



APPROVED

THE COURT OF APPEAL

Court of Appeal Record Number: 46/2024

High Court Record Number: JR 599/2021

Neutral Citation Number [2026] IECA 169

Kennedy J.

O'Moore J.

MacGrath J.

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

THE SPECIAL CRIMINAL COURT & MICHAEL CONNOLLY

RESPONDENTS

**JUDGMENT delivered on the 31st day of July 2026 by Mr. Justice Brian
O'Moore.**

1. The central issues in this case are: (a) did the Special Criminal Court ("*the SCC*") err in deciding to grant a certificate that there had been a miscarriage of justice pursuant to section 9 (1) (a) (ii) of the Criminal Procedure Act 1993 and (b) should any such error lead to the quashing of the grant of the certificate? Apart from these questions, there is a freestanding issue of what significance (if any) the SCC should have placed on a finding it made to the effect that there was evidence which tended to establish beyond reasonable doubt that the person granted the certificate ("*Mr. Connolly*") had been involved in the unlawful movement of explosive devices.
2. This judgment will be structured under the following headings:
 - (a) Background (paras 3-6);
 - (b) The findings of the SCC (paras 7-15);
 - (c) The judgment of the High Court (paras 16-23);
 - (d) The submissions to this Court (paras 24-79);
 - (e) Analysis and Decision (paras 80-127).

(a) Background

3. On the 1st of June 2017 Mr. Connolly was convicted by the Special Criminal Court of membership of an unlawful organisation (the Irish Republican Army) contrary to section 21 of the Offences Against the State Act 1939, as amended. The evidence against Mr. Connolly included, importantly, the testimony of a high-ranking Garda officer (Assistant Commissioner Michael O'Sullivan) of his belief that Mr. Connolly was at a material time a member of such an organisation. This "*belief evidence*" was given in accordance with the provisions of section 3 of the Offences against the State (Amendment) Act 1972. Belief evidence of this sort must be supported by other independent evidence which implicates the accused person in the offence with which he is charged; *Redmond v Ireland* [2015] 4 I.R. 84. This independent evidence must itself be credible. Obviously, it is important that the independent evidence is not in fact the very material which has caused the senior officer to come to his belief (or has contributed to this belief). To avoid this possibility, the senior officer will often testify that his belief evidence is not itself based on the investigation of the offence. This is what happened at the first trial before the SCC which, as already noted, resulted in the conviction of Mr.

Connolly. The shorthand description of this approach is that it is designed to avoid “double counting”; *DPP v Cassidy* [2021] 2 I.R. 710.

4. Mr. Connolly successfully appealed his conviction to this Court. The judgment of the Court was delivered by Mahon J. ([2018] 3 I.R. 753). The central ground of appeal was that the SCC had erred in refusing to consider the documentation relevant to the basis upon which the Assistant Commissioner had formed his belief that Mr. Connolly was a member of an unlawful organisation. Mahon J.’s conclusion was as follows:

“The court is satisfied that in the particular circumstances of this case the reasons provided by the trial court for rejecting the request made on behalf of the appellant for the court itself to examine the documentation or material were insufficient to justify their refusal to do so. In arriving at this decision the court is particularly cognisant that the belief evidence given by the assistant commissioner and its acceptance by the trial court contributed in a significant manner to the verdict of guilty and conviction of the appellant.

Accordingly, the court will allow this ground of appeal. In these circumstances, it is unnecessary for the court to engage with the other grounds of appeal save to comment that none of them appear meritorious. The court will proceed to hear counsel on the question of whether or not there should be a retrial”.

5. Ultimately, a retrial was ordered by this Court. This took place before a differently constituted division of the SCC. In a judgment of the 24th of June 2019, Mr. Connolly was acquitted. At the time of his acquittal (and consequent release) Mr. Connolly had served 14 months and 22 days of his original 3-year sentence. The reasons for Mr. Connolly’s acquittal are important, and are summarised at paragraph 12 of the SCC ruling of the 12th of April 2021 which resulted in the grant of the certificate that a miscarriage of justice had occurred:

“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.”

6. Following the acquittal of Mr. Connolly, he brought an application before the SCC seeking a certificate pursuant to section 9 of the Criminal Procedure Act 1993. This was opposed by the DPP. It is to the decision on that application that I will now turn.

(b) The findings of the SCC

7. Section 9 of the 1993 Act provides as follows:

“9.—(1) Where a person has been convicted of an offence and either—

*(a) (i) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and
(ii) the Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice,
or*

*(b) (i) he has been pardoned as a result of a petition under section 7 , and
(ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice,*

(2) A person to whom subsection (1) relates shall have the option of applying for compensation or of instituting an action for damages arising out of the conviction.

(3) *No payment of compensation under this section shall be made unless an application for such compensation has been made to the Minister for Justice.*

(4) *The compensation shall be of such amount as may be determined by the Minister for Justice.*

(5) *Any person who is dissatisfied with the amount of compensation determined by the Minister may apply to the High Court to determine the amount which the Minister shall pay under this section and the award of the High Court shall be final.*

(6) *In subsection (1) “newly-discovered fact” means—*

(a) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7 , or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings, and

(b) where a conviction was quashed by that Court on appeal, a fact which was discovered by the convicted person or came to his notice after the conviction to which the appeal relates or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial.

8. It will be immediately seen that an acquittal is not enough. There must be a “*newly discovered fact*” which shows that there has been a miscarriage of justice. This can arise in a number of ways. The first is that the newly discovered fact shows that the accused was innocent all along. There can be no doubt that the conviction of a person who is in a position to demonstrate his innocence with the assistance of facts which have subsequently come to light constitutes a miscarriage of justice. However, it is also possible to find a miscarriage of justice where there has been “*a grave defect in the administration of justice*”; Charleton J. in *DPP v Abdi* [2022] 2 ILRM 1.
9. The SCC did not find that Mr. Connolly was, by reason of the newly discovered fact or otherwise, to be treated as actually innocent of the offence for which he had been convicted. It framed its conclusion on this possible route to a certificate in this way:

“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”.

10. Instead, the SCC considered whether, as it formulated the question at para. 31 of its judgment “...*there has been a grave defect in the administration of justice, brought about ‘by agents of the State’*”. The SCC concluded that this had occurred and that a certificate should therefore be granted.
11. Before describing how the SCC came to this conclusion, it should be noted that the Court had earlier (at para. 29 of its judgment) found that the prosecution of Mr. Connolly was not one that should never have been brought “*in the sense that there was never any credible evidence implicating the applicant.*” Indeed, on several occasions the SCC repeated its finding that the evidence tended to implicate Mr. Connolly in the transportation of explosive devices for a criminal purpose.
12. In considering what constitutes such a grave defect in the administration of justice, the SCC referred to the approach towards miscarriage of justice taken in *DPP v Pringle (No. 2)* [1997] 2 I.R. 225, *DPP v Meleady & Grogan (No. 3)* [2001] 4 I.R. 225, *DPP v Wall* [2005] IECCA 140 and *DPP v Shortt (No. 2)* [2002] 2 I.R. 696. The SCC also referred to *Redmond*.
13. The SCC then proceeded to find that there had been a grave defect in the administration of justice in these circumstances:
 - (a) The Assistant Commissioner had, before forming his belief that Mr. Connolly was a member of a proscribed organisation, read an intelligence file which included a document summarising alleged movements and activities on the part of the accused man “*culminating in the finding of two explosive devices...*” The evidence in respect of these devices constituted the independent evidence supporting the belief evidence;
 - (b) In his evidence at the first trial, the Assistant Commissioner had averred that he “*was satisfied from the material that [he] viewed that none of it is in the Book of Evidence.*” He went on to say that he had never seen the Book of Evidence;

- (c) In this testimony, the Assistant Commissioner repeated that the material upon which he relied was not in the Book of Evidence;
- (d) In light of the documents reviewed by the SCC at the second trial, the Assistant Commissioner had in fact seen some material that was in the Book of Evidence;
- (e) Notwithstanding this, the SCC found that the evidence of the Assistant Commissioner was “*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 was being cross-examined.*”
- (f) The SCC found that “*it was reasonably possible that the senior garda officer had not merely considered but had also relied upon the relevant matters when forming his belief.*” However, it went on to find that the acquittal “*flowed from the rigorous application of the criminal standard of proof and not from a positive finding by this Court that the high ranking garda officer had in fact relied on the relevant supporting facts.*”
- (g) The evidence of the Assistant Commissioner was “*seriously incomplete and misleading...*” and gave a “*false assurance*” to the SCC at the first 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 to the judgment of the court.*”
- (h) The SCC considered “*the exceptional nature of belief evidence and the corresponding duty on a court of trial to ensure that the necessary constitutional safeguards are rigorously applied to counterbalance the use of such evidence.*” Notably, the SCC did not find that the erroneous evidence repeatedly given by the Assistant Commissioner was particularly serious because of the strictures to be found in *Redmond* or in *DPP v Donnelly* [2012] IECCA 78. Indeed, the latter judgment does not feature in the decision of the SCC. Instead, the SCC referred to this aspect of belief evidence in order to emphasise the importance of the newly discovered fact and the impact it may have had on the court conducting the first trial.
- (i) Very importantly, the SCC held that: “*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.” This was especially so as the incriminating evidence related to events on the very day that the Assistant Commissioner was asked to express his belief. While the SCC went on to comment on the careful evidence of the Assistant Commissioner (which on one reading of their judgment may suggest that the court was somewhat suspicious of the very precise testimony given by the witness), it remains the case that the SCC found that the officer had been careless and nothing else.

14. The decision of the SCC is summarised at para. 36 of its judgment:

“In considering the likely causative effect of the newly discovered fact on both the process and the outcome of the first trial, this Court must be cognisant of the exceptional nature of belief evidence and the corresponding duty on a court of trial to ensure that the necessary constitutional safeguards are rigorously applied to counterbalance the use of such evidence. Being cognisant of these matters, we believe that if the newly discovered fact had been disclosed either before or after the cross-examination which we have just considered, then it is probable that the original court of trial would have fully considered the issue of double counting and would have been rigorously circumspect in its assessment of the independent status of the supporting evidence in the case. We are, therefore, of the view that the way in which the senior garda officer gave his evidence greatly contributed to the issue of double counting not becoming a live issue in the original trial as it ought to have been. We are further of the view that if the issue of double counting had been considered in the light of all of the evidence that is now available, it is probable that the original court of trial would have considered itself compelled, as did this Court, to acquit the applicant”.

15. As there was no appeal available against the judgment of the SCC, the DPP launched these judicial review proceedings.

(c) The judgment of the High Court

16. Before considering the detail of the judgment of the High Court (Simons J.), one preliminary point should be noted. At the hearing before us, counsel for the DPP somewhat diffidently suggested that the absence of a right of appeal could mean that this is “*something that can be fed into a judicial review...*” but that this really related to the appropriateness of judicial review as a remedy in circumstances where an appeal lies against the impugned decision. In fact, the absence of a right of appeal does not in any way affect the standard to be applied in this case. The High Court judge was quite right, at para. 55 of his judgment, in deciding 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.*”
17. The High Court judge dealt with the DPP’s application under two headings. These were: (a) the argument that Mr. Connolly was not “*factually innocent*” and (b) the argument that there had been no grave defect in the administration of justice.
18. With regard to the first of these, the High Court decided that any finding by the SCC that Mr. Connolly had been involved in the movement of explosive devices did not mean that the certificate should be set aside. In a limpidly clear section of his judgment, the trial judge made the following findings:
- (a) The SCC had acquitted the accused of the offence with which he was charged. That does not mean that Mr. Connolly was “*factually innocent*”. Equally, however, the judgment of the SCC did not mean that Mr. Connolly was guilty of any offence. The findings of the SCC were that there was evidence which tended to implicate Mr. Connolly in connection with the transportation of explosives. This did not, in the trial judge’s view, equate to a positive finding that Mr. Connolly was guilty of these offences.
 - (b) It was not open to the certifying court “*to purport to impute guilt to an accused person.*” Even if the SCC had purported to make such a finding this “*would have been invalid as inconsistent with the presumption of innocence.*” On the basis of both Bunreacht na hÉireann (in recognising the presumption of innocence) and the decision of the ECHR in *Allen v United Kingdom* Application no. 25424/09 the trial judge found that an

acquitted person continues to be treated as innocent and it is not open to a court to purport “*to make positive findings of guilt in respect of offences for which a person has been acquitted...*”

It should be noted that the trial judge had directed the parties to make supplemental written submissions, in particular by reference to the Strasbourg jurisprudence.

19. The trial judge therefore rejected the first ground advanced on behalf of the DPP.

20. In considering the second line of argument put forward by counsel for the DPP, the trial judge found that the test in deciding whether there had been a fundamental defect in the administration of justice is contained in *DPP v Abdi* [2022] IESC 24 where Charleton J held (at para. 48) that:

“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 seen 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”.

21. The trial judge noted the submission of the DPP that “*careless*” conduct (as found by the SCC in this case) could not meet this test. Ultimately, the trial judge did not resolve this issue. Instead, he found that the threshold for intervention on judicial review had not been met. The trial judge did not consider whether or not careless behaviour could properly give rise to a finding that a miscarriage of justice had taken place. The core of the High Court judgment on this important issue is to be found at paras. 51 to 53:

“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”.

22. It is worth noting that the factor described at para. 52 (namely the significance of the 16th of December 2014) though certainly mentioned by the SCC does not feature as one of the reasons why a miscarriage of justice is found. Equally, the consideration identified at para. 53 (requiring “*the prosecuting authorities to ensure that the safeguards...identified in Redmond..., are not undermined by carelessness*”) played no real part in the SCC’s assessment of the nature of the

Assistant Commissioner's behaviour in giving incorrect evidence. Rather, the SCC felt that this factor was relevant to "the causative effect of the newly discovered fact on both the process and the outcome of the first trial"; para. 36 of the SCC judgment.

- 23.** The trial judge concluded (at para. 54) that it was open to the SCC to find as it did and that:

"Certainly, the [DPP] has failed to identify any error in principle in the approach adopted by the [SCC]. 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."

I will return to this conclusion when analysing the arguments on the appeal.

(d) The submissions to this Court

Appellant's Submissions

The Special Criminal Court's judgment

- 24.** It is submitted by the DPP that the way in which the SCC treated its own finding as to the conduct of the Assistant Commissioner constituted a fundamental error which requires rectification through judicial review. The submissions recite the three core findings of the SCC, as set out at para. 5 of this judgment. It is unnecessary to repeat them here.

- 25.** The DPP notes that the SCC stated that there was no evidence that the high-ranking Garda officer made the assertion in the knowledge that it was misleading.

- 26.** The SCC judgment cited *DPP v Nora Wall* [2005] IECCA 140 (Unreported, Court of Criminal Appeal, 16 December 2005):

"The legal principles applicable to an application of this nature were summarised by the Court of Criminal Appeal in DPP v. Nora Wall [2005] IECCA 140 (Unreported, Court of Criminal Appeal, 16 December 2005) as follows:

"(1) An application pursuant to s.9 of the Act is a civil claim in which the onus of proving that a newly discovered fact shows that there has been a miscarriage

of justice rests on the applicant (The People (DPP) v. Pringle (No. 2) [1997] 2 I.R. 225); The People (DPP) v. Meleady & Grogan (No. 3) [2001] 4 I.R. 16).

(2) The standard of proof is the same standard as in any civil claim, namely the balance of probabilities.

(3) An exhaustive definition of the term “miscarriage of justice” has not been attempted by the Court of Criminal Appeal or by the Supreme Court which has indicated that courts should not attempt such a definition (The People (DPP) v. Pringle (No. 2) [1997] 2 I.R. 225).

(4) Examples of circumstances which may constitute a miscarriage of justice include, but are not limited to the following:

- (a) Where it is established that the applicant was innocent of the crime alleged.*
- (b) Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant.*
- (c) Where there has been such a departure from the rules which permeate all judicial procedures as to make that which had happened altogether irreconcilable with judicial or constitutional procedure.*
- (d) Where there has been a grave defect in the administration of justice, brought about by agents of the State (The People (DPP) v. Shortt (No. 2) [2002] 2 I.R. 696).*

(5) The exercise in which the court is engaged under the Act of 1993 is to determine whether the newly discovered facts show that a miscarriage of justice occurred, and this is not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself (The People (DPP) v. Meleady & Grogan (No. 3) [2001] 4 I.R. 16).

27. The DPP submits that these examples, as set out in *Wall*, were intended to reveal that there is no exhaustive definition of miscarriage of justice in Irish law; they were not intended to be treated as something akin to a legal test. This reasoning

was supported by *DPP v Abdi* [2020] IEHC 434 and *DPP v Pringle* (No.2) [1997] 2 IR 225.

- 28.** It is clear, according to the Director, that the SCC emphasised the finding as to the body of circumstantial evidence against Mr. Connolly in contradistinction to his acquittal when it stated:

“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”.

It is submitted that the finding as to the body of circumstantial evidence as only relevant to the question of innocence (and nothing else) creates a fundamental error at the centre of the SCC’s reasoning.

- 29.** It is submitted that the High Court erred in its framing of the case being advanced by the Director. The Director argues that the first of the broad headings identified by the High Court does not reflect the nuances of the submissions made on that point.

- 30.** The case being put forward by the DPP is not that there was an error on the SCC’s part in finding that there was a miscarriage of justice on the basis that Mr. Connolly was not factually innocent. Instead, the argument is that the body of circumstantial evidence was not considered properly and was erroneously limited to whether actual innocence had been demonstrated.

- 31.** Referring to *Sweeney v District Judge Fahy*, the DPP submits that the SCCs judgment was fundamentally erroneous; a fundamental error of law gives rise to a decision being liable to be quashed by way of order of *certiorari*.

- 32.** At paragraph 34 of the High Court judgment, the Court stated that:

“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”.

- 33.** The Director argues that the SCC in fact found that although Mr. Connolly had been acquitted, it was satisfied as to the body of circumstantial evidence.

Determining guilt is an exercise for a criminal trial; the question is whether, as a matter of law, the circumstances of the case are capable of justifying a finding that a miscarriage of justice occurred.

- 34.** The Director's submissions refer to *Abdi*, which is described as instructive on the question of defining miscarriage of justice. It is noted that the term is not defined in the 1993 Act. Therefore, the premise of the SCC's reasoning was flawed from the start, according to the Director; the decision-making should not have been parsed into the series of miscarriage of justice examples identified in *Wall*.

Further, it was held by Owens J. that:

"This type of serious defect in criminal proceedings which leads to a miscarriage of justice may occur for a number of reasons. The new material may demonstrate the innocence of the accused or that a fundamental element of the evidence which led to a conviction has been undermined. It may demonstrate an irregularity which shows that a substantial failure of due process led to the conviction. The phrase "newly-discovered fact" is not confined to new evidence having a bearing on proof of guilt of the accused. It may relate to other matters which undermine confidence in the process or result of the original trial" .

- 35.** *Abdi* was upheld by the Supreme Court:

"Under the legislation, as interpreted by the case decisions, actual innocence being established suffices for the grant of a certificate. However, the relief is not limited to the proof of actual innocence.

43. Fault on the part of the prosecution is not a requirement under s 9 of the 1993 Act, but serious fault may be a component of an applicant meeting the test whereby more than a mere acquittal following a retrial, but an actual miscarriage of justice is required".

The Presumption of Innocence under s.9 of the 1993 Act

- 36.** The High Court judgment states:

"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".

The Court continues by referring to the case *Allen v United Kingdom*, Application No. 25424/09, stating that:

“...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”.

- 37.** The DPP submits that the High Court misapplied the meaning of the Strasbourg jurisprudence. The DPP accepts that there is an obligation on the Irish courts to take due account of Convention caselaw. However, it is argued that the correct starting point in this exercise is the Supreme Court’s judgment in *Pringle (No.2)* [1997] 2 IR 225:

“The presumption is, of course, fundamental to a trial in course of law. But the inquiry we make under the Act of 1993 is different: we have to find positively that a miscarriage of justice occurred in a given case. That the accused was improperly found guilty in the sense that that finding should not, in the circumstances as ultimately found, have been open to the court of trial”.

- 38.** In the Supreme Court, it was held that: “..., I would respectfully agree with what the Court of Criminal Appeal said in its judgment on this point. The presumption of innocence is fundamental to a criminal trial, but an inquiry as to whether a s. 9 certificate should be given is not a criminal trial. It is an inquiry as to whether there has been a miscarriage of justice, the onus of proof being on the applicant and is not a trial in which the onus is on the State to prove the guilt of the accused. The presumption of innocence has no place in such an inquiry”.
- 39.** The DPP argues that the court hearing an application under s.9 of the 1993 Act is not a criminal court as these are civil proceedings. The absence of proper consideration of the finding as to the body of circumstantial evidence led the SCC to make a fundamental error.

The Strasbourg jurisprudence

- 40.** The presumption of innocence is protected under Article 6 § 2 of the European Convention on Human Rights (*“the Convention”*) and has two aspects.

41. The first is the cornerstone of the criminal trial process; it imposes requirements in respect of the burden of proof on the prosecution, it gives rise to legal presumptions of fact and law, the privilege against self-incrimination, and it imposes requirements on pre-trial publicity and premature expressions by the trial court or by other public officials of a defendant's guilt.

42. The second aspect was explained in *Allen v UK*:

"...this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public".

43. It is submitted that several of the judgments of the UK Supreme Court judges are critical of *Allen* and the approach generally of the ECtHR in respect the scope of Article 6.2 of the Convention post acquittal (*R (Hallam) v Secretary of State* [2019] UKSC 2).

44. In *Nealon & Hallam v The United Kingdom Applications* nos. 32483/19 and 35049/19, the Grand Chamber considered in detail the jurisprudence on the second aspect of the presumption of innocence and refined the principles:

"The protection afforded by Article 6 § 2 in its second aspect should not be interpreted in such a way as to preclude national courts in subsequent proceedings – in which they are exercising a different function to that of the criminal judge, in accordance with the relevant provisions of domestic law – from engaging with the same facts as were decided in the previous criminal proceedings, provided that in doing so they do not impute criminal liability to the person concerned. A person who was acquitted or in respect of whom criminal proceedings were discontinued will remain subject to the ordinary application of domestic rules as to evidence and the standard of proof outside criminal trials".

45. Further, it is argued that the judgments of the ECtHR are not binding on this Court in the way that Community Law is (see para 65 of *Mahon v Keena* [2010] 1 IR 336, and the judgments of Collins J. (paragraph 65) and Hogan (paragraph 71) J. in *Corcoran & Others v Commissioner of An Garda Siochana* [2023] IESC 15).
46. It is submitted that the current position in Irish law on this is reflected in *DPP v Abdi*:
“In the ordinary course of the disposal of criminal business by the courts, an acquittal does not involve a finding of innocence, it is instead a statement that the presumption of innocence has not been displaced beyond reasonable doubt. There could, for instance, still take place a defamation case where if the accused sues a newspaper which pleads justification for asserting his involvement, the probabilities as found may speak otherwise”.
47. In addition to this, the Court is bound by the Supreme Court’s judgment in *Pringle*; therefore, it is argued that the presumption of innocence has no place in an application under s.9 of the 1993 Act.

No grave defect in the administration of justice

48. *Wall* cites the case of *The People (DPP) v Shortt (No.2)* [2002] 2 IR 696.
49. In *Shortt*, there was a situation where there was a grave defect in the administration of justice, brought about by agents of the State; it is submitted that this situation is far removed from the current case. In *Shortt*, the Court accepted evidence from a Garda member’s estranged wife that he had admitted perjury to her in respect of the trial of the applicant.
50. *DPP v Conmey* [2014] 2 ILRM 493 is also referenced in submissions and concerned a grave defect in the administration of justice where certain witness statements were withheld from disclosure. This can be contrasted with the present case.
51. The Supreme Court in *Abdi* commented on *Conmey*:
“A miscarriage of justice can arise due to prosecution fault, as in the concealment, or material non-disclosure, of witness statements focused on a central issue in the prosecution case which tend to support an actual defence for the accused; The People (DPP) v Conmey [2010] IECCA 105. This amounts not just to the justice system correcting itself but to the substantial failure of the system to administer justice in the first place. In that case, witnesses placed the

accused in a car enabling opportunity for the homicide of the victim at a precise time. In fact, there were earlier witness statements indicating that no car, never mind one ascribed to the accused, had passed at the crucial time. These were neither disclosed to the accused nor produced at the trial. This was, according to the judgment of the Court of Criminal Appeal, rejecting a prosecution submission that the statements were less than significant, a grave defect in the administration of justice. The statements were, consequently, of central significance and their non-disclosure an affront to the administration of justice; thereby establishing a miscarriage of justice without necessarily demonstrating the innocence of an applicant for a certificate under s 9 of the 1993 Act” .

Irrationality and unreasonableness

- 52.** The Director submits that even where the SCC’s reasoning is not seen as fundamentally erroneous, it is liable to be quashed as irrational and unreasonable (*The State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 or *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39). Further, this analysis incorporates the requirement of proportionality, per the judgment in *Meadows v Minister for Justice* [2010] 2 IR 710.
- 53.** The Director argues that the SCC’s decision was irrational, unreasonable and disproportionate in its determination that the circumstances amounted to a miscarriage of justice. Further, Mr. Connolly’s acquittal was solely based on the reasonable possibility arising that double counting could not be excluded.
- 54.** It is submitted that the order was made despite the SCC’s finding that there was a proper basis for the prosecution and that the DPP could not have had any knowledge of the overlap between the book of evidence and the Garda intelligence file. The Director submits that there was no evidence that the high-ranking Garda officer made his assertion in the knowledge that it was misleading, nor was there any finding of *mala fides* or improper deliberate action by any agent of the State.
- 55.** The submissions refer to *Croake v District Judge Michael Coghlan* [2017] IECA 65 which stated that:
- “... where - as here it is alleged that the exercise of a discretion fundamentally affects the substance of a constitutionally protected right, then the appropriate*

test is that articulated by Denham J. in Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 LR. 701...

"In determining the reasonableness of an administrative decision which affects or concerns constitutional rights the standard to be applied is that stated by Henchy J., in The State (Keegan) v. Stardust Victims' Compensation Tribunal [1986] LR. 642, 658:-

I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties require, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision... When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective".

56. The DPP's submissions note that in *Mooney v DPP* [2019] IEHC 647, the High Court emphasised that a decision ostensibly within a statutory jurisdiction could nevertheless be amenable to judicial review:

"In exceptional cases, however, judicial review may also be appropriate where the error touches upon the substance of the decision. Even the broadest statutory discretion is subject to implied limitations. The resulting decision must be reasonable and proportionate within the meaning of well-established case law such as O'Keeffe v. An Bord Pleanala [1993] 1 LR. 39 and Meadows v. Minister for Justice and Equality [2010] IESC 3; [2010] 2 LR. 701. It should be emphasised that this is a very high threshold for an applicant to meet".

57. The Director accepts that the threshold for judicial review is very high, however, she submits that it has been reached in this case.

Mr. Connolly's submissions

58. Mr. Connolly states that he has served 14 months and 22 days of a three-year prison sentence for a wrongful conviction. This was successfully appealed, and it is argued that "*seriously incomplete and misleading*" evidence and "*false assurance*" given by a high-ranking Garda officer during his first trial contributed to its success.

59. It is submitted that the High Court was correct in finding that it could only intervene in an application for judicial review to set aside a decision of the SCC if it was unreasonable or irrational; this threshold had not been met.

60. The submissions continue by stating that the appellant has failed to identify any error in principle in the approach taken by the SCC as its decision was one which fell within the range of reasonable decisions which could be made.

61. Further, submissions provide that the appellant is trying to use the judicial review process to appeal on the merits of findings and conclusions of fact reached by the SCC, however, it is stated that this decision was made within their jurisdiction, "*on the evidence heard, seen and carefully considered by an experienced panel of three judges*".

Failure to meet the threshold for intervention by judicial review

62. 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.

63. The High Court judge was correct in rejecting any suggestion that there should be a different standard of review as there is no statutory right to appeal from the SCC's decision.

64. Counsel's submissions refer to the High Court judgment:

"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 [2022] IESC 24.”

65. The High Court correctly identified the approach that should be adopted on an application for judicial review in the criminal context, as summarised in *Sweeney v Fahy* [2014] IESC 50 at para.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.”

66. The Connolly submissions note that this approach aligns with the established jurisprudence in judicial review with regard to the grounds of irrationality and unreasonableness (*“The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642 and O’Keeffe v. An Bord Pleanála [1993] 1 I.R. 39, and in Meadows v Minister for Justice [2010] 2 IR 701”*).

Grave defect in the administration of justice is an established basis for finding a miscarriage of justice

67. It is submitted that the caselaw makes it clear that a court may grant a certificate on the basis of “a grave defect in the administration of justice” having occurred.
68. The submissions refer to a number of cases on this point):

“In The People (DPP) v. Meleady & Grogan (No. 3) [2001] 4 I.R. 16 the Court of Appeal summarized the fundamental legal principles underlying findings of a miscarriage of justice in Irish law in [the] following term at p. 33: “the exercise with which this court is concerned under the Criminal Procedure Act, 1993, is whether newly discovered facts are tantamount to proving a miscarriage of justice and that is not confined to the question of actual

innocence but extends to the administration in a given case of the justice system itself.

*The High Court judge correctly identified that the Supreme Court in *People (DPP) v. Abdi* [2022] IESC 24, [2022] 2 I.L.R.M. 1 (at paragraph 42), found that while actual innocence being established suffices for the grant of a certificate, the relief is not limited to the proof of factual innocence...*

*“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 *Connery*) 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.”*

- 69.** The submissions then refer to examples of instances where a grave defect in the administration of justice was enough to grant a certificate, including *People (DPP) v Wall* and other authorities:

*“The case of *The People (DPP) v Shortt (No.2)* [2002] 2 IR 696 provides another example. Hardiman J. in that case referred to what was at issue in that case: “It involved giving an answer which was, at best, seriously incomplete to a question which, answered with the whole truth, would have revealed the concealed material.” Hardiman J. concluded in that case: “This was, to use no stronger language, a grave defect in the administration of justice in this particular case, brought about by agents of the State. We find that this led to a miscarriage of justice in the trial of the applicant. We do not believe that this finding extends the meaning of the phrase “miscarriage of*

justice" beyond that contemplated in The People (Director of Public Prosecutions) v. Meleady (No. 3) [2001] 4 I.R. 16.

...

The case of DPP v Conmey [2014] 2 ILRM 493 provides another example. It also concerned a finding that there had been a grave defect in the administration of justice, the defect in that case being non-disclosure of certain documents".

A finding of grave defect in the administration of justice was open to the Special Criminal Court on the evidence

70. It is submitted that the SCC's finding that there had been a grave defect in the administration of justice was: *"...made on the basis of a careful analysis of the evidence given by the Garda Assistant Commissioner at both the original trial and at the re-trial. It...had conducted the re-trial, and had itself heard and seen the evidence (including inspection of the confidential intelligence file) and was therefore best placed to carry out and make the assessment it did"*.

71. Further, it is stated that the high-ranking Garda officer who gave the belief evidence at the original first trial (who also gave evidence on re-trial) had made an unqualified assertion during his cross-examination that none of the material he viewed or had seen was in the book of evidence. It is argued that the SCC found that this was *"seriously incomplete and misleading"* in this section of their judgment:

"...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.

72. It is submitted by Mr. Connolly that the High Court judge identified correctly that the fact that the relevant evidence was not deliberately misleading on the part of

the high-ranking Garda officer does not automatically make the grant of a certificate unreasonable or irrational.

73. With regard to opinion/belief evidence, the submissions refer to *Redmond v. Ireland* [2015] IESC 98, where it was held 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. Hence the need to guard against ‘double counting’.*”
74. In addition to this, it is submitted that a finding of miscarriage of justice does not require a finding of fault on the part of the prosecution, as seen in *People (DPP) v. Abdi* [2022] IESC 24, [2022] 2 I.L.R.M. 1.

Further grounds and arguments raised by the DPP on appeal

75. Mr. Connolly submits that the DPP’s submission concerning the circumstantial evidence and the role of the presumption of innocence are unfounded. Additionally, it is argued that they misrepresent the judgment of the SCC. The circumstantial evidence related to the movement of explosive devices on the 16th of December 2014; however the only offence for which Mr. Connolly had been tried was membership of an unlawful organisation.
76. Mr. Connolly’s submissions support the High Court’s finding that the DPP’s submissions go too far in stating that the presumption of innocence has no place in an application for a certificate.
77. It is submitted that the High Court judge understood the submissions advanced, which is at odds with the DPP’s argument that the judge did not understand or engage with her “*nuanced submissions*”.
78. The Connolly submissions also address the DPP’s attempt to introduce a third concept, “*not factually innocent*” into the jurisprudence. Mr. Connolly argues that the High Court was correct in determining that this submission was misplaced as a result of the jurisprudence of the Irish courts and the European Court of Human Rights (*Allen v. United Kingdom* (Application No. 25424/09)).
79. The submissions conclude that the threshold for judicial review has not been met in this application. It is submitted that the High Court was correct in its findings that the SCC could conclude in the circumstances of the present case that the

prosecution's conduct gave rise to a grave defect in the administration of justice. Further, the submissions support the conclusion of the High Court judge that the DPP failed to identify any error in principle in the approach adopted by the SCC.

80. In describing the arguments of the parties, I have adopted the structure of the written submissions as counsel broadly followed these in their oral presentation to this court.

(e) Analysis and Decision.

81. In opening the appeal, counsel for the DPP described the "*heart of the matter*" as being the grant of a certificate by the SCC "*in a judgment where they effectively reaffirmed what is referred to as one of the core findings of the Court*" – namely the finding that there was evidence which tended to show that Mr. Connolly had been involved in the transport of explosives. I do not agree. The central issue in this appeal is the other ground upon which the Director relies, namely the linked questions of whether the conduct as found by the SCC could amount to a miscarriage of justice and (if it cannot) should the grant of the certificate be quashed. The separate question of whether the SCC's decision should be quashed because of its findings on the circumstantial evidence is very much a secondary one.

82. In deciding the main issue, it is necessary to consider what constitutes a miscarriage of justice under s. 9 of the 1993 Act. There is a great deal of helpful authority on this point. I will, however, confine myself to the caselaw argued before us.

83. I start with *Meleady* where the Court of Criminal Appeal granted a certificate in an exceptionally controversial case. The applicants had been convicted of malicious damage and assault. As vividly described in the judgment of Geoghegan J., a Mr. Gavin tried to prevent the theft of his car which was parked outside his home in Templeogue. His efforts, which included jumping onto the bonnet of the car on which he was driven "*for a considerable distance*", were fruitless. Both he and his son later identified the two applicants, and this evidence proved crucial in their later conviction. The theft of the car took place in 1984. The applicants were convicted in 1985, those convictions were set aside, a second trial took place late in 1985 and the applicants were convicted for a second time. In 1991, given a

great deal of public controversy about the theft and the convictions, a document known as the Walker memorandum came to light. This note, made by a state solicitor involved in the original return for trial, described an apparent request by Mr. Gavin (before he identified anyone formally) to be shown a book of photographs from which he identified one of the accused. The solicitor concerned was a Richard Walker. The memorandum was dated May 1984. As Geoghegan J. noted in the judgment, the *“terms of the memorandum...were bordering on the sensational.”*

- 84.** The convictions were quashed by a judgment of the Court of Criminal Appeal (Kearns J.), but a certificate was refused. That latter decision was itself set aside by the Supreme Court (in a judgment delivered by Blayney J.) and the application seeking a certificate was remitted to the Court of Criminal Appeal. Ultimately a certificate was granted, by the judgment of Geoghegan J. to which I have referred.
- 85.** It is important to note that, in the judgment of Kearns J., the CCA did not resolve any of the many factual disputes surrounding the Walker memorandum. For example, both Mr. Gavin and one of the Gardaí involved strongly denied that any album of photographs had been shown while Mr. Walker maintained that he would not have written the memorandum unless it was accurate and that it did relate to the prosecution of Messrs Meleady and Grogan. There was therefore no little uncertainty about exactly what had taken place. In his judgment, while Geoghegan J. found that there was nothing on the transcript *“which would give the slightest credence to any suggestion that there was any deliberate suppression of information by the CSSO, the DPP or any of the counsel engaged in the case”*, he was nonetheless unable to make any finding as to what had happened, still less why it had occurred.
- 86.** The certificate in *Meleady* was, therefore, granted for these reasons (at page 32 of the report):

“...The court considers that a trial judge in a voir dire would have to exclude all the identification evidence. There would then be no evidence against the applicants that could go to a jury. In these circumstances, one of the newly discovered facts, that is to say the Walker memorandum, shows that there has been a miscarriage of justice. The court will certify accordingly...”

...The court is not making any finding one way or another as to whether the applicants were in fact innocent of actual involvement in the events”

87. As is obvious Geoghegan J. made it clear that he was not making any finding on the guilt or innocence of the applicants. Equally, he made no finding as to the truth or otherwise of the Walker memorandum. However, he was satisfied that the mere deployment of the memorandum would have led to the withdrawal of the case from the jury.
88. There is one other notable feature of the *Meleady* saga. Delivering the judgment of the Supreme Court to which I have referred, Blayney J. avoided a comprehensive definition of the phrase “*miscarriage of justice*”; this approach earned the approval of Geoghegan J. in his judgment, and is consistent with the judgment of Lynch J. in *Pringle*. However, while a comprehensive definition of what constitutes a miscarriage of justice is undesirable this does not mean that one should not be able to identify circumstances which cannot amount to a grave defect in the administration of justice.
89. *Meleady* was followed by *Shortt*. The circumstances of that case were extraordinary. They defy brief summary. However, the judgment of Hardiman J. (in the CCA, granting the certificate) provides the best available distillation of the facts:

“The court has held that a number of documents, the half sheet notes and the annotated statement, were deliberately concealed at the trial by two gardaí. Furthermore, if these documents had been produced at trial they would have been severely damaging to the credibility of the primary prosecution witness. The principal prosecution witness, a garda, said after the trial that he had perjured himself in his evidence and the court has found, specifically, that his account in evidence of the genesis of his second statement was false. The court has also found that the suppressed documents were important, and their importance must have been clear to the relevant gardaí during the trial. The annotated statement, in particular, was quite inconsistent with a significant aspect of the principal prosecution witness’s evidence.

All of these matters, we believe, relate “to the administration in a given case of the justice system itself” as the Court of Criminal Appeal expressed it in The

People (Director of Public Prosecutions) v. Meleady (No.3) [2001] 4 I.R. 16. In that case, however, the court expressly did not find that the newly discovered material had been deliberately suppressed. That is precisely the finding this court has made in the appellant's case. Nor was this suppression merely passive. It involved giving an answer which was, at best, seriously incomplete to a question which, answered with the whole truth, would have revealed the concealed material. This was, to use no stronger language, a grave defect in the administration of justice in this particular case, brought about by agents of the State. We find that this led to a miscarriage of justice in the trial of the applicant. We do not believe that this finding extends the meaning of the phrase "miscarriage of justice" beyond that contemplated in The People (Director of Public Prosecutions) v. Meleady (No.3) [2001] 4 I.R. 16".

90. Much stress was laid by Mr. Connolly's counsel (in their written submissions to this Court) on the passage in *Shortt* in which Hardiman J. condemns "*giving an answer which was, at best, seriously incomplete...*". However, seen in its context the real criticism by the CCA in that part of the judgment is of a truly shocking level of dishonesty and perjury on the part of named Garda officers. They bear no relation to what happened in the current case.

91. *Shortt* was followed by *Wall*. It is important to note that this was a case where the DPP did not contest the application for a certificate. The case was, like *Meleady* and *Shortt*, one of considerable public notoriety. The applicant was a former nun who had been convicted of rape. Kearns J., in summarising why it was decided to grant a certificate, said the following:

"In acceding to the application of the applicant herein, the court does not find it necessary to distinguish in terms of gravity between the various newly-discovered facts which the court is satisfied show that there has been a miscarriage of justice in this case. The prosecution which did take place inasmuch as it involved the tendering of corroborative evidence by a witness known to be unreliable was thus, in that format, a prosecution that should not have been brought. There was further a most unfortunate breakdown in communications or systems failure between the respondent's office, that of the Chief State Solicitor, the Garda Siochana and prosecuting counsel which the court is satisfied constituted a serious defect in the administration of

justice brought about however unintentionally in this instance by agents of the State. It is now also accepted by the respondent that there had been significant non-disclosure in this case, including (a) the information that Regina Walsh had made, but not pursued, an allegation of being raped in England and (b) the non-disclosure of Regina Walsh's very proximate and material psychiatric history. It seems to this court that the applicant was further prejudiced during the course of her trial by evidence of which the defence had no prior notification, namely, that Regina Walsh recalled the alleged episodes of rape by reference to 'flashbacks and/or retrieved memory'. There was no scientific evidence of any sort adduced to explain the phenomenon of 'flashbacks' and/or 'retrieved memory', nor was the applicant in any position to meet such a case in the absence of prior notification thereof.

As previously indicated, this court does not find it necessary on the agreed facts of this case to elaborate a hierarchy of the newly-discovered facts which either singly or cumulatively amount to a miscarriage of justice. Virtually all of the newly-discovered facts are facts of significance which confirm the court in its view that there has been a miscarriage of justice in this instance.

The court will therefore grant the certificate in this instance".

92. One notes the references to the fact that the prosecution should not have been brought; the breakdown in communications between the prosecution agencies (which included advice by senior counsel that an individual be called as a witness despite a prior direction – of which counsel was aware - that she not be called as she was unreliable; the failure of either junior counsel or the attending solicitor to remind senior counsel of the instruction; a failure to notify the accused's solicitors that the same witness would not be called, which would have alerted them to the situation when she actually gave evidence), the fact that these failures lead to a witness giving evidence despite the view of the investigating Guard that the witness was "*most unreliable...*" and that "*her evidence should not be accepted as accurate*", and the lack of prior notification to the defence team of the evidence relating to flashbacks and retrieved memory. In terms of failings in the prosecution's handling of the case, these were epic.

93. After *Wall*, there was the Court of Criminal Appeal's decision in *Hannon*. A summary of that judgment is to be found in the judgment of Charleton J. in *DPP v Abdi*:

“Fault on the part of the prosecution is not a requirement under s.9 of the 1993 Act, but serious fault may be a component of an applicant meeting the test whereby more than a mere acquittal following a retrial, but an actual miscarriage of justice is required. In People (DPP) v Hannon [2009] 4 I.R. 147; [2009] 2 I.L.R.M. 235, a young lady who had testified against a neighbour and thereby secured a conviction for sexual assault, went abroad but returned to withdraw her allegation having reflected as to the morality of what she had alleged, in the context of a land dispute between neighbours. The prosecution had argued that because the Director of Public Prosecutions had acted in good faith, not having any reason to doubt the account, with the police similarly proceeding properly: while “unfortunate and disturbing” this was claimed, [16], not to be a miscarriage of justice without there “being fault on the part of the prosecutor or of the garda investigators or other State agents.” The Court of Criminal Appeal rejected this, describing a miscarriage of justice, at para.25, as “a failure of the judicial system to attain the ends of justice”. While this might seem broad, possibly requiring no more than an acquittal, which is not the case, on the facts the test was met, at para.47, as the applicant was “a person whose accuser has, almost a decade after the event, confessed that her allegation was wholly false and contrived.” This was, on any analysis, a significant change from the trial position due to the revelation of a new fact: that the offences had never taken place in the first instance”.

- 94.** Of course, the revelation that the allegation was completely invented meant that the accused was innocent, thus entitling him to a certificate pursuant to s. 9 (1). The absence of any prosecutorial malfeasance was irrelevant; see the reference to *Hannon* in the judgment of the Court of Criminal Appeal (Hardiman J.) in *Conmey*. Undoubtedly, where someone has been convicted on the basis of a concocted and dishonest story a miscarriage of justice has occurred no matter how well meaning the prosecution authorities show themselves to be.
- 95.** *Hannon* was followed by *DPP v Conmey* [2014] 2 ILRM 493. Importantly, at para. 42 of his judgment Hardiman J. echoed Lynch J. and Blayney J. in observing:

“Accordingly, there is no universally applicable definition of ‘miscarriage of justice’ available to be applied in the present case. But the previously decided cases do offer illustrations of ‘miscarriage’.”

- 96.** *Conmey* itself involved the suppression of the statements of certain witnesses, and the replacement of original statements with other, prosecution-friendly ones. The facts of *Conmey*, like the facts of all the other cases I consider in this section of the judgment, are important and are summarised by Hardiman J. at para 48:

“As already mentioned, neither at the original trial, nor on the original appeal, nor on the hearing of the s.2 application or the present application, was any evidence put forward as to the reason for the suppression of the first statements of Messrs Madden, Reilly and, less importantly, Shevlin. The only evidence bearing on that important question was the evidence of the sole survivor of these three witnesses, Mr. Reilly, who says that the second statement was obtained by pressure from the gardaí including physical assault. This is the only explanation before the court, from either side, for the changed evidence”.

- 97.** Unsurprisingly, in the light of these findings the judgment concluded:

“In the result, there is no “untouched” body of incriminating evidence capable of establishing a joint enterprise involving Mr. Conmey. But the establishment of such joint enterprise is, admittedly, essential to the establishment of any case against Mr. Conmey. On this narrow basis we find that the conviction of Mr. Conmey on July 14, 1972 after a trial during which the three original statements of Messrs Madden, Reilly and Shevlin were suppressed by a person unknown, but connected with the prosecution, amounted to a miscarriage of justice”.

- 98.** The final set of authorities, unavailable to the SCC, but cited by the trial judge in this case, arise from *DPP v Abdi*. In the High Court, Owens J. granted a certificate where, on a retrial, an accused was found not guilty by reason of insanity on a charge of murder. The accused had earlier been convicted of the murder of his son.

- 99.** In considering the application for a certificate, Owens J. observed (at paras 29 and 30):

“I have considered the authorities cited in relation to s.9(1) of the 1993 Act. In each case where a certificate was granted it was clear that the original verdict could not stand because of prosecutorial irregularities or perjured evidence or other material which demonstrated to the courts in a real way that there was a miscarriage of justice in the sense that the conviction was wrong in a fundamental aspect. These convictions were not merely wrong in law because of judicial misdirection or introduction of inadmissible evidence.

This type of serious defect in criminal proceedings which leads to a miscarriage of justice may occur for a number of reasons. The new material may demonstrate the innocence of the accused or that a fundamental element of the evidence which led to a conviction has been undermined. It may demonstrate an irregularity which shows that a substantial failure of due process led to conviction. The phrase “newly-discovered fact” is not confined to new evidence having a bearing on proof of guilt of the accused. It may relate to other matters which undermine confidence in the process or result of the original trial”.

100. I would respectfully agree with the analysis of Owens J. that each of the relevant authorities involve the grant of a certificate where either the innocence of the accused is established or there have been prosecutorial irregularities, perjury, the conviction being wrong in a fundamental respect, or the undermining of a fundamental element of the evidence leading to the conviction. Exactly what these last factors mean must be considered in the light of the decision of the Supreme Court in the same case, where a “*fundamental defect in the administration of justice*” is required for a certificate to be granted (unless the innocence of the accused is established).

101. The decision of Owens J. was upheld by this Court. In his judgment, Birmingham P. defined the issue as whether “*the conviction was wrong in a fundamental respect*”; in so doing, he expressly adopted the wording of Owens J.

102. There followed a further appeal, this time to the Supreme Court. Delivering the judgment of the Court, Charleton J. observed (at para. 43):

“Often, however, what is claimed to be a newly-discovered fact is an over-emphasised error or minor defect properly to be dealt with on appeal. As this

court stated in Buck at para. 44, to undermine a conviction after an appeal has upheld the jury's verdict as safe and satisfactory, the accused must demonstrate an error that goes beyond nuance and, furthermore, for a miscarriage of justice to be demonstrated if the accused is acquitted on retrial, requires a fundamental defect in the administration of justice amounting to an affront..."

Having quoted from *Buck*, Charleton J. went on (at para. 44):

"More, therefore, than the ordinary carriage of justice, involving as it does correction and the availability of an appeal, is required to demonstrate a miscarriage of justice."

103. There are three other aspects of this judgment that are significant.

104. At para. 35 of this judgment, I have quoted from para. 43 of the judgment of Charleton J. in *Abdi*. This opens by referring to the fact that the finding that a miscarriage of justice does not always require fault on the part of the prosecution authorities. This is undoubtedly correct. Where the innocence of an applicant is unequivocally established by reason of a newly discovered fact then the behaviour of the prosecution is irrelevant; an example of such a situation is provided by the facts of *Hannon*. However, it is incorrect to suggest (as does Mr. Connolly in this appeal) that this means that, in cases where the innocence of the applicant is not established, fault on the part of the prosecution is not required. This is plain from the balance of this part of Charleton J.'s judgment, where he states that: *"serious fault may be a component of an applicant meeting the test..."*. In the current case, Mr. Connolly must establish serious fault.

105. At para. 45, as part of his review of the authorities, Charleton J. refers to *Pringle*, *Shortt*, and *Meleady*. He states:

"...while it is unnecessary to demonstrate under s. 2 of the 1993 Act that a miscarriage of justice has occurred in the sense of the conviction of the innocent, the point established must be a substantial and fundamental failure in the trial process and one which undermines in a significant way the prosecution case as accepted by the jury."

To paraphrase, unless innocence is positively established the applicant must prove both a substantial and fundamental failure in the process and that this

failure undermines the prosecution case in a significant way. In the current case, therefore, Mr. Connolly must show that there is a grave fault that constitutes a substantial and fundamental failure in the trial process.

- 106.** At para. 48 Charleton J. sets out something close to a general approach to what must be established in order to be granted a certificate:

“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”.

- 107.** *Wall* and *Conmey* are characterised as bad faith cases while *Hannon* and *Meleady* are referred to as cases of error fundamentally undermining the prosecution. What is encompassed by this latter category? It will be recalled that *Hannon* involved a withdrawal of the allegation thus confirming the innocence of the applicant. *Meleady* involved an undoubted failure to disclose to the defence the contents of the Wallace memorandum, in circumstances in respect of which no court made any findings. The possible scenarios in *Meleady* range from (a) a Garda showing a book of photographs to a critical witness with a view to prompting him to identify a suspect, the Garda subsequently wrongly denying that he did so, and the suppression of these facts throughout two trials and one appeal to (b) the less malign, though nonetheless serious, possibility that (regardless of the truth of its contents) a crucial document was inexplicably kept from the defence notwithstanding two trials, an appeal and huge public controversy – only being revealed as a result of an inquiry by a senior solicitor in

the CSSO. Where Charleton J. refers to errors by reference to *Hannon* and *Meleady*, he must be understood to be referring to situations with the attributes of these cases, namely dishonesty (on the part of the complainant in *Hannon*) or abject failure at best and the possible fabrication of evidence at worst (as seen in *Meleady*).

108. *Abdi* is a unanimous judgment of the Supreme Court which draws heavily on the caselaw which I have considered in this judgment. While its conclusions are expressed vividly, they do not alter the pre-existing law on what constitutes a miscarriage of justice. Indeed, no such suggestion is made to that effect in the current appeal. While none of the judgments in *Abdi* were available to the SCC, the same view of the limits of s. 9 were in place at the time that court granted a certificate to Mr. Connolly. In my view, in doing so the SCC went beyond the bounds of what constituted a miscarriage of justice. The very narrow basis on which the SCC found a grave defect in the administration of justice was that the Assistant Commissioner had been careless in his evidence and that this evidence was very important. It is the case that the evidence was of particular significance. It is also the case that (as a result of this carelessness) the evidence was false, though only in the sense that it was inaccurate and not in the sense that it was untruthful or dishonest. However, carelessness does not constitute the sort of egregious conduct described in general terms in *Abdi* or seen clearly in all of the cases where a certificate has been granted. This is so notwithstanding the unusual nature of belief evidence. However, the SCC did not find that the Assistant Commissioner's testimony was given in the knowledge that it was misleading. In my view, the careless evidence of the Assistant Commissioner is the sort of conduct which Charleton J. described as part of the ordinary carriage of justice, which was corrected on appeal.

109. In describing this evidence as careless, the SCC went on to say that they were not finding that the officer's belief evidence was contaminated by the materials which he had seen. They made no finding that the officer may not have had a valid belief, uninfluenced by his perusal of the investigation report, that Mr. Connolly was a member of a proscribed organisation. The SCC made a positive finding that the officer honestly and genuinely believed that Mr. Connolly was a member of such a body. While the SCC skirted around a finding that the officer's evidence had been carefully tailored to avoid the significance of the 16th of

December 2014, the Court then deliberately made no such finding to that effect. This Court is obliged to operate on the findings of the SCC. These are both precise and limited.

110. While the fact that the Assistant Commissioner was careless in giving this central evidence is very regrettable, this is not the type of behaviour which warrants the grant of a certificate.

111. I have come to this conclusion notwithstanding the nature of the “*belief evidence*” being given by Assistant Commissioner O’Sullivan. As already noted, in *Redmond* the Supreme Court addressed the safeguards required in respect of this sort of evidence. In *DPP v Donnelly* – an authority heavily relied on by counsel for Mr. Connolly in his oral submissions to this court – O’Donnell J. (as he then was) observed that the categories of persons giving this type of evidence” is limited both as a matter of law and practicality”. O’Donnell J. went on;

“In Kelly, Fennelly J cited with approval at p. 135 an observation of Gannon J in People (DPP) -v- Cull (1980) 2 Frewen 36 41 as follows: -

‘It would seem probable ... that the legislature would expect an officer of that rank to reach, in a responsible manner, an opinion in accordance with principles of justice in relation to the guilt of a person in whose favour there is a presumption of innocence’.”

Fennelly J continued:

“...a court of trial is entitled to assume that an officer of the rank of Chief Superintendent would give evidence of his belief that an accused person is a member of an unlawful organisation only when he has satisfied himself of this fact beyond reasonable doubt. Hence, even when that is the only evidence, it is important that the court is entitled to act on it, in the absence of some challenge to questions sufficient to raise such a doubt.”

112. Notwithstanding the burden on the officer in giving this type of evidence, his lack of care in doing so does not have the pernicious quality required for a miscarriage of justice to be established. In addition to this important fact, it should also be remembered that the SCC did not find that the officer had considered and relied upon the relevant materials but only that it was reasonably possible he had done so. The acquittal of Mr. Connolly occurred because of this possibility, not because of any positive finding that the officer had in fact impermissibly “*double counted*”. As I have already noted, the officer’s genuine belief that Mr. Connolly was a member of the IRA was established beyond reasonable doubt. The standards expected of a high-ranking Garda giving such evidence do not in themselves transform carelessness, as found by the SCC, into the type of behaviour which justifies the grant of a certificate.

113. It follows that I do not agree with the refusal of the High Court to quash the decision of the SCC. I have noted that the trial judge found that the DPP had not identified any error of principle on the part of the SCC. Without delving into the several written submissions before the High Court or the details of the oral hearing before the trial judge (none of which were opened to us on the appeal), the case made to this court was clearly one in which it was argued that there had been no grave defect in the administration of justice and that the finding to that effect was not open to the SCC. Indeed, there is an entire section of Mr. Connolly’s written submissions headed:

“A finding of grave defect in the administration of justice was open to the Special Criminal Court on the evidence”

114. In addition, the written submissions of the DPP (at para. 31) read:

“The DPP’s argument as to a grave defect in the administration of justice was that the judgement of the SCC was fundamentally erroneous to the extent that it was out of kilter with previously decided cases and represented an unwarranted extension of what could be considered a grave defect in the administration of justice brought about by agents of the state such as would give rise to the making of an order under section 9 of the 1993 Act. Fundamental error of law gives rise to a decision being liable to be quashed by way of an order of certiorari (Sweeney v District Judge Fahy)”.

- 115.** This error of principle, hotly disputed by the parties, was central to the appeal. There has been no suggestion that the DPP introduced any argument (let alone one as fundamental as this one) which had not been before the High Court.
- 116.** In my view, an important question of principle was identified by the DPP.
- 117.** The SCC made an error of principle in deciding that behaviour of the type that occurred here was capable of sustaining a finding that a miscarriage of justice had occurred. The grant of the certificate was not one of the options properly open to the SCC. The decision to grant the certificate was therefore one which was unreasonable. It constituted a fundamental error of law on the part of the SCC in assessing what circumstances could constitute a miscarriage of justice.
- 118.** I would therefore grant the Director an Order quashing the grant by the SCC of a certificate pursuant to section 9 (1) (a) (ii) of the Criminal Procedure Act 1993.
- 119.** It is therefore unnecessary to consider the alternative case made by the DPP, in particular her contention that the SCC erred in not properly taking into account its findings that there was evidence which (beyond reasonable doubt) tended to suggest that Mr. Connolly had been involved in the unlawful transport of explosives. However, I will decide this issue. It appears to me to be a misconceived argument.
- 120.** The DPP accepts, as she must, that the SCC did consider the relevant findings in concluding that Mr. Connolly was not innocent of the crime of which he was convicted. Para. 28 of the SCC's ruling reads:
- “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”.*
- 121.** We have not been asked to review this finding. I will therefore not comment, one way or the other, on whether an individual is not to be considered innocent in circumstances where his conviction has been quashed but where the SCC has found that he was involved in a separate offence for which he was not charged. This issue is complicated by the fact that it puts an accused before the SCC (where such findings have been made) in a different position to an accused tried

by a jury (where such findings are practically impossible). In any event, it is not before this Court in this appeal.

122. The DPP argues that the SCC should have taken these findings into account in considering whether to grant a certificate. This is so, the Director argues, even when addressing not only the question of actual innocence but also whether there had been a grave defect in the administration of justice.

123. The Director has pointed to no authority from Ireland or abroad which supports this proposition either directly or by analogy. While the DPP's counsel refer to the judgments of Owens J. and Charleton J. in *Abdi*, in fact none of the quoted passages suggest that the Director's position is correct. Even though there was an extensive exchange of written submissions (both before the High Court and before this Court) on the Strasbourg jurisprudence, I agree with the observation by counsel for the DPP at the hearing of the appeal that this caselaw was not really central to the issue. The more germane question is whether, in deciding on a grave defect in the administration of justice, these findings have any place.

124. Apart from saying that the SCC should have taken account of all circumstances, the Director does not specify what role these findings were to play and what effect they should have had on the SCC's analysis. Towards the end of his opening submissions, the DPP's counsel put the position in this way:

"...I do lay great stress on [these findings] and the fact that the Court chose to, I say, state not once but twice in terms of the specific finding in the course of its judgment. So it's there as part of the overall circumstances but it is one, in my submission, of huge significance that can't be ignored and begs to be addressed in some shape, manner, or form and it simply wasn't."

125. I have already concluded that a finding of miscarriage of justice (in the absence of factual innocence) requires a serious and grave failure in the administration of justice. If that is established, it is difficult to see what role a finding by the court (in respect of an offence with which the applicant was not even charged) could possibly play. Let us take the example of Frank Shortt, who was convicted of serious drugs offences having been framed by members of the Gardaí. If the court convicting Mr. Shortt had also found that he was guilty of another offence with which he had not been charged, one struggles to

understand how that could be set against the perjury, concealment and conspiracy actually deployed against him. Of course, in the current case (as the High Court judge astutely observed) there is no finding of guilt per se but rather findings that circumstantial evidence tended to establish beyond reasonable doubt that Mr. Connolly had been involved in the transport of explosives.

126. Of course, the analogy with the *Shortt* case may be considered an extreme one. However, it does illustrate that the role to be played by findings such as those in the current case is quite unclear. Certainly, apart from stating that they should be taken into account the DPP has not specified exactly how the SCC was to proceed if it considered (in the context of a grave miscarriage of justice) its findings connecting Mr. Connolly with the transport of explosives.

127. This certificate was granted on the basis of a grave defect in the administration of justice. Had such a defect in fact been established, or had the SCC's decision on this point been one which could reasonably have been reached, the DPP has not convinced me that in this case the SCC was obliged to have regard to its findings about Mr. Connolly and explosive devices in deciding whether or not to grant a certificate on these grounds.

128. I would therefore allow the appeal, albeit on only one of the grounds advanced by the DPP.