



AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No. 2020/33

O'Donnell C.J.

MacMenamin J.

Dunne J.

O'Malley J.

Woulfe J.

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

v.

VINCENT BANKS

Appellant

Judgment of Ms. Justice Iseult O'Malley delivered the 10th February, 2022.

Introduction

1. The appellant in this case has been convicted of the offence of membership of an unlawful organisation, to wit the Irish Republican Army (“the IRA”), contrary to s.21 of the Offences Against the State Act 1939 as amended. The indictment alleged that he was a member of that unlawful organisation on the 18th December 2012, which was the date on which he was arrested.
2. Two issues arise in the appeal. The first is whether or not the arrest of the appellant was lawful. The dispute in that regard centres on the fact that the appellant had previously, in September 2012, been arrested on suspicion of membership of the IRA under the provisions of s.30 of the Offences Against the State Act 1939, as amended, but had been released without charge. The defence argument was that the arrest in December 2012 was for the “*same offence*” as the September arrest, and that, pursuant to s.30A of the Act, such an arrest could only be lawfully effected under the authority of a warrant issued by the District Court. The trial court followed the decision of the Court of Appeal in *People (Director of Public Prosecutions) v. A.B.* [2015] IECA 139 (“*A.B.*”), and ruled that the second arrest of the appellant was not for the “*same offence*” as the first, because it took place in different circumstances and as part of a different investigation.
3. The second issue concerns the effect of the claim of privilege made by the Detective Chief Superintendent who gave evidence that he believed that the appellant was a member of the IRA. The privilege claimed, and upheld by the trial court, covered all sources of information considered by the witness in forming his belief. The defence unsuccessfully contended that the breadth of the claim was such that no meaningful cross-examination could be conducted by the defence.
4. The Court of Appeal rejected all grounds of appeal including those relating to the two issues now before this Court (see *People (Director of Public Prosecutions) v. Banks* [2019] IECA 319).

The statutory context

5. Section 30A of the Offences Against the State Act 1939, as amended, confers a degree of protection against repeated arrests and detention where a person has been detained under the Act in respect of an offence and then released without charge. In its original form, the provision, inserted by s.11 of the Offences Against the State (Amendment) Act 1998, prohibited (*inter alia*) a further arrest “*for the same offence*” except under the authority of a warrant issued by a judge of the District Court. It was later amended by the substitution of a new subs.(1) by s.21(2) of the Criminal Justice (Amendment) Act 2009, and the words “*for the same offence*” were replaced with “*in connection with the offence to which the detention related*”. Subsection (1) now provides as follows:

(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him, he shall not-

(a) be arrested again in connection with the offence to which the detention related, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

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

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

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

6. Subsection (2) provides for the application of the general s.30 detention regime to a person arrested under warrant in accordance with this procedure. Subsection (3) makes it clear that, notwithstanding subs.(1), a person may be arrested for any offence for the purpose of being brought before the Special Criminal Court to be charged.

Background to the membership trial

7. The sequence of events in this case is slightly confusing and it is best to set it out chronologically before turning to the issues in the trial and appeal.
8. The appellant was arrested under the provisions of s.30 on the 13th September 2012, on suspicion of membership of the IRA and the possession of firearms. The basis for that arrest was that on the 8th September he had been in attendance at the funeral of Mr. Alan Ryan, a man who was believed to have been a member of the IRA and who had been murdered. A paramilitary-style “colour party” had fired shots over the coffin while it was outside the residence of the deceased. The men who fired the shots appear to have then got into the appellant’s van to change out of their paramilitary garb before disappearing into the crowd.
9. There was a garda investigation into this incident, and the appellant was one of about 18 people arrested. During the course of this detention his fingerprints were taken in the normal way. He denied both the possession of firearms and membership throughout his period of detention and questioning, maintaining that he did not know the deceased and was just “giving a hand” at the funeral. He was released without charge on the 14th September. It is agreed between the parties that this arrest was recorded on the Garda PULSE system.
10. On the 1st November 2012, a prison officer named David Black was murdered in Northern Ireland, a crime believed by the Police Service of Northern Ireland and the Garda Síochána to have been carried out by the IRA. The subsequent investigation involved both forces. A considerable body of evidence was discovered indicating that

the car that was used by the perpetrators of the murder had been purchased by the appellant in Dublin on the 10th October 2012. On the 18th December 2012 the appellant was again arrested, without warrant, this time on suspicion of withholding information (on the 1st November 2012) about the murder of Mr. Black, contrary to s.9(1)(b) of the Offences Against the State (Amendment) Act 1998, and also on suspicion of membership of the IRA (on the 10th October 2012).

11. On the expiry of his detention the appellant was charged with both offences before the Special Criminal Court. The charge in respect of withholding information was particularised as having been committed between the 10th October 2012 and the 20th December 2012, while membership was charged in relation to the 18th December 2012 (the date of arrest). The indictment was however subsequently severed on the application of the prosecution. The charge of withholding information was the first to proceed and was tried in March 2014 (hereafter “the withholding trial”).
12. The legality of the second arrest was raised as an issue in the withholding trial. The prosecution argued that the arrest in September was for a different offence of membership than that in December, in that it was at a different time and place and with a different set of circumstances in being. The trial court ruled that the arrest was lawful insofar as the withholding offence was concerned, but expressed the view (in, as it later acknowledged, strong terms) that it had been unlawful in respect of the membership offence. This view was based on the concept that membership of an unlawful organisation was a “*continuing offence*” as described in the judgment of the Court of Criminal Appeal in *People (DPP) v. Donnelly, McGarrigle and Murphy* [2012] IECCA 78 (“*Donnelly*”). The second arrest was therefore considered to have been for the same offence. Particular mention was made of the fact that the two arrests were only three months apart.
13. It may need to be stated clearly here that, since the charge before the court was in respect of withholding information only, and since the court held that the arrest had been valid insofar as that charge was concerned, the views expressed in relation to the membership arrest had no consequences for the trial. There was no ruling on that arrest that could have been the subject of an appeal, or a reference to the Court of Appeal by the prosecution.

14. The court then went on to acquit the appellant of the offence of withholding information, holding that the prosecution evidence did not establish beyond reasonable doubt that he knew the purpose for which the car was to be used.
15. The appellant was on bail. Given the pressures on the trial list at the time, custody cases took priority and his trial on the membership charge did not come on for hearing until July 2017. In the meantime, the Court of Appeal gave its judgment in *People (Director of Public Prosecutions) v. A.B.* [2015] IECA 139. This was a without-prejudice reference by the Director of Public Prosecutions, raising a question as to the correctness of a ruling by the Special Criminal Court on the legality of an arrest without warrant under s.30. The accused in that case had previously been arrested and detained under s.30 on suspicion of membership, but not charged, some 24 years before the arrest under challenge in the trial. The prosecution argued in the trial that the offence of membership was particular to the date specified in the charge. The trial court disagreed. With express reference to its own earlier ruling in the withholding trial of the current appellant, Mr. Banks, it held that membership was a continuing offence and that the second arrest was unlawful in the absence of a warrant.
16. In holding that the Special Criminal Court had erred in that ruling, the Court of Appeal in *A.B.* accepted that in *Donnelly* the Court of Criminal Appeal had described the offence of membership as a continuing one. The issue in *Donnelly* arose from an argument that the appellant's arrest on suspicion of membership was unlawful because the arresting officer had not specified the date or location of the suspected offence. That argument is dealt with in paragraph 16 of the judgment delivered by O'Donnell J. in the following terms: -

“The submissions on behalf of the appellant do not recognise however, that normally the offence of membership is a continuing offence in the sense that an individual will be a member of an unlawful organisation over a period of time, and ordinarily will continue to be a member as he moves from location to location during that period of time. It is true that the general, although the not invariable, practice is to charge offences of membership as being a member on a particular date within the State, but frequently the evidence will

reflect the fact that the allegation against the accused is that he was in fact a member of an unlawful organisation for a period leading up to the date charged and remained and was a member on the date charged.”

17. Applying the *Donnelly* analysis, the Court of Appeal in *A.B.* acknowledged that the offence did not comprise a single event or set of events on a particular occasion, but rather something continuing over a period of time. There might of course be relevant evidence as to what happened on a particular occasion, but that was not decisive. It would not be fatal to the charge if evidence was given of activities or events, either consistent with, or evidence of, membership, that happened on dates other than that specified in the indictment.

18. The judgment in *A.B.* then goes on:

14. It is clear that the offence of membership carries with it the notion of continuity, but continuity is different from permanence. A 24-year gap between arrests is a very different thing from a situation where the time period is three months. The offence of which A.B. was suspected in 1989 concerned a state of affairs in which he was allegedly involved at that time. The evidence grounding the suspicion was historical, in respect of events that had happened prior to the arrest.

15. The Special Criminal Court followed its own decision in DPP v. Vincent Banks. Mr Banks had been arrested under s.30 of the Offences Against the State Act 1939, on a date in September 2012 on suspicion of membership of an unlawful organisation, namely the IRA, and following questioning he was released without charge. He was once again arrested on 18th December 2012, and on that occasion he was charged and that was the matter that came before the Special Criminal Court. So the position was that in the space of three months, the accused man had been arrested twice. The Court held that since membership of an unlawful organisation necessarily connoted continued association or membership over a period of time, then it was essentially the same offence. He had, accordingly, been arrested for the same offence without the sanction of the judge of the

District Court that was required under s.30A. Here, the gap in time is some 24 years as opposed to the three months that occurred in Banks' case. The points of similarity between the two cases are merely that it was a charge by the same name in each case and that the accused person had previously been arrested for a charge in the same words. The Court was in error in thinking that this case was on all fours with DPP v. Vincent Banks.

- 16. Whether a suspicion or charge is based on information about events or the belief of a Chief Superintendent or on a combination of both, the source of each kind of material giving rise to the concept of membership on the part of the particular person is in facts that have allegedly happened at a time prior to the existence of the suspicion or charge.*

- 17. It seems almost too obvious to say that the charges are different because of the long lapse of time and the implications of that for the nature of the charge before the Court. The concept of a continuing state of affairs representing membership of an organisation is different, as stated above, from the same conditions being permanent. It was legitimate for the Special Criminal Court to infer in the Banks case that the period of three months was insufficient to distinguish between the cases/charges but the much longer period of years is a wholly different matter.*

- 18. It is a question of fact whether the membership that was suspected on the previous occasion is the same offence for which the person has been subsequently charged. It cannot be presumed simply because membership is by its nature a continuing condition or state that the offence alleged is the same. One way of approaching the issue is to examine whether the circumstances, facts or events that gave rise to the suspicion on which the later arrest was based had happened or come about at the time of the previous arrest. That is a matter of evaluation and judgment by the Court.*

19. The appellant's trial on the membership charge then came on before a different formation of the Special Criminal Court. The prosecution case in the trial rested on three elements – the belief of a Chief Superintendent that the appellant was a member of the IRA, adduced pursuant to s.3 of the Offences Against the State (Amendment) Act 1972; inferences proposed to be drawn, pursuant to s.2 of the Offences Against the State (Amendment) Act 1998, from failure to answer material questions; and evidence concerning the appellant's involvement in providing the car used in Northern Ireland in the murder of Mr. Black on the 1st November 2012.

The arrest issue in the membership trial

20. In challenging the lawfulness of his arrest, the appellant sought unsuccessfully to persuade the trial court that the ruling of the court in the withholding trial gave rise to an issue estoppel, or that procedural fairness relating to the severance of the indictment required a finding in his favour. He also argued that the arrest was prohibited by the terms of s.30A. He relied upon the references to his case in the *A.B.* judgment as supporting his position. The prosecution submitted that the views expressed by the court in the withholding trial were *obiter* (in that the court had upheld the lawfulness of the arrest insofar as the charge of withholding that was actually before the court was concerned). It was also submitted that, within the relevant three-month period, the facts and circumstances had changed comprehensively.
21. It is relevant to note that the trial court in the withholding trial did not hear evidence in relation to the September arrest, but relied in its decision on the agreed fact that there had been such an arrest. For the purposes of this issue in the membership trial, however, the trial court heard the evidence of garda witnesses who had been involved in the September 2012 matter, as well as those concerned with the arrest in December 2012.
22. Although the arrest and questioning of the appellant on the 13th September, in relation to the funeral incident, was carried out by members of the Special Detective Unit, the investigation into it was led by a Detective Inspector Scott who was attached to the J

District in North Dublin (i.e. not a member of the SDU). The evidence of this officer was that, as there was no other evidence to contradict the account given by the appellant as to his attendance at the funeral, the gardaí believed him and released him, “satisfied he wasn’t a member on the day”. (It may be noted that, although Detective Inspector Scott used the word “we”, the prosecution and the defence are agreed that this expression could not be taken as binding other members of the force.)

23. The December arrest was carried out by Detective Sergeant Brosnan, who was attached to the SDU and was involved in the investigation concerning the evidence linking the appellant with the car that had been used in the murder of Mr. Black. She was directed by Detective Inspector Lenehan, the senior investigating officer, to arrest the appellant. On the 17th December she obtained a District Court warrant for the search of the appellant’s residence, and she arrested him there on the 18th December, on suspicion of withholding information and of membership of the IRA on the 10th October 2012.
24. Sergeant Brosnan’s evidence was that she was aware of all of the information gathered by the investigation in respect of the appellant. She had been in constant communication with the senior investigating officer, Detective Inspector Lenehan and with Detective Superintendent Maguire (as he was at the time) of the SDU, as well as other members of the SDU. However, she said that she had not been aware that he had been arrested in September, and that this fact had not been mentioned in discussions. This was despite the fact that she had been involved to some extent in the investigation of the funeral incident, and had in that capacity downloaded the contents of a number of phones taken from suspects, including the appellant’s phone. She stated that she had not applied for a District Court warrant for the arrest because she had been unaware of the earlier arrest.
25. In her oral evidence Sergeant Brosnan said that she had not looked the appellant up on the PULSE system as she believed that she had sufficient grounds for an arrest and was aware of his address from intelligence. Later in the course of the trial, however, it was disclosed that she had in fact checked him on PULSE on the 17th December. A written statement to this effect was received from her (and accepted into evidence without a requirement of further *viva voce* testimony). The statement ended with the

following: - “I do not know the reason why I checked PULSE. I did not know Vincent Banks had been arrested previously.”

26. Detective Chief Superintendent Maguire was in charge of the SDU at the time of the trial, having been a detective superintendent in 2012. His evidence was that the information that he had in his possession in December 2012 stemmed from the “*totally and completely separate*” investigation of the murder and had nothing to do with the investigation of the funeral incident. The appellant was not questioned about that incident during the December arrest and detention.
27. In submissions, the defence accepted that “*continuity*” was not the same as “*permanence*”, but argued that membership was a continuing rather than a date-specific offence. This was said to be demonstrated by the fact that the prosecution evidence in nearly every such case would include matters pre-dating the date of the arrest. It was contended that the prosecution could not rely upon the view that the second arrest was separate and distinct, since the evidence of Sergeant Brosnan was that she had not been aware of the first arrest. Emphasis was placed on the closeness of the two matters in terms of the short period of time between the 8th September and the 10th October, as well as between the 13th September and the 18th December, and on what the defence viewed as the supporting remarks of the Court of Appeal in the *A.B.* judgment. It was submitted that, given the effect of s.30A, the gardaí were obliged to check PULSE for previous arrests before carrying out a s.30 arrest.
28. Counsel also pointed to the wording of s.30A, and the fact that the section as amended now prohibited a subsequent arrest “*in connection with*” the offence for which the suspect had previously been detained, as opposed to the earlier statutory reference to an arrest “*for the same offence*”. It was submitted that there was a clear connection in this case. A member of the IRA might commit different offences on different dates in that capacity, but could not be seen as having been a different type of member on the date of each offence.
29. The prosecution relied upon the distinction drawn in *A.B.* between continuity and permanence. The second arrest in this case was said to have been based wholly on material gathered as a result of the investigation that commenced after the murder on

the 1st November. While it was accepted that the period of time since the first arrest was short, it was contended that there was no connection between the two investigations. Suspicion of involvement in the murder could not arise until after it occurred. It was submitted that the Court of Appeal, when referring in its *A.B.* judgment to the decision of the Special Criminal Court in the appellant's withholding trial, had only the same information as did the latter court – that is, the agreed fact that there had been a previous arrest. The *ratio* of the decision was set out in paragraph 18 of the judgment (quoted above), with its direction that the trial court should examine the circumstances, facts or events giving rise to the suspicion on which the later arrest was based.

30. In ruling that the December arrest was lawful, the trial court stated that the fact that an individual was arrested for an offence under s.30 did not automatically mean that an arrest warrant was required for any subsequent arrest pursuant to the same section and that this matter was not a relevant consideration in the determination of the issue.
31. It was observed that the court had had the benefit of evidence about the September arrest that had not been adduced in the withholding trial and that had not, as a result, been considered by the Court of Appeal in its references in the *A.B.* judgment to the ruling made in that trial. The court then applied the criteria set out in *A.B.* It found that there was no connection between the two investigations and that there could not have been, since the events giving rise to the second arrest only came about after the 1st November. There was a new set of circumstances giving rise to new information. The offence for which the first arrest had been made was not the same offence for which the second arrest had been made. In the circumstances there was no need to obtain a warrant.

The belief evidence and the claim of privilege

32. The belief evidence was given by Chief Superintendent Gerard Russell. This witness had made it clear in his witness statement that he would be claiming privilege in relation to all of the material in his possession on the grounds that: - (1) the material related to the security of the State; (2) disclosure of the material could place lives at

risk; and (3) disclosure would reveal the trade craft and methodologies employed by An Garda Síochána in preventing, detecting and investigating domestic terrorist activity. An informal request by the defence for a review of the file by the prosecution was not acceded to. The privilege issue was dealt with in a *voir dire*.

33. Chief Superintendent Russell said that he had joined the SDU in 1985 and had served with it for 25 or 30 years. He was currently attached to security and intelligence in a role that involved analysing intelligence relating to terrorist activity from both a domestic and an international perspective. He had been requested on the 16th May 2017 to examine material relating to the appellant, with a view to determining whether he was a member of the IRA on the 18th December 2012. Having read it over the course of several days, he formed the belief that the appellant was a member of the IRA.
34. The witness stated that he had not, in forming his belief, referred to any material surrounding the date of the arrest in December or any matters subsequent to the investigation or any statements relating to it. He claimed privilege in respect of all of the material he had reviewed, on the basis of risk to life, the security of the State and the possibility of compromising future garda operations. The claim made covered all of the contents of the file including any documents, footage, memoranda and exhibits or records thereof.
35. When asked if each of the three heads of privilege identified applied to every piece of material, the witness said that he was “*just talking in general terms*” in relation to the material reviewed. He said he was aware of the impact of claiming privilege and had not made the decision to do so lightly. The claim in relation to the security of the State applied to all the material. The risk to life did not arise in respect of all of the material. The issue in relation to disclosure of tradecraft and methodology did apply to all of the material.
36. Counsel for the defence then asked for a ruling on the basis, firstly, that the claim of privilege was so wide that he could not cross-examine effectively in order to challenge the belief evidence, and, secondly, there was no material which would

enable the court to assess the reasonableness of the belief. He asked for the evidence to be excluded.

37. Counsel for the prosecution submitted that the evidence of belief was admissible under s.3(2) of the Offences Against the State (Amendment) Act 1972, and the question thereafter was the weight to be attached to it. The defence had not asked the court to assess whether or not the material disclosed a valid claim of privilege, which would have been open to it.
38. The court ruled that the evidence was admissible, and pointed out that it was well-established in the authorities that it was the belief that was the evidence and not the material upon which it was based. While there might be limitations on cross-examination, that did not mean that the defence could not cross-examine. The claim of privilege was held to be perfectly legitimate.
39. Counsel for the defence then proceeded to cross-examine the chief superintendent for the purpose of the trial proper. He confirmed that his belief was not based on any matter discovered at the time of the appellant's arrest on the 18th December or subsequent to that arrest. It was based on materials generated prior to that date but not relating to this investigation. He had examined two files – one in Garda Headquarters and one in the Special Detective Unit. The witness stated that he had not been aware, until asked by counsel, that the appellant had been arrested on the 13th September 2012. That information had not been included in the material seen by him. He could not comment on the evidence that the officer in charge of the September arrest had believed the appellant's denials of membership. This was the first he had heard of that investigation. He had made up his own mind independently.
40. The chief superintendent was asked to clarify whether he was basing his belief on matters that might have occurred in October and November 2012. He stated that he viewed material over a wide period, and that there was material before October. Counsel then asked whether there was material relating to the appellant's attendance at the funeral in September. Initially he claimed privilege, but when it was pointed out that this was not a secret matter he stated that he had not relied on the attendance at the funeral in question. He repeated that he had not known about the arrest in respect

of that incident. He could not say whether it would have been relevant to his opinion, because he was not aware of the extent of the investigation. He could not say why it was not on the file.

41. Chief Superintendent Russell claimed privilege in respect of questions whether the material he examined contained references to any association of the appellant with other IRA members. He refused to comment on whether the file disclosed the length of time for which the appellant had been a member.
42. He stated that he had not read the book of evidence, including the memoranda of interview and therefore could not comment about the proposition that, in December 2012, the appellant had been questioned about events going back in time before October and November.

Evidence of the appellant's activities

43. The relevant facts may be summarised as follows.
44. On the 8th October 2012 the appellant was observed by a garda attached to the National Surveillance Unit in a public house in Phibsborough, Dublin. He was in the company of a man named Eugene Lynch, who was known by gardaí to be from the village of Carrigallen in Co. Leitrim. This man was later suspected of having a role in the storage of the Toyota after its purchase, but it appears that no charge was brought against him.
45. On the 10th October 2012 the appellant bought a prepaid mobile phone SIM pack with €10 credit. Subsequent investigations showed that the number associated with that SIM card only ever made two calls – one to top up the credit and one to a man who had advertised a Toyota Camry for sale. These calls were made very shortly after the appellant purchased the SIM pack.
46. Later that day the vendor of the Toyota met with the man who had phoned him, and sold the car to him. The purchaser signed the log book with what transpired to be a

fictitious name and address. The log book was duly sent to the appropriate authority. It was recovered by gardaí in the course of the investigation and was examined for fingerprints. A thumb print identified as that of the appellant was found.

47. The Toyota appears to have been driven to Carrigallen on the night of the 10th October or early the following morning. It was seen there by a local person, whose evidence was that it was parked in a layby from the morning of the 11th October to the 31st October.
48. Mr. David Black was murdered on the 1st November, by persons driving the Toyota that had been purchased on the 10th October and left in Carrigallen.
49. A Mazda car was seen near Ballinamore, Co. Leitrim on the evening of the 9th November, and the appellant was identified by a garda as having been in a public house there, with one Stephen Brady, and having driven away in the Mazda. It was also established that the appellant was driving this car when it went through a toll plaza on the N4 later that evening. Mr. Brady was a mechanic who had been suspected of involvement in the murder, in that he was believed to have assisted in starting up the Toyota on the 31st October, in Carrigallen. He had been arrested and detained under s.30 at some point between the 1st and 9th November, and had been questioned on suspicion of membership and withholding information. However, he was not charged with any offence.
50. In the course of their investigation the gardaí traced the Mazda, which belonged to a woman named as Pauline or Paula Devlin. This car was searched on the 18th December, and gardaí found in it an insurance certificate in the appellant's name and a jacket that appeared similar to that worn by the man who purchased the SIM pack. They also found an Ordnance Survey roadmap of Ireland, from which the page with a map of Leitrim had been torn out. This bore a thumb print identified as the appellant's. The appellant accepted that the map was his.
51. A search of the appellant's home on the 18th December does not appear to have revealed anything of major significance. However, the prosecution did rely, to some extent, on the finding of a newspaper that was some weeks old and was open on a

page with a story about the murder of David Black. A garda witness agreed that there had been a pile of old newspapers there and that many of them had been left open on different pages.

The interview evidence

52. As would normally be the case, some of the interviews with the appellant were conducted under the ordinary legal caution and some pursuant to the provisions of s.2 of the Offences Against the State (Amendment) Act 1998. In brief summary, that provision permits a trial court to draw inferences from the failure of an accused person to answer questions material to an investigation of the offence of membership. The prosecution placed reliance on what were asserted to have been lies told in the ordinary interviews, and urged the court to draw inferences from the failure to answer or the giving of false or misleading answers in the s.2 interviews.
53. In ordinary interviews, the appellant denied having purchased the Toyota, having had anything to do with sourcing it for the IRA or knowing anything about it. He also denied knowing Pauline Devlin, although he subsequently said that he knew her as Pauline or Paula Byrne. He said that he did not recall driving on the N4 on the 9th November. He denied that a still taken from footage at a toll plaza showed him. He said that he did not know whether the number associated with the SIM pack had ever been his phone number. He denied purchasing the SIM pack and said that he had never been in possession of it and had never used the number. He denied knowing the name David Black.
54. In dealing with the s.2 interviews, the prosecution relied upon the appellant's denial of anything to do with the Toyota and of having driven it to Carrigallen. He had also denied having previously handled the registration certificate. He said that he knew Mr. Lynch through his sister, who was a partner of Mr. Lynch's brother. He had stayed with Mr. Lynch's brother once or twice but was not sure if the place was in Leitrim. He denied knowing the name Stephen Brady.

55. While it was accepted by the prosecution that it could not be proved beyond reasonable doubt that the appellant had driven the car to Carrigallen, it was argued that the denial of so doing was “*sufficiently in line with a falsehood to be a failure*” because he had said that he had nothing to do with its purchase. It was contended that his denial of knowing that the car was used in the murder was a lie, because by the time the question was asked he knew from the newspaper that it had been. He had also denied having the newspaper in question.
56. The prosecution also relied upon the appellant’s denials of purchasing the SIM pack, and of being on the N4 on the 9th November. He had also refused, in a s.2 interview, to answer a further question as to whether he knew Paula Devlin, stating that he had already answered that (in interview under ordinary caution). The prosecution characterised this response as not being “good enough” in the context of a s.2 interview.

Closing speeches

57. The prosecution had, necessarily, accepted the acquittal in the withholding trial and therefore accepted that the evidence did not establish that the appellant knew that the Toyota would be used in the murder of Mr. Black. Its case in respect of membership was that the car was bought by the appellant in his capacity as a member of the IRA, on behalf of the IRA. It was submitted that the belief evidence of Chief Superintendent Russell was corroborated by the conduct of the appellant, including the circumstances of his arrest, and by his failure to answer material questions. Lies told in ordinary interviews were also relied upon, with the proviso that the court would have to exclude other reasonable possibilities in line with a *Lucas* warning.
58. The defence argued that there was insufficient evidence to convict, and pointed to the absence of the kind of evidence generally admitted in membership cases. There was no evidence of incriminating documents, or of previous statements leading to a reasonable inference of membership, or of movements, actions, activities or associations consistent with membership, all of which would be expressly admissible under statute. There was nothing, for example, to suggest that he had attended funerals or commemorations as a supporter of the IRA or in association with known

members. Nor was there evidence of unlawful possession of specified types of articles, or the unlawful collection of information, or training in the use of firearms etc. It was pointed out that the questions asked in interview related only to the Toyota car – no other forms of alleged IRA activity were put to him.

59. Assuming that the evidence about the purchase of the car was taken as establishing the appellant's role in that regard, counsel argued that it proved no connection to the IRA and nothing in relation to IRA membership. It had not been established in evidence that the murder was an IRA operation, or that any member of the IRA had any dealings with the car. The appellant had been acquitted of withholding information, but it was argued in the alternative that even if it was proved that he did have knowledge of the purpose, and that the murder was carried out by the IRA, that would not establish membership. He could have made the purchase as a sympathiser.
60. Turning to the s.2 interviews, counsel pointed out that the appellant was being questioned in connection with a murder, raising the possibility that he was being implicated in the murder himself on the basis that he was part of an IRA operation to source a car for it. There was also the possibility that he was protecting another person. He had, however, clearly denied membership of the IRA.
61. The court was urged to bear in mind, in its assessment of the weight to be attributed to the belief evidence of the chief superintendent, that the witness had not been aware of the September arrest or of the view taken at that time by a senior officer. The evidence was further weakened by the blanket claim of privilege, which left the court with no material that would enable it to assess whether or not the belief was reasonable. The defence had been unable to explore the basis and rationale for the belief, and the court had not examined the material.

Verdict

62. The trial court found the factual evidence summarised in paragraphs 43 to 51 above to have been established beyond reasonable doubt.

63. The court accepted the belief evidence of Detective Chief Superintendent Russell as meeting the same standard. Its findings on that evidence are here set out in full.

“We acknowledge that it can be difficult for an accused man or an accused person to cross-examine a witness where privilege is asserted and upheld. However, this does not mean the evidence cannot be tested and Mr. Dwyer was in a position to do so and did do so. Furthermore, in the course of his cross-examination, Mr Dwyer brought to the witness’ attention the evidence which had been given by Inspector Scott [the officer in charge of the September investigation] as outlined above. The witness said he had no knowledge of this evidence and further was unaware of Inspector Scott’s opinion. We have carefully scrutinised this evidence and assessed the weight to be attached to it. Detective Superintendent Russell impressed this Court as a reliable and credible witness. He properly said that he was giving evidence of his belief as held by him in respect of the accused man. This was his own opinion, proffered as a result of his scrutiny of the files furnished to him on the 16th of May 2017. He is undoubtedly a very experienced member of An Garda Síochána and the Court has taken this into account in its assessment of his evidence. Inspector Scott investigated a separate matter in September 2012. At that time, the gardaí released the accused man without charge. Detective Superintendent Russell subsequently viewed the files when asked to do so in 2017 and formed his own opinion of which he gave evidence, which opinion was unconnected to any other officer’s view. This category of evidence which is adduced pursuant to section 3(2) of the 1972 Act as amended is admissible only in connection with offences relating to membership of an unlawful organisation and only while Part V of the 1939 Act is in force. The evidence is the belief of the Chief Superintendent that an accused person was at the relevant time a member of an unlawful organisation. It is the belief of the Chief Superintendent which is the evidence before the Court. That belief is rooted in material furnished to the Chief Superintendent. We are satisfied that Chief Superintendent Russell brought to bear his extensive experience, his judgment and training when analysing the material available to him and we accept this evidence beyond a reasonable doubt.”

64. Dealing with the interviews, the court found that under ordinary caution the appellant had lied about his knowledge of Mr. Black (having regard to the open newspaper), his knowledge of and connection with the Toyota and his knowledge of and use of the Mazda. He had offered no explanation for the presence of the jacket in the Mazda, along with with his name and insurance certificate. He had said that he did not recall driving it on the N4 on the 9th November 2012. The court found that the evidence in relation to the newspaper became significant in the light of his denial of knowing about Mr. Black. Overall, it was satisfied that these were deliberate lies, that there was no innocent explanation for them, and that they were therefore capable of supporting the belief evidence.
65. With specific reference to the s.2 interviews, the court found that the appellant had given patently false answers in relation to the purchase of the SIM pack, the purchase of €10 credit, the use of the mobile phone on the 10th October, the purchase and use of the Toyota, the use of the Mazda on the 9th November, the still from the toll plaza, and his acquaintance with Stephen Brady. It concluded that these were material questions and that there was no benign explanation for the failure to answer. In those circumstances it considered that it was entitled to draw an adverse inference, the inference being that he was a member of the IRA at the time. This supported the belief evidence.
66. The court disregarded the evidence that the appellant was with Mr. Lynch on the 8th October (because of the evidence that he knew him socially). His presence in Leitrim in the company of Stephen Brady, in the Mazda, might have only given rise to a suspicion, but it achieved greater significance when viewed through the prism of his denials in interview in respect of Mr. Brady and the Mazda. The fact that the Leitrim page had been torn out of the Ordnance Survey roadmap, and had the appellant's thumb-print on it, was also significant.
67. The court found it proper in the circumstances to draw the inference that the appellant was a member of the IRA.

The Court of Appeal

68. The Court of Appeal was satisfied that the findings of fact made by the trial court in relation to the arrest were findings that were open on the evidence. Specifically, it had been open to the court to make the finding that the suspected offence of membership for which the appellant had been arrested in December 2012 was not the same as the suspected offence of membership for which he had been arrested in September 2012. The trial court had correctly applied the law as stated in *A.B.* to the facts as found.
69. The Court of Appeal was also satisfied that the basis for the claim of privilege by the chief superintendent was legitimate. The reasons for the claim had not been impeached or disputed in any way.
70. The complaint that unfairness arose because the defence could not cross-examine on the belief had not been made out. It had been held in a succession of cases, such as (*The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115, *The People (Director of Public Prosecutions) v. Connolly* [2015] IESC 40, [2015] 4 I.R. 60 and *The People (Director of Public Prosecutions) v. Weldon* [2018] IECA 197, that an inability to cross-examine the witness as to the materials on which the belief was based did not imply an inability to cross-examine on any basis. As had been pointed out in *Weldon*, it was accepted that the claim of privilege severely limited the ability of the accused to test and probe the witness and that this represented a considerable deficit with potential for unfairness. However, belief evidence was not to be automatically discounted on this basis, and the evidence could still be devalued even by limited cross-examination. Moreover, in accordance with the decision of this Court in *Redmond v. Ireland* [2015] IESC 98. [2015] 4 I.R. 84, the accused could not be convicted solely on the belief evidence, and it required to be supported by some other evidence implicating the accused in the offence charged. There was nothing in the instant case to set it apart from other cases in which a general unfairness argument had been presented and rejected.

Submissions in the appeal

71. The appellant accepts the analysis of the statutory position adopted by the Court of Appeal in *A.B.*, but submits that the test was not correctly applied in his case. He relies again upon the fact that the *A.B.* judgment specifically refers to the facts of his case for the purpose of distinguishing it from the facts relating to Mr. A.B. It is accepted that it is always a question of fact whether a particular offence is one and the same as the one for which a suspect was previously arrested, but the argument is made that the purpose behind s.30A will be defeated if each new activity is to be seen as bringing about a new offence of membership. It is suggested that the time between the commission of the suspected offences is a critical consideration in determining whether the offence is continuing. Other considerations might include evidence which might suggest that an individual left the organisation for a period of time. The two matters will be connected if there is a continuing suspicion.
72. It is submitted that the position taken by the Special Criminal Court and the Court of Appeal in relation to the arrest fails to take account of (a) the physical connection between the two arrests, whereby fingerprints taken on the occasion of the first arrest were used to identify the appellant as a suspect on the withholding charge, and (b) the temporal connection, in that the December arrest was on suspicion of membership on the 10th October 2012 and the belief of the chief superintendent was based on material that was at least in part generated before that date. Although the arrests were three months apart, the evidence before the court largely dated from October 2012, very shortly after the September arrest.
73. It is pointed out that the December arrest was planned in advance and that there were no circumstances of particular urgency. There was nothing to prevent the gardaí from seeking an arrest warrant. Their failure to do so defeated the purpose of the legislature in enacting s.30A and undermined its function. Reliance is placed on the dictum of Fennelly J. in *The People (Director of Public Prosecutions) v. M.C.* [2014] 3 I.R. 279, to the effect that, since s.30 is an incursion onto the right to liberty, it must be construed strictly, and the rules and procedures laid down within it in relation to arrest and detention must be properly and completely complied with.
74. The appellant maintains the argument that the breadth of the claim of privilege mounted in the trial rendered it severely difficult, if not impossible, to cross-examine

the chief superintendent effectively about the basis for his belief. The claim is described as being much broader than that found in the authorities relied upon by the trial court and Court of Appeal. The appellant relies upon the recent decision of this Court in *People (DPP) v. Cassidy* [2021] IESC 60 (“*Cassidy*”) and the authorities cited therein for the proposition that there was, accordingly, a greater need for evidence to support or corroborate the belief evidence and a requirement that significantly reduced weight should have been attributed by the trial court to that belief.

75. Turning to the evidence offered by the prosecution in support of the belief evidence, the appellant submits that the s.2 inferences would be rendered inadmissible if the argument in respect of the arrest is upheld. He further submits that, although some demonstrably false answers were given, they should not be considered to be strong supporting evidence, since a person cannot be convicted on such inferences alone. It is pointed out that the only question the appellant was asked in relation to membership was whether he supported the IRA. The evidence in relation to the Toyota should, at best, be seen as weak circumstantial evidence. The appellant had been acquitted on the withholding charge because the evidence did not establish that he was aware that the car was to be used or had been used in connection with the murder.
76. The appellant submits that the two grounds of appeal overlap to an extent. The evidence given by the chief superintendent was that he took into account material that predated October 2012, thus demonstrating that he considered that the appellant was committing a continuous offence spanning those times and that the offence in December was necessarily the same as that in September.
77. The respondent argues that the ruling in respect of the arrest was correct, having regard to the analysis of the Court of Appeal in *A.B.* and that of the Court of Criminal Appeal in *Donnelly*.
78. Reliance is also placed on the judgment of Owens J. in a case entitled *Department of Justice and Equality v. Gleeson* [2019] IEHC 562 (perhaps correctly “Minister” rather than “Department”). In that case, the surrender of the respondent was sought on foot of a European Arrest Warrant seeking his surrender for the purpose of prosecution on

two charges of membership of the IRA in Northern Ireland in 2014. He argued that he had been convicted and sentenced for an offence of membership in this jurisdiction, relating to activities within the State in early 2017, and that, since it was a continuing offence, his surrender was precluded by the *ne bis in idem* provision in Article 3(2) of the Council Framework Decision. That provision mandates the refusal of surrender where the person concerned has been finally judged in a Member State in respect of “*the same acts*”. It is implemented in this jurisdiction in s.41(1) of the European Arrest Warrant Act 2003, which provides, in summary, that a person shall not be surrendered for an offence consisting of an act or omission that constitutes “*in whole or in part*” an offence in respect of which final judgment has been given in the State.

79. Owens J. considered that the statutory phrase “*in whole or in part*” related to repeated proceedings in relation to the same act where the facts relied on as constituting the offence included within them facts which had been the subject of a separate prosecution for another offence. He did not accept that it was relevant to a situation involving two separate instances of offending in different years in different jurisdictions. The obligation of the court, when dealing with an EAW, was to look at the acts relied upon as constituting the offending, as set out in the warrant, and to ask whether these acts had been the subject of a final criminal determination in this State or another Member State. The particulars of the offence alleged in the EAW had no relation to the subsequent offending in which the respondent was involved within the State in 2017.
80. With reference to the argument that membership was a continuing offence, Owens J. observed that on the most extreme application of this line of argument, it would follow that a person could never be convicted of the offence more than once. A person could therefore remain in active membership, after a conviction, without being prosecuted for his unlawful adherence. This was the reasoning that had been rejected by the Court of Appeal in *A.B.*
81. Owens J. described the passage (cited above) from the judgment in *Donnelly* as being a “*statement of the obvious*”, adding “*To refer in this context to an offence as a ‘continuing offence’ means nothing more or less than that the criminal conduct which*

constitutes the offending may take place over a period of time and that the manner in which the offence is charged may reflect this.” He continued: -

“This observation of Court of Criminal Appeal is of no assistance on other issues. It has nothing to say on whether a garda who suspects a person of having been a member of an unlawful organisation on a particular date or during a particular period can arrest that person under section 30 of the 1939 Act where that person has already been arrested under the same section on suspicion of membership of that unlawful organisation on a different date or during a different period by reference to different information. There is no reason why such an arrest cannot be made as the person previously arrested has not been arrested again for the one offence....

...The offence created by section 21 of Act of 1939 does not consist solely of a mental element. This point also applies to the offence created by section 11 of the 2000 Act. An essential ingredient is proof of adherence to the group in the sense of participation in the activities of the group. This participation may be an active participation, as where a person professes or declares adherence or engages in acts of association, or it may be the passive participation of a terrorist sleeper, or it may be both. The adherence may be evidenced by proof of a participation in a single event or in an activity over a period. Any participation may be intermittent. If it is charged that during different specific periods a person was a member of an unlawful organisation by reference to participation in the activities of that group during those periods, it does not follow that there is duplicity in separate charges relating to each of those periods because it cannot be proved that the person was not a member in the intervals not covered by the charges.”

82. The respondent submits that this analysis is correct and that the concept of “adherence”, in the sense of participation, is at the core of the offence of membership. An offence is committed on each day in which there is adherence, but it will be a different offence if the evidence as to participatory acts is different.

83. It is submitted that the admission and assessment of the belief evidence by the trial court was correct having regard to *Kelly, Redmond and Cassidy*. No issue was raised by the appellant in the trial in respect of the claim of privilege beyond the assertion that it left the defence unable to cross-examine the Chief Superintendent properly.
84. It is further submitted that the independent evidence offered in support of the belief evidence fell within the parameters identified in the authorities. The matters relied upon are the untruthfulness in the interviews under ordinary caution, untruthfulness in the s.2 interviews, the association of the appellant with Mr. Lynch in Phibsborough and his participation in acts that were preparatory to, or connected with, or assisted in the murder of David Black. All of the supporting evidence arose after the 13th September 2012, and in every case related to the murder of Mr. Black and the operations undertaken preparatory thereto.
85. The respondent accepts that s.2 inferences arise only in respect of questions that are “material”. It is argued that the questions in relation to how the appellant knew Pauline Devlin and Stephen Brady were material because the gardaí were filling in a mosaic of his movements. He denied knowing Pauline Devlin, but he was seen driving her car on the 9th November in the company of Stephen Brady. It is also relevant that the appellant also told untruths under ordinary caution.
86. Finally, it is asserted by the prosecution that the fact and manner of the murder of Mr. Black, a prison officer, were consistent with the activities of the IRA.

Discussion and conclusions

The arrest

87. In *People (Director of Public Prosecutions) v. M.C.* [2014] 3 I.R. 279 this Court considered the effect of another amendment to s.30, subs.(3A). This provided, for the first time, a role for the member in charge of a garda station in some circumstances where it was proposed to continue a suspect’s detention. Speaking for the majority of the Court, Fennelly J. emphasised that s.30, as an incursion into the right to liberty must be strictly interpreted:

“Insofar as it lays down rules and procedures governing the arrest and detention of individuals the courts insist that they be properly and completely complied with.”

88. To put the provision relating to re-arrest under s.30 in context, it should be pointed out, firstly, that s.30 powers of arrest and detention are not concerned only with the offence of membership but cover a range of scheduled offences such as possession of firearms or explosives. Secondly, the amendment effected by the Criminal Justice (Amendment) Act of 2009 was one of a suite of amendments in that Act relating to other legislation conferring powers to arrest and detain for investigation. Thus, the powers under the Criminal Justice Act 1984, the Criminal Justice (Drug Trafficking) Act 1996 and the Criminal Justice Act 2007 are now all subject to similar restrictions on the power to re-arrest. Although the Act of 1939 is not to be read *in pari materia* with those other statutes (*People (Director of Public Prosecutions) v. M.C.* [2014] 3 I.R. 279) I think that it is reasonable to say that the legislative intent is, clearly, to prevent abuse of the rights of individuals by ensuring that a person cannot be subjected to repeated arrest and detention in respect of the same matter (to use a neutral word), without the oversight of a judge. It may be noted that similar oversight is required in relation to many of the powers relating to extensions of detention, where a warrant for an extension must be obtained by satisfying a District Judge that it is necessary for the proper investigation of the offence.
89. In the great majority of cases, where a person has been arrested, detained and released without charge, there will be no difficulty in deciding whether or not a subsequent arrest is “*in connection with the offence to which the detention related*”. Most crimes can readily be described in terms of particular actions on a particular date or dates, or even over a defined period of time. However, some offences may take place over a period of time that cannot necessarily be defined, and may indeed be still ongoing during the investigation. The categorisation of the offence of membership may for some purposes present complex issues. Nonetheless, it is undoubtedly included within the ambit of s.30A and the question is how that provision is to be applied to it.

90. In *Donnelly*, O'Donnell J. described membership as a “*continuing offence*”. However, it seems clear that this phrase was not intended to convey the concept of permanence, or to suggest that membership was a single offence such that a conviction or acquittal would bar a further prosecution regardless of evidence of further participation. It was a finding, based on the evidence in the case, that it was unnecessary for the arresting officer to specify that his suspicion related to a particular date or place.
91. It is also clear that the phrase was not being used, in the context of that judgment, in the sense in which it may be found in some legislative provisions. For example, in the area of planning and development law, or in legislation relating to regulated businesses and activities, it is often a statutory offence to do a particular thing without, or in breach, of a licence, or to fail to comply with a particular decision. Such legislation may expressly provide that a separate offence is committed on each successive day of the breach. In the instant case, neither party suggests that this would be applicable at more than the most theoretical level, although the prosecution does argue that an offence is committed on each day in respect of which there is evidence of participation. It is not proposed that, in the absence of such evidence, a person could be arrested, detained, charged and tried for separate offences of membership alleged to have been committed on successive days. Equally, the appellant does not contend that an acquittal or conviction on a charge of membership would necessarily give rise to a successful plea of *autrefois acquit* or *autrefois convict* in a later trial.
92. Both of these concessions are in my view correct. The courts could not, in the context of an offence such as membership, permit the mere specification of a different date by gardaí to have the effect of avoiding the protection conferred by the legislature through s.30A, and to thereby permit an oppressive sequence of arrest and detention. Conversely, it is obvious that the legislature did not in s.30A confer an immunity against any further arrest, investigation and charge on any person previously arrested but released without charge. I find the analysis of Owens J. in *Gleeson* of the concepts of adherence and participation to be helpful in this regard, and would consider it to be entirely persuasive in relation to the meaning of the relevant provisions of the European Arrest Warrant Act 2003 and also, depending on the facts in a given case, in

relation to questions of double jeopardy and duplicity of charges in a trial under national law.

93. However, it seems to me that different considerations arise in different contexts, depending on the content of the applicable rules. The relevant provision in the European Arrest Warrant Act 2003 is s.41 which does not simply refer to “an offence” but to “an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given”. It is thus necessary, in a case where the issue arises, to examine the specific act and/or omission that was the subject of a previous conviction or acquittal, and to see whether the proposed prosecution is based on the same act or omission. A similar examination, bearing in mind the necessary legal ingredients of an offence, would be required where an accused person relies upon a plea of *autrefois convict* or *autrefois acquit*, or claims that a charge before the court is duplicitous.
94. However, I am not convinced that the same analysis can be applied to s.30A. The context here does not give rise to questions about double jeopardy or duplicity, and will not necessarily arise in the context of a trial. It is the exercise of statutory powers of arrest and detention, and a statutory limitation of that power in respect of persons who were previously arrested but not charged and brought before the courts. In those circumstances, the grounds for the earlier arrest (which, after all, required only a suspicion based on reasonable grounds, and not knowledge or admissible evidence) will not have been examined in court and no factual allegations of participation will have been either proved or disproved. It must also be borne in mind that this provision, like the similar provisions in other measures relating to arrest and detention, is intended to protect individuals against an oppressive exercise of garda powers. That protective purpose is emphasised by the fact that the section also covers offences in respect of which the person was **not** previously arrested, if he was at the time of the first arrest suspected, or ought reasonably to have been suspected, of such offences.
95. It is in my view significant that the limitation, after amendment, relates, not just to an arrest “**for**” the same offence but to an arrest “**in connection with** the same offence”. This is, obviously, a broader provision than that originally enacted, and it brings with

it the need to examine matters that do not arise in relation to matters such as double jeopardy and duplicity. For this purpose, I think it essential to bear in mind both of the elements of the offence – the adherence, as well as the act or acts of participation. It seems to me that the analysis of the trial court, and of the Court of Appeal in *A.B.*, as well as the *obiter* comments of Owens J. on this issue, may have focussed on the latter to the exclusion of the former. So, an investigation into a particular occurrence may well, *as an investigation*, be concerned with *acts* on the part of a suspect that are entirely separate from those with which the gardaí were concerned at an earlier time. However, it would be difficult to describe the element of *adherence*, which by its nature implies at least some degree of continuity, as being “unconnected”. To repeat, a lawful arrest needs only a suspicion based on reasonable grounds, and an arresting officer does not need to be able to prove that a suspect did or did not leave or rejoin an unlawful organisation.

96. It is also significant, in this context, that the legislature has provided a straightforward means to progress an investigation where the statutory limitation on the power of arrest applies. All that is necessary is that a District Judge be satisfied, by the evidence of an officer of the requisite rank, that the gardaí have new information about the suspect’s participation in the offence of membership of an unlawful organisation. That is clearly a simpler task than that which the *A.B.* judgment would require to be carried out by the trial court, and which was actually carried out in this case.
97. Furthermore, it is an important consideration that this is a task which the legislature allocated to the District Court and which is intended to be carried out before an arrest, and not at some later stage. Many arrests do not lead to charges and trials, and the protection of the statute must, as Fennelly J. said in *M.C.*, be provided in all situations to which it applies. Protection against abuse of the power of arrest would be gravely weakened if the issue were left to be determined in the context of a trial. If the statute is complied with, the only question that might be left for a trial court to consider would be, if a challenge is raised, whether the decision of the District Court to issue a warrant was made lawfully. A similar issue was considered by this Court in *People (Director of Public Prosecutions) v. Power* [2020] IESC 13, where it was made clear

that the trial court, dealing with such a challenge, is not concerned with the merits of the decision but only with its lawfulness.

98. I would therefore conclude, on this issue, that the statute applies to an arrest on suspicion of membership if the person was previously arrested on suspicion of membership.
99. Although it is not directly in issue in this appeal I would observe that the lawfulness of a subsequent arrest cannot be determined by the state of knowledge of the arresting officer, although that will, no doubt, be of some relevance to a *J.C.* inquiry as to the consequences of a finding of an unlawfulness. I note here that the evidence of the arresting officer, a sergeant in the SDU, was that she did not know that the appellant had been arrested in September. This may be thought surprising, in the view of the fact that he had been arrested and questioned by other officers of the SDU a relatively short time earlier about an incident that would certainly be of interest to the SDU. That unit is not generally dependent upon PULSE for its information, but in any event Sergeant Brosnan's written statement confirmed that she had indeed checked PULSE. The implication of that statement, although this is not entirely clear, appears to be that she did not notice the entry relating to the arrest on suspicion of membership. This, in my view, is irrelevant to the question whether the arrest was valid.
100. In the circumstances I consider that the trial court erred in holding that, because the second investigation related to a different incident and so took place in the course of a different investigation, no warrant was required for the subsequent arrest.

The belief evidence

101. It appears to be necessary to state that, as has been pointed out in several judgments of this Court, as well as judgments of the Court of Criminal Appeal and Court of Appeal, evidence of belief is admissible pursuant to the statute if given by an officer of the requisite rank. A trial judge cannot, therefore, find it to be inadmissible on the basis of some other factor in the case and practitioners should not seek to have the evidence excluded on such a basis. However, admissibility is, clearly, not dispositive of the issue of the weight to be attached to the belief.

102. An accused person may not be convicted solely on the basis of belief evidence – it must be supported by other relevant and independent evidence (*Redmond v. Ireland* [2015] 4 I.R. 84). Equally, it has frequently been pointed out that it is for the court of trial to assess the weight to be attached to such evidence in the light of any other relevant consideration. The impact of a claim of privilege is clearly one such relevant consideration. The reason for this is that the breadth of the claim may have the effect of insulating the belief evidence from a cross-examination that might demonstrate that the belief is wrong.
103. These issues were most recently considered by this Court in *Cassidy*. In that case the Court approved the approach taken by the court of trial, which had found that the breadth of the claim of privilege made in that case, coupled with the absence of any evidence as to how the witness satisfied himself that his information was reliable, meant that the weight of any supporting evidence would need to be relatively high. It was stated (in para. 142 of the judgment of O’Malley J.) that if there was a very wide claim of privilege, there would be a correspondingly greater need for strong supportive evidence that clearly did not form part of the basis of the belief.
104. In the instant case, the claim of privilege was at least as broad as that in *Cassidy*. However, the Court does not appear, from the terms of its verdict, to have considered that this had any impact in terms of the need for correspondingly strong supporting evidence. The view that such analysis was necessary is strengthened by the unusual fact in this case that no evidence was led as to prior association of the appellant with members of the IRA, or prior activities consistent with membership, or any items found in his possession or his home that would be consistent with membership.
105. In terms of an assessment of the impact of the claim on the overall fairness of the trial, it is noted in the verdict that defence counsel had been able to cross-examine to the extent that he had demonstrated that the Detective Chief Superintendent had been unaware of the earlier arrest and of the conclusions reached by Detective Inspector Scott, the officer in charge of that investigation. That fact appears to have been seen by the Court as relevant only insofar as it raised the possibility that Detective Inspector Scott’s contrary view might appear to undermine the belief of Detective

Chief Superintendent Russell that the appellant was a member of the IRA. It resolved that issue by determining that the witness was giving evidence of his own, independently formed belief.

106. However, this analysis does not deal with the potential impact of the missing information on the belief reached by the witness. Whatever emerged from the questioning of the appellant by members of the SDU in September 2012 is not known to the Court, but it led the officer in charge of that investigation to the conclusion, not just that there was insufficient evidence of membership, but to feeling “*satisfied*” that the appellant was not a member at that time. There must be some question as to whether it could have affected Detective Chief Superintendent Russell’s conclusions one way or the other. He could have found some reason to doubt the conclusions of the earlier investigators, or he could have accepted their view to a greater or lesser extent. Further, there was no consideration of the salient fact that the information was not on either of the two files examined by the witness in 2017. This fact is, in itself, surprising. Whatever the explanation is, none appears to have been given to the trial court (and this Court cannot, of course, speculate). In my view the absence of this information is capable of casting some doubt on the question whether the information seen by the witness was adequate for the purpose of forming a belief as to the membership of the appellant in December 2012, but this possibility was not considered by the trial court.
107. None of these matters would affect the admissibility of the belief evidence. However, they should in my view have led the trial court to seek a high standard of supporting evidence for that belief. I consider that the court erred in not so doing.

The supporting evidence

108. There can be no doubt about the fact that the evidence in relation to the purchase of the Toyota established the involvement of the appellant. Equally, there is no doubt but that the evidence pointed to the fact that he must have known that he was, at the least, facilitating some form of serious criminal activity. The appellant bought the car under a false name and gave a false address. He arranged the purchase using a phone acquired for that purpose, which was never used again.

109. However, in light of the fact that the appellant was acquitted of withholding information relating to the murder of Mr. Black, I find it difficult to see how much further the purchase of the car can progress the charge of membership. The prosecution case is that, while he may not have known the purpose to which the car was to be put, he acquired it in his capacity as an IRA member for the purposes of an IRA operation. I have a number of difficulties in relation to this proposition.
110. Firstly, there was no finding by the trial court that the murder of Mr. Black, a prison officer in Northern Ireland, was carried out by the IRA. There was evidence, in the form of a statement from a Chief Superintendent of the Northern Ireland Police Service, that a claim of responsibility had been made on behalf of the IRA. However, this is not referred to in the decision of the trial court and it is not possible to know what weight was given to it. There was no finding that the murder was carried out in such a manner as to be attributable to the IRA. This may be contrasted with the facts of *Cassidy*, where the trial court had extensive evidence that the device found in the possession of the accused was consistent with other devices previously known to be associated with IRA use.
111. It might be assumed that the Chief Superintendent's statement was accepted and that the trial court was proceeding on the basis that the murder was an IRA operation. However, it would still be necessary to say why that was considered probative of the proposition that the person who sourced the car was a member, and why the court was excluding the possibility that he was simply a criminal acting for reward. It might be that in a particular trial evidence might be given to the effect that certain roles, such as the supply of a vehicle, are only performed by members of the organisation, but there was no such evidence in this case.
112. The other evidence in this category relates mainly to lies told by the appellant in interview. It is certainly the case that he did tell a number of lies. Again, however, care needs to be taken in assessing the extent to which lies can be relied upon as evidence in any particular case.

113. Lies told by the accused under ordinary caution may, subject to an appropriate warning, be supportive evidence if they are shown to have been deliberate, to relate to a material issue and to have been motivated by the realisation of guilt and a fear of the truth (see, in this regard, the discussion of the *Lucas* warning in Charleton & McDermott *Criminal Law and Evidence* (2nd ed., Bloomsbury Professional, 2020) at paras. 2.80 and 2.82).
114. Inferences may be drawn from a failure to answer or from false or misleading answers given by the accused when under a specific caution relating to s.2 of the Offences Against the State (Amendment) Act 1998. However, the questions must be “material to the investigation of the offence”, and, as the Court of Criminal Appeal said in *Donnelly*, an inference of guilt is not an inevitable consequence of a failure to answer. The trial court must consider what inferences may be drawn as a matter of logic.
115. It seems to me that it follows that the materiality of the questions must be established before a trial court determines whether or not the responses of the accused were such as to justify the drawing of inferences. On certain matters, unfortunately, the trial court came at the issue from the wrong direction. Thus, it found the evidence about the open newspaper, and the presence of the appellant in Leitrim on the 9th November, to have a greater significance than such matters would otherwise have had because of the responses of the appellant to questions about them. That approach was, in my view, an error – the materiality of the questions must be demonstrated first.
116. However, the central difficulty that I find with the analysis of the court is that I cannot see the required probative connection between the undoubted lies told by the appellant and the offence of membership of the IRA. While there were undoubtedly grounds for deep suspicion arising from his role in the sourcing of a car used in the murder, and while most of the questions put in interview could be described as material to that investigation, or to the investigation of the offence of withholding information, s.2 inferences are available only in respect of the offence of membership. Very few of the questions put in interview were actually directed to that topic. As the defence pointed out, there were no questions about prior associations, activities or possession of incriminating articles that might be consistent with membership. Telling lies about

criminal activity that might be explicable without reference to the activities of the IRA does not, on its own, amount to evidence of membership.

117. In summary, the case displays the following features:

(i) The belief evidence was given by a witness who made a very broad claim of privilege. That necessitated correspondingly strong supporting evidence pointing to the guilt of the appellant of the offence of membership.

(ii) The belief evidence was, itself, weakened by the fact that the information upon which it was based did not include reference to the fact that the appellant had, not long before the events in question in the trial, participated in some undefined way in the actions of a “colour party” at the funeral of a man associated with the IRA, or to the fact that he had been arrested in connection with that incident and released without charge.

(iii) There was no evidence in the trial of any other prior activities, associations or possession of incriminating articles consistent with membership.

(iv) While the appellant was arrested on suspicion of membership, very few of the questions put to him during his detention were directed to that offence.

118. In these circumstances I would consider that the evidence offered in support of the belief evidence did not meet the high standard required, and that the trial court erred in finding the charge of membership to be proved beyond reasonable doubt.

Conclusion

119. For the reasons set out above I would conclude that the arrest was not lawful. Since that finding would not necessarily dispose of the appeal I have considered the evidence presented by the prosecution against the appellant on the charge of membership. I have reached the conclusion that the belief evidence of the detective superintendent, although admissible, was required to be supported by strong independent evidence. This is because of the breadth of the claim of privilege made by the witness and the doubts caused by the absence of certain relevant information from the material examined by him.

120. Having considered the other evidence in the case, I do not consider that it reaches the necessary standard to support the belief evidence. While I have found that there are grounds for grave suspicion in relation to the appellant's role in sourcing a car that was ultimately used in a murder, I do not believe a sufficiently strong link has been demonstrated with the offence of membership beyond reasonable doubt.
121. I would therefore allow the appeal.