be unthinkable that the Gardaí would not have major reservations about sharing it.

**70.** It seems to us that the circumstances may vary so considerably that it is very difficult to lay down rules of general application. However, we have no doubt that the starting point for consideration has to be the terms of the statute where the provision that the belief evidence of

a chief superintendent shall be evidence is clear and unqualified. Thereafter, much will depend on the individual circumstances of the case. If there is material to which the directing officer and/or prosecuting counsel can be permitted to have access, then that possibility should be availed of. It may well be, in particular cases, that the extent to which the material that was available to the Chief Superintendent has been reviewed, will be a matter that will be regarded as relevant when assessing whether it is a case where greater or lesser weight should be attributed to the belief evidence.

**71.** As has often been referred to, whether or not the underlying material has been reviewed, it is very likely that questions of privilege will arise. If that happens, the Chief Superintendent should avoid making a claim for privilege in terms any broader than necessary; if only because an unnecessarily broad claim will likely see lesser weight attached to the belief evidence.

**72.** In deciding whether to claim privilege, it seems to us that consideration of the impact of a claim or the absence of a claim on other cases is a relevant and proper consideration. The IHREC observed that it is understandable that an accused person would not wish for the trial court to review the Chief Superintendent's file; by definition, the accused person cannot know what the file contains and it may contain material which is prejudicial. Reference was made to the possibility of a differently-constituted panel of the Special Criminal Court perhaps dealing with issues of privilege and disclosure in advance of trial, and the point is made that this is perhaps more viable since the introduction of a second Special Criminal Court. In that regard, attention is drawn to the provisions of the Criminal Procedure Act 2021, particularly s. 6 thereof, which provides for matters of this nature to be dealt with by the Special Criminal Court in advance of trial, including making provision for a differently-constituted division of the Court.

**73.** However, the position of the IHREC is that difficulties would continue to attend reviews, whether by the trial court or by a differently-constituted trial court, and so they



contend that such an approach is not sufficient. While making the point that an accused person will often be reluctant to have the file viewed by the trial court, the IHREC accepts that there are instances which have shown this to be a valuable safeguard, in particular in the case of *Connolly*. The history of this case is an interesting one, in that when Mr. Connolly first stood trial, a request from the defence for prosecution counsel to review the documentation had been rejected. In those circumstances, the defence asked the trial court to review the documentation in order to determine whether a claim of privilege should be upheld, but the Special Criminal Court declined to do so. This Court allowed an appeal, essentially taking the view that an accused person could not be denied both a review by the prosecution and a review by the trial court. A re-trial was ordered, wherein the trial court reviewed documentation and directed that two documents be disclosed, the effect of which was to establish that there had been double counting, in that movements of an accused on a particular day had contributed to the opinion evidence of the Chief Superintendent, and also that those movements had been relied on at trial as independent supporting evidence.

**74.** The IHREC saw merit in a pre-trial review of the material within the Office of the Director, pointing out that directing officers are not generally readily identifiable to members of the public, and if necessary, further measures could be taken to ensure their anonymity in the context of a prosecution for membership.

**75.** The point that we have made about the difficulty of laying down rules to apply in what may be widely different circumstances is also of relevance in the context of a role of the directing officer. As in considering a possible role for prosecuting counsel, there may be cases where involving a directing officer would present little, if any, difficulty, but there may be other cases which would not be as straightforward. The comments by the IHREC about the fact that directing officers are not generally readily identifiable, while undoubtedly true in many cases, would not necessarily continue to be true if the involvement of directing officers became

routine. Presumably, if directing officers were to be involved, matters would be arranged within the Office of the Director to limit involvement to a single officer, or certainly to a very small number of officers. Measures to ensure anonymity might be neither straightforward, nor guaranteed to be effective.

76. Membership prosecutions have evolved over the years. There was a time when convictions based on belief evidence alone were not unknown, and there was a time when, as a rule of practice, trial courts did not convict in the absence of supporting evidence. Post-*Redmond*, what had been a rule of practice was elevated to a rule of law based on constitutional principles. It is entirely possible that there will be further evolution in the future, whether as a result of a role for a differently-constituted Special Criminal Court, dealing with certain matters in advance of trial, or otherwise. Other possible approaches, such as the involvement of a special advocate, which had been canvassed from time to time, would probably require legislative intervention; a review of the operation of the Special Criminal Court is currently underway.

77. However, while we are grateful to the IHREC for its intervention, in the particular circumstances of this case (while we have concluded that the trial court was not correct in deciding to depart from usual practice and to decide to exclude evidence, when the more normal approach would have been to admit the evidence, having regard to the applicable statutory provisions and then decide how much weight, if any, to attach), we have not found its intervention to be of great assistance.

### **The question of a re-trial**

78. Being of the view, as we are, that the trial court erred in deciding to exclude the evidence of the Chief Superintendent, that raises for consideration the question of what the consequences of that erroneous exclusion should be at this stage, and the related question of

whether the evidence excluded should be regarded as “compelling evidence”. Section 23(3)(a) of the Criminal Procedure Act 2010 provides:

“(3) An appeal under this section shall lie only where—

- (a) a ruling was made by a court during the course of a trial referred to in subsection (1) or the hearing of an appeal referred to in subsection (2), as the case may be, which erroneously excluded compelling evidence.”

The definition of compelling evidence is provided at s. 23(14) where it is stated:

“[...] ‘compelling evidence’, means evidence which

(a) is reliable

(b) is of significant probative value and

(c) is such that, when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person’s guilt in respect of the offence concerned.”

**79.** It must be said that it is the nature of belief evidence admissible by statute that it is not easy to determine whether it should properly be regarded as compelling evidence. By statute, it is evidence, but it is evidence that is required to be weighed and evaluated, and it is for the trier of fact to determine what, if any, weight is to be attached. This Court has commented previously that the significance of belief evidence from a Chief Superintendent is not constant across trials where accused persons stand charged with membership of an unlawful organisation. As we have pointed out elsewhere, there will be cases where the belief evidence is front and centre, and such evidence that is available to the prosecution is there to support or corroborate. However, there will be other cases where the evidence other than belief is particularly powerful or cogent. In a recent case of *DPP v. Metcalfe* [2020] IECA 176, we described the evidence there as “crushing”. In such cases, the evidence of the Chief Superintendent would be much less significant, though it may be relevant in allowing a trial

court to be confident to infer that the evidence that was put before it of untoward activity was attributable to subversion (as distinct from ordinary criminality). Again, it is possible to imagine that there might be cases where the non-belief evidence would lead inexorably to a conclusion that an accused was a member of an unlawful subversive organisation, but where the belief evidence would be of significance in quelling any doubts which might otherwise exist as to which one, *i.e.* the so-called IRA, or the Irish National Liberation Army, or some other body.

**80.** In *DPP v. JC* [2015] IESC 31, in the course of their judgments, a number of members of the Supreme Court all expressed concern as to the position in which an appellate court might find itself if a respondent did not concede that the evidence excluded was compelling. Here, it is certainly the case that there is no such concession. Both respondents have maintained the position, both before the trial court and before this Court, that the evidence sought to be tendered, which was excluded, was in fact valueless.

**81.** Having regard to the potentially difficult issues raised in determining whether evidence is “compelling”, issues which we regard as having real application in the present case, we think it useful, in the first instance, to ask the question of whether the evidence in question is potentially compelling evidence. In that regard, it seems to us that the intended evidence of the Chief Superintendent is capable of being regarded as reliable: it is the belief of a Garda of senior rank with long service in the force, who is an officer who has experience in assessing intelligence information. It also seems to us that the evidence can be said to be of significant probative value. The fact that a Garda of such high rank, who was the head of the SDU, is of the belief that particular individuals are members of an unlawful organisation is of probative value.

**82.** In saying that it is of significant probative value, that does not preclude the possibility that a particular chief superintendent might not place an unwarranted interpretation on

intelligence available to him, nor does it foreclose on the possibility that in a particular case, a chief superintendent might have been put wrongly by an informant who was mistaken, or even malicious. However, if there is evidence entirely independent of the Chief Superintendent, linking accused persons in some way or another to what appears to be IRA activity, that will go a very long way towards offering reassurance and comfort that this was not in fact a case.

*Background to the additional evidence*

**83.** The statutory definition of compelling evidence requires consideration of all the other evidence in the case. In this case, there was, as there had to be, additional evidence. The most significant non-belief evidence related to evidence that associated both accused with events that had occurred pre- and post-the Huntsman Inn murder.

**84.** The prosecution case was that there was a plan in existence which had probably originated some significant time beforehand, but which began to crystallise around 3<sup>rd</sup> March 2013, which was the Sunday before the Wednesday on which the murder occurred. The prosecution case was that the murder was carefully planned and that there were a significant number of people involved. Evidence was led of a significant surveillance operation in the days prior to the murder, focused on a number of vehicles and individuals.

**85.** On the day of his murder, the late Mr. Butterly, driving a grey Renault Laguna car, entered the carpark of the Huntsman Inn shortly before 1.55pm. Soon after the arrival of Mr. Butterly, a Peugeot 206 car driven by a person who is the brother of the accused, LM, entered the carpark, stayed there for a few minutes, and then, having reversed the car, exited the carpark. At about 2.00pm, a silver Toyota Corolla with false Kildare number plates (this was a stolen vehicle) was observed leaving the carpark beside an apartment at Brackenwood. This apartment was occupied by the aforementioned Mr. Cullen, who was, at one time, charged with the murder; he would subsequently plead guilty to a lesser count and give evidence across a number of trials on behalf of the prosecution. The silver Toyota Corolla had two occupants: a

driver, Mr. Eddie McGrath; and, in the back seat, one Mr. Dean Evans. Mr. Evans had been lying down, but then, through an open window, fired shots into the Renault Laguna. Mr. Butterly got out of the Renault Laguna, and was seemingly followed by Mr. Evans, who then killed Mr. Butterly in the carpark of the licensed premises. The Toyota Corolla then left the premises and Gardaí were rapidly in pursuit.

**86.** Initially, it seemed that the occupants of the murder vehicle may not have realised they were being followed, but in any event, a Garda car did pursue them, and rammed the vehicle, after which its occupants were arrested. The vehicle contained firelighters and fuel, making it clear that there had been an intention to destroy the vehicle. The occupants were in possession of wigs and glasses. When Gardaí stopped the Toyota Corolla, another vehicle, an Opel Zafira, appeared on the scene. That vehicle was driven by Mr. Sharif Kelly and the prosecution case was that his reason for being there was to take Mr. McGrath and Mr. Evans away. No firearm was found in the Toyota Corolla, but as the Toyota Corolla had been pursued, it was noticed that, at one point, something appeared to be thrown from it, near the entrance to Gormanston College. A Garda car was sent to that location and the Gardaí came upon a man on the road, and in close proximity to him was a parcel in a bush which contained the pistol which had been used in the shooting. The individual found with (or in close proximity to) the pistol was Mr. Cullen.

**87.** This brief overview is designed to offer some context for the evidence that was specific to RK and LM to which there will now be reference.

*The evidence in relation to RK*

**88.** In relation to RK, the prosecution's suspicion was that he was the person who had secured the attendance of the deceased at the scene where he met his death. RK came on the scene sometime after the shooting had taken place and, on arrival, had a conversation with Gardaí. RK was a friend or acquaintance of the late Mr. Butterly, and the evidence was that

there was an arrangement for them to meet in or around that time. The prosecution case was that the meeting was to take place at 2.00pm, though RK disputed this and said the meeting was not to take place until 2.30pm. The significance of this divergence is that at the time when the actual shooting took place, RK was in an Applegreen service station where he was visible on CCTV. RK was arrested at the scene on suspicion of membership and possession of a firearm. Gardaí were interested in a mobile phone which was in his possession; it was said that RK had set about destroying the SIM card from that phone on arrival at the carpark.

**89.** Analysis of the interaction between a number of phones formed a significant part of the investigation; it disclosed that there had been contact between RK's phone and the phone of the wife of the deceased, as it appeared Mr. Butterly did not often use a phone and tended to rely on his wife's phone. In the course of the search of No. 44 Brackenwood (the apartment linked to Mr. Cullen), a phone was found which came into operation only in February 2013, and had been used only for very limited purposes; it was said that it was reasonable to suppose it was used for the purposes of carrying out criminal activity. It indicated that after the contact between RK and Mrs. Butterly, there were then two brief contacts between the RK phone and the Brackenwood phone. The prosecution therefore attached considerable significance to his actions in seeking to destroy a SIM card.

**90.** The prosecution also put before the Court, in the case of RK, evidence of association by him with known subversives. Evidence was presented of: association on two occasions on the same day in 2011, and on another occasion in 2012, with Mr. Alan Ryan; association on two occasions in 2011 and three in 2012 with Mr. David Dodrill (though in assessing the significance of that, account has to be taken of the fact that they were friends from schooldays); and, association on one occasion with Mr. Dermot Gannon. In the case of Mr. Gannon, the prosecution contended that they could rely on the fact that the accused, when questioned about his association with that man, had lied. However, the defence say that this is not a permissible

interpretation, and that RK was not denying the fact of having had any conversation with Mr. Gannon, but rather, was denying that any such conversation was about IRA activities.

**91.** It appears the prosecution were also placing some significance on observations made in the course of what it was suggested was a debriefing that occurred on 7<sup>th</sup> March 2013 at a KFC in Charlestown, at which LM was present. The gathering was the subject of audio surveillance put in place by Gardaí, but it appears the quality of the recording was poor (perhaps very poor) because of the extent of background noise. However, the prosecution say that one of the participants made a remark about the presence of RK in the Applegreen service station at the time when the murder occurred. In assessing the significance of the KFC audio, one must not lose sight of the fact that RK was not among those who participated in the review or debriefing – if that is what it was – as he was already in custody at that stage.

*The evidence in relation to LM*

**92.** In the case of LM, the prosecution adduced evidence that he was living on a caravan site, as a permanent resident, reasonably proximate to the murder scene. In all, there were approximately 150 permanent residents of the site, including the brother of this accused (to whom reference has already been made, who was the driver of the Peugeot 206). The prosecution adduced evidence that, two days before the killing, a number of people who, it was suggested, had an association with the murder of Mr. Butterly, gathered in the caravan park. At one point, a red Seat Toledo with a 2002 registration was driven from the caravan park. That Seat Toledo was the car of LM. Gardaí noted that there were three occupants in the car as it emerged, but were not in a position to identify who those occupants were. The Court heard that, on 4<sup>th</sup> March, two days before the murder, sometime after 6.30pm, the vehicle left the caravan park. It then drove up to the Huntsman Inn, passed the Huntsman Inn, along Flemington Lane, slowing near the gates of Gormanston College (at or close to the point where



Mr. Cullen was arrested in proximity to the murder weapon) and then past Tobersool Lane, to the point where the Toyota Corolla had come to a stop.

**93.** Another area of evidence on which reliance was placed by the prosecution was that a review or debriefing meeting was held in Charlestown Shopping Centre KFC, attended by six people, one of them being LM. The impact of this evidence is reduced by reason of the poor quality of the audio surveillance. The prosecution had sought to have a professional transcript prepared and had entrusted the recording for that purpose to a professional sound engineer, a Mr. Aidan McGovern, but he was unsuccessful in that regard. Indeed, in the course of a *voir dire*, he was called as a defence witness. His evidence was that the recording was “inaudible, basically”, that there was an enormous amount of audio interference in it, the meeting having been held in a public place.

**94.** The prosecution also point to questions that were put to LM about the reconnaissance undertaken on 4<sup>th</sup> March 2013, and about his presence at the KFC meeting on 7<sup>th</sup> March. Essentially, the case is made that what he had to say when questioned was decidedly unimpressive, and had the effect of bolstering the case against him.

*Analysis of the non-belief evidence*

**95.** It is clear from this overview that there was significant evidence available to the prosecution apart from the belief evidence, even if one might not describe it as compelling in the extreme – or even “crushing”, to use language that has found favour in other cases.

**96.** In the course of the ruling of the trial court, which saw it exclude the evidence of the Detective Chief Superintendent and acquit the accused before the Court, the Court had commented:

“[T]here are suspicious circumstances which point to their involvement in events surrounding the murder of Peter Butterly. However, the evidence relating to the charge before the Court – namely, membership of the IRA – is inherently tenuous when the

evidence is considered as a whole. Accordingly, the Court is of the view that it could not return a verdict of guilty on that evidence alone, and for that reason, will direct a not-guilty verdict in this matter.”

It should be noted that the reference to “inherently tenuous” was in a situation where it was not going to be supported by, or itself supporting, the belief evidence of the Chief Superintendent, and where the trial court was considering and rejecting the suggestion that it could consider convicting in either or both cases, even absent the evidence of the Chief Superintendent.

**97.** While we are of the view that the evidence might be described as compelling within the terms of the Act, and might, along with all the other evidence in the case, have resulted in convictions had the evidence been admitted, there were factors in the case which would give rise to concern for triers of fact. In that regard, by way of example we would point to the fact that Mr. Cullen, who, on any view, had been a significant figure on the team that planned and executed the murder, had been recorded as saying that LM was not a member, and that he did not know RK. The comment about LM, in particular, was potentially significant. As alluded to by the trial court, the views of somebody who was a party to the conspiracy that an individual was not a member of the IRA, but was now giving evidence across a series of trials on behalf of the prosecution, could not be lightly discounted. At another level, it was of concern that this information had not been put before the Detective Chief Superintendent, and had the potential to raise questions about how comprehensive and balanced the information put before the Chief Superintendent, for his consideration, was.

**98.** Taking account of all of these considerations, we are satisfied that the Chief Superintendent’s belief evidence was compelling in principle. To be “compelling” it doesn’t have to be enough to convict. It is enough if it is evidence which is capable of being afforded some weight, and which, in principle, if supported by sufficiently strong supporting evidence, could lead to a conviction. We are satisfied that the Chief Superintendent’s belief evidence met

these requirements. As the evidence was excluded, we do not know what weight the trial court might ultimately have been prepared to attribute to it. The position is simply that, because the evidence was excluded, there was no finding either way. Absent an evidence-based finding that it was incapable of bearing any weight, we think it right to proceed on the basis that it was, in principle, capable of bearing at least some weight.

**99.** On that basis, it was evidence which, in principle, if supported by sufficiently strong supporting evidence, could have led to a conviction. Being of the view that evidence of such significance was excluded, it is appropriate to move to the stage of considering whether a re-trial should be ordered. If there is to be a re-trial, the weight (if any) to be actually attributed to the belief evidence and the strength of the available supporting evidence would be a matter for assessment by whatever court conducting the re-trial. It is not for this Court to decide these issues in the context of an appeal under s. 23(14) of the 2010 Act.

**100.** On the basis that compelling evidence was in fact excluded erroneously, this Court must turn to consider the question of whether to order a re-trial. The question of a re-trial is dealt with by statute and has also been the subject of consideration on occasions in the Supreme Court, most notably in the case of *JC*; but also in the case of *DPP v. TN* [2020] IESC 26, an appeal from this Court in relation to an unsuccessful waste management prosecution. Sections 23(11) and (12) of the 2010 Act, as amended, provide as follows:

“11. On hearing the appeal referred to in subsection (1), the Court of Appeal may

(a) quash the acquittal and order the person to be retried for the offence concerned if it is satisfied –

(i) That the requirements of subsection 3(a)(i) or (b), as the case may be, are met, and,

(ii) That, having regard to all the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so, or

(b) If it is not so satisfied, affirm the acquittal.”

12. In determining whether to make an order under paragraph (a) of subsection (11), the Court of Appeal shall have regard to

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and,

(d) any other matter which it considers relevant to the appeal.”

**101.** In relation to the considerations listed at subsection (12), the Court has no reason to doubt that a re-trial could be conducted fairly. As to the amount of time that has passed since the act or omission that gave rise to the indictment is concerned, it is true that a significant period of time has now passed since the date charged on the indictment. However, the period of time that has passed has to be seen in the context that there is no statute of limitations for criminal offences, and that the courts are used to seeing and coping with much longer periods of time, most notably in the area of historic sex abuse. The nature of the offence is also relevant. In the nature of things, as has been the subject of express comment on occasions, membership of an unlawful organisation is, while charged in respect of a particular date, a continuing state of affairs.

**102.** The context in which the charges were proffered are, in the view of the Court, relevant. Leaving aside cases where the offence as charged is one of directing the activities of an unlawful organisation, there may still be levels of membership. On the one hand, there may be membership which might be and has been seen as the equivalent of inactive or social membership of a sports club. On the other hand, there may be membership which appears to be consistent, persistent, and with the individual concerned occupying a position of significance in the organisation. In this case, the evidence in support of membership suggested

an involvement, though at precisely what level was not clear, in a plot to murder; a plot which was carried through to fruition.

**103.** Subsection (12)(c) requires consideration of the interests of any victim of the offence concerned. In this case, we are not concerned with a direct victim, in the way one might be in the case of a crime involving violence against the person, or certain offences of dishonesty. Nonetheless, it is not entirely without significance that the offence of membership was in the context of a plot to engage in violence and take human life. In the view of this Court, the interests of the family and next of kin of the deceased, while perhaps not falling directly within the terms of subsection (12)(c), are nonetheless matters that can and should be considered under subsection (d).

**104.** It is subsection (12)(d) which causes greatest concern. In this case, we identify as a relevant starting point the fact that the evidence was excluded by judges who would, in the ordinary course of events, have been going on to consider the evidence in the capacity of jurors, as triers of fact. In the Court's view, the Special Criminal Court erred in excluding the evidence, the error being that they ought to have admitted the evidence and then proceeded to consider what weight, if any, was to be attached to it. Unusually, because the judges of the Special Criminal Court act as judges of law and judges of fact, we have a very good inclination of how the members of the Court, as judges of fact, would have viewed the evidence had it been admitted. It seems to us an inevitable conclusion from the decision of the Special Criminal Court to take the unusual step of excluding the evidence, that had they decided to admit the evidence, it is a case where they would have been prepared to attach little, if any, weight to it. It seems to us an inescapable conclusion that the factors which contributed to the exclusion of the evidence would have led to little weight being attached to the evidence if admitted.

**105.** The factors that it appeared contributed to the decision to exclude, such as: the relatively limited experience of the Chief Superintendent, particularly in relation to combatting

subversion; the fact that the Chief Superintendent had no personal knowledge of the two accused and was expressing a belief on the basis of a paper review; and the difficulties which had bedevilled the case in terms of disclosure would, no doubt, all have required consideration. So too would the fact that there had been a very broad claim for privilege which had significantly restricted the scope for cross-examination, so that it could not be said that this was belief evidence which had been challenged by, and withstood, a robust cross-examination. For all these reasons, it seems to us likely that if the evidence had not been wrongly excluded and had been weighed alongside all the other evidence in the case, the trial court would not have been prepared to convict the accused on the basis of being satisfied of their guilt beyond reasonable doubt.

**106.** Had the evidence been admitted and weighed, and the court of trial concluded that it was not sufficient to persuade it of the guilt of the accused beyond reasonable doubt, it would not have been open to the prosecution to seek to invoke s. 23 of the 2010 Act. It seems to us, given the level of disquiet that the members of the Special Criminal Court appeared to experience in relation to the belief evidence in the context of this case, that the accused must have entertained realistic expectations of an acquittal.

**107.** Therefore, in the context of this case, it does not seem to us that the interests of justice would be served by requiring either respondent to be re-tried. In the case of RK particularly, there is an additional consideration that, since his acquittal on the membership charge, he has stood trial, and as we understand it, been convicted of and sentenced in respect of an offence of attempting to pervert the course of justice in relation to the destruction of the SIM card at the crime scene.

**108.** In all the circumstances, we are not prepared to uphold this ground of appeal. We will therefore dismiss the appeal.