



THE COURT OF APPEAL

Record Number: 129/19

Birmingham P.
Edwards J.
Kennedy J.

Neutral Citation Number: [2020] IECA 124

APPROVED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JAMES JOSEPH CASSIDY

APPELLANT

JUDGMENT of the Court delivered on the 1st day of May 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. On the 21st March 2019 the appellant was convicted by the Special Criminal Court of the sole count of membership of an unlawful organisation contrary to section 21 of the Offences Against the State Act 1939, as amended by section 48 of the Criminal Justice (Terrorist Offences) Act 2005.

Background

2. Mr Cassidy was arrested on the evening of the 21st of September 2016 at his home, pursuant to the provisions of section 30 of the Offences against the State Act, 1939. Prior to his arrest, a team of Gardaí searched his home and surrounding properties at Tullycollive, County Monaghan, under valid judicial search warrants.

3. At trial, the primary evidence was the belief evidence of Chief Superintendent Mangan who gave evidence of his belief that Mr Cassidy was a member of an unlawful organisation styling itself as the Irish Republican Army, otherwise known as Óglaigh na hÉireann or the IRA, on the 21st of September 2016. He added that this belief was not based upon the arrest of Mr Cassidy, his subsequent detention and interviews at the garda station or on any matters discovered as a result of that arrest and detention. Chief Superintendent Mangan also confirmed that he ordered the extension of the detention of Mr Cassidy under the provisions of section 30 of the Offences against the State Act, 1939 during the conduct of the investigation into this matter on the application of Detective Inspector William Hanrahan.
4. Chief Superintendent Mangan claimed privilege in respect of information relating to and connected with his belief evidence on the grounds of state security, protection of life and property and ongoing operations. The Court upheld the claim of privilege.
5. In its judgment of 21st March 2019, the Court, having found the belief evidence admissible, and, having regard to, *inter alia*, the argument of objective bias and the claim of privilege, concluded as follows: -

“In this case, we consider that the weight of the belief evidence is augmented by the length, breadth and relevance of the chief superintendent's prior service history, which more than compensates for his relatively brief tenure in his rank at the time when he formed his belief. On the other hand, the claim of privilege made by the chief superintendent in this case was comparatively broad and did not permit significant cross examination on the nature and extent of underlying material. Although even limited cross examination is capable of devaluing belief evidence, the complete absence of underlying detail did not permit Mr Dwyer to make even limited headway. Furthermore, the weight of the belief evidence in this case is limited by the absence of an expression of satisfaction that the information was reliable or

accurate and by the absence of evidence of use of techniques for measuring or assessing the strength of the underlying material which, in our experience, is sometimes a feature of such belief evidence.

We have also considered Mr Dwyer's point that a reasonable bystander would be concerned as to the impartiality of the chief superintendent in the formation of his belief due to his involvement in the investigation by considering and granting an application for Mr Cassidy's period of detention. In that regard, we do not see any analogy between the functions of a chief superintendent in granting such an order as a witness offering belief evidence for consideration by this Court and the position of judges or other decision makers referred to in the authorities opened by Mr Dwyer in the course of his closing submission. Whilst it is arguably preferable that a potential belief witness should play no part in any aspect of investigation, we consider that the matters imparted to Chief Superintendent Mangan by Inspector Hanrahan were not such as to compromise his belief evidence. The chief superintendent assured us on more than one occasion that his belief as to Mr Cassidy was not founded on any emanation of the circumstances of the arrest or detention in this case. Having considered the testimony of the chief superintendent and his demeanour in offering that testimony, we accept these assurances, and are satisfied that such matters did not in fact contribute to his belief which was limited to and founded on matters arising before the 21st of September 2016.”

6. The Court then went on to consider whether the belief evidence was corroborated by other evidence, independent of the belief evidence, as stated by the Supreme Court in *Redmond v. Ireland* [2015] 4 IR 84. The Court noted that Chief Superintendent Mangan was unable to say whether he had taken into account matters from 2014, 2015 and earlier in 2016 informing his belief and therefore, in order to avoid a situation whereby evidence that

contributed to the formation of the belief is also used to support that belief, the Court stated they would eliminate any matters arising prior to the 21st of September 2016, for the purposes of proof of or support or corroboration of the belief evidence.

7. The Court went on to consider four strands of supporting evidence as proposed by the prosecution. The first of these was the discovery of a booster tube which was similar in nature and appearance to an item seized in a previous search of premises at Kilcurry, County Louth, on the 26th of May 2014. The booster tube was found in a shed to which the appellant had access. The Court also referred to answers given by the appellant to Gardaí in relation to the discovery of the booster tube under ordinary caution and under the provisions of section 2 of the Offences Against the State (Amendment) Act, 1998.

8. The Court carefully considered the evidence relating to the finding of the booster tube and the significance of that item and assessed with scrupulous care the evidence that the item was found in a corner of a shed. In its conclusion on this issue the Court said as follows: –

“Having considered as evidence, we are satisfied that the likelihood that some person other than Mr Cassidy placing the booster tube in the corner of the shed to which Mr Cassidy was the only person with the established access is, in the circumstances, so remote and fanciful that it can safely be dismissed as a reasonable possibility. There is absolutely no evidence that Mr Quinn, Mr McMahon, or anybody else had, or had exercised, such access. We do not believe that the location of the booster tube in a shed which was then in use by Mr Cassidy, for the purpose of storing animals, is attributable to coincidence or misfortune on his part. On the contrary, we are satisfied that the location of the booster tube in the shed in those circumstances constitute strong independent support corroboration of the accuracy of the belief held by Chief Superintendent Mangan. The evidence establishes that the booster tube was an item specifically associated with the activities of an organisation such as the IRA,

and therefore, connection with such an item offers clear support for the belief that a person still connected is a membership (sic) of that organisation.”

9. The Court then went on to consider the interviews where the provisions of section 2 of the 1998 Act were invoked and in particular the questions asked concerning the finding of the booster pipe. The Court found itself satisfied that the questions were material to the investigation of the suspected offence and that the answers given by the appellant concerning his knowledge of the presence of the booster tube in the shed were false and misleading answers within the terms of section 2. Having so found, the Court then considered whether it was proper to draw an inference adverse to the appellant and said as follows: –

“Therefore, Mr Cassidy's false responses at interviews under both ordinary caution, but particularly under the provisions of section 2 of the 1998 Act, also provide the basis for drawing adverse inferences that constitute further strong support and corroboration for the belief of Chief Superintendent Mangan in relation to him, and serve to eliminate a reasonably possible, and innocent or coincidental, explanation for the presence of the booster tube in the shed. Having decided that the answers -- the two answers given in trial exhibit 34D were false, we cannot discern a logical alternative inference from these responses that is consistent with innocence.”

10. The second strand of evidence arose from searches carried out by the Gardaí on the 21st September and relates to two USB storage devices found on a bedside locker in Mr Cassidy's bedroom. The USBs were found to contain material relating to the extraction of ammonium nitrate from fertiliser. Again, the Court carefully scrutinised the evidence concerning and relating to the two USB storage devices which were located on a bedside locker in the appellant's bedroom. The description on the files contained on the devices was:

“How to extract ammonium nitrate from fertiliser”.

11. The evidence disclosed that efforts had been made to save this particular page on five occasions following which the content was deleted from the device. In assessing the evidence, the Court found as follows: –

“We can consider that the discovery of a USB key in Mr Cassidy's bedroom containing material referable to one of the essential ingredients of an improvised explosives device also provides significant independent support for the belief evidence offered in this case. Curiosity about the extraction of ammonium nitrate from fertiliser is not, in our experience as a jury, a common or everyday trait. Such a process is of interest only to a limited category of persons, which would principally include members of the IRA or similar organisations. It has additional significance in this case, in that it is completely consistent with the discovery of the booster tube in the shed on the farm, and it serves the further purpose of resolving any lingering doubt about the connection of the tube in the shed to Mr Cassidy. The expert evidence in this case shows that a booster pipe and ammonium nitrate are both common components of improvised explosive devices. We have now reached the point where a possible series of coincidences has, in fact, become part of a linked pattern.”

12. The third strand of proposed supporting evidence arose from a search of the interior of Mr Cassidy's home whereby two mobile phones were found. Evidence was adduced at trial concerning the manner in which the appellant came to possess those mobile phones; this evidence related to a meeting at a shopping centre in Newry, on the 17th September 2016 between the appellant and a Mr Rooney. Evidence was given that Mr Rooney was known to be a friend and associate of Seamus McGrane, a convicted terrorist. The Court did not use the evidence relating to this meeting or the possession of the two mobile phones with SIM cards bearing consecutive numbers to support the evidence of Chief Superintendent

Mangan but relied on the evidence to assess the materiality of questions asked of the appellant in respect of those events in interview where the provisions of section 2 of the Offences Against the State (Amendment) Act, 1998 were invoked:-

“The evidence relating to the events at Newry on the 17th of September has not been used by us to corroborate or support the belief evidence. We have relied on it solely to establish the materiality of questions asked of Mr Cassidy in relation to these events. Mr Cassidy was asked about these two mobile phones by the interviewing gardaí in an interview where the adverse inference provisions of section 2 of the 1998 Act were invoked.”

In considering the issue of the two mobile phones, the Court at a later stage in the judgment stated as follows: –

“There is nothing inherently unusual or unlawful about possession of two new mobile phones containing SIM cards with consecutive numbers. In the absence of any other circumstances, the main inference that could be drawn about possession of such items is that two such phones were purchased or otherwise acquired together. In circumstances where the interviewing gardaí is (sic) suspected that Mr Cassidy was a member of the IRA, we are satisfied that possession of such items was a legitimate subject of inquiry and that the questions asked of Mr Cassidy in this regard were material to the investigation.”

13. Moreover, the evidence relating to the handover of the mobile phones by Mr Rooney to the appellant in the context of Mr Rooney’s connection with Mr McGrane was again considered by the Court in assessing the materiality of questions asked in interview where the provisions of section 2 were invoked.

14. In the final analysis on this issue, the Court found as follows: –

“In the circumstances, we are satisfied that the discovery of the two phones, together with the adverse inferences that we are satisfied to draw from the false and misleading answers given by Mr Cassidy to questions on the subject of the phones, provides strong and independent support for the statutory belief evidence in this case and for our interpretation of the strands of evidence concerning both the booster tube and the contents of the USB key; in other words, the strands interrelate and strengthen each other.”

15. The fourth strand of evidence relied upon by the respondent related to a number of items found in the appellant’s house which, it was said, suggested a significant interest in “republican matters”. The Court did not attach positive significance to the finding of these items and observed: –

“(W)hile it’s not advancing the prosecution case to any meaningful extent, they do not undermine it either.”

16. The Court came to the same conclusion concerning association evidence relating to the appellant’s attendance at various events which were also attended by persons with IRA-related convictions and said: –

“(T)his part of the evidence does not provide strong support for the belief evidence. However, does not undermine in any way the other evidence that does provide strong support for the Chief Superintendent’s belief.”

17. In the final analysis the Court, having reviewed the entirety of the evidence, concluded as follows: –

“ On the contrary, when the strands of evidence relating to the booster pipe, the contents of the USB key, the mobile phones and associated matters and the adverse inferences from Mr Cassidy's seriously false and misleading answers are taken in combination with the belief evidence, the weight of the combination points surely and

inevitably to the conclusion that the prosecution have discharged the burden of disproving the reasonable possibility that Mr Cassidy was not a member of the IRA on the 21st of September 2016. The supporting evidence in this case is particularly strong, both individually and in combination, and therefore meets the standard set out by us above as being required to support our assessed weight of the belief evidence in this case.”

Grounds of appeal

18. Whilst the appellant puts forward ten grounds of appeal as outlined in his notice of appeal of 11th December 2019, this Court will proceed to analyse the grounds of appeal in the manner argued in written and oral submissions. However, for the sake of completeness the grounds are as follows: –

- (1) The learned trial judges erred in fact and in law when they held that the evidence of Chief Superintendent Mangan as to his belief of the appellant's membership was admissible even though it was Chief Superintendent Mangan who reviewed the investigation material and was briefed by the investigation team to grant the extensions of time for the appellant's further detention and questioning.
- (2) Further or in the alternative, the learned trial judges erred in fact and in law when they gave any or too much weight to the said belief evidence of Chief Superintendent Mangan.
- (3) The learned trial judges erred in fact and in law when they held that Chief Superintendent was not guilty of objective bias or acting in breach of the natural law principle of *nemo iudex in causa sua* in that there was a reasonable apprehension that his belief that the appellant was a member of an unlawful organisation was arrived at having reviewed the investigation material/evidence and having been briefed by the investigating team.

- (4) The learned trial judges erred in fact and in law when they refused to exclude the belief evidence of Chief Superintendent Mangan on the basis that it was not arrived at independently from the investigation.
- (5) The learned trial judges erred in fact and in law when they upheld the broad and multifarious claim of privilege by Chief Superintendent Mangan over the confidential information and material upon which he based his belief of the appellant's membership of an unlawful organisation.
- (6) The learned trial judges erred in fact and in law when, by upholding the claim of privilege, they excluded any examinable reality of Chief Superintendent Mangan's evidence by undermining any potential avenue to effectively challenge the opinion evidence and failing to provide any sufficient counterbalancing factors and procedural safeguards during the trial.
- (7) The learned trial judges erred in fact and law when they breached the appellant's right to a fair trial pursuant to article 6 of the European Convention on Human Rights and/or the Constitution.
- (8) The learned trial judges erred in fact and in law when they ruled that the metal pipe found on property owned by another person was admissible as evidence against the appellant.
- (9) The learned trial judges erred in fact and in law when they ruled that the USB keys were admissible as evidence against the appellant.
- (10) The learned trial judges erred in fact and in law when they ruled that association evidence was admissible against the appellant.

19. Reliance was not placed on the final three grounds of appeal with the submissions on behalf of the appellant largely confined to the evidence of the Chief Superintendent. The appellant contends that the trial court erred in admitting this evidence, or in the alternative

erred in the weight the Court afforded to the evidence of belief. It is said that a number of factors should have led the Court to exclude/give little or no weight to Chief Superintendent Mangan's evidence of belief, namely:

- The issue of double counting;
- Objective bias/breach of the principle *nemo iudex in causa sua*;
- The weight attributed to Chief Superintendent Mangan's 'belief' evidence;
- Denial of meaningful cross-examination.

Submissions of the parties

Double counting

20. The appellant accepts that the trial court expressly recognised the potential for double counting and specifically excluded evidence prior to 21st September 2016 when considering the supporting evidence but it is submitted that the Court erred in then considering the association evidence as corroborative evidence, albeit recognising it as weak evidence. Moreover, it is said that the Court referred to the mobile phone evidence and the manner of the acquisition of those phones and so the issue of double counting arises in this respect also.

21. The respondent submits that the contention that there was double counting in the manner in which Chief Superintendent Mangan formed his belief that the appellant was a member of the IRA is entirely misconceived. The Court expressly excluded from its consideration any material arising prior to the arrest of the appellant on the 21st September 2016 when seeking to identify other evidence which was supportive of the belief evidence of Chief Superintendent Mangan. The Court specifically noted that it accepted the evidence of Chief Superintendent Mangan that, in forming his belief, he had not relied upon anything arising from the arrest, detention and interviewing of the appellant.

Objective bias

22. The appellant submits that Chief Superintendent Mangan was a decision-maker discharging a public function given only to Chief Superintendents by statute and he was acting as a decision-maker subject to the rules of bias. In those circumstances, it is clear that a reasonable person might have apprehended that there might be bias arising from the acceptance by Chief Superintendent Mangan that in order to grant the extension of the appellant's detention and questioning, he had discussed the evidence against the appellant with other officers and "knew a lot" about the investigation, and that all of this was done before and during his decision-making process that led him to believe that the appellant was a member of an unlawful organisation. Further or in the alternative, it is submitted that he was guilty of breaching the principle of *nemo iudex in causa sua*.

23. The respondent submits that the contention there was objective bias on the part of Chief Superintendent Mangan in forming his 'belief' that the appellant was a member of the IRA is entirely without foundation. The respondent submits that on a number of occasions, Chief Superintendent Mangan repeated his evidence that, in forming his 'belief', he had not relied upon any material arising from the arrest, detention and questioning of the appellant and the Court accepted this evidence.

Claims of privilege

The evidence and ruling

24. The appellant's solicitor wrote to the Director of Public Prosecutions prior to trial seeking information concerning the basis underpinning Chief Superintendent Mangan's 'belief' that the appellant was a member of the IRA at the relevant time. Chief Superintendent Mangan claimed privilege in respect of this material at trial and gave evidence on a number of occasions that he did not ground his "belief" on any matter which arose from the arrest and detention of the appellant, but he did not examine or look at the

book of evidence and that he had not examined any disclosure material. The claim of privilege was upheld by the Court.

25. The witness in evidence, stated that he had considered material in his possession on the 22nd and 23rd September 2016 and formed his belief concerning the appellant on the afternoon of the 23rd September 2016. He stated that he considered confidential information in his possession over that timeframe. In cross-examination, the proposition was put to the witness that there may have been an element of double counting. The contention was succinctly stated by the presiding judge, Mr Justice Hunt when he said: –

“Q. Mr Justice Hunt: That there may have been evidence which the prosecution relied on in support of your belief which also was a component of the formation of the belief?

A. I understand that, Judges.

Q. Mr Justice Hunt: Yes. Well, can you eliminate that?

A. I – I’m unable to say at this point.

Q. Mr Dwyer: Because you are claiming privilege?

A. That’s correct.”

26. Therefore, the witness was not in a position to confirm that when he considered the material in his possession over the timeframe indicated, that he had not considered material in forming his belief, which the prosecution were seeking to rely upon as supportive of his evidence of belief.

Weight

27. The appellant submits that the Court erred in affording too much weight to the evidence of Chief Superintendent Mangan. In making this submission the appellant refers to several factors relied on by the Court in *The People (DPP) v. Kelly* [2007] IECCA 110 when considering the weight to be attached to the evidence of the Chief Superintendent:-

“(i) The belief was not associated with any of the events relating to matters which occurred on the date of arrest.

(ii) The belief was not associated with any actions or admissions made by the accused at that time.

(iii) The belief was not based on the questioning pursuant to section 2 of the Offences Against the State (Amendment) Act .

(iv) The court had regard to the Chief Superintendent's evidence that he had held this view for some five or six years.

(v) The court had regard to the experience of the Chief Superintendent.

(vi) The court had regard to the demeanour of the Chief Superintendent in the witness box and the manner in which he responded in cross-examination.”

28. The appellant submits that when these factors are applied to the present case, most of these cannot be satisfied due to the claim of privilege.

Examinable Reality

29. The appellant further submits that the broad claim of privilege upheld by the Court excluded any “examinable reality”, as explained in *Redmond v. Ireland* [2015] 4 IR 84 at para 25:-

“...these matters in combination tend to exclude any 'examinable reality' from the case and thereby undermine any potential avenue to effectively challenge the opinion evidence. The effect of this is wholly to subvert the prospects of useful cross-examination and to exclude even the theoretical possibility of undermining the opinion by cross-examination. This creates scope for the possibility of a conviction on opinion evidence only, which evidence is effectively unchallengeable.”

30. As a result, it is submitted that the safeguards or counterbalancing factors, as referred to in *Donohoe v. Ireland* [2013] ECHR 1363, were absent and as a result the appellant's right to a fair trial was compromised under both Art 6 ECHR and the Constitution.

31. The respondent submits that the Court correctly applied the legal principles outlined in *The People (DPP) v. Kelly* [2006] 3 IR 115; *Connolly v. Director of Public Prosecutions* [2015] 4 IR 60 and *Redmond v. Ireland* [2015] 4 IR 84 in assessing the belief evidence of Chief Superintendent Mangan and the appellant suffered no unfairness.

Discussion

1. Double Counting

32. Section 3 (2) of the Offences Against the State (Amendment) Act 1972 renders admissible a Chief Superintendent's belief as to whether an individual is a member of an unlawful organisation at the relevant time. The section provides as follows: –

“Where an officer of the Garda Síochána, not below the rank of chief superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of another organisation, the statement shall be evidence that he was then such member.”

33. It is well-established that the evidence is that of the belief expressed by the Chief Superintendent and not the material or information which underpins the belief.

34. The Supreme Court in *Redmond v. Ireland* [2015] 4 IR 84 found that s. 3 (2) of the 1972 Act requires that the belief evidence of a Chief Superintendent be supported by independent evidence. The courts have recognised the exceptional nature of this evidence which of course has limited application, being confined to the offence of membership of an unlawful organisation. As pointed out by O'Donnell J. in *The People (DPP) v. Donnelly*

[2012] IECCA 78 in referring to the fact that evidence of belief is only admissible in respect of the offence of membership of an unlawful organisation :-

“...unlawful organisations pursuant to the Act of 1939 are cell based, secretive, and violent organisations which invest considerable resources in the enforcement of secrecy about the membership of such organisations, and do so by torture, death, and by the inevitable fear that those methods engender.”

35. It is well settled that the belief of a Chief Superintendent must be based on matters external to the evidence in the trial. It is said in the present case that Chief Superintendent Mangan expressly stated in evidence that he could not eliminate the possibility that the supporting evidence relied upon by the respondent was also a feature leading to the formation of his belief that the appellant was a member of the IRA. In particular, it is said that an issue of double counting arises in circumstances where the Court considered evidence of association as evidence supportive of the Chief Superintendent's opinion.

36. The evidence adduced disclosed that on the 22nd September 2016, Chief Superintendent Mangan was requested to consider material in his possession to assess whether the appellant was a member of an unlawful organisation, namely; the IRA, on 21st September 2016. The witness considered material over a period of days and on the 23rd September 2016, formed the belief that the appellant was a member of the IRA on the 21st September 2016. He stated that he did not ground his belief on anything which arose from the arrest and/or detention of the appellant and he did not look at the book of evidence or any disclosure material. In cross-examination, he stated that he was unable to confirm that he had not considered material which the prosecution was seeking to rely upon as evidence supportive of his evidence.

37. In those circumstances, the Court specifically stated that it eliminated any matters arising before 21st September 2016 as capable of supporting or corroborating the evidence of belief as given by the witness.

38. However, the Court considered that evidence concerning matters arising prior to that date was relevant for the purpose of assessing the materiality of questions put to the appellant during the course of interviews where the provisions of section 2 of the Offences Against the State (Amendment) Act 1998 were invoked.

39. On behalf of the appellant reliance is placed in particular upon the following extract from the decision of the court below: –

“A similar situation arises in relation to the association evidence relating to Mr Cassidy's attendance at various events, which were also attended by other persons with serious IRA-related convictions. However, the size of these events, the possibility of innocent attendance and the lack of any direct association in the evidence between Mr Cassidy and Declan Carroll and/or Seoirse Brannach at these events means that this part of the evidence does not provide strong support for the belief evidence. However, it does not undermine in any way the other evidence that does provide strong support for the chief superintendent's belief.”

40. It is clear from a perusal of the judgment delivered by the Special Criminal Court and from the transcript that the Chief Superintendent gave evidence that his belief was not dependent upon the evidence relating to the arrest and detention of the appellant.

41. The Special Criminal Court expressly noted in its judgment that the respondent relied upon the evidence of belief, evidence elicited during a search of the appellant's home, matters arising from his arrest and detention and matters arising from conduct and associations of the appellant prior to the date of his arrest, stretching back to 2014.

42. In light of the evidence given by Chief Superintendent Mangan in cross-examination whereby he was not in a position to say whether or not he had excluded material from 2014, 2015 and prior to the appellant's arrest in September 2016 informing his belief, the Court expressly eliminated from its considerations any matters arising prior to the 21st September 2016 for the purpose of material capable of supporting the opinion evidence given by the Chief Superintendent.

43. Moreover, we are not persuaded that the portion of the judgment relied upon by the appellant should be considered in isolation. To consider that particular extract without considering the express exclusion by the Court of any material arising prior to the appellant's arrest is incorrect.

44. The judgment of the Special Criminal Court must be read in its entirety and on carrying out this exercise, it is readily apparent that the Court did not take into consideration any material arising prior to the 21st September 2016 as evidence capable of corroborating the evidence of opinion given by the Chief Superintendent. Indeed, in our view, the judgment of the Court is crystal clear; the Court expressly excluded the aforementioned material in its consideration of potentially supportive evidence, but held that such evidence was available in order to establish the materiality of questions put at interview where section 2 of the Act was invoked.

45. The Court then considered the various strands of the evidence put forward by the respondent as capable of supporting the evidence of the Chief Superintendent, the booster tube, the USB devices and the mobile phone boxes and contents.

46. The Court summarised the evidence regarding the manner in which the appellant came to be in possession of the mobile phones and prior to analysing the evidence, repeated that the evidence concerning events in Newry on the 17th September 2016 had not been used by the Court to support corroboration of the belief evidence. The Court expressly stated that it

relied on that evidence solely to establish the materiality of questions asked of the appellant in interview where the provisions of section 2 were invoked.

47. It is important to note that when the Court came to consider the evidence regarding the finding of flags, banners, posters and other items in the appellant's home, it was satisfied not to attach positive significance to that aspect of the evidence. Immediately following this finding, the Court states: –

“A similar situation arises in relation to the association evidence relating to Mr Cassidy's attendance at various events...”

48. It is therefore clear that the Court was of the view that positive significance should not attach to that evidence. It is so that the Court then stated that that aspect of the evidence did not provide strong support for the belief evidence, however it is quite clear that the Court eliminated from its consideration all evidence relating to events prior to the 21st September 2016 in considering evidence capable of supporting the opinion evidence.

49. This becomes even more clear in the Court's final analysis when the Court states as follows: –

“ On the contrary, when the strands of evidence relating to the booster pipe, the contents of the USB key, the mobile phones and associated matters and the adverse inferences from Mr Cassidy's seriously false and misleading answers are taken in combination with the belief evidence, the weight of the combination points surely and inevitably to the conclusion that the prosecution have discharged the burden of disproving the reasonable possibility that Mr Cassidy was not a member of the IRA on the 21st of September 2016.”

50. Moreover, the Court went on to say: -

“The events relating to the booster tube, the USB key and the phones are not random and unrelated. They are part of a pattern of behaviour on the part of Mr Cassidy that

convincingly and overwhelmingly supports the belief that he was a member of the IRA on the date in question.”

Conclusion

51. It is quite clear to this Court that the Special Criminal Court took scrupulous care to exclude from its deliberation any issues or matters which arose prior to the 21st September 2016 in assessing evidence capable of supporting or corroborating the Chief Superintendent’s evidence of belief. The Court specifically excluded this material from its deliberations and expressly stated this to be so. This Court has no reason to go behind the stated position adopted by the Special Criminal Court in this respect. Moreover, in the Court’s final analysis and concluding portions of its judgment, the Court repeatedly referred to the material which it had considered as supporting the Chief Superintendent’s evidence of belief.

52. The Court took care to exclude material prior to the 21st September 2016 in order to ensure that there was no duplication or double counting of the material relied upon by the Chief Superintendent underpinning his opinion, and the evidence independent of that belief which the respondent sought to rely upon to support the evidence of belief.

53. We are entirely satisfied that the Special Criminal Court took all steps to ensure that the appellant received a fair trial in this respect and are not persuaded that any issue of double counting arose.

2. Objective Bias

54. Chief Superintendent Mangan granted the order sought by Detective Inspector Hanrahan extending the appellant’s detention pursuant to the provisions of section 30 of the Offences Against the State Act 1939. It is said on behalf of the appellant that Chief Superintendent Mangan was subject to the rules concerning objective bias. Chief Superintendent Mangan accepted that he had discussed the evidence concerning the

appellant with other officers and that he had done so prior to and during his decision-making process leading to the formation of his opinion that the appellant was a member of an unlawful organisation. Moreover, it is said that he breached the principle of *nemo iudex in causa sua*.

55. In summary, it is contended that in the circumstances, a reasonable bystander would be concerned that Chief Superintendent Mangan might have been biased in coming to his belief regarding the appellant.

56. The Special Criminal Court rejected the contention put forward on behalf of the appellant. In so doing the Court said, *inter alia*: –

“Whilst it is arguably preferable that a potential belief witness should play no part in any aspect of investigation, we consider that the matters imparted to Chief Superintendent Mangan by Inspector Hanrahan were not such as to compromise his belief evidence. The chief superintendent assured us on more than one occasion that his belief as to Mr Cassidy was not founded on any emanation of the circumstances of the arrest or detention in this case. Having considered the testimony of the chief superintendent and his demeanour in offering that testimony, we accept these assurances, and are satisfied that such matters did not in fact contribute to his belief which was limited to and founded on matters arising before the 21st of September 2016.”

57. The concern expressed on the part of the appellant is that as Chief Superintendent Mangan took the decision in connection with two aspects of the investigation, namely; the extension of the appellant’s detention and the formation of evidence of belief pursuant to section 3 (2) of the 1972 Act, an objective bystander would have had a reasonable apprehension of bias.

58. Section 3 (2) of the Offences Against the State (Amendment) Act 1972 makes the opinion or belief of a Chief Superintendent evidence at trial that an individual was a member of an unlawful organisation at the relevant time. It has been stressed time and again that it is the belief of the Chief Superintendent which is the evidence. The evidence in this case was that Chief Superintendent Mangan did not consider any material prior to 21st September 2016 (the date the appellant was arrested) in forming his belief. This evidence was not challenged on behalf of the appellant.

59. Firstly, we observe that the section does not provide that the senior officer giving the belief evidence must be independent of the investigation. There is no statutory provision indicating that such a witness may not perform one or more functions in the investigation. This was made quite clear in the decision of this Court in *The People (DPP) v. Glennon* [2018] IECA 211 where a similar argument was advanced and the Court found, at para 5: –

“The Court begins its consideration of this issue by pointing out that there is no statutory requirement that a Garda officer of appropriate rank performing the duty must be someone independent of the investigation. What is sought therefore is to read into the legislation something that is not there. The Court then calls to mind the well-known observations of Oliver Wendell Holmes that the life of the law has not been logic; it has been experiencing. The Court is not at all persuaded that there is any analogy to be drawn between the position of a member of an investigation team issuing a warrant to search a dwelling and the position of officers involved in the investigation taking decisions in relation to somebody who, on this scenario, has been lawfully arrested and validly detained. It seems to us that it would be destructive of the efficiencies required and expected of An Garda Síochána to exclude from decision making those who are best equipped to form judgments; those who are most familiar with the investigation. As the case of *DPP v. Gary Howard* [2016] IECA

219 establishes, where what was essentially the same argument was advanced in the context of s. 50 of the Criminal Justice Act 2007, the argument would find favour only if abstract logic were to be preferred to the experience of the law. The Court does not see this as a point of substance and has no hesitation in rejecting this Ground of Appeal.”

60. In the present case, a more nuanced argument is advanced in that it is contended that there must have been an apprehension of objective bias on the part of the Chief Superintendent.

Conclusion

61. As we have observed above, Chief Superintendent Mangan gave evidence, indeed on a number of occasions, that he had not relied on any material arising on foot of the arrest, detention or questioning of the appellant in coming to his opinion that the appellant was a member of the IRA. We are not persuaded that the issue of objective bias was a live one. There is no statutory provision which mandates that the senior officer considering material relating to an individual in terms of section 3 (2) of the 1972 Act cannot be involved in any other aspect of the investigation. Finally, the Special Criminal Court noted that Chief Superintendent Mangan’s opinion was not founded on the circumstances of the appellant’s arrest or detention and was satisfied to accept the assurances given by the witness in this respect.

62. We are not persuaded that this is a point of any substance.

3. Privilege

63. Claims of privilege were asserted by Chief Superintendent Mangan and upheld by the Court. It is said that the Special Criminal Court should not have attached any weight to the evidence of the witness or in the alternative it is contended that too much weight was given

to his evidence. Moreover, the argument is also advanced that as a result of the decision to uphold the claim of privilege, the ability of the appellant to challenge the evidence of Chief Superintendent Mangan in a meaningful way was restricted to such a degree so as to deny the appellant the right to meaningfully cross-examine.

a) Weight and b) cross examinable reality

64. In his direct testimony, Chief Superintendent Mangan gave evidence as to the breadth of his experience and said that he was a member of An Garda Síochána since 1982, some 37 years. He stated that during that period of time he had served on the border on three separate occasions, with the National Bureau of Criminal Investigation for almost 10 years, served as the head of the Garda Court Case Unit, served in the Cavan/Monaghan Division as Chief Superintendent and at the time of giving evidence was the Chief Superintendent in charge of the Louth Garda Division with responsibility for policing issues in that division, furthermore his responsibilities also included state security, the gathering and assessment of intelligence in relation to subversive crime and the investigation of such criminal activity.

65. There can therefore be no doubt that the witness was one with extensive experience in policing matters at a senior level.

66. Chief Superintendent Mangan expressed an opinion that having been asked to consider material in his possession on the 22nd September 2016 in terms of section 3 (2) of the 1972 Act, he formed the opinion that the appellant was a member of an unlawful organisation. He based this opinion on confidential information in his possession and specifically excluded any material arising from the date of arrest of the appellant, being the 21st September 2016.

67. In cross-examination he asserted his claim of privilege on the basis of state security, the protection of life and property and to protect ongoing and future Garda operations. In effect, he reasserted his claim of privilege over the information which had been sought by

letter from the appellant's solicitor and the reasons for the assumption of the claim of privilege.

68. He was unable to confirm that when you consider the material in his possession on the 22nd and 23rd September 2016, that he had not considered material upon which the prosecution was seeking to rely as supportive of his opinion evidence.

69. The Court upheld the claim of privilege, following which no further cross-examination took place.

The judgment of the Special Criminal Court

70. In giving its judgment, the Court first identified the broad experience of Chief Superintendent Mangan and summarised the evidence given by him. The Court was more than alert to the difficulties that can arise in situations where a claim of privilege is upheld and stated with admirable clarity the legal principles and the nature of such evidence: –

“Firstly, no special presumption attaches to evidence by virtue of the fact that it is received pursuant to statute or by virtue of the rank held or uniform worn by a police officer proffering such evidence. Secondly, the ability of an accused to challenge such evidence by normal cross-examination within the adversarial context may be significantly compromised by claims of public interest privilege over the material or information used by the officer to form his belief. This places an obvious limitation on the normal forensic technique of cross-examination conducted by reference to the details of the information disclosed to the cross-examiner in relation to the evidence to be tested by him.

Thirdly, where neither the Court nor defence counsel is aware of the nature and extent of the material used by the witness to form his belief, the normal expectation that a chief superintendent would not offer such evidence, unless he was genuinely satisfied from his review of the materials that the materials warranted the

formation of such a belief, this is not a source of comfort where, as is almost inevitable in such circumstances, there is a reasonable possibility that the information relied upon might be, for a variety of reasons, false, misleading or inaccurate. Having considered the belief evidence in this case, we are satisfied that the chief superintendent genuinely holds his stated belief. This was not disputed by Mr Dwyer. Therefore, the belief evidence is admissible in support of the allegation against Mr Cassidy. The fact that neither the Court nor Mr Dwyer had sight of the foundation material does not affect the admissibility of this evidence.”

71. The Court then proceeded to assess the weight to be assigned to the evidence of belief as given by Chief Superintendent Mangan and was satisfied that the weight to be attributed to the evidence was augmented by the breadth and relevance of his prior service history. However, the Court then proceeded to balance the extensive experience of the witness with the limitations placed on the cross-examination by virtue of the successful claim of privilege. The Court was satisfied as follows: –

“On the other hand, the claim of privilege made by the chief superintendent in this case was comparatively broad and did not permit significant cross-examination on the nature and extent of underlying material. Although even limited cross-examination is capable of devaluing belief evidence, the complete absence of underlying detail did not permit Mr Dwyer to make even limited headway. Furthermore, the weight of the belief evidence in this case is limited by the absence of an expression of satisfaction that the information was reliable or accurate and by the absence of evidence of use of techniques for measuring or assessing the strength of the underlying material which, in our experience, is sometimes a feature of such belief evidence.”

72. The Court proceeded to accept beyond reasonable doubt that Chief Superintendent Mangan was genuinely of the belief that the appellant was a member of the IRA on the relevant date. On the issue of weight the Court said: –

“The weight to be attached to that belief is supplemented by relevant skills and experience deployed by the witness in coming to that belief after a consideration that spanned two days on the 22nd and 23rd of September 2016. And the weight is tempered by the inhibition on cross-examination by the broad claim of public interest privilege and by the absence of evidence of an assessment as to the reliability and/or means of assessment of the information, or the sources thereof.”

Discussion

73. It is quite clear therefore, that the Special Criminal Court was very conscious of the principles applicable to this category of evidence and of the limitations which can arise in circumstances where cross-examination is restricted by virtue of a successful claim of privilege.

74. It is well-known that it is the belief of the Chief Superintendent which is the evidence and not the material which underpins that belief. Therefore, it is not question of a senior officer giving hearsay evidence, it is the belief of the Chief Superintendent arising from the material which constitutes the evidence.

75. It is also well-known that only a superior officer may give such evidence. Such an officer will of course have broad experience given the fact that he or she has reached that particular rank. Therefore, it is expected that an officer of that calibre will only give this category of evidence where he or she genuinely, having assessed the material, has concluded that an individual in respect of whom he or she is giving evidence is a member of an unlawful organisation beyond reasonable doubt.

76. It is also well-known that it is almost inevitable that an officer giving evidence in terms of section 3 (2) will assert a claim of privilege and such a claim is readily understandable given the potential for harm to individuals or loss of life or negative impact on the policing operations. Such a claim of privilege, if upheld, may impact in many circumstances on the ability to cross-examine freely. However, as has been stated, this does not mean that cross-examination is set at naught.

77. It is the position that simply because there are limitations placed on cross-examination, does not in and of itself mean that counsel cannot cross-examine extensively on peripheral or collateral issues.

Conclusion

78. It is quite clear in the present case that the Special Criminal Court took scrupulous care in assessing the appropriate weight to exhibit to the evidence of Chief Superintendent Mangan. The Court engaged in such exercise in a carefully balanced manner and in accordance with well-established legal principles. The Court approached the belief evidence given by the Chief Superintendent with caution and recognised that the weight to be attributed to the evidence was, in the words of the Court: -

“...tempered by the inhibition on cross-examination by the broad claim of public interest privilege and by the absence of evidence of an assessment as to the reliability and/or means of assessment of the information, or the sources thereof.”

79. The Court considered the evidence given by the Chief Superintendent and the supporting evidence and was cognisant that the weight and importance to be attached to the two categories of evidence is dependent upon the circumstances in any given case.

80. The Court was of the view that there were factors existing which tended to limit the weight to be attributed to the evidence of the Chief Superintendent and consequently was of

the opinion that it was necessary that the supporting evidence should in effect provide strong support given that the weight to be given to the Chief Superintendent's evidence was curtailed by the difficulties of cross-examination due to the claim of privilege.

81. We are entirely satisfied that the Special Criminal Court approached the case in an appropriate manner. The Court considered the particular circumstances of the case, including, *inter alia*, the experience of the Chief Superintendent, the manner in which he gave his evidence, and the consequences of the claim of privilege. The Court tempered the weight to be given to the evidence in light of those factors and moreover, scrutinised the supportive evidence and the strength of such evidence.

82. In the circumstances we are entirely satisfied that no error in principle arises in this respect.

83. Insofar as it is said that the appellant did not receive a fair trial as counsel's capacity to cross-examine was restricted, we are entirely satisfied that the Special Criminal Court considered this matter very carefully and put this matter into the mix in assessing the weight to be given to the evidence of the Chief Superintendent. The evidence in this case in respect of the appellant was, in the view of this Court, compelling.

84. Supporting the evidence of Chief Superintendent Mangan was the evidence of the finding of a booster tube, the contents of the USB keys, the mobile phones and the adverse inferences drawn by the Court in accordance with section 2 of the Offences Against the State (Amendment) Act 1998. The circumstantial evidence in this case was compelling indeed and capable of providing significant supportive evidence. In our view the evidence pertaining to the offence of membership was, in the present case, particularly cogent, given that the evidence was multifaceted.

Decision

85. Accordingly, the appeal is dismissed.

Isabel Kennedy

26th June 2020