THE COURT OF APPEAL

Record Nos: 251/18, 254/18, 240/18, 226/18, 241/18

The President.
Edwards J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KEVIN HANNAWAY, EVA SHANNON, SEAN HANNAWAY, DAVID NOONEY AND EDWARD O'BRIEN

APPELLANTS

JUDGMENT of the Court delivered on the 6th of February 2020 by Mr Justice Edwards.

1. On 29th June 2018, following a fifty-day trial the appellants, Kevin Hannaway and Eva Shannon, were convicted of the offence of providing assistance to an unlawful organisation contrary to s. 21A of the Offences Against the State Act 1939, as inserted. The other appellants, Sean Hannaway, David Nooney and Edward O'Brien, were convicted of the offence of membership of an unlawful organisation. Following a sentence hearing which took place on 24th July 2018, the Special Criminal Court, on 31st July 2018, sentenced Kevin Hannaway to a term of three years and nine months' imprisonment, Eva Shannon to a term of four years imprisonment, Sean Hannaway to a term of five years and six months imprisonment, David Nooney to a term of three years and nine months imprisonment, and Edward O'Brien to a term of sixteen months imprisonment. All five appellants have appealed against conviction. Kevin Hannaway, Eva Shannon and Sean Hannaway have lodged appeals against severity of sentence. In the case of David Nooney and Edward O'Brien, the Director of Public Prosecutions has sought to review the sentences imposed on grounds of undue leniency. This judgment deals with the conviction aspect only and so for that reason it is convenient to collectively refer to the five persons convicted by the Special Criminal Court as the appellants.

Factual Background

2. The trial was an extraordinarily lengthy one and the appeal hearing took three days. However, the background facts were quite straightforward. The case was primarily concerned with events that occurred on 7th and 8th August 2015 at No. 10 Riverwood Park, Castleknock, Dublin, a rental property that was vacant at the time. Information relating to No. 10, Riverwood Park came into the possession of the Special Detective Unit of An Garda Síochána who were investigating the activities of the unlawful organisation styling itself as the "Irish Republican Army" or the "IRA". In these circumstances,

Detective Superintendent (now Detective Chief Superintendent) Cliona Richardson of the Crime and Security Branch at Garda Headquarters, applied to a judge of the District Court by way of information on Oath for an authorisation pursuant to the Criminal Justice (Surveillance) Act, 2009 ("the Act of 2009"). An authorisation issued. In accordance with the authorisation, an audio surveillance device or devices, capable of recording conversations within No. 10, Riverwood Park was or were deployed by the National Surveillance Unit. The movements of persons and vehicles to and from No 10, Riverwood Park ("the premises") were monitored over 7th and 8th August by members of the National Surveillance Unit ("NSU"), and in particular, were observed by a member of that unit referred to at trial as Detective Garda BK.

3. Over the course of the weekend, the premises were visited on two occasions by the owner, a Mr. Paul Keegan, who had agreed to a request from his letting agent to permit a person stated to be "the uncle" of the maintenance person stay over. The second such visit was at approximately 2.15 p.m. on 8th August 2015. Shortly after that visit, all of the appellants were observed leaving the premises. Having done so, Edward O'Brien was observed placing bags of rubbish brought from the premises into the boot of a vehicle linked to him, a Ford Mondeo, registered to his partner. The other four appellants left the premises together and having placed their luggage in the boot of a Ford Focus registered to David Nooney, they drove away. These four appellants were arrested at 2.25 p.m. in the car park of a McDonald's Restaurant in Blanchardstown Shopping Centre. At the time of her arrest, Eva Shannon was in possession of a book, *'The Dirty War'* by Martin Dillon. The prosecution sought to attach some significance to this because the 'Green Book' or "Constitution of the IRA" appears as an appendix to the book. Whatever label is attached to the document, it deals with matters such as the procedure for holding internal inquiries, Court Martials, and the like.

4. At the heart of the prosecution case was the audio recording evidence obtained through the deployment of surveillance devices. The prosecution's case was that this unequivocally established that an internal IRA inquiry took place over 7th and 8th August 2015 at the premises the subject matter of the surveillance. Moreover, it was said to prove that the inquiry was focused on a foiled or failed IRA operation, and that three individuals were interviewed during it, i.e., Robert Day, Patrick Brennan, and Damien Metcalfe. The prosecution case was that the interviews were conducted by Kevin Hannaway, Sean Hannaway and Eva Shannon, that David Nooney had secured the premises used for the enquiry and had further facilitated the interviews, and that Edward O'Brien also had an involvement in the events of the weekend.

5. Much of the trial centred on the question of whether the audio recording of the events at No. 10 Riverwood Park were admissible in evidence or whether it should have been excluded at trial. The admissibility of the recording was challenged on a number of different grounds and the probative value of what was recorded was called into question. The audio recording has again been the primary focus of the appeal. It is the existence of this recording that differentiates this trial and this appeal from other membership cases that have come before the courts. It is, however, also the case that Detective Chief

Superintendent Anthony Howard, then recently appointed Head of the Special Detective Unit, gave evidence pursuant to statute of his "belief" or opinion that Sean Hannaway, David Nooney, and Edward O'Brien were, on 8th August, 2015 members of the unlawful organisation styling itself the 'IRA' or the 'Irish Republican Army'. Another element of the prosecution case was that the Special Criminal Court was urged to draw inferences from the failure on the part of David Nooney and Edward O'Brien, both charged with membership of the IRA, to answer material questions when interviewed pursuant to the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998, when that provision was invoked.

Grounds of Appeal

6. These appeal proceedings are complicated somewhat by the number of appellants involved, all of whom are individually represented, and in circumstances where each has lodged a separate Notice of Appeal, relying on distinct grounds of appeal therein. It would be fair to say that there is a great degree of thematic overlap within the grounds of appeal advanced, something which the appellants themselves have recognised both in their written and oral submissions. As such, it is possible to condense and summarise the grounds of appeal into the following issues:

(i) the prosecution's reliance on belief evidence;

(ii) the refusal to disclose surveillance devices and associated items;

(iii) the admissibility of the "PB1" audio recording, and the transcript of it;

(iv) the lawfulness of the initial search, detention, and arrests of the respective appellants;

(v) the failure to direct an acquittal or stay the trial at the end of the prosecution's case;

(vi) the purported identification or attribution made during the prosecution's closing speech;

(vii) the jurisdiction of the Special Criminal Court (Edward O'Brien only); and

(viii) the interviews conducted under s. 2 of the 1998 Act (Edward O'Brien only).

The Opinion or Belief Evidence of Detective Chief Superintendent Anthony Howard

7. While some of the issues raised in relation to the audio recording were unusual, even unique, the same cannot be said for the issues raised in relation to the opinion/belief evidence. Routinely, issues as to the admissibility of the opinion/believe evidence arise in membership trials and on appeals from those trials, as do issues relating to the weight to be attached to the evidence, if it is admitted. This case was no exception. The prosecution sought to put before the Court the opinion/belief evidence of Detective Chief Superintendent Anthony Howard. The admissibility of that evidence and the reliance placed on it by the Special Criminal Court forms a significant part of the appeals of Sean Hannaway, David Nooney, and Edward O'Brien.

8. The relevant grounds of appeal in the case of Sean Hannaway were formulated in these terms:

(i) the trial court erred in law and in fact in convicting the appellant on the evidence of the opinion of Detective Chief Superintendent Howard that the appellant was a member of an unlawful organisation without any other evidence demonstrated to be consistent only with membership of an unlawful organisation as opposed to evidence which was also possibly consistent with other offences;

(ii) the trial court failed to address or to properly address the evidence in this case, and in particular, failed to differentiate between the evidence on which it relied in support of its findings that the appellant was a member of an unlawful organisation and the evidence on which it relied to convict the appellant's co-accused, Kevin Hannaway and Eva Shannon, the said co-accused being convicted of the offence of assisting a terrorist organisation pursuant to the provisions of s. 21A of the Offences Against the State Act 1939, as inserted by s. 49 of the Criminal Justice (Terrorist Offences) Act 2005;

(iii) finding that the same evidence that supported the prosecution case, that Kevin Hannaway and Eva Shannon were guilty of assisting a terrorist organisation contrary to s. 21A of the Offences Against the State Act 1939, also supported a finding that the appellant was a member of an unlawful organisation contrary to s. 21 of the Act of 1939 as amended by s. 48 of the Criminal Justice (Terrorist Offences) Act 2005;

(iv) failing to address properly, or at all, the circumstantial evidence, and in particular, failing to address the question of whether the evidence, other than the evidence of the Detective Chief Superintendent's opinion, was consistent only with the appellant's membership of an unlawful organisation and consistent with any other interpretation, such as assisting an unlawful organisation;

(v) the trial court erred in failing to grant a direction of not guilty at the close of the prosecution case, in that the Court failed to address in any real way the basis for and the weight to be given to the opinion evidence of Detective Chief Superintendent Howard in circumstances where he had formed an opinion that Sean Hannaway was a member of the IRA and where the Chief Superintendent had no personal knowledge of the accused and was, in giving evidence of his opinion, unaware that the accused was a man of no previous convictions and who had never previously been arrested; and

(vi) the trial was unsatisfactory and the trial court erred in failing to address the weight to be given to evidence of belief in the circumstances of the case, where the Detective Chief Superintendent had limited knowledge of the accused's background and where no detail, either direct or collateral, was given of the material on which the belief was formed.

9. In the case of the appellant, David Nooney, the relevant grounds of appeal are less elaborate and simply state that "the learned trial judges erred in law and in fact in relying, in part or in whole on the evidence of Detective Chief Superintendent Anthony Howard".

10. The relevant ground of appeal in the case of Edward O'Brien, as amended, was as follows:

> *"[t]he Court erred in law and in fact in admitting into evidence and/or in placing any weight on the evidence of Chief Superintendent Anthony Howard that the appellant herein was a member of the IRA, the said evidence was compromised due to a failure to have regard to relevant considerations and, conversely, by having regard to irrelevant considerations and where Chief Superintendent Howard was unable to give accurate details about the appellant herein."*

11. So far as the appellant, Sean Hannaway, is concerned, the point is made that the only evidence against him, other than the evidence relating to Riverwood Park, including the evidence of the contents of the audio tape, was the evidence of the Chief Superintendent. It was pointed out that his arrest was ruled invalid, and thus, that there was no evidence before the Court as to answers given during the course of interview, nor was the Court in a position where it could be asked to draw inferences from a failure to answer questions. Other than the belief evidence of Chief Superintendent Howard, the evidence against him was the same as that against Kevin Hannaway and Eva Shannon, which had seen them charged and convicted, not of the offence of membership of an unlawful organisation, but of the offence of assisting an unlawful organisation. It is said that, in these circumstances, he should not have been convicted of the offence of IRA membership. At most, had he been properly charged, he could have been convicted of assisting an unlawful organisation, but he was not and never had been charged with such an offence.

12. It is said that the evidence of the Chief Superintendent should not have been relied upon. It is pointed out that the Chief Superintendent was appointed to that post only on 13th July 2017, whereas the events which had given rise to the charges had occurred some two years earlier. It is said that the manner in which he claimed privilege meant that his evidence was reduced to the level of the formulaic. It is pointed out that he did not appear to have any personal knowledge of Sean Hannaway or ever had any personal dealings with Sean Hannaway, and so the belief/opinion evidence had to be seen as low-quality evidence on which no reliance should have been placed. It is said that in a situation where there was no other evidence against Mr. Hannaway, other than the evidence relating to the events at Riverwood Park, that this was a case where there should have been a directed verdict of not guilty.

13. In the case of David Nooney, the appellant again focused on the fact that there had been a claim of privilege. It was said that the manner in which the claim was advanced meant that the defence was denied the opportunity to cross-examine in any meaningful way at all. It was submitted that the case was unique, in that not only was there a restriction on the cross-examination of Chief Superintendent Howard, but that was compounded by the

fact that the defence had been denied access to the audio device by virtue of a claim of privilege. This gave rise to a so-called POC application to halt the trial.

14. In closing arguments, the appellant focused on Chief Superintendent Howard's limited experience at that rank. It was pointed out that on previous occasions, courts had been told that while there were some sixty-nine people in the country who could, by virtue of the rank that they held, give belief or opinion evidence pursuant to statute, in practice, however, such evidence was given only by a very much smaller cohort. It was pointed out that he held the rank only three months when he came to make his statement and had been Head of the SDU for only two months at the time. The appellant says that it is remarkable that the Chief Superintendent should come to Court unaware of whether or not the appellant, David Nooney, had admitted to being a member of the IRA when that issue was raised with him while he was in custody on 8th August 2015. This last point might be seen as slightly disingenuous. It has long been the practice for Chief Superintendents, when giving evidence, to make clear that they hold their opinion or belief without reference to the specific events under investigation. The rationale being that if that was not the case, and if the events under investigation fed into the formation of the opinion or belief that there was an element of double counting.

15. A further element arises in the case of the opinion/belief evidence as it related to Edward O'Brien. The additional factor at play here was that Mr. O'Brien was initially charged with assisting the activities of an unlawful organisation. It is said that this meant that other members of the Gardaí, as well as the DPP and her officers, were at one stage of the view that Mr. O'Brien was a not member of the IRA. It is submitted on behalf of Mr. O'Brien that the belief evidence of Chief Superintendent Howard ought not to have been admitted into evidence, or if it was admitted at all, should have been afforded only very limited weight. It is said that in the circumstances of this case, the Chief Superintendent should have familiarised himself with the disclosure material and should have made himself aware of the fact that the appellant had been charged initially with assisting, as distinct from membership, as that might have affected his consideration. It is said that in all the circumstances, the Chief Superintendent's evidence against the appellant should have been rejected by the Court.

16. In its judgment, the Special Criminal Court dealt with the evidence of Detective Chief Superintendent Howard and the submissions that had been made to it in that regard. It did so in these terms:

> *"[w]e have had the opportunity to assess the evidence of Chief Superintendent Howard and to take into account, as we are entitled to do, his demeanour whilst giving that evidence. There is no doubt that he is a member of An Garda Síochána with significant experience. Whilst he was only appointed to the position of Chief Superintendent in July 2017, he nonetheless has vast experience, in the mind of this Court, as a senior member of An Garda Síochána, and, as he said in his own evidence, he has been exposed to intelligence throughout his career, and has, as a consequence, learned to analyse, assess, action and investigate that material. He*

said, as Head of the Special Detective Unit, he is responsible for analysing, gathering and assessing intelligence and also responsible on a national basis for the investigation of subversive activity and subversive crime.

We are satisfied that he is a man of integrity and considerable experience. We are also conscious that where a claim of privilege is made, the defence are not, and were not in this case, in a position to test those aspects of the evidence or to challenge that. That is relevant to the assessment of the weight to be attributed to this evidence. We also weigh that in the course of interview, David Nooney and Edward O'Brien denied membership of an unlawful organisation. A person accused of the offence of membership cannot be convicted in the absence of supporting evidence. It is clear that in an assessment of Chief Superintendent Howard's evidence, we must take into consideration the fact that he gave an erroneous date of birth for Edward O'Brien, stating 1976 as opposed to 1973. In that regard, we take into consideration that Chief Superintendent Howard gave evidence that the name and address of an individual might be utilised in order to retrieve material, and further, that he identified each of the accused in Court. We take into consideration that Chief Superintendent Howard stated that he was not aware whether Sean Hannaway had been arrested in other jurisdictions. We consider this material in assessing the weight which we ought to give to the evidence of Chief Superintendent Howard. It is suggested that it was, in effect, impossible for counsel for the accused men to conduct any meaningful cross-examination of Chief Superintendent Howard, or to test the validity of his belief expressed by him in respect of each of the individual accused. Section 3, subsection (2) of the Act permits of evidence to be given pursuant to the section, only in respect of membership of an unlawful organisation, contrary to s. 21 of the Offences Against the State Act 1939. As has frequently been stated, s. 3, subsection (2) makes the belief of a Chief Superintendent evidence that a particular accused was, at the relevant time, a member of an unlawful organisation. It is the belief of the Chief Superintendent which is the evidence and not the material upon which the belief is based. The evidence is given in open Court and privilege is invariably asserted as regards the material reviewed by a Chief Superintendent, which privilege may be upheld by the Court. Only persons holding the rank of Chief Superintendent are permitted to give this evidence by law, and it is the position that in giving this category of evidence, a Chief Superintendent will state that his or her evidence is based on material other than that relating to events before the Court, to avoid duplication of evidence on which the Court is being asked to adjudicate and will not take that material into account. In this trial, privilege was claimed by Chief Superintendent Howard, and as a consequence, it has been submitted on behalf of each of three accused charged with membership of an unlawful organisation that they are entirely stymied in cross-examining the witness in any meaningful way. When one carefully scrutinises and analyses the entirety of the evidence given by Chief Superintendent Howard, this Court is satisfied that this is simply not borne out. We have provided in this judgment a summary of the evidence given by the Chief Superintendent wherein it can be seen that many questions were asked in

cross-examination and many questions were answered, albeit privilege was claimed in respect of certain questions. As stated in the decision of DPP v. Donnelly, McGarrigle and Murphy, a judgment of the Court of Criminal Appeal delivered on 30th July 2012:

> *'Even where such privilege is upheld, it does not follow that the evidence of a Chief Superintendent cannot be tested. The credibility of any witness is not dependent solely on the material which that witness seeks to adduce in evidence-in-chief. On the contrary, credibility can be challenged on any issue collateral to the particular testimony'.*

In this case, Chief Superintendent Howard set out the breadth of his vast experience before the Court. It is clear that he is, as stated, an experienced member of An Garda Síochána with experience in analysing, gathering and auctioning intelligence. He gave evidence that he was satisfied that the material he examined was accurate and reliable and he independently analysed the material in a very careful fashion on the evidence, in respect of each of the accused persons charged with membership of an unlawful organisation, and he approached this task without any preconceived notions, and, in his own words, 'with a blank canvas'. He accepted that he was unaware until recently that Mr. O'Brien was not charged on his release with membership of an unlawful organisation, but disagreed that that would have been something of relevance for him to consider at the time when he was making his statement.

We are satisfied that the evidence of Chief Superintendent Howard was impressive evidence given by a witness of the highest integrity. We accept his evidence beyond a reasonable doubt.

We have taken into account in deciding the weight to be attributed to this witness's evidence the fact that he was unaware whether Mr. Sean Hannaway had convictions in any other jurisdictions, and also that he gave the incorrect Date of Birth in respect of Edward O'Brien. These factors reduce the weight to be attributed to his evidence.

As stated in DPP v. Redmond [2015] IESC 98, belief evidence is required to be supported by other independent evidence implicating the accused. The following was stated by Charleton J:

> *'Among those safeguards is that the belief evidence should not stand alone, but that the charge should otherwise be supported by some other piece of evidence or some admissible circumstance which supports the charge. On the current case law, that support would be independent of the belief evidence'.*

We will not therefore proceed on the evidence of Chief Superintendent Howard alone, in the absence of evidence tending to strongly support the charge against

each of the respective accused. We now proceed to analyse that evidence which the prosecution say is capable of providing such support."

17. The provision by statute for the belief evidence/opinion evidence of an officer of An Garda Síochána not below the rank of Chief Superintendent has now been part of Irish law for almost half a century. Its presence on the statute books is very unwelcome from the perspective from those charged with the offence of membership of an unlawful organisation, and it is a section that has given rise to debate and unease among sections of civil society. It is, however, unquestionably part of Irish law. Despite numerous challenges over the years, its validity as part of Irish statutory law remains, and as such, courts must give effect to it. It must be said that by this stage, many of the criticisms and objections formulated have become somewhat repetitive. It is true that it is normally the case that the Chief Superintendent, if questioned about the material to which he had access, or the material or sources by reference to which he formed his belief or opinion, will claim privilege. The fact that privilege is claimed and upheld, if that is the case, does not mean that courts are precluded from placing reliance on the evidence of the Chief Superintendent. In the Court's view, in the present case, the manner in which the Special Criminal Court approached the evidence put before it from the Chief Superintendent and the challenges and criticism of that evidence was entirely proper, and the conclusions arrived at were ones that were certainly open to it to make.

18. Much has been made on behalf of Sean Hannaway (in particular, although we note that the arguments made on his behalf in this regard were adopted by others who were also charged with membership) of the fact that the judgment of the Special Criminal Court relied on certain evidence as supporting, or corroborating, the belief evidence of Detective Chief Superintendent Howard which was in substance the same evidence as was relied upon to convict the appellant's co-accused Kevin Hannaway and Eva Shannon of the offence of assisting a terrorist organisation.

19. The relevant passages from the judgment of the Special Criminal Court, in so far as they specifically relate to Sean Hannaway (David Nooney and Edward O'Brien were dealt with in broadly similar terms) state:

> *"As stated in DPP v. Redmond [2015] IESC 98, belief evidence is required to be supported by other independent evidence implicating the accused. The following was stated by Mr Justice Charleton, "Among those safeguards is that the belief evidence should not stand alone, but that the charge should otherwise be supported by some other piece of evidence or some admissible circumstance which supports the charge. On the current case law, that support would be independent of the belief evidence". We will not therefore proceed on the evidence of Chief Superintendent Howard alone, in the absence of evidence tending to strongly support the charge against each of the respective accused. We now proceed to analyse that evidence which the prosecution say is capable of providing such support."*

> *"Sean Hannaway: As stated, we accept beyond reasonable doubt the evidence given by Chief Superintendent Howard that Sean Hannaway, at the relevant time, was a member of the IRA. We now examine the evidence to access what the prosecution assert is evidence which is capable of supporting this evidence. We consider the content of the audio recordings, some of which we have set out above. It is clear that Sean Hannaway can be heard on numerous occasions throughout the 7th and 8th of August 2015. In fact, his voice is very much central to what we have found to be the enquiry which was ongoing at various times during those dates. He is directly, in our view, involved in the direction which each interview takes. He sets out the stated purpose of the interview process and proceeds to interrogate individuals. It is compelling and cogent evidence against this accused man, and we accept this evidence beyond reasonable doubt. The prosecution relies on this evidence, together with the evidence of the events of the 7th and 8th of August 2015, including Sean Hannaway's arrival and departure from the house, as circumstantial evidence, capable of supporting the evidence of Chief Superintendent Howard. In assessing this evidence, we must, before relying on the evidence, be satisfied that it is consistent with the guilt of the accused and inconsistent with any other rational hypothesis. We are satisfied that there is no rational conclusion consistent with innocence to be drawn from this evidence. This evidence is therefore capable of supporting the evidence of Chief Superintendent Howard.*

20. The argument that has been advanced appears to be premised on the notion that before evidence can be deemed capable of supporting, or corroborating, belief evidence in a membership case it must be demonstrated that that evidence was consistent *only* with membership of an unlawful organisation as opposed to being evidence which could also possibly be consistent with involvement in another offence or other offences.

21. We expressly reject that notion. In doing so we acknowledge and accept the "two views" rule, set forth in the seminal case of *People (A.G.) v Byrne* [1974] IR 1, which is to the effect that where two views on any part of the case are possible on the evidence, the tribunal of fact should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt. However, the two views rule is only engaged where "two views on any part of the case are possible on the evidence" and the tribunal of fact is required to prefer one view over the other *in the course of its fact-finding function*. In that event it must certainly adopt that which is favourable to the accused *unless* the State has established the other beyond reasonable doubt (our emphasis). It is not engaged however where the court of trial engages in the first instance in determining as a matter of law whether a piece of evidence is capable of providing support or corroboration of other evidence.

22. The conduct that had been engaged in by the appellant(s) was in fact potentially consistent both with membership, and with assisting an unlawful organisation. The Special Criminal Court considered that it was nonetheless capable of providing the necessary support/corroboration for the belief evidence provided by the Detective Chief Superintendent, and we find no error in their having done so. As alluded to by the Special

Criminal Court in its ruling, the legal test in that regard in that set out in *The People (Director of Public Prosecutions) v Redmond* [2015] 4 IR 84, namely that it is evidence which (a) tends to implicate the accused in the offence charged, (b) is seen by the trial court as credible in itself and (c) is independent of the witness who gives the belief evidence. On one view of it, it undoubtedly implicated Mr Hannaway in the offence of membership. This was an inquiry conducted for and on behalf of the IRA and with a manifestly illegal objective in mind. It was overwhelmingly probable that the main participants were in fact IRA members. The fact that in some cases, other evidence required in addition to sustain a membership charge might not have been available, leading to some being charged with providing assistance to, rather than actual membership of, the IRA is neither here nor there in terms of the inferences capable of being drawn from the controversial evidence. It therefore undoubtedly tended to implicate those involved in likely membership. It might not have been enough on its own to found a conviction for membership, but in our view it was definitely implicatory at a level sufficient to satisfy the test in Redmond.

23. Having decided that it was capable of providing the necessary support or corroboration, the Special Criminal Court had then to go on and consider whether the evidence in controversy in fact provided the necessary support or corroboration. They concluded that it did so. In arriving at that conclusion, they were entitled and indeed obliged to view the controversial evidence in the context of the evidence as a whole. Having done so they expressed themselves satisfied beyond reasonable doubt that the evidence in controversy was *"consistent with the guilt of the accused and inconsistent with any other rational hypothesis. We are satisfied that there is no rational conclusion consistent with innocence to be drawn from this evidence."* This was a clear and correct application of the two views rule. If they had had any reasonable doubt as to whether the evidence, viewed in the context of all of the other evidence in the case, tended to implicate Mr Hannaway in the offence of membership they would have been obliged to adopt the inference that was more favourable to him, namely that it did not. However, the Special Criminal Court expressed itself to be in no doubt and accordingly was entitled to adopt the inference unfavourable to Mr Hannaway.

24. To the extent that there is an implicit complaint that the Special Criminal Court's finding in that regard was in some way perverse or against the weight of the evidence, we expressly reject that. In our assessment the evidence of Mr Hannaway's participation in this inquiry was very strong evidence tending to support the case of membership against him. The mere fact that it also proved sufficient to convict Kevin Hannaway and Eva Shannon of a different offence, in circumstances where they were not charged with membership, is not indicative of any error or perversity. We find no error of principle.

25. Accordingly, the Court is not prepared to uphold the grounds of appeal relating either to the evidence of Chief Superintendent Howard, or to the evidence relied upon as supporting or corroborating his testimony.

Challenges to the Admissibility of the Audio Recording

26. The following separate arguments were made by some or all of the appellants relating to the admissibility of the copy audio recording "exhibit PB1", and the transcript of it. In many instances an argument advanced by one appellant was adopted and relied on by one or more of the other appellants. In this situation rather than deal with every aspect of the case on behalf of each appellant individually, the court will instead address specific heads of complaint. While the judgment may sometimes refer to a specific appellant as having raised, or offered argument, on a particular issue or sub issue, the court in addressing it will do so on the basis that its decision and ruling is applicable to all those who rely on the same complaint. It was complained that:

- The claim of privilege over the nature/precise details of the 'surveillance device' deployed at 10 Riverwood Park was not properly or lawfully established and should not have been allowed. Further in that regard, the Special Criminal Court erred in law and in fact in failing to direct the disclosure of the said device to the defence. Further, the Court did not properly address the 'expert' evidence [Bek Tek Report] being put forward on behalf of Kevin Hannaway.

- Authorisation for the deployment of the device was not lawfully obtained

- The device was not lawfully or properly deployed

- The privilege claimed in respect of the deployment of the device should not have been upheld by the Court;

- There had been a breach of s. 10 of the Act of 2009;

- The Court erred in its determination as to the effect of a breach of s. 10 of the Act of 2009

- The Court erred in its ruling as to the authenticity of the recording

- The Court erred in receiving the transcript prepared by D/Gda. Judge, the so-called "aide memoire".

Claim of Privilege in Relation to the Surveillance Device,and related complaints.

27. At the commencement of the trial, the Court was told that the defence had engaged the services of an independent expert on audio surveillance, namely a company called Bek Tek, to provide a professional report. In order to carry out the analysis that they wished, Bek Tek maintained that they required access to the surveillance device that had been used to record the audio. The prosecution, for its part, advanced a claim of privilege on the grounds of state security and the need to maintain secrecy in respect of operational matters in respect of the conduct of covert audio surveillance, including with respect to the nature, details, capabilities and specifications of devices and equipment used. However, the prosecution did offer to have an independent third party create test recordings and to provide these to Bek Tek for the purpose of allowing them to carry out their analysis. This unusual proposal came about in a situation where Bek Tek was indicating that the reason it required access to the device was so that they could make

such test recordings for use in their analysis of the claimed surveillance, and of PB1. However, the offer was declined.

28. Having heard submissions from counsel for each of the appellants and from counsel on behalf of the prosecution, the Court ruled on the matter on 13th February 2018. The ruling, which upheld the claim to privilege, was a detailed and careful one. It stated, inter alia:

> *"The independent expert. The prosecution have made the offer of an independent expert in the terms outlined above. Any test recordings created by this person or persons would have been made available to the defendants. There is no suggestion that this expert would give evidence in this trial; on the contrary, the purpose of engaging this expert was to facilitate the creation of test recordings which would then be disclosed to the defendants. It is an entirely different situation to that which pertained in JF v. the Director of Public Prosecutions. However, the offer is relevant to the determination on the issue of prejudice to the defendants as a result of nondisclosure of the devices and related components. We accept the prosecution's submission that if there was any reality to the contention of prejudice accruing to defendants as a result of nondisclosure, this over would have been accepted.*
>
> *As this Court has already stated, we must balance the public interest in the proper administration of justice against the public interest asserted for non-disclosure in order to decide which is the superior interest in the circumstances of this trial. A Court should have all relevant evidence before it in order to ensure that justice is done. We must consider the relevance of the material sought to the issues in the trial. If the defendants had the material they seek, would it advance the defendant's case, or damage the prosecution's case, or lead to an inquiry which may have either of those consequences. The defendants contend that the authenticity of the recordings cannot be tested without access to the devices and related parts. In this respect with are conscious that the audio recordings are items of real evidence, and that an offer has been made that the hardware and associated components be examined by an independent expert who may provide a test recording. This offer was rejected by each defendant. We are satisfied that the material is not crucial to the defendants' case. We can see no prejudice to the defendants as a result of non-disclosure. If we are incorrect in that assessment, the possibility of an independent expert mitigates against disclosure. The defendants are fully entitled to refuse to accept the prosecution's offer, but the very fact that each defendant refused leads to the inevitable conclusion that the defendants are not prejudiced by non-disclosure, and with therefore, up hold the claim of privilege."*

29. In this Court's view, this ruling properly engaged with the competing interests at stake and the conclusion the court below arrived at was a proper one. The nature of the devices deployed and the capability of those devices by the State in combatting organised crime

and terrorism are classically the sort of issues which are likely to see a claim for privilege advanced and upheld. We find no error on the part of the Special Criminal Court concerning this aspect of the case.

The Validity of the Authorisation and related complaints

30. For ease of reference, it is appropriate at this point to outline to some of the relevant statutory provisions.

31. Section 1 of The Interception of Postal Packages and Telecommunications Messages (Regulation) Act 1993 ("the Act of 1993") defines "interception" (to the extent relevant to this case) as:

> "(b) an act—
>
> (i) that consists of the listening or attempted listening to, or the recording or attempted recording, by any means, in the course of its transmission, of a telecommunications message, other than such listening or recording, or such an attempt, where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording,
>
> and
>
> (ii) that, if done otherwise than in pursuance of a direction under section 110 of the Act of 1983, constitutes an offence under section 98 of that Act, and cognate words shall be construed accordingly".

32. Section 2(3) of the Act of 2009 provides:

> "[a]n authorisation or approval under this Act may not be issued or granted in respect of an activity that would constitute an interception within the meaning of the Act of 1993."

33. Further, s. 4(1) and (5) of the Act of 2009 (to the extent relevant to issues that have been raised) provide as follows:

> "4(1) A superior officer of the Garda Síochána may apply to a judge for an authorisation where he or she has reasonable grounds for believing that-
>
> (a) as part of an operation or investigation being conducted by the Garda Síochána concerning an arrestable offence, the surveillance being sought to be authorised is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purposes of proceedings in relation to the offence,
>
> (b) the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of arrestable offences, or

(c) the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State.

(2) [not relevant]

(3) [not relevant]

(4) [not relevant]

(5) A superior officer who makes an application under subsection (1), (2), (3) or (4) shall also have reasonable grounds for believing that the surveillance being sought to be authorised is—

(a) the least intrusive means available, having regard to its objectives and other relevant considerations,
(b) proportionate to its objectives, having regard to all the circumstances including its likely impact on the rights of any person, and
(c) of a duration that is reasonably required to achieve its objectives."

34. Section 5 of the Act of 2009 then provides (to the extent relevant):

"5.(1) An application under section 4 for an authorisation and under section 6 for a variation or renewal of an authorisation—

(a) shall be made ex parte and shall be heard otherwise than in public, and
(b) may be made to a judge assigned to any district court district.

(2) Subject to subsection (4), the judge shall issue such authorisation as he or she considers reasonable, if satisfied by information on oath of the superior officer concerned that—

(a) the requirements specified in subsection (1), (2) or (3), as the case may be, of section 4 are fulfilled, and
(b) to do so is justified, having regard to the matters referred to in section 4 (5) and all other relevant circumstances.

(3) An information on oath of a superior officer specifying the grounds for his or her belief that the surveillance is necessary for the purpose of preventing the commission of arrestable offences referred to in section 4 (1) (b), or the commission of revenue offences referred to in section 4 (3) (b), need not specify a particular arrestable offence or a particular revenue offence, as the case may be, in respect of which the authorisation is being sought.

(4) The judge shall not issue an authorisation if he or she is satisfied that the surveillance being sought to be authorised is likely to relate primarily to communications protected by privilege.

(5) An authorisation may impose such conditions in respect of the surveillance authorised as the judge considers appropriate.

(6) An authorisation shall be in writing and shall specify—

(a) particulars of the surveillance device that is authorised to be used,
(b) the person who, or the place or thing that, is to be the subject of the surveillance,
(c) the name of the superior officer to whom it is issued,
(d) the conditions (if any) subject to which the authorisation is issued, and
(e) the date of expiry of the authorisation.

(7) An authorisation may authorise the superior officer named in it, or any member of the Garda Síochána, any member of the Defence Forces or any officer of the Revenue Commissioners designated by that superior officer, accompanied by any other person whom he or she considers necessary, to enter, if necessary by the use of reasonable force, any place for the purposes of initiating or carrying out the authorised surveillance, and withdrawing the authorised surveillance device, without the consent of a person who owns or is in charge of the place.

(8) [Not relevant].

(9) [Not relevant]."

35. At trial, counsel on behalf of the appellant Kevin Hannaway argued that the statutory precondition listed in s. 4(1)(a) of the Act of 2009, was to be read conjunctively with either one of the additional preconditions mentioned in s. 4(1)(b), or in s. 4(1)(c). It was accepted that, given the presence of the word "or", s. 4(1)(b) and s. 4 (1)(c) were to be read disjunctively *inter se*, i.e., as alternatives, but it was argued that sub-subs.(a), together with one or other of sub-subs.(b), or sub-sub.(c), of s.4 of the Act of 2009 had to be satisfied in every case before an authorization could be valid. As such, it was said that the evidence that was forthcoming from Detective Chief Superintendent Richardson was deficient, in that it only addressed the question of the surveillance being necessary for maintaining the security of the State i.e., the precondition in s.4(1)(c). The prosecution, on the other hand, argued that the requirements of sub-subsections (a),(b), and (c) of s.4 of the Act of 2009 were entirely disjunctive, an argument which found favour with the Special Criminal Court.

36. We are quite satisfied that, having regard to well-established common-law rules relating to statutory interpretation, and the provisions of the Interpretation Acts 1937 to 2005, the correct view was taken by the Special Criminal Court.

37. A further point was raised on behalf David Nooney relating to the interaction of the Act of 2009 with The Interception of Postal Packages and Telecommunications Messages (Regulation) Act 1993 ("the Act of 1993"). It was submitted that in a situation where the prosecution had claimed privilege in respect of the nature of the device or devices deployed, that it followed that the judge in the District Court could not have known the nature of same and therefore could not be satisfied that in making the orders sought, that there would not be a breach of s. 2(3) of the Act of 2009. The Special Criminal Court

pointed out that what s. 2(3) does is to provide that an authorisation or approval may not be issued or granted in respect of an activity that would constitute an interception within the meaning of the 1993 Act. However, the Special Criminal Court felt that there was no requirement that the authorisation should, on its face, exclude that particular use.

38. Once more, we find ourselves in agreement with the Special Criminal Court.

Complaints relating to the lawfulness of the deployment of the surveillance device, and the privilege claimed with respect to manner of its deployment.

39. The complaints in this regard are neatly encapsulated in paragraph 30 of the written submissions on behalf of David Nooney, which state:

> *"The difficulty presented to the defence in the instant case was that the respective Garda witnesses, when presented with any meaningful attempt to explore real and relevant issues regarding the deployment of the devices pursuant to authorisation, and in an effort to establish whether the activity actually carried out went beyond what was permitted, a claim of privilege was presented by those witnesses and that claim was allowed. This had the consequences that the defence were completely unable to effectively test and probe the assertions made by the witnesses. For example, Detective Sergeant AQ was at pains to stress that all he could do what he was 'legally entitled to do'. It is quite clear that Detective Sergeant AQ was not legally entitled to deploy devices that had capabilities that allowed it to and actually had intercepted communications per s.2 (3) of the Act. An analogy can be drawn with a situation where an arresting Garda invokes s.23 of the Misuse of the Drugs Act, 1977 as amended to search a person. At that person's trial, can be it be the position that the Garda can rely on privilege in setting out what statutory steps were required to invoke the search and further to legally execute that search in accordance with s.23? Would be enough for that member to simply assert in evidence 'I lawfully searched him'?"*

40. Further, the submissions on behalf of Edward O'Brien to the court below had relied *inter alia* on the fact s. 5(7) of the Act of 2009 provides that an authorisation may allow entry by force in certain circumstances for the purpose deploying a surveillance device. Counsel on behalf of Mr O'Brien complained that the defence should be entitled to explore with Detective AQ whether in the course of his deployment of the surveillance device the property had been entered by force and the circumstances around that.

41. The specific aspect of the cross-examination of Detective Garda AQ alluded to in the passage quoted was where he was being asked concerning what instructions he may have received from Detective Superintendent Richardson concerning deployment of the device. He was asked if she had told him to deploy devices *inside the house* (this court's emphasis), and he responded:

> *"A. I can't recall those exact words, Judge. I know, it doesn't matter I suppose in fairness all I can do on a deployment is what I am legally entitled to do. If Detective Superintendent Richardson told me to do something that was illegal I wouldn't do it, or anybody else I wouldn't do it. I had the authorisation and the*

authorisation authorised me for the deployment of audio and video at 10 Riverwood Park and the environs of 10 Riverwood Park, and that's what I done, Judge. Regardless of what any other person may have said to me that morning or that lunchtime, I know what my responsibility was. I know what my task was and I carried out that task within the law."

42. The Special Criminal Court ruled in regard to these complaints that:

"MS JUSTICE KENNEDY*: Detective Sergeant AQ was asked a number of questions regarding the deployment of the surveillance devices in respect of which questions he asserted a claim of privilege which was then challenged by the defence and each of the defendants. Specifically, Mr McGillicuddy challenged the assertion of privilege as to whether the witness entered the property in question. Detective Sergeant AQ asserted a claim of privilege in respect of the deployment of the devices on the basis of the risk which may present to the lives of others and the efficacy of current and future operations in this and other jurisdictions. He said that is any information in the hands of criminal organisations or terrorist organisations would act to the detriment of current and future operations. The defendants and each of them submit that they are not in a position to properly explore the legality of the deployment of the devices absent this information. Mr McGillicuddy specifically asserts that the terms of the authorisation itself authorised Detective Superintendent Richardson or any member of An Garda Síochána designated by her to enter if necessary by the use of force, number 10. Mr McGillicuddy submits that this is an essential component of the authorisation and that the defence require to know if this witness, that is Detective Sergeant AQ, entered the property in order to test whether there was lawful compliance with the execution of the authorisation. Mr McGillicuddy submits that therefore privilege should not be upheld by this Court.*

This Court must balance the competing interest, that is the public interest in the administration of justice and the public interest advanced for nondisclosure of this information which is being sought by the defendants. The public interest obviously requires that the Court has all the necessary information to ensure that justice is done. We must therefore assess the relevance of the information sought, vis à vis the issues in the trial. The witness, AQ, gave evidence on day 10 that he went to Riverwood Park area having been given the authorisation. He said he was with members of the NSU specifically tasked to the Technical Support Unit. When asked specifically if he entered number 10, he asserted privilege and stated as follows, and I quote, "We carried out the deployment under this authorisation exactly and correctly." He later said as follows, and I quote, "We deployed listening devices at number 10 Riverwood Park." He accepted that he was the person authorised to enter number 10 Riverwood Park.

In our assessment of the evidence we are satisfied that the superior public interest is the public interest put forward for nondisclosure. We have ruled the

authorisation is a valid authorisation. We do not accept that it is crucial to the defence to learn whether the designated officer entered the premises or if he did so enter, with whom he entered the relevant location in order to test whether the authorisation was validly executed. The authorisation issued for the purpose of carrying out surveillance by the use of video and audio devices, the subject of the surveillance being number 10 Riverwood Park. That is the authorisation and that is the document which was utilised to permit the deployment of the devices. In all those circumstances we uphold the claim of privilege."

43. We find no error in the approach of the Special Criminal Court. While it is true that the upholding of the claim of privilege, which was clearly justifiable in the circumstances by that court in its ruling, had the effect of limiting the scope of possible cross-examination of the relevant witnesses to a significant extent, it is not the case in our judgment that the witnesses could not be meaningfully cross-examined at all. For example, while Detective AQ was not prepared to say precisely what he or any of his staff had, how the device had been deployed, or who had been with him, he had asserted specifically that he could only do what he was legally entitled to do, and that he had carried out his task within the law. He was certainly capable of being cross-examined, not in terms of what he actually did, but in terms of his understanding of what the law did and didn't allow him to do, in circumstances where he had positively asserted that he could only do what he was legally entitled to do, and that he had carried out his task within the law. Moreover, the transcript reveals that he did answer some questions, e.g., confirming that a video surveillance device was not deployed, concerning what account would be taken of background noises at a site to be surveilled using an audio surveillance device, concerning whether in planting a surveillance device a note would be made of potential background noise sources, and concerning whether in planting a surveillance device a note would be made of cellular telephones operating close to the site in question, to give but some examples. Accordingly, while the scope of cross-examination was limited, and some avenues were substantially closed off to exploration by the claim of privilege, other matters were capable of being probed and potentially material evidence was capable of being elicited. We are satisfied that to the extent that there was an interference with the ability of the appellants' counsel to cross-examine, such interference was not so far-reaching in its effect as to create a real risk of an unfair trial. We therefore consider that the upholding of the privilege claimed was proportionate notwithstanding the competing interests at stake, and that the court below was correct to uphold it.

44. Finally, we would endorse remarks of the Special Criminal Court to the effect that *"the suggestion that there may have been an unlawful interception is speculative and is not evidentially grounded and has been submitted without any engagement with the facts of the case."*

Complaints arising from alleged breaches of s.10 of the Act of 2009

45. Once again, it is convenient at the outset to set out the statutory provisions at the centre of the controversy, in this instance s. 9, particularly s. 10, and also s. 13 of the Act of 2009.

46. Section 9 provides (to the extent relevant):

"9.(1) An application for an authorisation under section 4 … , and any documents supporting the application, shall be retained until—

(a) the day that is 3 years after the day on which the authorisation concerned ceases to be in force, or

(b) the day on which they are no longer required for any prosecution or appeal to which they are relevant,

whichever is later.

(2) [Not relevant]

(3) The documents obtained as a result of surveillance carried out … , other than those referred to in subsection (1) … , shall be retained until—

(a) the day that is 3 years after the end of the surveillance … concerned, or

(b) the day on which they are no longer required for any prosecution or appeal to which they are relevant,

whichever is later.

(4) Subject to subsection (5), the documents referred to in subsections (1) to (3) shall be destroyed as soon as practicable after they are no longer required to be retained under those subsections.

(5) The relevant Minister may authorise in writing the retention of any of the documents referred to in this section where he or she considers it necessary to do so having regard to—

(a) the interests of the protection of the privacy and other rights of persons,

(b) the security of the State,

(c) the aims of preventing the commission of, and detecting, arrestable offences, and

(d) the interests of justice."

47. Section 10 then provides (to the extent relevant):

"10(1) The relevant Minister shall ensure that information and documents to which this Act applies are stored securely and that only persons who he or she authorises for that purpose have access to them.

(2) In the interests of the protection of the privacy and other rights of persons, the security of the State, and the aims of preventing the commission of, and detecting, arrestable offences, the relevant Minister may make regulations prescribing—

(a) the persons or categories of persons who are to have access for the purposes of this section to information with respect to the existence of authorisations, … and documents referred to in section 9,

(b) the procedures and arrangements for the secure storage, and the maintenance of the security, of that information and those documents, and

(c) the number of copies that may be made of those documents and the destruction of those copies as soon as possible after they are no longer required under section 9.

(3) [Not relevant].

(4) [Not relevant]."

48. Section 13 of the Act of 2009 criminalises disclosure of information in connection with the operation of the Act in relation to surveillance in certain circumstances, and is in the following terms:

13.(1)A person shall not disclose, inside or outside the State, any information in connection with the operation of this Act in relation to surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8 , including any information or documents obtained as a result of such surveillance, or reveal the existence of an application for the issue of an authorisation, the variation or renewal of an authorisation under section 6 or the grant of an approval under section 7 or 8 , unless the disclosure is to an authorised person and is—

(a) for the purposes of the prevention, investigation or detection of crime,

(b) for the prosecution of offences,

(c) in the interests of the security of the State, or

(d) required under any other enactment.

(2) A relevant person who contravenes subsection (1) shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(3) A person other than a relevant person who contravenes subsection (1) shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding €1,000 or imprisonment for a term not exceeding 6 months or both, or

(b) on conviction on indictment, to a fine not exceeding €10,000 or imprisonment for a term not exceeding 2 years or both.

(4) In this section—

"authorised person" means—

(a) a person referred to in section 62 (4)(a) of the Garda Síochána Act 2005,

(b) the Minister for Defence,

(c) the Minister for Finance, and

(d) a person the disclosure to whom is—

(i) authorised by the Commissioner of the Garda Síochána, the chairperson of the Ombudsman Commission, the Chief of Staff of the Defence Forces or a Revenue Commissioner, or

(ii) otherwise authorised by law;

"relevant person" means a person who is or was—

(a) a member of the Garda Síochána, a designated officer of the Ombudsman Commission, a member of the Defence Forces or an officer of the Revenue Commissioners,

(b) a reserve member of the Garda Síochána within the meaning of the Garda Síochána Act 2005,

(ba) an officer of the Ombudsman Commission other than a designated officer of the Ombudsman Commission,

(c) a member of the Reserve Defence Force within the meaning of the Defence Act 1954,

(d) a member of the civilian staff of the Garda Síochána or of the Defence Forces, or

(e) engaged under a contract or other arrangement to work with or for the Garda Síochána, the Ombudsman Commission, the Defence Forces or the Revenue Commissioners."

49. The Special Criminal Court received admissions from relevant prosecution witnesses, and (through counsel) from the DPP, that no one involved in the process of storing and accessing the information or documents obtained as a result of the surveillance had received prior authorisation from the Minister. The Special Criminal Court ruled that this was a breach of s. 10(1) of the Act of 2009, stating:

"… we now move to consider the terms of section 10(1) of the 2009 Act. The true meaning of section 10(1) appears to this Court to be clear and unambiguous. It is only in cases of doubt that the courts resort to considering the purpose and intent of the legislation. Section 10(1) provides that:

"The Minister for Justice Equality and Law Reform shall ensure that documents which in accordance with the definition of a document include audio recordings are stored securely and that only persons who he or she authorises for that purpose, being the purpose of storage shall have access to the aforementioned documents."

Detective Superintendent Johnson gave evidence of the storage of the material which was created as a result of the deployment of the authorised devices. However, we have received no evidence that the Minister or indeed any minister

issued any authorisation as mandated by the Act. This section expressly provides that the Minister shall ensure that only persons who he or she authorises shall have access to the documents or information under the Act for the purpose of storage.

Section 10 addresses the storage handling access and disclosure of material including documents obtained as a result of surveillance under the Act with the intent of protecting persons' privacy and other rights. The gardaí may only operate within the terms of the statute. There is no doubt that the correct procedures were followed by members of An Garda Síochána, however, section 10(1) of the 2009 Act is a legal impediment to access to documents absent an authorisation by the Minister for that purpose. The defendants argue that the effect of this is not a situation of minor noncompliance with the statute by the real effect is to compel the gardaí to self regulate regarding the issues of storage and access. We find merit in this submission.

Whilst the material was created on foot of a validly issued authorisation, the material was subsequently stored and accessed without ministerial authorisation as mandated by the terms of section 10(1). This achieves even greater significance as the prosecution are seeking to rely upon a copy of the original recording which of course the prosecution are fully entitled to do in terms of section 30 of the Criminal Evidence Act of 1992. The difficulty is that whilst the original recording was lawfully obtained, access to that recording for the purpose of making a copy or copies was done without the necessary ministerial authorisation. The issue that this Court is concerned with is the admissibility of PB1 and the Court, as stated, must be satisfied as to its provenance and history before the material may be admitted in evidence. The Criminal Justice Surveillance Act 2009 is clearly central to this prosecution. The Act applies to the evidence garnered by the gardaí on foot of the authorisation sought and obtained by the District Court under the Act. The prosecution contend that the ordinary rules as to the retention of evidence must apply, however, where the surveillance Act is specifically engaged, there must be compliance with the terms of that Act. The gardaí did indeed seek to comply with the terms of the legislation, however despite their best effort subsequent access was not authorised by the Minister for the reasons already stated. The prosecution sought to rely upon the terms of section 14 of the Act, however, section 14 indicates that for the purpose of this argument evidence obtained as a result of surveillance carried out under an authorisation may be admitted as evidence in criminal proceedings. That of course is patently so.

However, whilst the evidence in this case was lawfully obtained on foot of an authorisation, the evidence was accessed without the requisite ministerial authority and therefore any copy which was made, which copy is sought to be relied upon by the State was obtained absent the requisite ministerial authority, which in the view of this Court constitutes a breach of section 10(1) of the Act. The subsequent provisions of section 14 permit of the admissibility of evidence garnered as a result of surveillance, notwithstanding an error or omission on the face of an authorisation

or record of approval granted, if such error or omission was inadvertent and the information or documents ought to be admitted in the interests of justice. Equally, information or documents obtained as a result of surveillance carried out under an authorisation or under an approval granted may be admitted in evidence if there has been a failure to comply with the requirement of the authorisation or approval concerned if the Court is of the opinion that the officer acted in good faith and the failure was inadvertent and that the information or documents sought to be admitted in the interests of justice. However, it is clear that section 14 does not apply in the instant case as there is no question of there being an error or an omission on the face of the authorisation and furthermore the Court is satisfied that nor was there a failure by the gardaí concerned to comply with the requirements of authorisation granted and the Court has so ruled to that particular effect. We note that the Act is not silent as regards access to the material, but specifically mandates that the Minister shall ensure that only authorised persons have access to the material.

In conclusion we are satisfied that there has been a breach of section 10(1) of the statute for the aforesaid reasons and we will now hear submissions as to the consequence of that breach regarding the admissibility of PB1."

50. The respondent has sought to argue on this appeal that the court below was incorrect in ruling that there had been a breach of s. 10(1), pointing to rulings in three other trials before different panels of the Special Criminal Court (*DPP v Robert Day; DPP v Kevin Braney et al* and *DPP v Damien Metcalfe*) which had taken the view that s. 10(1) is not a penal provision and that it does not require to be strictly construed, which was the approach taken by the panel in this case. It was argued that a purposive interpretation can be given to s. 10(1) because *"it does violence to reason and to any reading of the Act as a whole to interpret Section 10 as precluding members of an Garda Siochána engaged in the obtaining and retention of evidence as requiring separate ministerial sanction to do so where the Act's plain purpose is inter alia to provide for the admission of evidence in criminal proceedings."*, (quotation taken from the written submissions of the respondent). While the sentiment was expressed somewhat tortuously (precluding … as requiring) we understand what counsel for the prosecutor meant, namely that the Oireachtas could never have intended to so constrain members of An Garda Siochana from dealing with surveillance evidence gathered for the purpose of its use in support of a prosecution, as to prevent them from dealing with that evidence in any way whatsoever without ministerial authorisation once it had been stored.

51. We have considered this submission but do not consider that there is any merit in it. The possibility of giving a statutory provision a purposive interpretation (assuming for the sake of the argument that it is not a penal provision) only arises where the provision is ambiguous, or where a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. In that regard absurdity is not to be equated merely with creating an inconvenience, even a very great inconvenience. It means a nonsense and contradiction of otherwise manifest legislative intention. The Special Criminal Court

expressed the view that *"the true meaning of s.10(1) appears to this Court to be clear and unambiguous"*, and we see no reason to disagree with them. On the issue of absurdity, the literal interpretation is undoubtedly highly inconvenient for members of An Garda Siochána, and the constraints imposed may be operationally unworkable or at least very difficult for them to comply with, but they are not a nonsense and contradiction of manifest legislative intention. On the contrary, s. 10(2) makes clear that the Oireachtas has in mind "the interests of the protection of the privacy and other rights of persons, the security of the State, and the aims of preventing the commission of, and detecting, arrestable offences" in imposing a requirement to obtain ministerial authorisation and granting the minister the power to make regulations in that regard (which, incidentally, he has not done to date). In the circumstances we are in no doubt but that the Special Criminal Court's interpretation of s. 10(1) was correct, as was their finding that that provision had been breached.

52. In the light of that ruling it was argued on behalf of the appellants that PB1 ought to be excluded as unlawfully obtained evidence, as breaching rights of the appellants relating to privacy arising both under the Constitution and under Article 8 of the ECHR, and also on the basis that there is an obligation on the courts to discourage illegality and uphold the law.

53. In response the prosecution argued that the jurisprudence in respect of the exclusionary rule related only to the obtaining or gathering of evidence and does not extend to the storage or the handling of the evidence after it has been obtained. In rejoinder counsel on behalf of each appellant submitted that the term 'the gathering of evidence' must include the copying of the material. The prosecutor's "fall-back" position was flagged as being that if the court was against them on that argument the evidence should nonetheless be admitted, notwithstanding any illegality identified, in reliance on the principles enunciated in *The People (Director of Public Prosecutions) v J.C.* [2017] 1 IR 417.

54. The Special Criminal Court ruled that PB1 could be admitted and expressed the view that the exclusionary rule was not in fact engaged. The court stated:

> *"We have carefully considered all the arguments advanced by all of the parties. The issue at hand at this particular time as stated is whether the exclusionary rule is engaged in the first instance. We must consider the unusual facts of this particular case and those are that an authorisation validly issued by the District Court was deployed by An Garda Síochána giving rise to the creation of the audio recordings. Those audio recordings were downloaded to a hard drive and copies were then made. One such copy which the prosecution seek to exhibit, PB1. This is as we have stated, an item of real evidence.*
>
> *A prima facie case of authenticity of such audio recordings must be established by the prosecution. The original audio recording was lawfully obtained as we have already ruled upon and have already stated in the course of this ruling. The issue we are concerned with now comes about as a result as we stated of a breach of*

section 10(1) of the 2009 Act where that piece of lawfully obtained real evidence was assessed without authorisation, such authorisation not having been issued by the Minister for Justice Equality and Law Reform. Throughout the judgment of the Court in JC, that is the judgment of Mr Justice Clarke, reference is repeatedly made to the legal circumstances in which an item of evidence was obtained or discovered. The decision in JC addresses the questions of admissibility which emanate from the circumstances in which the evidence was gathered. Those are the words used by the Court and in particular by Mr Justice Clarke as he then was in his judgment. JC does not apply to questions of admissibility affecting the probative value of the evidence concerned, that is the distinction drawn in that particular decision.

The question is whether the process of copying the audio recordings, which process necessitated access to the original audio recording is incorporated in the words 'obtained' or 'gathered'. We must determine this issue on the factual circumstances of this case. We have already found that the audio recording was lawfully obtained. That material came into existence at the time of the recording in the same way as the gardaí seize evidence on foot of a lawful search. That is the point when the evidence is gathered, not at a later stage in the view of this Court when material already obtained is copied.

We refer in this respect to stage one of the test as stated by Mr Justice Clarke as he was in JC and I quote, "The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned. The relevant words are quite obvious for the purpose of this ruling, being, and I quote, "Relate solely to the circumstances in which the evidence was gathered." We find that these words limit the application of the exclusionary rule to the circumstances where evidence was gathered which in this case means when the audio recording was made and does not extend to the time after the recording came into being. We find that there is a distinction between the gathering of evidence and the retention of evidence which has already been gathered and therefore in those circumstances we are satisfied that the exclusionary rule is not in fact engaged."

55. It was submitted to us during this appeal that the court below fell into serious error in so ruling. Firstly, it was submitted, the Special Criminal Court (while ruling that section 10 (1) had been breached), ruled that the evidence had been lawfully obtained. However, it is said, there were no reasons, or no adequate reasons given for this. It was submitted that the statutory authorisation granted to Gardaí simply allowed them to violate the dwelling and place the surveillance device in the house, but not to record, store and access the fruits of the surveillance.

56. Secondly, it was argued that when the Court sought to apply *J.C.*, it placed far too a narrow aperture through which the exclusionary principle can pass. By limiting the

exclusionary rule to the time of the 'gathering' of the audio, (presumably in real time as the words were spoken), the Court has created an artificial division. From the moment the audio was received by the transducer of the microphones it was converted instantaneously into bits of code. This was also the same moment that the information was being stored and accessed on a digital recorder. In other words, the evidence was simultaneously being gathered, stored and accessed.

57. Thirdly, it was said that applying the Special Criminal Court's reasoning to the creation of 'PB1' shows a further grave error of reasoning. The Court had already held that 'PB1' was 'real evidence'. However, it was clearly established that 'PB1' was created *after* the original recordings and CDs had been stored for some 5 or 6 days which were then accessed and 'gathered' to create 'PB1'. Therefore, the gathering of the real evidence 'PB1' was only possible because of the storage and accessing of the information or documents obtained through the alleged surveillance. This storage and accessing was done without the requisite ministerial authority.

58. Fourthly, it is complained that despite being repeatedly asked to do so, the Special Criminal Court failed or refused to enter into an inquiry as to whether members of An Garda Síochána had committed criminal acts by reason of breaches of s. 13 of the 2009 Act.

59. We are satisfied that the rulings of the Special Criminal Court with respect to the complaints arising from the acknowledged breaches of s. 10 of the Act of 2009 should be upheld, and we find no error of principle. In doing so we have considered whether the distinction sought to be drawn between gathering information and documents as evidence, and the secure storage and subsequent accessing of such information and/or documents whilst they are in storage, is a Jesuitical one. In that regard the Act of 2009 defines a document as including "any recording, including any data or information stored, maintained or preserved electronically or otherwise than in legible form". We have concluded that it is not. The clear intention of s. 10(1) is that the actions that it mandates are to apply to information and documents once gathered. Sound is an ephemeral phenomenon that has no readily observable physical or concrete manifestation that is capable of being gathered or stored. It is a vibration that propagates as an acoustic wave. The vibration itself is incapable of being captured or stored, although it may leave a signature allowing it to be reproduced. Sound can, of course, be perceived through the hearing sense by virtue of the stimulatory impact of an acoustic wave on the tympanic membrane in the ear, and a record of it may be stored in the memory of the person who has heard it. In the same way the impact of that acoustic wave on the membrane within a microphone leaves a signature that can be registered and recorded in a variety of ways to facilitate reproduction. The point, however, is that the only means by which sound can be gathered is by the simultaneous creation of a recording of it, whether that be in the memory of a person who hears it, or by recording the impact of its vibrational wave on some medium. Accordingly, the recording process constitutes the gathering of evidence when the evidence consists of sound. The gathering of the evidence is complete once the recording process stops. What happens thereafter in terms of the handling, accessing and

so forth of the medium on which the recording has been made, comprises a different event or series of events.

60. In our assessment s. 10 of the Act of 2009, in the case of audio evidence, is directed not towards the gathering of evidence but rather towards its handling and processing once it has been gathered. It requires the "secure storage" of the record of the relevant evidence once gathered and provides for the regulation of who shall have access to such material once it has been stored.

61. We are satisfied that the respondent is correct in maintaining that the exclusionary rule only applies to the gathering of evidence, and not to its handling or processing once gathered. In that regard we find support for our view in the following passage from McGrath on Evidence (2nd Ed) where the author says, at para 7-30:

> *"Given that the exclusionary rule is a compensatory remedy designed to place the accused in the position in which he or she would have been if his or her rights had not been breached, it logically follows that it is only applicable where evidence has been obtained as the result of a breach of the constitutional rights of the accused. Thus, in order for the exclusionary rule to apply, there must be a causative link between the evidence sought to be excluded and the breach of constitutional rights in question."*

62. We are satisfied that the audio recording made in the course of the surveillance conducted by An Garda Siochána was lawfully gathered evidence and that the exclusionary rule is not engaged with respect to it. In so far as the appellants contend that the copy of the original recording which was adduced in court, namely exhibit PB1, represents different audio evidence that was illegally and separately gathered much later than the creation of the original record, and gathered in breach of the appellants' rights, we reject that. Arguably, the physical copy may have been unlawfully created, because it was created without s. 10 authorisation, but the mere production of a physical copy would not on its own have breached the appellant's constitutional rights. Both documents exhibit the same content, which was lawfully gathered. The causal connection spoken of in the passage just quoted would not exist in the case of the copy.

63. Moreover, and in any event, the original recording represents a document within the meaning of s.30 of the Criminal Evidence Act 1992, which provides:

> *"30.(1) Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.*
>
> *(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made.*

(3) In subsection (1) "document" includes a film, sound recording or video-recording."

64. Accordingly, since the original sound recording, which was lawfully authorized, and would at all stages have been admissible before the Special Criminal Court its contents were capable of being proved before the Special Criminal Court by producing a copy of it. However, as the contents of the original recording and the copy comprising PB1 were identical, it cannot be said that any new evidence was gathered nor was any evidence obtained in breach of any rights of the appellants.

65. We therefore reject the complaints arising from alleged breaches of s. 10 of the Act of 2009.

Complaints relating to the authenticity of the audio recording.

66. The complaints in this regard are most elaborately set forth in the supplemental submissions on behalf of Eva Shannon.

67. It was submitted therein that Exhibit PB1 is a Digital Versatile Disc ("DVD") on which audio files are stored. Reliance was placed on the evidence of Detective Sergeant. AQ who testified that he was the person who made the recordings of activity in Riverwood Park. He also gave evidence that he had never seen the exhibit PB1. Detective Sergeant AQ gave evidence that he was *"there for the duration of the operation"*. He also gave evidence that he made discs containing copies of the files recorded during the operation at Riverwood Park on 28 November 2017. In giving this evidence he confirmed that he made these copies off the recorder in the NSU office. He confirmed that there was only one such disc generating machine in the office. He confirmed that he made six discs labelled AQ 1 through AQ 6 and that later he was informed discs AQ 5 and AQ 6 were corrupted and these were recreated as AQ 7 and AQ 8. He confirmed that all of these copies were made from the hard drive on which all recordings are stored. He confirmed that the names that were given to the files were automatically generated by the device to which they were downloaded. He confirmed that after the recordings were made by the devices, he did not interfere with them in any way, shape or form. He further stated that he did not rename the files after they were created.

68. Detective Superintendent Eugene Lynch (also known as Detective Inspector AE) had given evidence that he generated the disc PB1 and that he handed this to Detective Sergeant. Boyce. He also stated that he did not in any way alter the files he found. He was cross-examined as to the directory tree within which relevant folders containing the relevant audio files were stored. He confirmed an outline, presented in considerable technical detail within defence exhibit 1 (which was an analysis of the folder and file structures on PB1 prepared by expert retained by the defence legal teams) was correct.

69. The only other person to give evidence about the provenance of the recordings was Detective Sergeant Boyce who received the disc from Detective Superintendent Lynch, gave it the exhibit reference PB1 and presented it formally in evidence.

70. It was argued on behalf of the appellants that PB1 was an item of real evidence. There is a requirement that real evidence, particularly evidence of recordings, must be controlled and preserved from the time of its recording to its eventual deployment in Court. Reliance was placed in that regard on *The People (Director of Public Prosecutions) v A McD* [2016] 3 IR 123, a decision of the Supreme Court concerning CCTV evidence. In the course of his judgment in that case, McKechnie J. had stated:

> *"[60] Like all pieces of evidence, CCTV footage must be proved in an appropriate way and to the required standard. I do not accept that some notion of judicial notice, or any similar type of approach, plays any part in satisfying this requirement, nor do I believe that there exists any type of presumption to the effect that security systems operate as designed or function as intended (see para. 27, supra). In the established phraseology, the evidence should prove the provenance and authenticity of the footage; the recording must be intelligible and of sufficient quality, and must also be relevant and have probative value.* ***In addition, the party seeking to adduce such evidence must be able to account for its history from the moment of its recording until its production in court, this to exclude the possibility that it may have been interfered with (Reg. v. Robson [1972] 1 W.L.R. 651)****. Obviously, it is open to the accused person to test this evidence in the normal way and to raise any admissibility objection that might be open to him on both the law and the facts: the exclusionary rules, fair procedures, illegality and unconstitutionality come to mind. However, once the above requirements are satisfied, then the material in question will normally be available for consideration in the same way as any other piece of real evidence so tendered."* (emphasis added by appellants)

71. With respect to the appellants, we do not understand the effect of this dictum, which merely reiterates the long standing position as to the requirement that real evidence should be properly authenticated, as implying that inability to present a history of provenance and integrity that is "watertight" in every respect must automatically lead to inadmissibility of the evidence. In some cases the deficiency might be so serious and fundamental as to warrant exclusion, but in many other cases it may simply go to weight. It all depends on the circumstances of the case and degree and extent of any claimed deficiency.

72. It is claimed that in this case the original recordings were made by Detective Sergeant. AQ. However, the versions of these recordings upon which the prosecution relied are those contained on the disc PB1 which was generated by Detective Superintendent Lynch. There are 14 original recordings on the Discs AQ 1 through AQ 8. There are 6 recordings on PB1. By comparing file sizes and creation time stamps, it is possible to suggest a match for the files. However, not all of the files can be shown to match.

73. It was submitted that the file names associated with the original recordings made by Detective Sergeant AQ, accepted by him as being the original recordings and copied onto discs AQ1 through AQ 8, are different both in name and structure to the file names on

disc PB1. Detective Sergeant AQ, Detective Superintendent Lynch and Detective Sergeant. Boyce all denied making any changes to any files. It is suggested that the files must have been altered by someone as the filenames on PB1 do not accord with the naming structure described by Detective Sergeant AQ.

74. The appellants submit that, absent any explanation, manipulation of the files between recording and their deployment in court may be inferred. It is suggested that in the circumstances PB1 should have been ruled inadmissible.

75. Counsel on behalf of the prosecution submitted that as the three persons who had "handled", who had had access to, or who had had control of, the audio recording were all asked in turn whether or not there had been any interference with it, and as each of them had stated in bald, clear terms that there had been no interference with it, there was simply no basis for concern relating to the authenticity or integrity of the copy produced and which was exhibited as PB1.

76. Evidence of non interference was given by Detective Superintendent William Johnson (transcript, 31st January 2018, at p. 12), by Detective Sergeant AQ, (transcript, 7th February 2018 at p. 43), and Detective Superintendent Eugene Lynch (transcript, 8th February 2018, at p. 7). The prosecution say that this was a case where the authenticity of the evidence was plainly and obviously not an issue. In circumstances where there was positive and cogent evidence confirming non-interference, any unexplained discrepancies in file naming could not per se justify excluding the evidence. Absent other evidence tending to suggest actual interference, and in circumstances where there was no evidence tending to show that the contents of any files had in fact been altered or manipulated, the unexplained discrepancy could only go to the weight to be attached to PB1.

77. The Special Criminal Court ruled as follows:

> *"Mr Berry submitted that there were in effect unexplained or are unexplained differences between the recordings made by Detective Sergeant AQ and the recordings which the prosecution now seek to rely upon being exhibit PB1. In this respect Mr Berry has referred inter alia to the different track names and dates and that was itemised and given to the Court in some detail. Mr Berry further submits that each witness has stated in evidence that there has been no interference or alteration to the relevant files, but that nonetheless variations exist in the files copied by Detective Sergeant AQ and the copy which is known as PB1. He said that this subsequently affects and must affect the admissibility of PB1. Mr Berry makes the argument that the date being the 7th August 2015 and the time as 16:26 ascribed to a particular recording cannot be correct in light of the evidence given by Detective Garda BK.*
>
> *As we have already stated, the prosecution must establish that PB1 is prima facie authentic before it can be admitted into evidence. In the course of this voir dire we have heard no evidence or received any submissions that the content of PB1 is not as suggested by the prosecution. We have, on the contrary, received evidence that*

Detective Superintendent Lynch copied the relevant material without any editing or any interference.

As regards AQ1 to 8, these items were copied on the evidence in November 2017 and furnished to the defence by way of disclosure. Any discrepancies found between AQ's discs being AQ1 to 8 inclusive and PB1 are issues if so found which may be relevant to the assessment of the weight to be attached to PB1 but such issues are not relevant to this particular assessment which relates to the admissibility of PB1. Issues of weight are for the triers of fact as everybody in this Court is aware of. Therefore we do not find merit in this particular submission. An audio recording if relevant is admissible if it is established that it is prima facie authentic. Further consideration on this aspect may arise when assessing the weight to be given to such a piece of real evidence."

78. We regard the Special Criminal Court's ruling on this issue as having been impeccable and fully in accordance with our understanding of the law. We find no error in its approach.

Complaint that the court erred in receiving the transcript prepared by D/Gda Judge as an "aide memoire"

79. The appellants say that the aide memoire was a "creature unknown to the law", and that the court should not have been prepared to receive it, much less rely upon it.

80. In that regard D/Gda. Ronan Judge gave detailed evidence as to the process he engaged in for the purpose of preparing a transcript of the audio recording (Ex. PB1). That process involved listening to the recording repeatedly using high quality headphones. The prosecution proposed that the transcripts would be provided to the Court to use as an 'aide memoire' while listening to the audio recordings being played i.e. on the basis that each member of the Court, with the assistance of the transcripts, could independently note what he/she heard on the recordings. In the course of submissions by Senior Counsel for the prosecution, the cases of *R v Harris* [1972] 1 WLR 651 and *The People (Director of Public Prosecutions) v O' Brien and Stewart* [2015] IECA 312 were opened to the Court as authorities for the proposition that the Court could lawfully receive and use the transcripts as proposed.

81. Having heard submissions from all parties, the Special Criminal Court delivered a ruling accepting the transcripts as *"an aid to the Court in order to assist the Court in listening to the audio recording whilst the audio recording is being played"*. The Court further noted that *"the defence have received the transcripts which have been prepared by Detective Garda Judge, thus enabling the defence, at any point in time, to engage in a comparison exercise as regards the material contained on the audio recording and the material contained in the transcript as prepared by Detective Garda Judge"*.

82. The court further observed that *"… the transcript is an administrative convenience to be used by the Court as assistance whilst listening to the audio recordings. We have been guided by what we ourselves have heard on the audio recordings, and it is on the content of PB1 that we have deliberated and come to our conclusions"*. The Court further noted that *"The Court has scrutinised the contents of PB1, which evidence is central to the*

prosecution's case. The Court has listened to PB1 with and without the transcript prepared by detective Garda Judge, which were prepared to assist us in listening to the recordings. The Court has heard material on the audio recordings which is not contained on the transcripts …"

83. The prosecution have submitted that the court below properly received the transcripts prepared by D/Gda. Judge as an 'aide memoire' while listening to the audio recordings (Ex.PB1) and, having received the transcripts, conducted its own thorough analysis of the audio recordings (with and without the assistance of the transcripts) before arriving at any conclusions in respect of the content of same.

84. We agree with this submission and are not disposed to uphold this complaint.

The Identification of Speakers on the Audio Recording

85. The appellants seek to complain about the content of the closing address by Senior Counsel for the prosecution whereby the Special Criminal Court was invited to identify the individuals on the audio recording (designated M1, M2, M3 and F1 respectively) as David Nooney, Kevin Hannaway, Sean Hannaway and Eva Shannon respectively.

86. The appellants say that the aide memoire had been introduced for a limited purpose, namely to assist the court in following the audio recording as it was being played, and having been so introduced, it mutated into a document of much greater significance as it was used to assist in attribution.

87. The appellants say that at one stage, it was anticipated that there might be evidence of voice attribution from an expert in the field, a Mr French, but that for various reasons, including cost and time, it was not proceeded with. At another stage, there were indications that the prosecution would seek to deal with the attribution of remarks uttered through the evidence of Detective Sergeant Finnerty. The defence had intended to challenge that course of action, but just before he gave evidence, it became clear that Detective Sergeant Finnerty would not be going so far as to attribute particular remarks to particular accused persons. Instead he gave the evidence just described. What transpired, according to the appellants, was that attributions took place only in the context of closing submissions by prosecution counsel, at a time when all the evidence in the case had concluded. This is said to represent a fundamental unfairness in the case.

88. It is useful to examine the evidence that was actually relied upon and referred to in the closing. In relation to the identification of the individual speakers on the recording, the prosecution makes the case that seven voices are heard on the recording. Detective Garda Finnerty was in a position to identify the voice of Patrick Brennan, assisted by the fact that on tape, a man was asked what his name was and he said it was *Patrick Brennan*.

89. In relation to Damien Metcalfe, in respect of which no issue was taken, the Detective Garda was in a position to say *"I've known him for a number of years"*. Concerning Robert Day, this interviewee responds repeatedly to the name *"Bob"*. That accounts for three of

the seven discernible voices, the three that are non-controversial in the context of the case. On tape, there is one female voice, F1, and the appellant, Eva Shannon, accepted that that was her.

90. This left three remaining male voices to whom the tags M1, M2 and M3 were attributed. Detective Garda Finnerty was in a position to attribute individual remarks to one or other of these three men. The contents of the recording, according to the prosecution, assists in identifying which man is which. So far as M1 is concerned, on three occasions, he answers to the name Dave, and the prosecution say that by reference to this, that one can with confidence say that of the three men, the one who answers to *Dave*, was David Nooney. One of the other two men answers to the name three times. In addition, he tells his companions a story about a telephone call that he receives where he relates that the caller said *"hello, is it Sean?"* to which he answered *"yes"*. The prosecution described this as self-identifying. So far as the person identified as M2 was concerned, M2 recounts an anecdote which begins with someone saying to him *"look, Kev"*. The prosecution contended that it could be inferred that this was Kevin Hannaway.

91. Having heard submissions from the parties in respect of the content of the closing address by Senior Counsel for the prosecution, the Special Criminal Court ruled as follows:

> *"The position is yesterday afternoon Mr Munro on behalf of his client and his submissions were adopted by each of the respective counsel on behalf of their client, submitted to the Court that there was a serious difficulty in that the prosecution had referred to material which was not part of the evidence and had made certain submissions which each of the accused said went over and beyond the case being made against their respective clients. In closing the prosecution are entitled to marshal the evidences, to draw strands of evidence together and to invite a court or a jury to assess that evidence. The prosecution in this instance has submitted to the Court that on an assessment of the evidence, this Court may draw an inference as to the identity of the voices on the audio recordings. In so doing Ms Lawlor has pointed to various aspects of the evidence in stating the prosecution case. It is as everybody in this court knows, for the Court to assess the evidence in its totality and to come to its own conclusions on the ultimate issue, that is whether the accused are guilty or not guilty of the offences alleged against them. Each of the accused assert a fundamental unfairness in the manner of Ms Lawlor's closing on behalf of the prosecution and state that the case against each accused has shifted from the commencement of this trial.*
>
> *This Court is satisfied that Ms Lawlor was fully entitled to refer to aspects of the evidence and to ask the Court to apply its common sense and to come to certain conclusions. Issues of fact are of course for the assessment of a court or for a jury and it is the position and well known by everybody in this court that speeches by counsel for the prosecution or speeches by counsel for the defence are not evidence, they are simply arguments made on behalf of their respective clients. It*

is also the position and noted by this Court that on the 6th June Ms Burns, Senior Counsel, in replying to a defence application regarding Detective Garda Finnerty's evidence said the following, and that was on the 6th June 2018, day 41, and we refer to the end of page 75 where Ms Burns said:

> *'In due course, if the case proceeds in relation to Detective Garda Finnerty's evidence submissions will be made to the Court in relation to all of the evidence that has been heard in the case and how the Court can interpret all of the evidence in relation to the case.'*

Thus it is quite clear that the prosecution intended to rely on the evidence and to ask the Court in its concluding remarks to come to certain conclusions.

Therefore, we will in due course having heard submissions from the defence counsel, assess the evidence in its entirety and come to a verdict based solely on the evidence before this Court. So we are refusing whatever application was being made by the defence on the last occasion. This Court is entitled to the assess the entirety of the evidence, to hear submissions made by counsel on behalf of the prosecution and counsel on behalf of the defence which are simply arguments made in closing to assess the entirety of the evidence to draw the strands of the evidence together and to come to our conclusions based on the evidence and our assessment of the evidence."

92. This Court is now asked to find that the Special Criminal Court was in error in its approach to the complaints ventilated in respect of the prosecution closing. We are not prepared to do so in circumstances where we are satisfied that those complaints are without legitimacy or foundation. The prosecution were entitled to be shown considerable latitude in terms of what they highlighted in the closing of their case, and in terms of what inferences they would invite the court to draw based on the evidence. There was ostensibly an evidential basis, based on a combination of direct evidence received, and inferences which it was suggested were open to the court to draw, for all of the attributions which prosecuting counsel invited the court to make. There was nothing inappropriate about the closing speech complained of.

The Lawfulness of the Initial Search, Detention and Arrests of the Respective Appellants

93. In the course of the trial, Kevin Hannaway, Eva Shannon, Sean Hannaway, and David Nooney challenged the legality of their initial detention, search, and arrest at the McDonald's restaurant in the Blanchardstown Shopping Centre on the afternoon of 8th August 2015. It was argued at trial that there was no justification in law for that initial detention by members of the Emergency Response Unit of An Garda Síochána, and that their detention by the ERU amounted to a *de facto* arrest. It was submitted that Detective Sergeant Gerard Doherty did not invoke s. 30 of the Offences Against the State Act 1939. It was further submitted that Detective Sergeant Padraig Boyce unlawfully detained each accused for the purpose of a search pursuant to s. 30.

94. There were two limbs to this argument. Firstly, it was said that Sergeant Boyce had no power to detain for the purpose of search, as members of the ERU had already searched the accused in each case, and secondly, that no search actually took place and that the detention for the purpose of a search was a colourable device designed to detain the accused pending their respective arrests. An issue was also raised by the appellant, David Nooney, about the fact that he was handcuffed by the member who arrested him: Detective Garda Graham Dunne. Detective Garda Dunne had given evidence of his arrival at the carpark attached to the McDonalds restaurant in Blanchardstown, and the fact that on arrival, he observed a number of members of the ERU and a number of individuals with them. He said he focused on David Nooney who he said was lying on the ground. He said he assisted David Nooney to a sitting position and then arrested him at 14.53 hours. He informed Mr. Nooney that he was being arrested under s. 30 for the offence of membership of an unlawful organisation and he was cautioned. Detective Garda Dunne then placed handcuffs on Mr. Nooney. He said he had done this as Mr Nooney had not been properly searched at that stage and it was both for Mr. Nooney's protection and the witness's own protection. In cross-examination, Detective Garda Dunne agreed that Mr. Nooney had not used or threatened force in order to avoid or resist arrest. It was pointed out that the member of the Garda Síochana who was initially dealing with Mr. Nooney, i.e., Detective Garda Mark McHugh, did not handcuff him. It is said that in these circumstances, the decision by Detective Garda Dunne to do so was not justified and the effect was to invalidate the arrest.

95. The Special Criminal Court rejected all of the complaints made and concluded that the detentions, searches and ultimately the arrests were all lawful. In our assessment, following a review of the transcript, the court's conclusions were ones that were open to it to arrive at on the evidence that had been received.

96. The Special Criminal Court also took the view that the decision of Detective Garda Dunne to handcuff David Nooney was justified in the circumstances. In this Court's view, there was a proper basis for such a conclusion. It must be understood that on the occasion, Gardaí had been briefed that they would be dealing with a group of IRA members. It seems to the members of this Court that in such a situation, a considerable margin of appreciation must be afforded to members of An Garda Síochána. They, along with everybody else in the country, must be aware of the propensity for the IRA to engage in violence, and indeed, that they have been responsible for the deaths of many members of the security forces in this State, in Northern Ireland and in England.

97. The Court will therefore reject the challenges to the validity of the initial arrests.

The Challenge to the Reliability of the Evidence of Detective Chief Superintendent Richardson

98. In the course of a voir dire, evidence was given by Detective Superintendent (now Detective Chief Superintendent) Cliona Richardson detailing the circumstances in which the authorisation under s. 4(1) of the Act of 2009 for surveillance was sought and obtained. Senior Counsel for Eva Shannon challenged the reliability of the evidence of this Garda officer. The argument advanced arose from the fact that in her statement of

evidence, Detective Chief Superintendent Richardson appeared to say that IRA meetings were ongoing at No. 10 Riverwood Park, Castleknock, at the time she swore her information. It was said that this puts her evidence in conflict with that of her colleague, Detective Inspector AE who had stated that meetings were not ongoing at the relevant time.

99. The court below was specifically referred to paragraphs 9 and 10 of the information, which state as follows:

> *9. "My grounds for believing that the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State are; I am satisfied from information and intelligence that David Nooney, 2 Coultry Green, Ballymun, Dublin 11 is a member of the IRA, otherwise known as Óglaigh na hÉireann. Intelligence in my possession indicates that Nooney may use 10 Riverwood Park, Castleknock, Dublin 15 for meetings in support of operational and logistical activity by the IRA".*
>
> *10. "My grounds for believing that the surveillance being sought to be authorised is the least intrusive means available having regard to the objectives and other relevant circumstances are; current intelligence suggests that David Nooney and associates, as members of the IRA, otherwise known as Óglaigh na hÉireann, will 10 Riverwood Park, Castleknock, Dublin 15 to meet and discuss the directing and organisation of IRA operations and operational activity. A garda operation is in place to monitor these meetings by members of the IRA in order to develop intelligence and evidence to support garda operations and future prosecutions against the IRA. The deployment of surveillance devices will assist in the development of this intelligence and evidence gathering process".*

100. The Special Criminal Court considered that the terms of the sworn information were prospective in nature. There was a reference to the fact that Mr. Nooney *"may use"* 10 Riverwood Park for meetings in support of operational and logistical activity by the IRA, and elsewhere references to the fact that David Nooney and his associates, as members of the IRA, *"will use"* 10 Riverwood Park.

101. The court ruled:

> *"When one looks at Detective Chief Superintendent Richardson's sworn information, neither paragraphs 9 or 10 are termed in the present tense. Each paragraph looks to the future. This is the material which she swore at the relevant term before the district judge. Her statement of proposed evidence is not evidence unless of course she accepts the content of her statement in evidence. She agreed in evidence that she had said in her statement that meetings were ongoing but this is not reflected in her sworn information which is the document she relied upon to ground her application for an authorisation. She confirmed these grounds in her evidence before this court. She also confirmed on a number of occasions that she had in her possession different strands of information and she furthermore received*

information on the morning in question from Detective Inspector AE from which she believed that the surveillance in issue was necessary for the purpose of maintaining the security of the State.

A superior officer is entitled to make such application for an authorisation where he or she has reasonable grounds for believing that one of the three situations exist pursuant to section 4 (1) (a), (b) or (c). The officer must of course also have reasonable grounds for believing that the surveillance meets all of the requirements provided by section 4 (5) of the 2009 act. Detective Chief Superintendent Richardson gave evidence of the information she swore as to the purpose of the surveillance and as to the appropriateness of the surveillance in question. We are satisfied beyond reasonable doubt that she had reasonable grounds to make the application from the information held by her and the information given to her at the relevant times. This ground also fails."

102. Again, this Court is happy to uphold the ruling on this aspect by the Special Criminal Court. The reasoning is cogent and represents a view that was open to the members of that court on the evidence. We see no reason to interfere with it.

103. A further challenge was also advanced by counsel for Sean Hannaway on the basis of suggested conflicts between the evidence of Detective Chief Superintendent Richardson and Detective Inspector AE. It is said that the conflict is most evident in relation to the construction of the sworn information. Evidence was adduced that this document was constructed using a template, envisaged by the District Court Rules, where certain content was to be completed or inserted by the individual making the application The clearest conflict relied upon relates to the narration of the content to be inserted. Detective Chief Superintendent Richardson gave evidence that Detective Inspector AE was present for some of this process and that Detective Sergeant AQ may have been present. In contrast, Detective Inspector AE asserted that he was not present but was engaged in other activities in the building on the date in question. It was submitted to the court below that the consequence of such conflict was to render Detective Chief Superintendent Richardson's evidence entirely unreliable and that in turn affected the legitimacy of her application before the District Judge for the authorisation in question.

104. The Special Criminal Court accepted that there were conflicts in the evidence relating to the circumstances of the sworn information. However, the court went on to hold:

"Certainly there is a template for the purpose of drafting sworn information; however, what is important is the evidence which was given to this court in respect of the content of the sworn information. Detective Chief Superintendent Richardson was very clear that she read the document through and that she was entirely satisfied as to its contents. She repeatedly said that she believed the surveillance she sought on the 7th of August 2015 was necessary and specified the grounds for her belief. Clearly the district judge was satisfied that the requirements under the 2009 act were met and therefore issued the authorisation.

Ms Burns submits that the grounds relied upon by Detective Chief Superintendent Richardson were reasonable grounds and she argues that her grounds are entirely borne out by the evidence already adduced at this trial. She pointed to paragraphs 9 and 10 of the sworn information in this regard and to the evidence of observations by members of the NSU of David Nooney and other persons' movements on the relevant date.

Clearly there are conflicts in the evidence of Detective Chief Superintendent Richardson and Detective Inspector AE regarding their presence in the course of the narration of the material for inclusion in the sworn information. The relevant issue however for our consideration at this juncture is that of the validity of the authorisation permitting video and audio devices to be installed at the relevant location for the purpose of surveillance.

The district judge must be satisfied by the information on oath from the superior officer that one or more of the three situations set out in section 4 (1) of the 2009 act are fulfilled and that the authorisation is justified having regard to the three requirements set out in section 5 (2) of the act. He or she must also of course be satisfied regarding section 5 (4) of the act before issuing an authorisation. An authorisation must be very carefully scrutinised as such document enables members of An Garda Síochána or other persons not applicable in this instance to enter a property, if need be by force, to give effect to that permitted by such authorisation. We find on the evidence that there are conflicts in the evidence relating to the preparation of the sworn information. However, this does not affect the veracity of the information contained in the sworn information and nor does it affect the witness's belief. It is of primary significance that the evidence adduced clearly demonstrated that the witness read the sworn information and signed the document. She was satisfied with the content of the sworn information in respect of which she gave evidence before the district judge prior to the issuing of the authorisation. In those circumstances this ground also fails."

105. Once more, in the view of this Court, the ruling on this issue by the Special Criminal Court was an entirely proper one.

Evidence of providing assistance in respect of Eva Shannon and Edward O'Brien

106. Counsel for Eva Shannon submitted in furtherance of an application for a direction that not all of the ingredients of the offence of providing assistance to an unlawful organisation were established. The offence is committed when "a person who knowingly renders assistance, including financial assistance to an unlawful organisation, whether directly or indirectly, in performance or furtherance of an unlawful object, is guilty of an offence". Counsel pointed out that the words "unlawful object" are not defined by the Act, but says that significance is to be attached to the fact that the words were inserted by the Criminal Justice (Terrorist Offences) Act 2005. It was submitted that in circumstances where the phrase "unlawful object" is otherwise capable of wide construction, the court must be especially cautious and avoid affording an unduly wide construction to it, "particularly where the amorphous concept of an unlawful object (which could range from genocide to

parking on a double yellow line) is coupled with the also amorphous concept of providing assistance" (quotation taken from written submissions on behalf of Eva Shannon). It is for this reason that the list of terrorist related offences set out in the Act of 2005 is relevant and was provided to the court. It was submitted that none of these offences come close to what is charged as the alleged unlawful object in the instant case. In the circumstances it is said that this appellant should have been granted a direction based on the first limb of the test in *R v Galbraith*, ie on the basis of insufficiency of evidence.

107. We beg to disagree. In this case, the unlawful object in contemplation is pleaded with considerable precision in the particulars to the indictment i.e., the conducting of interviews for the purpose of ascertaining whether information was provided to An Garda Síochána in relation to previous IRA operations with a view to ensuring that future criminal offences could be committed without detection. Such an objective, if established, would undoubtedly be unlawful. Moreover there was clear evidence tending to support the case that assistance was rendered with that object in mind. The Special Criminal Court was right to refuse a direction in the circumstances. There was clearly sufficient evidence to allow a properly charged jury, or in this case the Special Criminal Court in its role as the trier of fact, to convict of the offence of rendering assistance,

108. On behalf of the appellant, Edward O'Brien, it is said that the prosecution case against him is very considerably weakened by the deficiencies in the surveillance evidence of Garda BK, who claimed to have noted times at which people went into and left the house. The issue arises because on one of the four times when Garda BK has recorded Mr O'Brien as being present in the house then under surveillance, Mr. O'Brien is in fact to be seen on CCTV footage as having been present in a public house in the north inner city.

109. It is pointed out that the case against Mr. O'Brien did not contain any of the features of the case against other appellants. His voice was not heard on the audio recording and there was no suggestion that he participated in any of the interviews. The only evidence specific to Mr. O'Brien was that he left the house at about 2.20pm on 8th August with two bags containing rubbish which he placed into the boot of a car.

110. It was contended in the circumstances that the case against Mr O'Brien should have been the subject of a direction both on Galbraith grounds and also on *P.O'C* grounds. The Special Criminal Court rejected this submission, following an extensive review of the relevant authorities, contending that the issues raised were capable of being determined and resolved by the court acting in its capacity, similar to that of a jury, as the trier of matters of fact. It also indicated that it did not consider that any of the matters raised rendered it unfair to proceed with the trial.

111. We are satisfied that these rulings were justified on the evidence, in accordance with law, and that they should be upheld.

Jurisdiction of the Special Criminal Court to try Edward O'Brien

112. A submission was made on behalf of Edward O'Brien that the Special Criminal Court lacked jurisdiction to try him. The submission arose from the fact that Mr. O'Brien was

originally charged before the Court with an alleged offence contrary to s. 21A of the Offences Against the State Act 1939, as amended – the offence of providing assistance to an unlawful organisation. Mr. O'Brien appeared before the Court on 8th June 2018, at which point he was charged with an offence contrary to s. 21 of the Offences Against the State Act 1939 – the offence of membership. The submission was made that as Edward O'Brien appeared on bail before the Court in respect of the s. 21A charge, he was not "brought" before the Court in respect of the s. 21 charge. The Special Criminal Court was of the view that there was no merit in the submissions made. This Court is of the view that what occurred is what would normally be expected to occur *i.e.* the proffering of new charges and the withdrawal of the original charges.

113. The Court cannot uphold this ground of appeal on behalf of Mr. O'Brien.

Interviews Conducted with the Appellant, Edward O'Brien

114. A number of interviews were conducted with Edward O'Brien at Finglas Garda Station on 8th and 9th August 2015, and the memoranda of these interviews was read to the Court by counsel for the prosecution. One interview was conducted under ordinary caution, and in three cases, the provisions of s. 2 of the Offences Against the State (Amendment) Act 1998 were invoked. On these occasions, the provisions of s. 2 were explained to Mr. O'Brien and he was afforded an opportunity to consult with his legal advisers. In the course of the "s. 2 interviews", Edward O'Brien made a number of denials and refused to answer questions including:

    (i) repeatedly and consistently denying that he was a member of the IRA;

    (ii) refusing to give an accounts of his movements on 7th and 8th August 2015;

    (iii) refusing to answer questions concerning his association with David Nooney, Sean Hannaway, Kevin Hannaway, Eva Shannon, and Damien Metcalfe,

    (iv) refusing to account for his presence and for his activities at No. 10 Riverwood Park; and

    (v) refused to give an explanation for removing bags of rubbish from No. 10 Riverwood Park into the boot of his car.

115. The Special Criminal Court concluded that Mr. O'Brien had failed to answer every material question put to him and concluded that he simply did not have any response which would bear scrutiny, and accordingly, drew the inference that he was, at the relevant time, a member of the IRA. It is now complained that the Special Criminal Court was in error in the conclusions that it reached and that, in effect, they were against the weight of the evidence.

116. We disagree with this contention. In our view, the Special Criminal Court dealt with the s. 2 interviews in a manner that is entirely unimpeachable. There was a clear evidential basis for the conclusions that it reached.

Miscellaneous

117. In so far as there may be additional points, or aspects of complaints, raised in individual appellant's submissions which have not been expressly addressed in this judgment, we confirm for the avoidance of doubt that all such points have nevertheless been duly considered, but that the court has not been disposed to uphold them.

Conclusion

118. In circumstances where we have not been disposed to uphold any of the appellants' complaints, we are satisfied that their trials were satisfactory and that their verdicts are safe. Accordingly, we dismiss the appeals of each of the appellants against their respective convictions.