APPROVED **[2023] IEHC 664**

THE HIGH COURT
JUDICIAL REVIEW

2021 599 JR

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

SPECIAL CRIMINAL COURT
MICHAEL CONNOLLY

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 December 2023

INTRODUCTION

1. The Director of Public Prosecutions seeks to quash a certificate issued by the Special Criminal Court to the effect that there has been a miscarriage of justice. The certificate was issued pursuant to Section 9 of the Criminal Procedure Act 1993. The certificate relates to the earlier conviction of an individual of an offence of membership of an unlawful organisation. This conviction was set aside on appeal and a subsequent retrial resulted in an acquittal.

NO REDACTION REQUIRED

2. The Director of Public Prosecutions seeks to challenge the issuance of the certificate under two broad headings as follows. First, it is said that the Special Criminal Court erred in purporting to find that there had been a miscarriage of justice in circumstances where that court had, supposedly, made a finding that the acquitted person was "*not factually innocent*". Secondly, it is said that the conduct of the prosecuting authorities, which had been criticised by the Special Criminal Court, had not given rise to a grave defect in the administration of justice such as might properly ground the issuance of a certificate.

3. It should be explained that there is no statutory right of appeal against the decision of the Special Criminal Court to issue a certificate. This matter thus comes before the High Court by way of an application for judicial review, with all of the limitations that that implies, rather than by way of appeal. The High Court is not considering *de novo* the question of whether or not there has been a miscarriage of justice. Rather, it is considering the *legality* of the decision of the Special Criminal Court.

PROCEDURAL HISTORY

4. Mr. Michael Connolly, the second respondent, had been convicted by the Special Criminal Court of an offence of membership of an unlawful organisation pursuant to Section 21 of the Offences against the State Act 1939. The date of conviction is 1 June 2017. The conviction was overturned by the Court of Appeal on 26 June 2018: *Director of Public Prosecutions v. Connolly* [2018] IECA 201. A retrial was directed and took place before a differently constituted division of the Special Criminal Court.

5. During the course of the retrial, a newly discovered fact emerged, namely that an assertion made by a high ranking garda officer while giving belief evidence was "*seriously incomplete and misleading*". The accused was acquitted, and his release directed, for the reasons stated in a judgment delivered on 24 June 2019. The accused had already served some fourteen months of a three year sentence of imprisonment.

6. In a written judgment of 12 April 2021, the Special Criminal Court subsequently certified, pursuant to Section 9 of the Criminal Procedure Act 1993, that there had been a miscarriage of justice. It is this decision which the Director of Public Prosecutions seeks to impugn in these judicial review proceedings.

7. Leave to apply for judicial review was granted by the High Court (Hyland J.) on 2 March 2022 following an *inter partes* hearing. The substantive application for judicial review subsequently came on for hearing before me. The second respondent has acted as *legitimus contradictor* to the proceedings. The Special Criminal Court has not participated in the proceedings.

8. The hearing was adjourned twice to allow the parties to file supplemental legal submissions as follows. First, the Director of Public Prosecutions was given leave to file revised legal submissions which more accurately reflected the findings made by the Special Criminal Court. Secondly, both parties were given leave to file submissions which addressed the implications, if any, of the case law of the European Court of Human Rights on the presumption of innocence. The parties were requested to address, in particular, the judgment of the ECtHR in *Allen v. United Kingdom* (Application No. 25424/09), [2013] ECHR 25424/09.

9. The DPP filed revised submissions on 13 June 2023. Both parties filed submissions addressing the ECtHR case law: these were filed on 20 September 2023 and 16 October 2023, respectively. The hearing resumed on 13 November 2023 and judgment was reserved until today's date.

"DOUBLE COUNTING" AND OFFENCE OF MEMBERSHIP

10. To assist the reader in better understanding the discussion which follows, it is necessary to pause here and to explain what is meant by the concept of "*double counting*". This concept played a pivotal role in the decision of the Special Criminal Court to issue a certificate.

11. The certificate related to a prosecution for an alleged offence of membership of an unlawful organisation. The offence is unique in that opinion evidence as to the guilt of the accused is admissible. More specifically, a statement of belief, by a member of An Garda Síochána not below the rank of Chief Superintendent, that the accused was at a material time a member of an unlawful organisation is admissible as evidence that he was then such a member. See Section 3 of the Offences against the State (Amendment) Act 1972. Evidence of this type is often referred to by the shorthand "*belief evidence*".

12. The Supreme Court held, in *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84, [2016] 1 I.L.R.M. 301, that a constitutional construction of this provision requires that the belief evidence must be supported by some other evidence which implicates the accused in the offence charged, which is seen by the trial court as credible in itself, and which is independent of the witness who gives the belief evidence.

13. The concept of "*double counting*" describes the risk that the evidence which has been put forward as independent evidence, intended to support the belief evidence, might actually have contributed to the formation of that belief. To avoid this risk, it has become the norm for the officer giving belief evidence to state that the belief is not based on anything that arose during the investigation of the offence or from the arrest and detention of the accused. The officer may, to emphasise this point, say that he or she has not read the book of evidence or disclosure material. The objective of this approach is to exclude, as a concern for the court, the possibility of double counting. (*Director of Public Prosecutions v. Cassidy* [2021] IESC 60, [2021] 2 I.R. 710).

THE JUDGMENT OF THE SPECIAL CRIMINAL COURT

14. The Special Criminal Court delivered a written judgment on the application for a certificate of miscarriage of justice on 12 April 2021. The judgment explains the practical implications of the rule against "*double counting*" as follows (at paragraph 8):

> "As previously stated by this Court when delivering its judgment on 24 June 2019, the application of the rule does not mean that a high ranking garda officer is precluded from relying on an intelligence file merely because it makes reference to alleged supporting facts upon which the prosecution propose to rely as independent supporting evidence nor does it mean that such a garda officer is necessarily required in every case to disclose the existence of such references or to disclose the information that is contained in those references, *a fortiori*, where the information goes beyond matters disclosed in the Book of Evidence. What it does require, however, is that the Special Criminal Court should be astute to ensure that the evidence upon which the prosecution rely in order to show compliance with the rule against double counting is of such a nature as to allow a high degree of confidence that the rule has been properly adhered to and observed. Accordingly, where belief evidence arises solely from the reading of an

> intelligence file, there is an onus on the prosecution to produce clear and unambiguous evidence to establish that the high ranking garda officer was cognisant at all times of the rule against double counting when forming his or her belief and to further establish that the relevant garda officer was aware at least of the general nature of the alleged supporting facts upon which the prosecution propose to rely and to further establish that he or she consciously discounted those facts when forming his or her belief."

15. The judgment then explains the circumstances leading up to the acquittal as follows (at paragraph 11):

> "[…] the applicant was acquitted of the relevant charge primarily because an inspection of the intelligence file which the high ranking garda officer had considered prior to forming his belief disclosed the existence of material relating to matters which the prosecution had relied on as providing independent supporting evidence for the belief evidence of the garda officer in circumstances which caused this Court to have a reasonable doubt as to whether the garda officer had impermissibly double counted the relevant evidence in arriving at his belief."

16. It should be explained that the prosecution had sought to rely on evidence in relation to events on a particular date as supposedly independent evidence capable of supporting the belief evidence of the high ranking garda officer. In brief, this supposedly independent evidence related to the movement of two vehicles on the evening of 16 December 2014. The two vehicles had been under surveillance and were ultimately intercepted by members of the emergency response unit. Two improvised explosive devices were found in one of the vehicles. The acquitted person is said to have been the driver of the other vehicle. The Special Criminal Court held, in its acquittal judgment, that there was no direct evidence that the acquitted person had knowledge of or control over these devices.

17. The difficulty with this supposedly independent evidence is that the intelligence file, upon which the belief evidence was based, contained a summary of the

events of 16 December 2014. Unless the high ranking garda officer had consciously discounted this information, the circumstantial evidence in relation to the events of 16 December 2014 could not be regarded as independent evidence. This difficulty only emerged as an issue at the stage of the retrial, and only then as a result of the Special Criminal Court reviewing the intelligence file itself. This difficulty had not been made known at the initial trial.

18. The Special Criminal Court summarised its core findings on the criminal trial as follows in its judgment on the certification application (at paragraph 12):

> "This Court made three core findings in its judgment, the third of which led to the acquittal of the accused. Those findings were as follows: -
>
> (1) a finding beyond reasonable doubt that the high ranking garda officer honestly and genuinely held the belief that the accused was a member of the relevant unlawful organisation on the date charged being 16 December 2014;
>
> (2) a finding beyond reasonable doubt that circumstantial evidence adduced by the prosecution tended to implicate the accused in the transportation of two improvised explosive devices for a criminal purpose on 16 December 2014 which we were further satisfied was capable of supporting the belief evidence of the high ranking garda officer but only if we were satisfied beyond reasonable doubt that the relevant movements and activities of the accused and the finding of the improvised explosive devices on the relevant date had not been already been considered and relied upon by the senior garda officer when forming his belief;
>
> (3) a finding that it was reasonably possible that the high ranking garda officer had considered and relied upon the relevant matters and had therefore impermissibly double counted them when forming his belief."

19. The Special Criminal Court concluded that, in forming his belief, the high ranking garda officer had considered, and possibly relied on, information in the intelligence file which summarised the movements and activities of the accused

(i.e. the acquitted person) on the date of his arrest. The prosecution had relied upon these same events as supposedly independent evidence capable of supporting the belief evidence as required by *Redmond v. Ireland*. The Special Criminal Court held that it was reasonably possible that the high ranking garda officer's belief was based, in whole or in part, on the very same facts as were being offered by the prosecution for its independent support.

20. The Special Criminal Court went on then to consider the legal test for the grant of a certificate of a miscarriage of justice, citing extensively from *People (DPP) v. Wall* [2005] IECCA 140.

21. The court correctly identified that one circumstance in which a certificate might be granted is where the acquitted person has established that they are factually innocent. The court held that this did not apply (paragraph 28 of the judgment).

22. The Special Criminal Court ultimately held, by reference to the original trial, that there had been a grave defect in the administration of justice brought about by agents of the State. This holding was predicated on the conduct of the high ranking garda officer who had given the belief evidence. During the course of cross-examination, this officer had made an unqualified assertion that none of the material that he viewed or that he had seen was in the book of evidence. The Special Criminal Court characterised this assertion as "*seriously incomplete and misleading*". See paragraphs 34 and 35 of the judgment as follows:

> "It is clear from the foregoing exchange that the high ranking garda officer made an unqualified assertion that none of the material that he 'viewed' or that he had 'seen' was in the Book of Evidence. The assertion so made was, of course, not factually inaccurate because strictly speaking the materials in an intelligence file, in the sense of the actual documents in such a file, would never make their way into a Book of Evidence but that was manifestly not the issue upon which the senior garda officer was being cross-examined. The witness was clearly being cross-examined as to whether

> there were 'things' in the Book of Evidence which he 'relied on' when forming his belief in order to establish whether there might have been an overlap and therefore possible double counting of matters contained in the intelligence file and matters contained in the Book of Evidence. In that specific context, the assertion made by the high ranking garda officer was seriously incomplete and misleading in that it conveyed to the original court of trial that his belief was based only on matters that were wholly extrinsic to the matters contained in the Book of Evidence such that his belief evidence could be independently supported by all or any matters of relevance contained in the Book of Evidence including the circumstantial evidence relating to the movements and activities of the accused on the 16 December 2014.
>
> There is no evidence that the high ranking garda officer made the assertion in the knowledge that it was misleading, and nor could there be, because as he repeatedly stated, the witness had no knowledge of what was in the Book of Evidence. For the same reason, however, we are satisfied that it was careless of the senior garda officer to make the relevant assertion without being aware at least of the general nature of the alleged independent supporting evidence disclosed in the Book of Evidence upon which the prosecution proposed to rely, *a fortiori*, as the intelligence file contained material of an incriminating nature that related to 16 December 2014, the very day in respect of which he was asked to express a belief and therefore a date which he knew or ought to have known was a date of relevance to matters contained in the Book of Evidence. Whilst the witness did elsewhere explicitly state to the original court of trial that he had not relied on anything which occurred 'during' or 'after' arrest, the senior garda officer gave no similar assurance about matters occurring before arrest on 16 December 2014. It seems to this Court that in the context in which it was given, the assertion under scrutiny gave a false assurance to the original court of trial that the issue of double counting simply did not arise which would appear to explain why the issue did not become of any curial relevance in the judgment of the court."

23. The Special Criminal Court concluded its judgment by stating that it was satisfied that there had been a grave defect in the administration of justice in the trial that resulted in the conviction and sentencing of the accused which was

brought about by an agent of the State and that such constitutes a miscarriage of justice within the meaning of Section 9 of the Criminal Procedure Act 1993.

DISCUSSION

(1). ALLEGATION THAT ACCUSED "NOT FACTUALLY INNOCENT"

24. The Special Criminal Court certified a miscarriage of justice solely on the ground of a grave defect in the administration of justice. The case law makes it clear that it is open to a court to grant a certificate on this basis alone, i.e. in the absence of a finding of factual innocence.

25. The gravamen of the Director of Public Prosecutions' complaint is that it was irrational for the Special Criminal Court to certify a miscarriage of justice in circumstances where that court had, supposedly, decided beyond a reasonable doubt that the acquitted person had been involved in the movement of explosive devices and had made a "*positive finding*" to this effect. (See paragraphs 17, 32 and 34 of the revised written submissions).

26. On the DPP's argument, the Special Criminal Court erred in law in considering that the only consequence of this supposed finding was that the acquitted person could not be regarded as "*factually innocent*". The Director contends that the supposed finding establishes something more, namely that the acquitted person is "*not factually innocent*".

27. The distinction between these two propositions is subtle and may not be immediately apparent to the reader. It is necessary, therefore, to elaborate upon same. The concept of "*factual innocence*" is employed in the case law in contradistinction to that of "*presumptive innocence*". A person who has been acquitted of an alleged offence, or who has had an earlier conviction overturned,

continues to enjoy a presumption of innocence. In certain instances, it may be possible on an application for a certificate of a miscarriage of justice to go further and to establish that such a person is actually innocent of the alleged offence. This is referred to in the case law as "*factual innocence*". As emphasised by the Supreme Court in *People (DPP) v. Abdi* [2022] IESC 24, [2022] 2 I.L.R.M. 1 (at paragraph 42), actual innocence being established suffices for the grant of a certificate. However, the relief is not limited to the proof of factual innocence: a miscarriage of justice may also be certified where there has been a grave defect in the administration of justice (*ibid*., paragraph 46).

28. The case law to date thus proceeds on the basis that a subset of applicants for a certificate will not only be entitled to assert that they are presumptively innocent, but they will also be able to establish that they are factually innocent of the alleged crime.

29. In the present case, the DPP seeks to introduce a third concept, namely a finding that a person is "*not factually innocent*". This involves more than merely a failure on the part of the acquitted person to establish positively that they are "*factually innocent*". It amounts, in essence, to a finding that the acquitted person is guilty of a criminal offence. The legal consequence of such a finding is said to be that a court cannot certify a miscarriage of justice, not even on the grounds of a grave defect in the administration of justice.

30. Counsel for the DPP was careful to emphasise that his side perceives there to be a distinction between a finding of "*not factually innocent*" and one of "*guilt*". With respect, the supposed distinction is more apparent then real.

31. The DPP's position is stated as follows at paragraph 34 of the revised written submissions:

> "It is respectfully submitted that the circumstances of the instant case show how far removed it is from the decided cases cited herein, and that the error made by the Special Criminal Court in granting the order was of such a fundamental nature that it requires to be quashed. In this case, not only was innocence not established but to the contrary it was decided beyond a reasonable doubt that the Second Named Respondent was involved in the movement of explosive devices."

32. For the reasons which follow, the DPP's arguments are not well founded. The first reason is that the Special Criminal Court did not purport to make a "*positive finding*" that the acquitted person had been involved in the movement of explosive devices. Rather, the Special Criminal Court, very properly, confined itself to the distinct question of whether the acquitted person had demonstrated factual innocence. This is apparent from the following passage at paragraph 28 of the judgment:

> "Although it acquitted the applicant, this Court was nonetheless satisfied beyond reasonable doubt as to the existence of a body of circumstantial evidence which tended to implicate the applicant in the transportation of two improvised explosive devices for a criminal purpose on 16 December 2014. This is not, therefore, a case where the newly discovered fact establishes that the applicant was innocent of the crime alleged."

33. The Special Criminal Court had previously characterised the "*newly discovered fact*" as the reasonable possibility that the high ranking garda officer's belief evidence at the first trial had been based, in whole or in part, on the very same facts as had been offered by the prosecution for its independent support.

34. The Special Criminal Court thus went no further than deciding that whereas the discovery of the difficulty with the belief evidence necessitated an acquittal, it did not go so far as establishing that the acquitted person was "*factually innocent*". This is qualitatively different from a positive finding that the acquitted person was guilty of an offence. Crucially, there is nothing in the

judgment which displaces the presumption of innocence. The acquitted person is still presumed innocent but has not established factual innocence such as would justify certifying a miscarriage of justice on that specific basis.

35. The revised written submissions filed on behalf of the DPP on 13 June 2023 do not accurately reflect the language of the judgment of the Special Criminal Court. In particular, the characterisation of the supposed findings of that court, as set out at paragraphs 17, 32 and 34 of the revised written submissions, is incorrect. The reference by the Special Criminal Court to the existence of "*circumstantial evidence*" which tended to implicate the acquitted person does not equate to the Special Criminal Court being "*satisfied to the criminal standard of proof beyond a reasonable doubt that [the acquitted person] was involved in the movement of explosive devices*" as erroneously stated at paragraph 17 of the revised written submissions.

36. These errors endured notwithstanding that the hearing of these judicial review proceedings had been adjourned for the specific purpose of affording the DPP an opportunity to correct her original written submissions. The mischaracterisation of the Special Criminal Court's judgment carries through to the revised written submissions filed on 13 June 2023.

37. The second reason that the DPP's arguments are not well founded is that it is not open to a certifying court to purport to impute guilt to the acquitted person. To do so would undermine the presumption of innocence. The presumption of innocence is a right recognised by both the Constitution of Ireland and the European Convention on Human Rights. The ECtHR held in *Allen v. United Kingdom* (Application No. 25424/09) that if the national decision on an application for compensation for an alleged miscarriage of justice were to

contain a statement imputing criminal liability to the acquitted person, this would raise an issue falling within the ambit of Article 6 § 2 of the European Convention. Article 6 § 2 provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

38. The ECtHR stated that the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 §2. Thus, in a case where the domestic court held that it was "*clearly probable*" that the applicant had "*committed the offences ... with which he was charged*", the ECtHR held that the domestic court had overstepped the bounds of the civil forum and had thereby cast doubt on the correctness of the acquittal.

39. Here, the DPP's argument is that the Special Criminal Court decided beyond a reasonable doubt that the acquitted person had been involved in the movement of explosive devices. With respect, this argument is not well founded. Had the Special Criminal Court *purported* to make such a finding, it would have been invalid as inconsistent with the presumption of innocence. It would have involved a criminal court purporting to make a finding that the acquitted person was guilty of an offence in respect of which the acquitted person had never even been tried. In truth, the Special Criminal Court made no such finding: the proper meaning of its judgment has already been explained.

40. (It will be recalled that the only offence in respect of which the acquitted person had been tried had been an alleged offence of membership of an unlawful organisation. The acquitted person had not been charged with explosive-related offences. This was so notwithstanding that his co-accused had been charged

with, convicted of and sentenced for offences of possession of explosive substances in suspicious circumstances).

41. The DPP submits that the presumption of innocence has "*no place*" in the context of an application for a certificate under Section 9 of the Criminal Procedure Act 1993. With respect, this submission goes too far. A person who has been acquitted continues to enjoy the presumption of innocence. This has been explained as follows by the ECtHR in *Allen v. United Kingdom*: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected.

42. It is correct to say that an acquittal does not imply factual innocence. If an acquitted person seeks to assert a miscarriage of justice by reference to their factual innocence, then they must establish this on the balance of probabilities. It does not, however, follow as a corollary that the certifying court is equally entitled to determine that that person is "*not factually innocent*". To do so would involve the certifying court undermining the presumption of innocence by making a finding which is tantamount to a finding of guilt. The supposed distinction between a finding of "*not factually innocent*" and one of "*guilt*" is a distinction without a difference.

43. The Director's reliance on *People (DPP) v. Pringle (No. 2)* [1997] 2 I.R. 225 (at 237) is misplaced. As appears from the passage cited, the Supreme Court

was addressing an argument that an acquittal implied factual innocence. The judgment in *Pringle* is not authority for the proposition that a criminal court can purport to make positive findings of guilt in respect of offences for which a person has been acquitted, still less that it can do so in respect of offences for which the acquitted person has never even been tried. Moreover, the judgment in *Pringle* predates the enactment of the European Convention on Human Rights Act 2003. By virtue of Section 2 of that latter Act, the provisions of Section 9 of the Criminal Procedure Act 1993 must now be interpreted, insofar as is possible, in a manner compatible with the State's obligations under the European Convention. The Court of Appeal has recently observed that there are passages in the ECtHR judgment in *Allen v. United Kingdom* which, arguably, do not sit easily or comfortably with certain passages in the Supreme Court judgment in *Pringle*. See the judgment of Ní Raifeartaigh J. in *Pringle v. Ireland* [2022] IECA 113 (at paragraphs 212 to 218).

(2). GRAVE DEFECT IN THE ADMINISTRATION OF JUSTICE

44. The second broad head of challenge advanced by the Director of Public Prosecutions is that the Special Criminal Court erred in holding that there had been a grave defect in the administration of justice such as would justify the certification of a miscarriage of justice.

45. There was, initially, some suggestion on behalf of the DPP that it might not be open to a court to certify a miscarriage of justice on this ground alone. Counsel on behalf of the DPP placed great emphasis on the statement in *People (DPP) v. Pringle (No. 2)* [1997] 2 I.R. 225 (at 246) to the effect that the "*primary meaning*" of a miscarriage of justice is that the applicant for the certificate is, on

the balance of probabilities, innocent of the offence of which he was convicted. Counsel, very fairly, accepted that the more modern case law confirms that a certificate may properly be issued even in the absence of factual innocence. The recent judgment of the Supreme Court in *People (DPP) v. Abdi* [2022] IESC 24, [2022] 2 I.L.R.M. 1 (at paragraph 42) confirms that the grant of a certificate is not limited to cases where factual innocence has been established.

46. The test to be applied where it is asserted that there has been a fundamental defect in the administration of justice is summarised as follows in *People (DPP) v. Abdi* (at paragraph 48):

> "Cases will depend on their own facts. But, if innocence is not demonstrated in consequence of an acquittal following on the discovery of a new fact, then for a certificate of a miscarriage of justice to issue, what is required is that the accused demonstrate such bad faith on the part of the State authorities (as in *Wall* or *Conmey*) that undermines the justice system, or such a failure in the administration of justice (as in *Meleady* or *Hannon*) due to error that the prosecution is fundamentally undermined. This goes beyond the system correcting itself and is not established merely by the acquittal of the accused. The matter is a civil application requiring the accused applying for a certificate to bear the burden of establishing a miscarriage of justice. Where the accused can demonstrate innocence, that case is made out (as in *Hannon*) despite the prosecuting authorities not being in any way at fault in terms of concealment or other grave wrong."

47. It is submitted on behalf of the DPP that the threshold of a grave defect or fundamental defect has not been met in the present case. In support of this submission, the DPP has sought to minimise the criticism made by the Special Criminal Court of the conduct of the prosecution. In particular, the DPP draws attention to the statement in the judgment that there was no evidence that the high ranking garda officer had made the misleading assertion in the knowledge that it was misleading, and to the description of his conduct as "*careless*".

48. It should be recalled that this matter comes before the High Court by way of an application for judicial review rather than an appeal. There is no right of appeal provided against the decision of the Special Criminal Court to grant a certificate pursuant to Section 9 of the Criminal Procedure Act 1993. It follows, therefore, that the High Court, as the court of judicial review, is not considering *de novo* the question of whether or not there has been a miscarriage of justice. Rather, the High Court could only intervene to set aside the decision of the Special Criminal Court in circumstances where either (i) that court erred in its interpretation of the statutory test under Section 9 of the Criminal Procedure Act 1993, or (ii) that court's decision was unreasonable or irrational.

49. It is apparent from paragraphs 4 and 31 of the certification judgment, in particular, that the Special Criminal Court properly identified the criteria to be considered. The court asked itself whether there had been a grave defect in the administration of justice brought about by agents of the State. This is consistent with the test as formulated by the Supreme Court in cases, including, most recently, *People (DPP) v. Abdi*.

50. In circumstances where the Special Criminal Court asked itself the right question, the High Court could only intervene by way of judicial review if the conclusion reached on the question is one which no reasonable decision-maker could properly reach. The approach to be adopted on an application for judicial review in the criminal context has been summarised as follows by the Supreme Court in *Sweeney v. Fahy* [2014] IESC 50 (at paragraph 3.8):

> "Thus, there are very significant limitations on the extent to which it is appropriate for the superior courts to exercise their judicial review jurisdiction arising out of allegations that the evidence before a lower court or other decision maker was insufficient to justify the conclusions reached rather than insufficient to establish that the decision maker had any

> lawful capability to make the relevant decision in the first place. Absence of a lawful power to make the decision would render the decision unlawful. Save in an extreme case, absence of sufficient evidence as to the merits would only render the decision incorrect and, thus, not amenable to judicial review."

51. This threshold for intervention has not been met. Here, the Special Criminal Court held that the high ranking garda officer had been careless in giving his evidence in relation to a crucial matter and that this had resulted in the conviction of the accused. The Special Criminal Court was entitled to decide, having regard to the exceptional nature of belief evidence, that the making of an assertion which was "*seriously incomplete and misleading*" constituted a grave or fundamental defect in the administration of justice. It gave a "*false assurance*" to the court of trial and "*greatly contributed*" to the issue of double counting not becoming a live issue in the original trial as it ought to have been.

52. It will be recalled that the fact that the intelligence file contained a summary of the events of 16 December 2014 only emerged as an issue at the stage of the retrial, and only then as a result of the Special Criminal Court reviewing the intelligence file itself. The Special Criminal Court held (at paragraph 35) that the high ranking officer "*knew or ought to have known*" that 16 December 2014 was a date of relevance to matters contained in the book of evidence.

53. The fact that the identified deficiencies may not have been deliberate on the part of the high ranking garda officer does not make the grant of a certificate unreasonable or irrational. The admissibility of opinion evidence in a criminal prosecution is exceptional and is subject to protections in order to safeguard the constitutional rights of those affected. It behoves the prosecuting authorities to ensure that the safeguards, which the Supreme Court identified in *Redmond v.*

Ireland as being essential to ensure the constitutionality of the statutory provisions, are not undermined by carelessness.

54. Having regard to all of the foregoing considerations, it was open to the Special Criminal Court to find, in the particular circumstances of the present case, that the conduct of the prosecuting authorities gave rise to a grave defect in the administration of justice. Certainly, the Director of Public Prosecutions has failed to identify any error in principle in the approach adopted by the Special Criminal Court. The decision made is one which lay within the range of reasonable decisions which could have been made in respect of the application for a certificate. The fact that the High Court might have reached a different conclusion, had the matter come before it at first instance, is not sufficient to warrant intervention by way of judicial review.

55. Finally, for completeness, it should be recorded that any suggestion that the High Court should apply a more exacting standard of review because there is no statutory right of appeal against the Special Criminal Court's decision is incorrect. The references in the case law to the existence of a right of appeal go to the separate question of whether judicial review of a first instance decision should be refused as a matter of *discretion* because there is an alternative remedy available. There is nothing in the case law which suggests that, once all rights of appeal are exhausted, a more searching standard of review will be appropriate. Any adjustment in the standard of review would be contrary to principle and inconsistent with the supervisory jurisdiction exercised by way of judicial review.

CONCLUSION AND PROPOSED FORM OF ORDER

56. The Special Criminal Court decided to certify a miscarriage of justice on the ground that there had been a grave defect in the administration of justice. This decision was one which it was open to the Special Criminal Court to reach on the evidence. The High Court, on an application for judicial review, could only intervene to set aside that decision if it were unreasonable or irrational. This threshold has not been met. See, in particular, paragraphs 50 to 53 above.

57. The decision of the Special Criminal Court is not invalidated by the absence of a finding that the acquitted person is "*factually innocent*" (as opposed to merely presumptively innocent). The circumstances in which a miscarriage of justice may be certified are not confined to those where the acquitted person is able to establish, on the balance of probabilities, that they are factually innocent. A miscarriage of justice may be certified on the distinct ground that there has been a grave defect in the administration of justice.

58. The argument that the Special Criminal Court made a positive finding to the effect that the acquitted person was "*not factually innocent*" is incorrect. The Special Criminal Court did not make a finding that the acquitted person had been involved in the movement of explosive devices. Indeed, had the Special Criminal Court *purported* to make such a finding, it would have been invalid as inconsistent with the presumption of innocence. It would have involved a criminal court purporting to make a finding that the acquitted person was guilty of an offence in respect of which the acquitted person had never even been tried still less convicted.

59. Accordingly, none of the grounds for judicial review are made out and the Director of Public Prosecutions' case must be dismissed in its entirety. As to

costs, my *provisional* view is that the second respondent, having been entirely successful in opposing the application for judicial review, is entitled to recover his legal costs against the DPP. This would represent the default position under Section 169 of the Legal Services Regulation Act 2015. If either side wishes to contend for a different form of order than that proposed, then they should contact the registrar within seven days and arrange to have this matter listed before me on a Monday in January 2024 which is convenient to the parties.

Appearances

Brendan Grehan SC and Conor McKenna for the applicant instructed by the Chief Prosecution Solicitor
Hugh Hartnett SC, Philipp Rahn SC and Henry Kelly for the second respondent instructed by Thompson Solicitors