



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

165/14

166/14

The People (at the Suit of the Director of Public Prosecutions)

Respondent

V

Wayne Dundon and Nathan Killeen

Appellants

JUDGMENT of the Court delivered on the 19th day of October 2017

by Mr. Justice Birmingham

1. On 15th July, 2014, following a lengthy trial, both appellants were convicted by the Special Criminal Court of the offence of murder. The particulars of the offence being that they on 9th April, 2009, at Coin Castle Amusements, Roxboro Road Shopping Centre, Limerick murdered Roy Collins. The prosecution had not alleged that either appellant was the actual gunman who fired the fatal shot on the occasion in question. Rather, the prosecution case against Nathan Killeen was that he drove the gunman, Mr. James Dillon, to and from the murder scene. Mr. Dillon pleaded guilty to the offence of murder at an earlier stage. Insofar as Wayne Dundon is concerned, the case against him was that he had ordered the shooting from prison. The evidence and final legal submissions in this case concluded on 30th June, 2014, and the Special Criminal Court took time to consider the matter. Then, on 15th July, the Court, in a judgment delivered by O'Malley J. convicted both men who had been on trial. In a situation, where the form and structure of the Special Criminal Court's judgment is an issue on the appeal and because the judgment helpfully summarises the evidence at trial, a copy of the judgment and ruling of the Special Criminal Court is attached to this judgment for ease of reference. Insofar as there are disputes about the recital of the evidence, and certainly it is accepted that in one respect at least, namely in what the judgment said about whether Mr. Killeen had previously left clothing for washing at a particular location, there was a misstatement of the evidence, that will, to the extent necessary, be dealt with in the body of this judgment.

2. As emerges from the judgment of the Special Criminal Court, the prosecution mounted two quite distinct cases. In the case of Mr. Killeen there were really two aspects to the prosecution case. There was, first of all, evidence from a number of civilians, for the most part members of the McCarthy/Collins family, implicating Mr. Killeen in the crime and then there was a considerable amount of circumstantial evidence, including forensic evidence. In the case of Mr. Wayne Dundon, with the exception of evidence as to motive, the case depended pretty much entirely on the evidence of the McCarthy/Collins family witnesses. Lest there be any confusion about this, the reference in this context to "Collins family witnesses" is not to the family members of the deceased victim but rather to the extended Collins/McCarthy family. The background of the various civilian witnesses and their connection to each other is helpfully set out by the Special Criminal Court in the body of its judgment.

The Wayne Dundon Appeal

3. The prosecution opened its case against Wayne Dundon by reference to the evidence it expected would be given by Mr. Gareth Collins, sometimes known as "Gareth Keogh" (hereinafter referred to as Gareth Collins save where the context requires otherwise), about being handed a phone on a date in March, 2009 by Nathan Killeen to facilitate a conversation between Mr. Collins and Wayne Dundon who was then in prison. This intended witness was expected to say that, in the course of this conversation, Mr. Wayne Dundon asked Mr. Gareth Collins to drive a car which would be used in connection with the shooting of Steve Collins and offered €20,000 for doing so. Mr. Collins was further expected to say that after the phone call finished, in the course of the further conversation he had with Mr. Nathan Killeen, Mr. Killeen said that they were going to "whack" Mr. Stephen Collins in his public house. Mr. Stephen Collins is the father of the deceased and the public house adjoins Coin Castle Amusements. The prosecution indicated that it was expected that Mr. Collins would refer to further contact with Mr. Killeen about a week later when Mr. Killeen told him that a high-powered black Mercedes had been sourced for the job; and to further contact on the morning of the murder when Mr. Killeen and James Dillon appeared in the hallway of 7 Crecora Avenue, the home of Lisa Collins and Christopher McCarthy; to telephone contact on that occasion with Wayne Dundon, who would be alleged to have said "it is a simple job – yoke and all is up there, up and down in two minutes". Mr. Collins would further give evidence that he refused to drive the car that was going to be involved in the incident, and that this was not the first time he had refused to do so.

4. Prosecution counsel also referred in his opening to the evidence that he expected would be given by Mr. Anthony "Noddy" McCarthy. Counsel indicated that it was expected that Anthony "Noddy" McCarthy would say that on the day of the murder of Roy Collins, that he was a prisoner in Wheatfield Prison, as was his cousin Wayne Dundon, and that Mr. Anthony "Noddy" McCarthy would give evidence that he overheard Wayne Dundon speaking on a mobile phone, that Mr. Dundon was hyper and was shouting into the phone "you better do it for us, you never did nothing for our family, you and your mother will be sorry". The Special Criminal Court was told Mr. Anthony "Noddy" McCarthy would be giving evidence that Wayne Dundon hung up, that Mr. McCarthy enquired what was going on and that Wayne Dundon responded, "James Dillon, that's who, I told him to go down and do Mr. Collins or him and his mother will be sorry" but then Mr. McCarthy said not to be talking like that to him, that Mr. Dillon was a cousin of theirs, to which Wayne Dundon responded, "well, we'll see how loyal he is now". It was further indicated that Mr. Anthony "Noddy" McCarthy would give evidence in relation to further contact that he had with Wayne Dundon after lunch that day in the prison. Mr. Anthony "Noddy" McCarthy, it was expected, would also say that Mr. Wayne Dundon had also said "that fucking muppet Gareth Collins wouldn't drive the car either", and that Mr. Anthony "Noddy" McCarthy would give evidence in relation to further contact with Wayne Dundon after lunch that day. In that conversation Mr. Anthony "Noddy" McCarthy had spoken about a man being shot in the leg, as he had understood was the situation, and that Wayne Dundon had said "as far as being shot in the leg, he is dead" and had tapped his wrist commenting that Mr. Steve Collins might have thought he was joking when Wayne Dundon had made that gesture towards him in court. Anthony "Noddy" McCarthy, it should be explained, was serving a life sentence in 2009 which had been imposed in 2003 for the murder of Ciaran Keane.

5. Counsel indicated that Lisa Collins and Christopher McCarthy were expected to give evidence which would materially confirm aspects of the testimony of Gareth Collins. Counsel referred also to the fact that April Collins would be giving evidence that, on the day of the murder at a time when she was in Limerick Hospital with her child who was sick, she received a phone call from Wayne Dundon who asked "is he dead?" and that he asked her if she had seen members of the Collins family, *i.e.* the family of Steve Collins and Roy Collins, and whether she had seen any of the Crawfords at the hospital. Melissa Crawford was the fiancée of the deceased.

6. As the trial proceeded Mr. Collins and Mr. Anthony "Noddy" McCarthy gave evidence in chief substantially as anticipated in the prosecution's opening. However, in the case of Mr. Collins it was elicited by the defence in cross-examination that he had given different accounts to the Gardai at different times.

7. On Day 27 of the trial, counsel for the prosecution, Mr. Seán Guerin, Barrister at Law, closed the case. He made clear that the prosecution case was one of joint enterprise, involving the two accused before the court and also James Dillon. Mr. Wayne Dundon, he said, was "the person who directed operations, and was the moving spirit behind the entire enterprise". Counsel referred to the fact that in early May, 2005, Wayne Dundon had been convicted of the offence of threatening to kill Ryan Lee, a stepson of Steve Collins and had received a ten year prison sentence, that a few days later, Mr. Wayne Dundon's daughter was born, that at that stage Gareth Collins was sharing a cell with Wayne Dundon and had given evidence of overhearing a mobile phone conversation. Counsel reviewed the evidence that had been given by Gareth Collins. That evidence was summarised by the Special Criminal Court in the course of its judgment which has been appended to the judgment of this Court and then went on to review the evidence of Christopher McCarthy and Lisa Collins. Counsel referred to the evidence of April Collins about her hospital visit and commented that it was fair to say that the evidence was less decisive in and of itself, but that it showed an interest in, and a knowledge of what was happening in relation to the shooting by Wayne Dundon in the immediate aftermath of the shooting. Counsel also dealt in detail with the evidence of Anthony "Noddy" McCarthy.

8. The Court has taken some time to set out the basis on which the prosecution opened and closed the case in order to illustrate that the prosecution initially presented a multi-layered case against Wayne Dundon relying on the testimony of several witnesses. However, the analysis and reasoning conducted by the Special Criminal Court meant that ultimately the case was entirely dependent on the evidence of Anthony "Noddy" McCarthy, though the court utilised the evidence of Steve Collins in relation to gestures made to him in the courtroom by Wayne Dundon as a tool when assessing the credibility of Anthony "Noddy" McCarthy. The case against Wayne Dundon morphed from a multi-layered one to what was essentially a single witness case because of the court's view that no reliance could be placed on the evidence of Gareth Collins and the court's assessment that the prosecution was not advanced by the evidence of April Collins and that the evidence of Christopher McCarthy was peripheral. Understandably, in these circumstances much of the focus of attention on this appeal has been on criticising the approach taken by the Special Criminal Court when it came to assessing the testimony of Anthony "Noddy" McCarthy and in particular criticising the conclusion of the trial court that he gave truthful evidence on which reliance could be placed.

Grounds of appeal

9. The written submissions on behalf of Wayne Dundon list the grounds of appeal as follows:

- (a) The Special Criminal Court erred in regarding the evidence of Gareth Collins as merely "inconsistent". The preponderance of the evidence showed him to have fabricated the greater part of his testimony.
- (b) The Special Criminal Court erred in treating the failure of the evidence of Gareth Collins as a neutral factor or as having no impact or effect on the evidence of Anthony "Noddy" McCarthy.
- (c) The Special Criminal Court failed to have any or any adequate regard to the possibility or likelihood of collusion as between the witnesses it considered to be unreliable and Anthony "Noddy" McCarthy.
- (d) In failing to identify the reasons underlying the corroboration warning it administered to itself the Special Criminal Court rendered the warning meaningless or ineffectual.
- (e) The Special Criminal Court failed to have any or any adequate regard to the clear inconsistencies in the evidence of Anthony "Noddy" McCarthy.
- (f) The Special Criminal Court erred in its approach to the testimony of Anthony "Noddy" McCarthy as a "jailhouse informer".
- (g) The Special Criminal Court erred in its approach to the testimony of Anthony "Noddy" McCarthy as a "supergrass witness".
- (h) The Special Criminal Court failed to grant a direction in circumstances where the evidence disclosed a profound failure of investigation by the Gardaí and at least one demonstrable instance of a deliberate attempt to suppress relevant evidence by a senior member of An Garda Síochána.

10. At first sight, it might seem somewhat surprising that considerable attention in both the oral and written submissions has been placed on the evidence of Gareth Collins in a situation where the trial court had concluded that as a witness he did not meet the standard of being capable of belief. However, there is undoubtedly a logic to the position taken by the appellant. Gareth Collins in particular, but also Christopher McCarthy and Lisa Collins, had given evidence about the use of a phone at 7 Crecora Avenue on the morning of the murder. If, as the defence contended, the transaction involving the telephone never occurred and was entirely fabricated, then this served to undermine totally the evidence of Anthony "Noddy" McCarthy who was claiming to have overheard part of the phone conversation, or certainly a phone conversation, at the other end and to have spoken to Wayne Dundon immediately after the phone call terminated.

11. At trial and again on appeal, a major focus of attention has been to establish that the accounts of his movements given by Gareth Collins to gardaí in the immediate aftermath of the murder were more likely to be correct than the later account which formed the basis of his evidence in trial.

12. The appellant says that such objective evidence as there was in the case made the account of his movements that was given by Gareth Collins in the immediate aftermath of the murder overwhelmingly more probable than the revised account that formed the basis of his evidence at trial. The appellant says the original account was supported by CCTV footage. Counsel for Mr. Dundon refers in that regard to the footage which shows a man walking on Hyde Avenue at 10.10 a.m. real time on 9th April, 2009. The CCTV footage indicated 10.08 a.m. but it was two minutes slow on the morning of the murder and at 10.26 a.m., the footage shows a man, it seems

the same man, on Hyde Avenue followed by a small child. The relevance of this is that in the original account given by Gareth Collins he had described bringing a particular child, D.D., to a shop for sweets and then bringing the child back to 31 Hyde Avenue. He described the child dropping his jelly sweets. It is pointed out that CCTV footage also showed what appeared to be a silver Lexus pulling up outside 31 Hyde Avenue and leaving again a few minutes later at 10.42 a.m. April Collins, sister of Gareth Collins, drove a Lexus motor vehicle at the time. In the course of her evidence she accepted that the car in the footage was probably hers. The relevance of this is that in his initial account Mr. Gareth Collins had referred to being in 31 Hyde Avenue when his sister April had dropped in with her son. Overall the appellant says that there is significant support for the initial account to be found in the CCTV footage.

13. Then the appellant says that the support for the original account of the movements that is provided by the CCTV footage is reinforced by XRY analysis of the phone that Gareth Collins was carrying around the time of the murder. The appellant points to a call received at 9.35 p.m. by Gareth Collins on the night prior to the murder from his partner, Elaine Walsh. This is said to provide a degree of support for Gareth Collins' initial account of his partner collecting him that evening. It is pointed out that at 10.10 a.m., real time on the morning of the murder, the phone was two minutes fast, Gareth Collins made a call to his mother. It is said that this was highly significant in that Gareth Collins in his original account of his movements had described calling to his mother's home at 10.10 a.m. but found that she was not there. Again, the appellant draws attention to the fact that the phone records indicate that Gareth Collins was engaged in flirting by phone at a time proximate to the occasion when he was, on his subsequent account, being requested to participate in a murder. The appellant draws attention to and indeed places particular focus on the fact that Gareth Collins' final account of events on the morning of the murder indicated that after the phone call about which he had given evidence, the handset used was dismantled and dumped but that no broken up phone was located by Gardaí despite extensive searches. The appellant says that failure to locate a phone takes on greater significance having regard to the nature of the detailed searches that were carried out and to the areas that were covered by those searches. The appellant says that if Gareth Collins' original account is true or indeed might reasonably be true, that this means that he was not at 7 Crecora Avenue to receive a phone call, and his account of being there and receiving a call is a fabrication. If that is true or might be reasonably true then the implications, it is submitted, for what might be described as the Anthony "Noddy" McCarthy leg of the prosecution case is truly profound indeed. The appellant says that the state of evidence in relation to Gareth Collins was such that it was not open to the Special Criminal Court to merely set aside his evidence and exclude it from further consideration. Once it concluded that he did not meet the standard of being capable of being relied on, it was necessary for the court to go a step further and to positively disbelieve the evidence of Gareth Collins and then to regard this as fundamentally undermining the evidence of Anthony "Noddy" McCarthy.

14. In essence, the appellant argues strongly that the court should have gone further than it did, much further than it did, that it should not have confined itself to concluding that Gareth Collins did not meet the standard of being capable of being believed and that the evidence of Lisa Collins as to hearing the voice of Wayne Dundon on the phone while in the garden was at best peripheral and that the evidence of April Collins did not advance the prosecution case. The appellant has contended and summarised the situation as being that the trial court had concluded that it could not rely on the evidence of Gareth Collins, Lisa Collins, April Collins and Christopher McCarthy. In this Court's view that is something of an oversimplification. It is not the case that the court went so far as to reject the evidence of Lisa Collins and April Collins. In this Court's view what the Special Criminal Court did in relation to Lisa Collins was simply to say that her evidence, of having recognised the voice of Wayne Dundon was peripheral to the case against Wayne Dundon. She was not purporting to give evidence of what Wayne Dundon had said in the course of the telephone call. It is however the case that the Special Criminal Court took the view that the presence of DNA that matched that of Mr. Killeen on the two wash basket hoodies corroborated her evidence that he removed the outer hoodies that can be seen in the CCTV footage from the post office. The Special Criminal Court concluded that there was corroboration for her evidence that Nathan Killeen had told her that he was going to shoot Steve Collins and specifically accepted that evidence. This evidence in relation to Mr. Killeen will be examined in more detail later in the judgment.

15. The trial court's view that the evidence of April Collins in relation to the phone conversation she had while at Limerick Hospital with her child did not advance the prosecution was scarcely surprising. As much had, in effect, been conceded by prosecution counsel in the course of his closing remarks. That Mr. Wayne Dundon and no doubt other Limerick prisoners would be keenly interested in emerging details of a Limerick shooting was only to be expected. Moreover, it was also to be expected that if the shooting victim was a member of the Steve/Roy Collins family, given that Wayne Dundon would quite naturally have been expected to have harboured some ill-will towards members of that family, that his interest would be heightened.

16. The defence strategy at trial was to focus on the issue of collusion between the prosecution civilian witnesses and to suggest that they were therefore incapable, individually and collectively, of being relied on. In particular, so far as the evidence of Anthony "Noddy" McCarthy is concerned, counsel for the appellant Wayne Dundon's strategy was to seek to undermine the significance of Mr. McCarthy's evidence by contending that he had colluded with Gareth Collins in particular but also with other members of the Collins family and Christopher McCarthy.

17. This Court is in absolutely no doubt that the trial court was fully alive to the arguments and contentions as to interaction and cross contamination that were being advanced on behalf of both appellants and must have reached the conclusions that it did with those considerations very much in mind. Conscious of the links and connections that had been established and indeed were not in doubt, the trial court assessed the significance of what each witness had to say individually. Very different conclusions were reached about the extent to which it was possible to rely on individual witnesses. In all the circumstances the Court cannot conclude that the evidence was coercive in one direction only, such that the only rational conclusions that the Special Criminal Court could have come to was that there was collusion, and a conspiracy between members of the Collins and McCarthy family which must necessarily have embraced Anthony "Noddy" McCarthy so that the Court could not place any reliance on his evidence. On the contrary, we are satisfied that the conclusions reached by the trial court in relation to the evidence given by other civilian witnesses left it free to consider the evidence of Anthony "Noddy" McCarthy on its merits.

18. The next step therefore is to consider how the Special Criminal Court approached the evidence of Anthony "Noddy" McCarthy. As we have seen from the judgment of the trial court, it expressly administered a caution to itself that it was dangerous to convict on the uncorroborated evidence of Anthony McCarthy. It then specifically found that the evidence of Anthony McCarthy was uncorroborated but nonetheless accepted the truth of the evidence of Anthony McCarthy.

19. Mr. Anthony "Noddy" McCarthy was the subject of lengthy cross examinations that were intense, forensic and robust. There is no doubt that those cross examining had considerable material with which to work and there is no doubt that the available material was deployed very effectively indeed. The question that arises at this stage is whether the 'hits' recorded during cross examination were such when taken in conjunction with the submissions that were made on behalf of Mr. Wayne Dundon, that the court was left with no option but to reject the evidence of Anthony "Noddy" McCarthy.

20. In addressing that issue this Court has to remind itself what has been said on a number of occasions about the limitations of the

role of an appellate court. See in that regard cases such as *DPP v. Madden* [1977] 1 I.R. 336 and the *SS Gairloch* [1899] 2 I.R. 1 and the recent restatements of the continuing relevance of that line of jurisprudence in cases such as *DPP v. Doyle* [2015] IECA 109 and *DPP v. Campion (No. 2)* [2015] IECA 274.

21. The summary of the evidence of Anthony "Noddy" McCarthy as set out at p. 35 of the transcript of the 15th July, 2014, and subsequent pages, refer to a number of aspects of the evidence and of the cross examination on which the defence case relies. This has caused the prosecution to observe that the Special Criminal Court in its ruling had set out his evidence "warts and all". These included the fact that he had referred to the cell from which he had overheard the shouting coming as that of H.H., a prisoner who associated with the Dundons but who at that time was not sharing a cell with any of them, having been moved to other cell accommodation some time before the 9th April, 2009. The Court referred to the issue raised about the teletext coverage of the breaking news of the Limerick shooting. Mr. Anthony "Noddy" McCarthy had contended that there was a news item which he had read to the effect that a man had been shot in the leg in a pub in Limerick, whereas in fact there was evidence that the first three news reports to emerge, starting at about 1.30 p.m., had referred to a man being injured, with a fourth news report emerging at 1.46 p.m. referring to a death for the first time. Moreover, there was no suggestion in any of those reports that the man had been shot in the leg.

22. The defence's interest in this aspect is heightened by the fact that according to Anthony "Noddy" McCarthy he had asked Wayne Dundon had he seen a teletext about the fact that a man had been shot in the leg to which Wayne Dundon had said, "Steve Collins didn't believe me when I done that to him in the court" pointing to the wrist where a watch is worn and had then said "as for him being shot in the leg he's dead". The Special Criminal Court refers to his cross examination on the basis of having been "a classic jail house snitch" with nothing to lose and a lot to gain by making these allegations. The Court refers to his response which was to compare the prison regime to which he is now subjected as a person on protection with what he previously enjoyed. However, the judgment notes that Mr. McCarthy had in fact been in protection within the prison system since February, 2011. The relevance of this is that he wrote to the gardaí in April, 2011, but it was not until August, 2013 that he spoke to them, making a statement on 3rd September, 2013.

23. The trial court in its judgment refers to a number of recorded prison phone calls which it felt to be of potential relevance to an assessment of the motivation and truthfulness of witnesses including telephone call 34 between Anthony McCarthy and his mother which was recorded between the 27th March, 2011, and the 19th April, 2011, in the course of which Anthony McCarthy is recorded as having said "sure I heard that the Dundons threatened him and threatened his mother and all and said if you don't go and shoot you will have to do all that....scandalous carry on, mam, a young fella nothing to do with that all his life."

24. The Special Criminal Court judgment refers to the fact that Anthony McCarthy was cross examined as to the difference between the statement that he heard Wayne Dundon threaten James Dillon and the statement that he heard the Dundons had threatened James Dillon. The judgment records Mr. Anthony "Noddy" McCarthy's response being that he saw no difference.

25. Telephone call 41, again between Anthony McCarthy and his mother, was also the subject of particular interest. Dealing with this call, the Special Criminal Court records that Anthony McCarthy told his mother to call Sara Ryan, a solicitor. He said "Christy was on a visit there today and when he came off Gareth called him and Gareth said the guards were up to see Gareth yesterday, and he is working for the guards now, and if Christopher doesn't start giving him money that, what do you call it, he is going to start making up lies about Christopher to the guards". He then said "there are trying to extort us for money". He wanted the solicitor to get the CCTV footage from the prison, because the conversation would be on camera. He told his mother to tell the solicitor exactly what was said. The court records that in cross examination, that Anthony McCarthy initially said that this was about a threat by Gareth Collins to tell Lisa that Christopher had been with girls in cars. He added that there had been something about a car that caught fire, that Christopher McCarthy was meant to pay for. Anthony "Noddy" McCarthy is recorded as saying that he had a sleeping disorder and sometimes got confused and said things that he did not mean. He said that he had wanted to see Sarah Ryan at the time in order to discuss the book of evidence in Christopher's forthcoming case, and he was concerned that she was not doing a proper job for Christopher. The court records that it was put to Anthony "Noddy" McCarthy that Christopher McCarthy had in fact pleaded guilty in that case on the 16th March, 2011, at least one month before this phone call.

26. Finally, the Special Criminal Court records that Anthony "Noddy" McCarthy eventually agreed that the call was about extortion by Gareth Collins. He said that he had been under a lot of emotional stress at the time and that his head had "been in a mess ever since". The defence attached very great significance to this phone call. They say that not only was the commentary on the call absurd, there was no reference whatever to cars and girls in the call, but even more significantly the very odd explanation offered by Mr. McCarthy mirrored closely the explanation that was offered by Christopher McCarthy when he came to give evidence.

27. The defence says that this offers the clearest possible evidence of two witnesses coordinating their position and as they put it, "colluding". The particular significance of this arises from the fact that the coordination and collusion, which the defence contends was established, was designed to protect the principal prosecution witness Gareth Collins and absolve him from criticism. However, the prosecution contended that Anthony "Noddy" McCarthy had modified his position which put him apart from other witnesses. The appellant is very critical of the treatment of this issue by the Special Criminal Court and says that apart from adverting to the fact that the issue was raised, that the issue was not the subject of any real analysis by the Special Criminal Court.

28. The complaint that the Special Criminal Court merely adverted to issues as having been raised rather than engaged with the significance of what was raised is a recurring theme. The same point is made in relation to Mr. McCarthy's comment to his mother that he heard the Dundons were threatening James Dillon and his mother as distinct from his evidence at trial that he heard Wayne Dundon threaten James Dillon and his mother and also in relation to the fact that the cell from which the alleged phone call was made was described as that of H.H., when it was not in fact his cell on the day of his murder.

29. The prosecution take quite a different attitude to the phone call which was alleged to have been about girls and cars pointing out that senior counsel on behalf of Mr. Dundon in the course of his closing submissions on a number of occasions expressly acknowledged that in the course of cross examination Mr. Anthony "Noddy" McCarthy had resiled from the proposition that the call was about girls and cars and had accepted that the call was indeed about extortion.

30. In addition to the complaint about the failure of the Special Criminal Court to recognise the significance of its findings in relation to Gareth Collins which was that no reliance could be placed on his testimony, for the assessment of the evidence of Anthony "Noddy" McCarthy and the Court's failure to have regard to the possibility of collusion between witnesses, including witnesses not relied on, there are a number of criticisms made of the trial court. It is said that the Court paid insufficient attention to clear inconsistencies in the evidence of Anthony "Noddy" McCarthy. This Court, in the course of this judgment has already referred to some, though not all, of the areas where very considerable headway was made by the defence. In addition, it is said that the trial court erred in not treating the civilian witnesses, including Anthony "Noddy" McCarthy as accomplices. It is also said that the failure

to identify the reasons underlying the corroboration warning that the court proceeded to give itself, rendered the warning ineffectual. Two additional points are made in that it is said that the court failed to approach the testimony of Anthony McCarthy as being that of a "jailhouse informer" and failed to approach the evidence as that of being a "supergrass".

31. So far as the jailhouse informer is concerned, as appears from the judgment of the Special Criminal Court, lengthy submissions were addressed by reference to the Canadian experience. This Court would point out that what was involved here was far from the classic jailhouse informer situation. A classic jailhouse informer comes forward to give evidence that while detained in the same prison as the suspect and usually while sharing a cell or occupying an adjoining cell that the suspect had confessed to him his involvement in a particular crime committed prior to his incarceration.

32. Here, the situation was quite different. It was not a case of Mr. Anthony "Noddy" McCarthy coming forward to give evidence about what Wayne Dundon had said about some misdeeds in the past but rather that Anthony "Noddy" McCarthy was saying that he witnessed the actual commission of the crime in that he was a witness to Mr. Wayne Dundon directing the murder.

33. Again, the reference to supergrass is quite misplaced. That term came into vogue in the early 1980's in Northern Ireland. It was used first in relation to Christopher Black who gave evidence against twenty two members of the provisional IRA who were convicted on his evidence. Other supergrasses emerged to offer evidence which resulted in the arrest of hundreds of people from different terrorist organisations such as the provisional IRA, the INLA and the UVF. That resulted in very lengthy trials involving a great number of charges and with multiple defendants.

34. A further distinction is that the classic supergrass will usually be giving evidence that he participated in multiple terrorist or criminal incidents and was recounting the role played by others that were alongside him. Nobody was suggesting any active involvement by Anthony "Noddy" McCarthy in the murder of Mr. Roy Collins. In this case there is no question of Mr. Anthony "Noddy" McCarthy giving evidence against large numbers of former criminal associates in relation to multiple incidents committed over a significant period of time. Rather, he was giving evidence in relation to one individual and in relation to one specific incident.

35. The appellation supergrass is not an appropriate one. However, while the Court does not regard the references to jailhouse informers or supergrasses as being apt, in truth that is not an issue of major significance because the reality is that the Court repeatedly warned itself that it was dangerous to convict on the evidence of the civilian witnesses, including Anthony "Noddy" McCarthy, if that evidence was uncorroborated.

36. For the same reason, this Court regards the controversy as to whether the civilian witnesses, and in this context Anthony "Noddy" McCarthy in particular, should properly be regarded as accomplices, so that as a matter of law the trial court was obliged to caution itself that it would be dangerous to convict on the evidence if uncorroborated as something of a non-issue as the Special Criminal Court did in fact warn itself and indeed warned itself repeatedly. While regarding that as a non issue, this Court agrees with the view of the Special Criminal Court that as a matter of law the civilian witnesses were not technically accomplices so as to trigger a legal requirement for a warning. So far as Mr. Anthony "Noddy" McCarthy was concerned there was never any suggestion that he had any hand, act or part to play in the murder of Mr. Roy Collins. The height of what could be contended is that if his evidence in relation to what he overheard on the day of the murder is true, then in failing to disclose the information in his possession to Gardaí as soon as practical that he committed an offence of withholding information under s. 9 of the Offences against the State Act, 1998. In the case of someone serving a life sentence for murder, the reality is that would not seem a consideration of very great significance. However, while not persuaded of the merits of some of the specific arguments formulated on behalf of Mr. Wayne Dundon, the Court is entirely satisfied that the evidence of the witnesses in question had to be approached with very great care. The Court also agrees with the Special Criminal Court that in the circumstances the risks associated with the evidence of Lisa Collins and Anthony "Noddy" McCarthy were sufficiently grave to warrant a warning that it would be dangerous to convict on their evidence in the absence of corroboration. The trial court gave itself that warning, recognised that the evidence of Anthony "Noddy" McCarthy was uncorroborated but still proceeded to convict. The question that must be answered is whether it was open to the trial court to do so?

37. There is no doubt that points of real substance were identified by the defence at trial, points which would certainly cause any tribunal of fact to hesitate and to think long and hard. This Court recognises that it might well be that another tribunal of fact might have reached a different conclusion. However, that is not really the point. The issue for this Court is whether it was legitimately open to the Special Criminal Court to convict Wayne Dundon on the evidence it had before it. We are satisfied that it was legitimately open to the trial court to do so on the evidence. It was essential that a tribunal of fact should be warned, or in this case should warn itself, that it was dangerous to convict on the uncorroborated evidence of Anthony "Noddy" McCarthy. However, a tribunal of fact also had to be instructed, and in this case had to instruct itself that having taken the warning on board, it was open to it to convict if satisfied beyond reasonable doubt of the guilt of the accused. In these circumstances, this Court cannot go so far as to say that the trial court was obliged to refuse to act on the evidence of Anthony "Noddy" McCarthy. Indeed in some respects the trial court approached the assessment of evidence in a way that was quite favourable to the appellant. The trial court approached the case from the position that the evidence of Anthony "Noddy" McCarthy was uncorroborated and indeed largely unsupported. The Court did not directly advert to the evidence of Lisa Collins. Her evidence in relation to the phone call on the morning of the murder was seen as peripheral. However, her evidence of being able to hear and identify the voice of Wayne Dundon on the other end of the call offered a degree of support for the evidence of Anthony "Noddy" McCarthy which the Special Criminal Court might have factored into the equation.

38. The issue of collusion between prosecution witnesses was front and centre throughout the trial. Nobody who sat through the trial could have been unaware of that. This Court is in no doubt that the court of trial was fully alive to the issue. It was a theory that was fully explored. However, this Court cannot conclude that the Special Criminal Court would have been coerced into concluding that there was collusion, and a conspiracy between members of the Collins and McCarthy families which must have embraced Anthony "Noddy" McCarthy so that the Court could not place any reliance on his evidence. It cannot be said that no other rational conclusion was open on the evidence. The conclusions reached by trial court in relation to the evidence given by other civilian witnesses left the court free to consider the evidence of Anthony "Noddy" McCarthy. Having expressly warned itself about the dangers of convicting on his uncorroborated evidence, the court did that.

39. Had this been a jury trial and had the case been left go to the jury, and the jury convicted the appellant, that would very likely have been the end of the matter. However, this was not a jury trial. The Special Criminal Court gave reasons for its decision and the nature and extent of the analysis it undertook is available for scrutiny. As we will see presently, the appellant Wayne Dundon and indeed his co-appellant are very critical of the reasoning of the Special Criminal Court. They say that no adequate reasons were provided by the Special Criminal Court. Mr. Wayne Dundon says he is left wondering why he was convicted.

40. At trial and again on this appeal, the case is made that the Garda investigation was so deeply flawed, and so incomplete that the

trial should have been halted. The appellant points to a number of particular aspects of the Garda investigation in that regard, placing particular significance on the way in which the fact that Gareth Collins had implicated Wayne Dundon in a murder that he could not have committed, i.e., the murder of Brian Fitzgerald, was not probed.

41. It seems to this Court that the court of trial was fully aware of the contacts and relationships between the various members of the Collins/McCarthy families and was fully alert to the suggestion that they were a party to a conspiracy, but in these circumstances it was for the trial court, in the first instance, to decide whether there was in fact a conspiracy to have Mr. Wayne Dundon and Mr. Nathan Killeen convicted, and whether if there was a conspiracy it embraced Anthony "Noddy" McCarthy. If there was a conspiracy, which involved the fabrication of a telephone call on the morning of the murder, then the conspirators were inept to a truly extraordinary degree in that they could not get their lines right about who was the intended victim. Anthony "Noddy" McCarthy said that the call that he overheard related to Roy Collins while other witnesses, in particular Gareth Collins said that it related to Steve Collins. The divergence was so great that it caused the Special Criminal Court to ponder whether it was possible that there was more than one call. It begged the question as to why, if there was a conspiracy, central to which was the invention of a phone call, those involved in the conspiracy, even though they had all the time in the world to do so, could not get their story straight even to the extent of agreeing who was the intended victim.

42. This was a case where the theory of collusion or conspiracy was fully explored and where there was rigorous cross examination of each of the civilian prosecution witnesses. Relevant in particular to the appeal of Mr. Dundon is that Anthony "Noddy" McCarthy was subject to a very lengthy and detailed cross examination. A court made up of experienced trial lawyers who had repeatedly expressly warned themselves about the dangers of relying on the evidence of Anthony "Noddy" McCarthy to convict if uncorroborated, nevertheless relied on that evidence and convicted. The appellant Wayne Dundon is dissatisfied with the outcome. However, this Court considers that there is substance in the observation of the prosecution that the appellant is inviting this Court, which has not seen any witnesses or heard any evidence from the witness box, to substitute its own view on the facts for that of the trial court. Having regard to the long established jurisprudence of this Court that is not something that we can do, even if we wished to do so.

43. In this case, the fact that the witness, Anthony "Noddy" McCarthy, engaged in what was described by the Special Criminal Court, echoing the language of defence counsel, as a "stunt" when claiming that he had a telephone while giving evidence in court when it later emerged that what he had was a TV remote control, places a particular premium on the ability of those who had witnessed this stunt performed to assess its significance for the assessment of the witness' reliability.

44. Even if it is the case that the Special Criminal Court was not precluded from relying on the evidence of Anthony "Noddy" McCarthy to ground a conviction, that does not dispose of this appeal. The appellant says that there was an onus on the Special Criminal Court if convicting, to do so by reference to a detailed judgment that sets out with sufficient clarity the evidence relied on to establish particular matters and the legal standards that were applied but it is said this did not happen in this case. Simply referring to or identifying issues that were raised without engaging with them in a meaningful manner and indicating which issues were accepted as having been made out and what significance was attached to them individually is inadequate. For her part, the respondent, the Director of Public Prosecutions, rejects the criticism. She says that the trial court outlined the case against each appellant with considerable clarity and engaged in a critical and careful analysis of the evidence that was laid before it. She refers to the decisions of the Court of Criminal Appeal and Supreme Court in the case of *DPP v. Gilligan (No. 2)* [2006] 1 I.R. 107 and the decision of the Supreme Court in *DPP v. McKevitt* [2009] 1 I.R. 525 and says that the judgment in this case meets and indeed surpasses the standards set in those cases. This Court recognises that there is substance in the complaint about a failure to engage fully with individual points. To take but two examples, the Court does not purport to resolve the conflict between "I heard that" and "I heard him say" relating to threats to John Dillon and his mother. Neither does the Court make any observations about the attitude of Anthony "Noddy" McCarthy when this subject was raised with him, which is to say that he sees no difference. Again, the trial court did not make any particular observation about the fact that Mr. Anthony "Noddy" McCarthy said that he had read a piece on teletext about an individual being shot in the leg and that having read that on the TV screen he had a conversation with Wayne Dundon which involved Wayne Dundon rejecting the suggestion that the victim of the shooting had merely been shot in the leg and instead conveying the information that the individual in question had been shot dead. However, while a counsel of perfection might see the trial court engaged in such an exercise in respect of each and every point raised, this Court does not believe that that was required. What the written judgment must make clear is the basis on which the Court approached its task. So far as the critical witness Anthony "Noddy" McCarthy is concerned, the Court summarised his evidence, referred in considerable detail to the various challenges to his evidence, warned itself about the dangers of convicting on corroborated evidence but concluded:

"Anthony McCarthy is in a somewhat different position [from Gareth Collins, April Collins and Lisa Collins]. There is no evidence that he had any direct part in any conflict between the Collins family and the Dundons. Although he attempted to make contact with the gardaí at around the same time as most of the others, he did not in fact make a statement until August, 2013, four and a half years after the events in question and after Wayne Dundon had been charged with the offence before the Court.

The Court finds that the need for caution in respect of his evidence arises from the fact that he is a person who may be described as having nothing to lose, and perhaps something to gain, from giving untruthful evidence. It is further noted that he has shown himself, by his behaviour in court, to be a person who would take risks for the sake of what must, at best, be considered an ill-judged prank."

45. Later, the trial court said it had considered very carefully the evidence of Anthony McCarthy, adding:

"The Court repeats that it is aware of the dangers of convicting Wayne Dundon on the uncorroborated evidence of Anthony McCarthy and accepts that there is no corroboration in the sense that there is no independent evidence implicating Wayne Dundon in the offence. Nevertheless it accepted the truth of Anthony McCarthy's evidence... The Court places significant weight on the evidence of Anthony McCarthy as to the gesture of Wayne Dundon pointing to his wrist. This is a gesture that, that in the view of the Court, does not require an actual watch to have meaning."

The Court found that it was not a reasonable possibility that Steve Collins and Anthony McCarthy independently fabricated evidence of the gesture.

46. In truth, anyone reading the judgment would be left in no doubt about the basis on which the trial court approached the case against Wayne Dundon and in particular how they approached the evidence of Anthony "Noddy" McCarthy. Some may disagree with the approach and obviously Wayne Dundon is very critical indeed. As already acknowledged, other tribunals of fact might have reached different conclusions. However, the conclusion reached by the Special Criminal Court was one that was open to it and the Court is satisfied that the outcome is not called into question by any deficiency of reasons. Mr. Wayne Dundon is well aware of how and why he was convicted. He was convicted because the trial court decided to believe and to act upon the testimony of a witness

that he said should not have been believed.

47. However, the appellant, Mr. Dundon, also says that the case should never have gotten past the direction stage. He says that the garda investigation was so fundamentally flawed that it meant there could never be a fair trial. This appellant has many criticisms of the garda performance but it must be said that most of these relate to the garda interaction with Gareth Collins. Of particular significance, he says, is how the gardaí dealt with, or rather failed to deal with, the fact that Mr. Collins had implicated Wayne Dundon in the murder of Brian Fitzgerald and had apparently assigned to him a role that he could not have performed. The Special Criminal Court, with considerable restraint it might be thought, described the garda evidence in relation to this issue as "unsatisfactory". However, in a situation where the Special Criminal Court did not place any reliance on the evidence of Mr. Collins, this Court does not see the criticisms as having any real relevance to the case that was ultimately considered against Mr. Dundon and which ultimately saw him convicted. In coming to that view the Court is not at all ignoring the central plank of the appellant's argument that the Special Criminal Court fell into error in regarding its rejection of the evidence of Gareth Collins as an essentially neutral factor and in failing to proceed further and conclude that his evidence was positively false. This Court, however, does not believe that such criticisms as might be made of the garda investigation could ever see a case based on the evidence of Anthony "Noddy" McCarthy stopped at the direction stage. Mr. McCarthy gave his evidence, was challenged in respect of it but did not resile from his story. In those circumstances, it was quintessentially for the designated tribunal of fact to decide whether they believed him and whether they were prepared to convict on the basis of his evidence.

48. In summary, the Court has considered all of the arguments that have been advanced on behalf of Wayne Dundon in the course of both the very detailed written submissions and oral argument. However, the Court has not been persuaded to uphold any ground of appeal. Accordingly, the appeal of Mr. Dundon is dismissed.

The Nathan Killeen Appeal

49. The background facts relevant to Mr. Killeen's alleged involvement in the murder of Mr. Roy Collins and which culminated with his conviction for that murder by the Special Criminal Court on the 15th July, 2014, are, in general terms, set out in the early paragraphs of this judgment. The Court will endeavour to repeat them only to the extent necessary to contextualise the issues required to be considered in Mr. Killeen's appeal.

50. The prosecution case against Mr. Killeen is that he drove the killer (James Dillon) to and from the murder location. CCTV established that Mr. Dillon and Mr. Killeen were together at Roxboro Shopping Centre Post Office and in the Steering Wheel public house in the area close to Coin Castle Amusements shortly prior to the murder. While in the post office at 11.07 a.m., Mr. Killeen was seen to be wearing a hoodie with a light grey body and hood, and with the sleeves in darker grey with white stripes, and underneath that garment another hoodie coloured dark grey with thin black stripes. Mr. Killeen left the post office at 11.13 a.m. Shortly afterwards, a man in similar dress was seen entering the premises of the Steering Wheel bar and leaving two minutes later. At more or less the same time, another man was seen entering and leaving the Coin Castle Amusements premises. Approximately forty minutes later, at 11.54 a.m., a black Mercedes was seen travelling on Childers Road towards the shopping centre.

51. CCTV footage showed, and evidence was given by witnesses, of the departure at speed from the car park at Coin Castle Amusements of an 06 registered Mercedes car. It glanced off a number of other vehicles as it left. A similar car was seen driving towards Childers Road at a few minutes past twelve noon. The driver was described as wearing a black hoodie with the hood up. Shortly after noon, an 06 registered Mercedes was found engulfed in flames in the nearby Mill Lane area. At about 12.20 p.m., gardaí in a patrol car at Hyde Road saw two men walking in the direction of Garryglass Avenue. One of them was recognised as Mr. Killeen. As the garda car drew up beside them the men ran, and Mr. Killeen jumped over a wall into the garden of No. 1 Hyde Park. Search warrants were then obtained for numbers 5 and 7 Crecora Avenue because of the gardaí's suspicion that Mr. Killeen was in one or the other. Mr. Killeen was found in the attic of number five whereupon he was arrested.

52. Mr. Killeen's grounds of appeal are wide ranging and cover a number of aspects of the trial and the Court's judgment. In Mr. Killeen's written submissions the grounds are grouped under seven headings, and at the opening of the hearing of this appeal, counsel for Mr. Killeen identified the first three as being the areas on which he would concentrate his oral submissions. While this Court has endeavoured to discuss and analyse these three areas separately, it is the case that there is a considerable degree of overlap as between them. The seven grounds are as follows:-

- (a) Insufficient reasons: It is alleged that the trial court gave insufficient reasons for its various decisions, and, in particular for its decisions to convict. Furthermore, there was no rational or logical basis for the findings.
- (b) The forensic evidence did not support the findings of the learned trial judge and were not in accordance with the law.
- (c) Gang associates' evidence was not subjected to careful scrutiny and should have been excluded from consideration or rejected as being incapable of belief.
- (d) The exclusion of evidence arising from the series of warrants was refused despite applications *inter alia* on the grounds that the evidence was procured in breach of constitutional rights, otherwise than in accordance with the law and where it was necessary to discourage the conduct adopted by the gardaí.
- (e) The exclusion of the evidence arising from DNA in circumstances where the swab was allegedly taken by consent on a previous occasion when Mr. Killeen was detained for another offence and where he was not informed that the evidence could be used for any other prosecution at any time in the future.
- (f) The exclusion of the evidence arising from the seizure of the appellant's clothing was refused despite the fact that no statutory power was invoked and the appellant's consent was not sought.
- (g) Insufficient disclosure and excessive additional evidence throughout the trial rendered the trial unsatisfactory and unfair and the verdict unsafe.

General

53. As indicated earlier, Mr. Gareth Collins gave evidence implicating both Mr. Dundon and Mr. Killeen in the murder. Essentially, his evidence, *inter alia*, was that on the morning of the murder, the 9th April, 2009, (between 9.30 a.m. and 10.15 a.m.) he was awoken by his sister and advised that Mr. Killeen and Mr. Dillon were looking for him. He spoke to them in the front garden of the house, No. 7 Crecora Avenue. He gave evidence of being pressured, initially by Mr. Killeen in person, and then by Mr. Dundon on a mobile phone, to

drive Mr. Killeen to the Steering Wheel public house where Mr. Killeen would kill Mr. Collins. Mr. Anthony "Noddy" McCarthy, who was then in prison with Mr. Dundon, claimed to have overheard Mr. Dundon engage in this phone conversation. He said that when he persisted in refusing to assist them, Mr. Killen and Mr. Dillon then left the house without him.

54. Christopher McCarthy (a brother of Anthony "Noddy" McCarthy), and Lisa Collins lived together at 7 Crecora Avenue. Mr. McCarthy's evidence was that on the morning of the 9th April, 2009, Mr. Killeen and Mr. Dillon called to No. 7 looking for Gareth Collins, who was also in the house. Mr. McCarthy said that Mr. Collins and Mr. Killeen were engaged in a conversation in the corner of the garden when he saw Mr. Killeen handing Mr. Collins a mobile phone and he then witnessed Mr. Collins engaged in speaking on the phone. At the time he, Mr. McCarthy, was in conversation with Mr. Dillon. After Mr. Killeen and Mr. Dillon left No. 7, he found Lisa Collins to be "upset in herself a bit". Mr. McCarthy also gave evidence that later in the day he saw Mr. Killeen and Mr. Dillon walking towards Hyde Park, and he described how they ran off at the appearance of an approaching garda car. He described how one of them jumped over the wall of No. 5 Crecora Avenue. He believed the other jumped over the wall of No. 7 Crecora Avenue.

55. Mr. Collins' evidence was extensively challenged. That evidence was considered in detail in the course of the trial court's judgment, and its import is summarised earlier in this judgment. It was ultimately rejected as not meeting "the standard of being capable of belief", and of not being reliable.

Insufficient reasons

56. It is contended on behalf of Mr. Killeen that the trial court gave insufficient reasons for its various decisions and particularly its decision to convict and furthermore, that there was no rational or logical basis for its findings.

57. The prosecution case against Mr. Killeen rested upon the evidence of Christopher McCarthy, Lisa McCarthy, Mr. Doyle, Lisa Collins, garda evidence, CCTV footage and forensic evidence. The trial court having analysed that evidence in considerable detail proceeded to summarise the prosecution case against Mr. Killeen as follows:-

"In the absence of any reliance on Gareth Collins, the case against Nathan Killeen is based on the evidence of his movements, the evidence of Christopher McCarthy and Lisa McCarthy that Nathan Killeen and James Dillon were present together in their garden for some period of time; the evidence of Lisa Collins as to what Nathan Killeen did and said when he returned at a later stage, and the forensic evidence. The Court repeats to itself the warning that the evidence of Lisa Collins and Christopher McCarthy must be subjected to a very high level of scrutiny and must be corroborated. The following facts have been established beyond reasonable doubt by the combination of the CCTV footage, the garda evidence and the admissions made by Nathan Killeen.

Nathan Killeen was with James Dillon for a period of time during the earlier part of the morning in the Post Office, around the area in front of the Coin Castle and the Steering Wheel and in a taxi. He was in the post office between 11.07 and 11.13. Immediately afterwards he went into the Steering Wheel for about two minutes at about 11.15, while another man went into the Coin Castle for the same length of time. Nathan Killeen and James Dillon then took a taxi to Crecora Avenue stopping briefly at Hyde Road.

The description of the driver of the Mercedes giving by Mr. Doyle is in the view of the Court consistent with the appearance of Nathan Killeen as seen on the CCTV footage from that day.

Nathan Killeen was with James Dillon very shortly after the murder, when the pair were seen by the gardaí and ran from them.

The forensic evidence establishes the following matters:-

- The evidence that James Dillon was present in the Coin Castle when the fatal shot was fired is "extremely strong".
- There was firearm residue on the track suit bottoms worn by Nathan Killeen on the day.
- There was also firearm residue present on the gloves found in the garden of no. 3.
- DNA matching Nathan Killeen's profile was found on the hat found with the gloves.
- DNA on the gloves contained an incomplete profile, all the elements of which were also present in his DNA.

58. The trial court was further satisfied that the presence of Mr. Killeen's DNA on the two hoodies found in a wash basket corroborated the evidence of Lisa Collins that he removed the outer hoodie seen in the post office footage and continued to wear the dark hoodie with the thin dark stripes. The quantity of DNA present on the wash basket hoodies is not such as could be explained by transfer from some other unidentified item in the basket. The trial court therefore found that there was corroboration for her evidence that Mr. Killeen told her that he was going to shoot Steve Collins and accepted that evidence.

59. It is submitted on behalf of Mr. Killeen that the trial court's judgment ought to have dealt with all of the crucial issues in the trial, but failed to do so. In particular, it is argued that the judgment does not reach a conclusion in relation to the collusion issue, and that it is insufficient to merely recite certain facts and evidence but fail to make a determination in relation thereto. In this respect, reliance is placed on the decisions in *Mallak v. The Minister for Justice* [2012] 3 I.R. 297 and *O'Mahoney v. Ballagh and the DPP* [2002] 2 I.R. 410.

60. *Mallak* and *O'Mahoney* both deal with the judicial requirement to give reasons for decisions. In *Mallak*, for example, Fennelly J. states (at para 45):-

"Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons."

61. Particular emphasis is placed on behalf of Mr. Killeen on the suggested failure of the trial court to give reasons in respect of findings made relating to the evidence of Lisa Collins. In that regard five main points are highlighted by Mr. Killeen's counsel as being matters which were not sufficiently dealt with in the course of the trial court's judgment. They are:-

- (1) Did Lisa Collins lie on oath and if so does it matter, and if she did, did she lie in relation to important matters?

(2) Was Lisa Collins involved in criminal activity? Did she have effective immunity? Was she disinterested in this case?

(3) Did Lisa Collins collude with others to make a statement to the gardai? If so, does it matter? What is the nature of any such collusion?

(4) Lisa Collins alleged that she saw Mr. Killeen running and then jumping over a wall. In evidence she said she could not have seen it. This raises the issue of reliability in relation to her evidence.

(5) The communications between garda witnesses and Lisa Collins and others.

62. In its judgment, the trial court set out in considerable detail its summary of the evidence of Lisa Collins at pp. 27 to 30 inclusive of the transcript. In that summary, it referred to matters including the witnessing by Lisa Collins of contact between Mr. Killeen and Mr. Dillon on the one hand, and Mr. Collins on the other hand; and her recognising the voice of Mr. Wayne Dundon when he spoke on the telephone to Gareth Collins, evidence which the trial court characterised as “peripheral” as she did not claim that she heard anything that was said.

63. The trial court dealt with the changing and washing of clothes, Ms. Collins being interviewed by the gardaí, how she saw Mr. Killeen and Mr. Dillon running and Mr. Killeen jumping over a wall. The Court also summarised in some detail evidence relating to conversations between Lisa Collins on the one hand and Jimmy Collins, Alice Collins and Christopher McCarthy on the other hand.

64. It is contended that the trial court failed to adequately deal with the issue of whether or not there was collusion between Lisa Collins and the gardaí. This is a reference to the suggestion (by defence counsel at the trial) that Detective Superintendent Browne told Lisa Collins what to put into her statement. However, it is clear that in its judgment, the trial court accepted the evidence of both witnesses that such had not occurred. The trial court was entitled to so find on that evidence.

65. The trial court had the opportunity to hear evidence first hand from the various witnesses, and to assess the demeanour of those witnesses as they were examined and cross examined in considerable detail. It has long since been established that an appellate court should be slow to reverse a conclusion of a trial judge in relation to evidence given in the course of a trial. It is of course permissible for an appellate court to correct a decision of a trial court which was based on error of law or logic, or a “demonstrable misapprehension of known fact”. (See *DPP v. Ward* (Unreported, Court of Criminal Appeal, 22 March, 2002). A similar view was taken by the Supreme Court in *DPP v. McKevitt* [2009] 1 I.R. 525.

66. Similar views were also expressed by this Court in its decision in *DPP v. Dundon and Another* [2016] IECA 156. Birmingham J., in delivering the Court’s judgment, stated:

“So far as the substantive appeal by Wayne Dundon is concerned, it is based on a contention that the main prosecution witnesses in the case, Ms. Alice Collins and Ms. Bianca Collins and also Ms. April Collins, in relation to counts 9 and 10 were unreliable to the extent that the Court should have directed an acquittal. Understandably in that situation the prosecution again categorises this as an invitation to this Court to form a different view on the facts than the trial court did and submits that this is impermissible having regard to decisions such as *People (DPP) v. Madden*. The Court would simply observe that it has on a number of occasions recently reiterated the continuing importance of that line of jurisprudence. (See by way of example *People (DPP) v. Campion* [2015] IECA 190).”

67. Submissions made on behalf of Mr. Killeen saw the trial court judgment criticised for what is contended was a failure to address particular issues relating to the credibility of Lisa Collins and Christopher McCarthy. However, it is not necessary that all relevant issues relating to prosecution witnesses be responded to specifically, or dealt with in detail in the course of a judgment by the Special Criminal Court. In *DPP v. Gilligan (No. 2)* [2006] 1 I.R. 107, the Supreme Court referred to this exact issue when dealing with a challenge to an aspect of the judgment of the Special Criminal Court in that case, when it stated:-

“...The decision might perhaps be criticised on the basis that it did not deal with every individual piece of evidence which was before the court. However, this court does not feel that that approach would be justified. It must be remembered that this was a hearing before a non-jury court which had a dual function of stating the law and of determining facts. The decision in the present case set out the relevant legal principles clearly and in some detail, as it was bound to do, and indeed the accused does not seriously contest the legal principles set out. In relation to its other function, as a fact finding tribunal, the position is somewhat different. If this had been a trial before a jury, this court would have no indication of how the jury reached its verdict or of what witnesses it considered to be reliable and credible. In the present case the court was looking at the evidence of witnesses which it had before it for considerable periods of time, it was able to examine the demeanour of those witnesses and to estimate their reliability based on their own evidence and on the surrounding evidence. This is what the court did, and expressed its views of the reliability of witnesses with some clarity. The court then made findings of fact on a number of matters relying both on its assessment of the witnesses and on the surrounding facts which were proved by others. ...”

68. A judgment of the Special Criminal Court at the conclusion of a trial should provide a summary of the facts and a summary of the reasons for the Court’s conclusions. It is not necessary for the Court to provide a detailed account and analysis of all evidence given, and covering every aspect of that evidence. To do so, more particularly in a lengthy trial as this one was, would result in an unnecessarily lengthy and ultimately unhelpful judgment.

69. It is not the function of an appellate court to revisit and retry every piece of evidence. In *DPP v. Madden* [1977] 1 I.R. 336, O’Higgins C.J., in giving the judgment of the Court, said:-

“It is of importance to emphasise that the function of this Court, as already outlined, is not itself to reach a conclusion on the facts but rather to ascertain whether the conclusion of fact reached by the trial court (the Special Criminal Court) was justified having regard to the onus of proof which the law imposes upon the prosecution.”

70. O’Higgins C.J. later in the judgment in relation to a co-accused said:-

“Once it was open to the Special Criminal Court as a fact-finding tribunal to reach that conclusion on the evidence, then the conviction of O’Donnell was properly arrived at by that court and his application for leave to appeal must be dismissed.”

The forensic evidence

71. It is contended on behalf of Mr. Killeen that the forensic evidence provided in the course of the trial did not support the findings relating to it made by the trial court.

72. The Court heard evidence that firearm residue was found on certain items of clothing associated with Mr. Killeen. DNA evidence also purported to establish a link between certain items of clothing and Mr. Killeen.

73. It was submitted on behalf of Mr. Killeen that the firearm residue did not of itself prove any connection between Mr. Killeen and the firearm used to murder Mr. Collins. The Court found evidence that Mr. Killeen was in close contact with a source of firearm residue that morning to be compelling and was satisfied that contact occurred as he drove James Dillon from the scene of the shooting. It rejected as not being reasonably possible the contention, as suggested on behalf of Mr. Killeen, that the gun shot particles could have either lasted on his clothing from a trip to Prague some weeks earlier in the course of which he handled weapons on a visit to a firing range, or that it was innocently transferred from James Dillon as they walked along the road, or that it had been transferred to him by gardaí in the course of close contact between them and Mr. Killeen in the period shortly after his arrest.

74. Forensic testing was undertaken in relation to seven items of clothing associated with, or possibly associated with Mr. Killeen, in addition to three gloves. Firearm residue was found on all but two items of clothing, and on all three gloves. Dealing separately with the various items, the position can be summarised as follows:-

(i) A dark grey hoodie with thin black stripes was worn by Mr. Killeen at the time of his arrest. Firearm residue was found on the cuffs of this garment.

(ii) A pair of black track suit bottoms which were worn by Mr. Killeen at the time of his arrest was found to have evidence of firearm residue on its outer surface.

(iii) A black and grey hoodie found in a child's bedroom in no. 5 Crecora Avenue was found to contain firearm residue on its cuffs. A glove tucked into the pocket of that garment was also found to have firearm residue present. This hoodie resembled in appearance the outer garment being worn by Mr. Killeen as seen on CCTV footage taken at the post office at 11.07 on the morning of the murder.

(iv) Two further hoodies were found in a wash basket in the kitchen of No. 7 Crecora Avenue. No firearm residue was detected on either.

(v) A black hat and scarf found by the gardaí in the garden of no. 3 Crecora Avenue were found to contain firearm residue.

(vi) Three gloves were also found to contain firearm residue. One was in the pocket of the black grey hoodie found in the child's bedroom in no. 5, while a pair of gloves were found in the garden of no. 3 with the black hat and scarf.

75. In the course of its judgment, the trial court, having considered the evidence of two experts, Ms. Fleming and Dr. Hannigan, summarised their understanding of that evidence in the following terms:

"When a firearm is discharged it is to be expected that some particles will be deposited on the person holding it and on a person standing nearby. Particles on the hands can be lost by washing or wiping. In the absence of such a mechanism, they might persist for some time but it would not be expected that they would be found more than four hours after the discharge. Particles may persist for a longer period on clothing but will be lost through activity. If the clothing is worn it would not be expected that residue would be detected after twenty hours, but particles can last indefinitely if the item of clothing is undisturbed. Residue can be transferred by contact.

In this case, all of the gardaí who were in physical contact with Nathan Killeen on the day of his arrest have given evidence in relation to their contact with firearms, the effect of which is to rule out the possibility that firearm residue was transferred to him from their clothing.

The conclusions drawn by the two forensic scientists involved in this aspect, Ms. Brigid Fleming and Dr. Thomas Hennigan, are as follows:-

• There was a slight support for the view that the navy and white top taken from James Dillon had been in contact with a source of firearm residue such as that from the scene, but forces other than firearm residue could not be ruled out.

• There was extremely strong support for the suggestion that the inside of the pockets of James Dillon's track suit bottoms had been in contact with a source of firearm residue.

• There was slight support for the view that the hooded top taken from Nathan Killeen has been in contact with a source of firearm residue such as that from the scene but sources other than firearm residue could not be ruled out.

• The residue on Nathan Killeen's track suit bottoms provided moderately strong support for the suggesting that Nathan Killeen was present when Roy Collins was shot rather than the suggestion that he was not present.

• There was support for the view that the black and grey hoodie found in the child's bedroom in no. 5, and the glove found in its pocket, had been in contact with a source of firearm residue such as that from the scene of the shooting.

• The residue on the hat, scarf and gloves, specifically the gloves, provided strong support for the suggestion that the wearer was present when Roy Collins was shot rather than the suggestion that he was not present."

76. Later in its judgment, the trial court made the following finding in relation to the firearm residue and Mr. Killeen:-

"The Court finds that the evidence that Nathan Killeen was in close contact with a source of firearm residue that morning is compelling and that in the circumstances the contact occurred as he drove James Dillon from the scene of the shooting. It rejects as not being reasonably possible the contention that the gun shot particles could have either lasted on his clothing from the Prague trip some weeks earlier or had been innocently transferred from James Dillon as they walked along the road."

77. As already indicated, the trial court earlier excluded the possibility that firearm residue had transferred to Mr. Killeen from the gardaí with whom he was in contact at the time of his arrest and shortly thereafter.

78. It was argued on behalf of the appellant that "the findings of the trial court in regard to gun shot residue are not explained and are inexplicable by reference to the evidence and the applicable law as to reasonable possibilities".

79. This Court has read the evidence of the two forensic experts, and the extent to which that evidence was challenged or questioned on behalf of Mr. Killeen. It is the Court's view that the learned trial court, who had the benefit of hearing the evidence first hand, was entitled to make the findings it did make in relation to it. It was undoubtedly open to the learned trial court to reach the conclusions it did in relation to the firearm residue evidence.

80. There was also relevant DNA evidence in relation to certain items of clothing. Forensic evidence was given in the course of the trial by Mr. Burrington relating to two hoodies taken from the wash basket in the kitchen of no.7 Crecora Avenue, a pair of runners taken from the washing machine in the same kitchen, a hoodie found in a child's bedroom in no.5 Crecora Avenue, a glove in a pocket of the hoodie, and a pair of runners taken from the same bedroom. DNA samples from these items were compared with those of Mr. Killeen and Mr. Dillon.

81. Another expert witness, Dr. Connolly, gave evidence that he generated a DNA profile from a sample taken from the hat found with the scarf and gloves in the back garden of no. 3 Crecora Avenue, and found that it matched the profile of Mr. Killeen. There was less conclusive relevant DNA evidence found in relation to the gloves.

82. The trial court accepted this forensic evidence. It said, *inter alia*:-

"..The quantity of DNA present on the wash basket hoodies, and its location, is not such as could be explained by transfer from some other unidentified item in the basket. .."

83. Again, as in the issue relating to the firearm residue, expert evidence was heard in relation to DNA in respect of items of clothing possibly worn by Mr. Killeen on the morning in question and is accepted that evidence established a link with Mr. Killeen, particularly in relation to the hoodies found in the wash basket.

84. In the course of its judgment, the trial court misstated evidence, when it said:-

"Counsel for Nathan Killeen put it to Lisa Collins that Nathan Killeen had never left clothes there to be washed and did not do so that morning. She agreed that he had not done so before but insisted that he did on that day."

85. In fact, the questions put to Lisa Collins by Mr. O'Leadhá, S.C. for Mr. Killeen, and the answers from Lisa Collins were as follows:-

"Q. And in relation to that allegation, just to be clear, that Nathan Killeen's instructions are that that is not true about that morning, and that he didn't leave clothes in that morning, he denies that he was in there that morning, do you understand that question?

A. He was there that morning and he did leave clothes that morning.

Q. ..., I'm not putting the proposition that he never left clothes there. I am putting the proposition that there was nothing unusual in him being there and he may well have left clothes there to be washed on other occasions. I am not disputing that.

A. I never washed clothes belonging to him before.

Q. Well, I mean you said in your statement, "I use usually do the washing for the boys so I put Nathan and James' clothes into the washing machine. There was track suits and hoodies there. I remember there was a pair of Nike runners there too. I put them into the washing machine too. That was normal enough?"

A. That's because they left them there that morning so they were there, I put them into the washing machine."

86. While the above quoted extract of the questioning and evidence of Lisa Collins establishes that the judgment of the trial court misstated what had actually been said, this error is of no great significance. What is relevant, and which was undoubtedly so for the trial court, is that on the morning in question it was Lisa Collins' clear recollection that on the particular day, being the day of the murder, Mr. Killeen left items of clothing in her house and she put those items of clothing into her washing machine.

87. Taken in its entirety, the forensic evidence relating to firearm residue and DNA constituted relatively strong evidence of proximity to a firearm recently discharged and clothing of Mr. Killeen deposited for washing on the date of the murder. The learned trial court was entitled to reach the conclusion it did in respect of this evidence.

Gang associates' evidence

88. The third matter highlighted on behalf of the appellant relates to what is described as "gang associates evidence". The learned trial court is criticised on the following basis:-

(i) It did not find that Lisa Collins and Christopher McCarthy should be treated as accomplices;

(ii) it did not find that the evidence of Lisa Collins and Anthony McCarthy ought not to be relied on;

(iii) it ought not have held that the finding of the appellant's DNA on the two hoodies found in no. 5 Crecora Avenue amounted to corroboration of Lisa Collins' evidence that the appellant had told her that he was going to shoot the deceased.

89. Lisa Collins gave evidence that she had seen the appellant running and jumping over a wall. She gave inconsistent evidence as to the wall in question, and which was, in turn, inconsistent with the evidence given by one of the pursuing gardaí as to the wall actually jumped over by Mr. Killeen. It is also contended that Lisa Collins gave conflicting evidence as to where she witnessed the conversation taking place between Gareth Collins and Mr. Killeen on the morning of the murder. She said she had forgotten whether or

not Mr. Collins had told her after the telephone call with Mr. Dundon that he had been asked to take part in the murder. Issues were also raised in relation to certain comments and references made by Lisa Collins in relation to making statements on the subject of Mr. Killeen being imprisoned. Issues were also raised in relation to the extent to which Lisa Collins may have been prompted as to what to put into her statement by Detective Superintendent Browne.

90. In its judgment, and particularly in that section of it dealing specifically with Mr. Killeen, the trial court expresses its view that the evidence against Mr. Killeen is that relating to his movements on the date in question, and also the evidence of Christopher McCarthy and Lisa McCarthy. This was the evidence concerning the presence of Mr. Killeen and Mr. Dillon in the McCarthy's garden at No. 7 Crecora Avenue on the morning of the date in question, and what transpired there. Also relevant, in the trial court's view, was the evidence of Lisa Collins to what Mr. Killeen did on his return later in the day.

91. Arguably, given the absence of a jury, whether or not Lisa Collins and Christopher McCarthy (or either of them) were accomplices as a matter of law and ought to have been treated as such by the trial court is academic, as it is abundantly clear that their evidence was treated and considered with particular caution, indeed scepticism. The trial court did in fact warn itself of the dangers of relying on the evidence of Lisa Collins and Christopher McCarthy.

92. That degree of caution is evidenced from the following extracts of the court's judgment:-

"Each of the civilian witnesses named above has, on the face of it, significant credibility issues. Each has either been involved in a serious criminal activity or is, or has been, closely associated with persons involved in such activity. It is also apparent that until relatively recent times, they were on personal terms with the accused, but fell out with them. Counsel for each of the accused has vigorously challenged their motivation and truthfulness in giving testimony against the accused. In order to assess their reliability in this case it is therefore necessary to examine their evidence in considerable detail."

93. Lisa Collins and Christopher McCarthy were two of the witnesses referred to. The trial court proceeded to examine their evidence in considerable detail.

94. The trial court also said:-

"The Court considers that the most likely potential motivation affecting Gareth Collins, April Collins and Lisa Collins was fear of the Dundon brothers, as a result of the events outlined at the start of this judgment, and consequently a desire to get them imprisoned for as long as possible. There can be no doubt as to the reality of this fear. However, it is the duty of the Court to reject untruthful evidence and/or unreliable evidence and to act only on such evidence as it accepts beyond reasonable doubt to be true.

In the case of Christopher McCarthy, the need for scrutiny arises because of his relationship with Lisa Collins and because of her fears. The suggestion that he might have been able to use his status as witness to influence a proposed prison transfer of his brother does not seem to be borne out."

95. And:-

"Although it may not be required as a matter of law, the Court considers that in the circumstances the risks associated with the evidence of Lisa Collins and Anthony McCarthy are sufficiently grave to warrant a warning that it would be dangerous to convict on their evidence in the absence of corroboration. The Court accordingly gives itself that warning."

96. And:-

"The Court repeats to itself the warning that the evidence of Lisa Collins and Christopher McCarthy must be subjected to a very high level of scrutiny and must be corroborated."

97. As to the narrower issue as to whether in fact Lisa Collins and Anthony McCarthy were accomplices, this Court is of the view that they were not. The meaning of the term "accomplice" was addressed by Kennedy C.J. in *AG v. Linehan* [1929] I.R. 19, at 23, when he said:-

"The meaning of the term "accomplice" in the rule was discussed in argument. We do not think that in the case of a rule of caution concerned with the credit of accomplice witnesses and the weight of their uncorroborated evidence, a narrow or precise definition of "accomplice" should be, or indeed can be, laid down. We think however, that a person implicated either as principal or as accessory in the crime under investigation is an "accomplice" within the rule, though the degree and gravity of such complicity may vary, and in as much as the extent of the effect of such complicity upon the credit of the witness or the weight of his uncorroborated testimony will vary accordingly, so should the degree and gravity of the warning be measured."

98. In *A.G. v. Carney and Another* [1955] I.R. 324 at 345, O'Byrne J., adopting the definition in *Linehan* said that:-

"...a very slight degree of complicity, either as principal or accessory, in the crime charged is sufficient to render a person an accomplice for the purpose of the rule requiring that the jury should be warned of the danger of acting on his uncorroborated testimony."

99. This Court does not take issue with the following observation in the trial court's judgment:-

"The Court does not consider that these persons were accomplices of the accused within the meaning of the legal principle that it is dangerous to convict on the uncorroborated evidence of accomplices. The rationale of that principle is that accomplices are, by definition, complicit in the crime. They will be tempted to minimise their own roles in the crime and exaggerate that of the accused, and their evidence may therefore be untrustworthy. That particular issue does not, on the evidence, arise here. It may be that each of these witnesses could be charged with the offence of withholding information, but on the facts of this case that could only be based on a finding that the evidence that they have now given is true in the first place, and that they were therefore not involved in the actual offence."

100. Specifically in relation to the evidence of Lisa Collins that Mr. Killeen removed the outer hoodie seen in the Post Office CCTV footage and continued to wear the hoodie with the thin dark stripes is corroborated by Mr. Killeen's DNA on the two hoodies found in

the wash basket. The Court also found there to exist corroboration for her evidence that Mr. Killeen had told her that he was going to shoot Steve Collins and accepted that evidence.

101. The trial court's close scrutiny of the evidence of Christopher McCarthy arose from his relationship with Lisa Collins. The court found that "the suggestion that he might have been able to use his status as a witness to influence a proposed prison transfer of his brother does not seem to be borne out".

102. Mr. McCarthy was arrested on the 24th November, 2011, on suspicion of withholding information in respect of the murder. Although he denied lying to the gardaí, it is nevertheless evidence that there were areas of inconsistency in relation to his evidence, particularly in relation to what he told the gardaí. He denied trying to do a deal with the gardaí in the hope that his brother, Anthony "Noddy" McCarthy, would not be transferred to another prison.

The remaining grounds

103. As already stated, Mr. O'Lideadha, at the commencement of the oral hearing of Mr. Killeen's appeal, advised the Court that oral submissions would concentrate on the first three grounds of appeal, and that he would rely on his written submissions in relation to the remaining grounds of appeal.

104. The Court has also had the benefit of written submissions made on behalf of the respondent in relation to these other grounds of appeal. The Court has considered both Mr. Killeen's written submissions and the respondent's written submissions in relation thereto and is satisfied that these further grounds of appeal are without merit.

Conclusions

105. In summary, the Court has not been persuaded that the conviction of either appellant is unsafe, or that the trial of either appellant was unsatisfactory, and accordingly the Court dismisses both appeals.