



THE COURT OF APPEAL

Neutral Citation: [2024] IECA 311

Appeal No: 214/13

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

V

JOHN DUNDON

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 5th of December 2024.

Introduction

1. Before the Court is an appeal by the appellant against his conviction by the Special Criminal Court, on the 13th of August 2013, and following a thirteen-day trial, of the murder of Shane Geoghegan on the 9th of November 2008 at Clonmore, Kilteragh, Dooradoyle, Limerick.
2. Also before the Court is a motion filed by the appellant on the 31st of March 2023, seeking an Order pursuant to Order 86, Rule 10 (1) and (2) seeking liberty to add an additional ground of appeal to the twelve grounds of appeal originally filed on his behalf on the 14th of September 2013. The appellant having changed his legal team, it was then intimated in emailed correspondence addressed to this Court from the appellant's solicitors dated the 12th of April 2024 that the appeal would be confined to original grounds of appeal no's 1 to 8 inclusive, plus the proposed additional ground (if permitted to be argued), and that original grounds of appeal no's 9, 10, 11 and 12 would no longer be pursued.
3. Then, in exchanges with members of the Court at the opening of the appeal hearing on the 22nd of April 2024, senior counsel for the appellant stated that the only matters that would in fact be pursued at the appeal hearing was the motion seeking to add a new ground of appeal and (contingent on that motion being successful) reliance on that proposed new ground to suggest that the trial had been unsatisfactory and that the appellant's conviction should therefore be quashed. It was confirmed that none of the original grounds of appeal were being proceeded with.
4. Accordingly, the appeal hearing proceeded on the basis indicated.

Background to the case

5. We propose for the purposes of this judgment to adopt a summary of evidence relevant to the issues set forth in the submissions of the respondent, which seems to us, following a perusal of the transcript, to be a succinct and fair summary.
6. The prosecution case was that Shane Geoghegan, a 28-year-old man, was shot dead near his home shortly after 1 am on the 9th of November 2008 by Barry Doyle in a case of mistaken identity - the intended target being one John McNamara. The prosecution case was that the killing of John McNamara had been ordered by the appellant. Barry Doyle, who fired the fatal shots, was convicted of the murder of Shane Geoghegan before the trial of the appellant. The prosecution case against the appellant rested largely on the evidence of April Collins, Lisa Collins and Christopher McCarthy, who all proffered testimony implicating the appellant in the commission of the offence. At trial, there was no great dispute over the fact or immediate circumstances of the killing.
7. April Collins gave evidence that she had been going out with the appellant's brother, Ger Dundon, for ten years and that they had three children together. Ger Dundon went to prison in February 2011 and their relationship had subsequently broken down. During examination-in-chief, April Collins said she recalled the time that Shane Geoghegan was murdered and explained that she had been in the appellant's house the night before. The appellant was there, as was the appellant's girlfriend, Ciara Killeen. Also present were Nathan Killeen, Ger Dundon, Lika Casey and Barry Doyle. They were in the sitting room and a conversation took place. April Collins explained what was discussed, as follows-

"John just started talking, saying that he'd John McNamara's whereabouts sussed out the last two days. And he was explaining to Barry Doyle what he looked like, and his times of when he was coming and going and stuff. And he was saying that he'd a gun in the car ready there, everything was sorted, it just needed to be done. And then Nathan Killeen jumped up and said, "You've nothing sorted", and John says, "I do." He said, "The gun and car is ready, it just needs to be done." And he was explaining it to Barry Doyle what John McNamara looked like, and stuff. He was telling him he was a big fella and explaining the details of him. And John Dundon said to Barry Doyle, "The gun is there; you kill him." And he said to Nathan and Lika, "And one of ye are driving, and that's that."

8. April Collins also stated that she had booked a room in the Strand Hotel that night, for herself, Ger Dundon and their children. During cross-examination, she conceded that this was to create an alibi for Ger Dundon. They stayed there a second night. April Collins gave evidence that on the morning of the 9th of November, herself, Ger Dundon and their children travelled to Finnegan's Pub, following a telephone call at around 6.30 am. When they arrived, the appellant and Barry Doyle were already in the carpark. April Collins gave evidence as to the exchanges between the parties in the carpark, as follows:

"Q. And what -- and what transpired there, what happened there?"

A. *We pulled up, and John was very excited in himself, he was saying, "John Mac is dead, we got him." And then he picked up his phone, he goes, "I'm going to ring Philip Collopy now," he said, " and slag him".*

Q. *Now, you needn't tell us what -- even if you heard what Philip Collopy said, you needn't tell us that. But as a result of the phone call to Philip Collopy -- sorry, who phoned Philip Collopy?*

A. *John Dundon.*

Q. *Yes. And after his phone call, what -- what happened after the phone call?*

A. *John started panicking. He was giving out to Barry Doyle because Philip Collopy was telling him that it was the wrong man, that it wasn't John Mac, and John was roaring and shouting at Barry Doyle giving out to him, saying, "You hit the wrong man," and all, and they were panicking, and he said -- he said to Barry, "Are you sure it was him?" And Barry was saying, "It is him, the way you described this man, this is the man I killed." And Barry then started getting frightened of him because he was getting out of control, roaring and screaming. And he said to Ger that they were going to go away for a while."*

9. Lisa Collins gave evidence that she was the older sister of April Collins, and that she had been in a relationship with Christopher McCarthy since she was about 13 years of age. She said that she knew both the appellant and Barry Doyle and that they used to come to her house together in 2008. Lisa Collins confirmed in evidence that she recalled the time that Shane Geoghegan was murdered. She said that a few weeks prior to that, certain discussions had taken place between her, Christopher McCarthy and the appellant, during the course of which the appellant directed her and Christopher to steal a car, which they did-

"Q. *And can you relate these discussions in your house to that event? Was it long before the death of Mr Geoghegan?*

A. *It would have been a couple of weeks before, yes.*

Q. *A couple of weeks. And did John Dundon ask you to do anything?*

A. *He did, yes.*

Q. *What did he ask you to do?*

A. *He told us to get a car.*

Q. *When you say us who do you mean?*

A. *Me and Christopher McCarthy.*

Q. *And what do you mean get a car?*

A. *Steal a car.*

Q. *And did you know why he wanted the car?*

A. *No, I didn't know what he wanted it for.*

Q. *And did you want to steal a car?*

A. *No, I didn't want to do it.*

Q. *So, how did it come about that you well, did you steal a car?*

A. *I was there, yes.*

Q. *You did?*

A. *Yes."*

10. Lisa Collins gave evidence that she and Christopher stole a "big 7-seater car which was blue" on the 16th of October 2008 (further evidence adduced during the trial confirmed that this vehicle was a Renault Espace, stolen from Marie Carew, subsequently used as the getaway vehicle after the murder). She said that the appellant called to her home a few days later and asked to be taken to see the car. On a subsequent date, she and Christopher took the appellant and Barry Doyle to see the car.

11. In examination-in-chief, Lisa Collins also described the night that Shane Geoghegan was murdered. She explained that the telephone rang and, soon after, there was a knock at her door. It was the appellant and Barry Doyle. They came into the house and a conversation took place during the course of which the appellant was laughing and saying that John McNamara was dead-

"A. *When they came into the house we went out to the kitchen and John Dundon was saying that John Mc was dead. He just said that a few times and he was just laughing.*

Q. *Yes. Barry Doyle, what was his humour at the time? Was he saying anything or was he quiet?*

A. *Barry, no, Barry was quiet. He wasn't saying anything.*

Q. *Do you remember what Barry Doyle was wearing?*

A. *Yes, Barry had on new clothes on him when he came in to the house.*

Q. *He had new clothes on him?*

A. *Yes.*

Q. *Did they stay long?*

A. *No, they didn't stay long at all."*

12. Lisa Collins outlined that she later saw a CrimeCall programme on RTÉ, which reconstructed the murder of Shane Geoghegan, and she saw a car "*similar to the car that was used in Shane Geoghegan's murder*", the car she and Christopher had stolen.

13. Christopher McCarthy gave evidence that shortly before the murder of Shane Geoghegan, the appellant ordered him in a threatening way to get a car; he confirmed that he then stole a vehicle for the appellant:

"Q. *All right. And do you remember him saying anything to you?*

A. *No, he threatened me to get a car.*

Q. *All right. Just if I could first of all, before we deal with any question of threat, what was he asking you to do?*

A. *Get him a car.*

Q. *All right. And did you know anything about what this car was for?*

A. *No, I didn't. I didn't know what he was going to use it for, no.*

Q. *All right. And did this happen often?*

A. *A few times he came up, yes.*

Q. *All right. And what was the threat that you mentioned?*

A. *That he'd kill me or kill my girlfriend if I didn't get him a car.*

Q. *All right. And what was your reaction to that?*

A. *Yes, I had to get him a car or*

Q. *All right. And what did you do?*

A. *I drove around and we robbed a car and I gave it to him."*

14. Christopher McCarthy also gave evidence in relation to the appellant's request to see the stolen car, and the subsequent showing of the car to the appellant and Barry Doyle. Christopher McCarthy also described what the appellant said when he called to his home on the night of the 9th of November 2008:

"Q. *And did John Dundon say anything when he came into the house?*

A. *He was saying "Pitchfork is dead, Pitchfork is dead, Pitchfork Mc is dead."*

Q. And do you know who Pitchfork was?

A. I do. I knew who he was on about, yes.

Q. Who is that?

A. John McNamara.

Q. John McNamara. And what was John Dundon's manner like when he was saying this?

A. Kind of excited he was.”.

The proposed Additional Ground of Appeal

15. The ground of appeal which the appellant seeks leave to add to original grounds of appeal, none of which are now being relied upon, is as follows:

“The appellant’s conviction is unsafe because transcripts of, and/or recordings of, telephone conversations between two of the key prosecution witnesses, Christopher McCarthy and Lisa Collins, while Christopher McCarthy was in prison in 2011, were not included in the core disclosure provided to the appellant’s legal team, pursuant to the undertakings given by senior counsel for the prosecution to the Supreme Court on the 25th of June 2013, which said telephone conversations had a bearing on the credibility of the key prosecution witnesses, their antipathy towards Wayne Dundon and the appellant, and their desire to ensure that the Dundons were imprisoned for as long as possible.”.

16. It bears remarking upon that for some reason no parallel motion has been brought seeking the leave of the court to adduce new or fresh evidence (i.e., the transcripts of, and/or recordings of, the alleged telephone conversations between Christopher McCarthy and Lisa Collins, while Christopher McCarthy was in prison in 2011) in support of the proposed additional ground of appeal, were this court to permit it to be argued.

Evidence in Support of the Motion

17. The appellant’s motion was grounded upon the affidavit of his solicitor, Conor Moylan, affirmed on the 31st of March 2023. In his said affidavit, Mr. Moylan sets out a *précis* of the background facts, and specifically of the evidence of April Collins, Lisa Collins and Christopher McCarthy at the trial before the Special Criminal Court.

18. At paragraphs 12 *et seq* of his affidavit he addresses the issue of pre-trial disclosure and says the following:

“12. A novel approach was taken to disclosure in this case. The trial was initially scheduled to commence on the 2nd of June 2013, with the defence applied on the 10th of May 2013 for an adjournment for six months on the basis of the vast amount of disclosure that had been made, some of it shortly before the application for an adjournment.

13. The application to adjourn was refused by the Special Criminal Court on the grounds that April Collins was in threat of her life and the prosecution was anxious to get the case tried as soon as possible.
14. The appellant sought judicial review of the refusal to adjourn, and that application was unsuccessful. I beg to refer to a true copy of the judgment of Mr. Justice Hedigan in that regard, dated 31st of May, 2013 [which he exhibits as "CM4"].
15. As is apparent from the said judgment total disclosure is described as "25,000 pages of documents and 1,266 discs of CCTV footage together with two hard drives and a memory stick."
16. The appellant appealed the judicial review to the Supreme Court and in an *ex-tempore* judgment Denham CJ. (as she then was) ruled as follows on the 25th of June 2013: "*1. Having heard submissions on behalf of the appellant in the notice party the court requested an undertaking from Thomas O'Connell SC, on behalf of the notice party, to disclose to the solicitor for the appellant the relevant documents by close of business on Thursday, 27th June, 2013. To indicate which documents, if any, of the 27,000 sheets supplied or of the CCTV (which have not already been disclosed in the book of evidence, or the April disclosure) were relevant; and the notice party to provide copies of the documents identified as relevant. 2. On the basis of that undertaking being given, the Court would dismiss the appeal, and the trial should proceed.*".
17. I beg to refer to true copies of the said ruling [as exhibit "CM5"].
18. The trial was then due to commence on the 2nd of July 2013, but on the morning the appellant dispensed with his legal team, and suffered some medical issue in his cell over lunchtime. These events are set out under the title "*Preliminary Matters*" in the judgment of the Special Criminal Court dated 13th of August 2013 [which he exhibits as "CM6"].
19. As appears from the said judgment John Devane solicitor came on record for the appellant on the 3rd of July 2013 and instructed Brendan Nix SC and Lawrence Groucher BL. The prosecution opened its case on the 3rd of July 2013 and the trial was adjourned to the 8th of July 2013 to allow the new legal team time to read the book of evidence and the "*relevant*" disclosure selected by the prosecution.
20. Because April Collins was hospitalised for a medical condition the trial did not in fact commence until the 23rd of July 2013, and the appellant was convicted on the 13th of August 2013.
21. The appellant's brother, Wayne Dundon, was tried before the Special Criminal Court in July 2014 in a case entitled *The People (DPP) v. Wayne Dundon and Nathan Killeen* (i.e., "the *Wayne Dundon and Nathan Killeen* case"). The trial concerned the murder of Roy Collins on 9th of April, 2009. Both accused were convicted of the

murder, and I beg to refer to a true copy of the judgment of the Special Criminal Court, dated the 15th of July 2014 [which he exhibits as "CM6"].

22. The principal prosecution witnesses in that trial were Christopher McCarthy, Lisa Collins, April Collins, Lisa and April Collins' brother Gareth Collins, and Christopher McCarthy's brother Anthony McCarthy.
23. The defence in that case had been furnished by way of disclosure transcripts of recorded prison phone call conversations between Christopher McCarthy, Lisa Collins and various other members of the Collins and McCarthy families (see the top of page 21 of the judgment). The phone calls were recorded in April/May, 2011 around the time that the Dundon's were taken into custody on foot of April Collins' allegation of a threat to kill.
24. It is clear from the said phone call conversations that the Collins and McCarthy families bore a large amount of animus towards Nathan Killeen, Wayne Dundon and the appellant. The Special Criminal Court concluded, in the trial of Wayne Dundon, that the transcripts were admissible as tending to show the state of mind of the Collins family in relation to Wayne Dundon. The Special Criminal Court also concluded that a certain number of calls were of potential relevance in an assessment of the motivation and truthfulness of the witnesses in question, and in fact recited excerpts from the transcript in the judgment.
25. I say that as a result of the evidence contained in the transcripts of the phone calls (and other factors relating to the credibility of the witnesses) the Special Criminal Court held that the most likely potential motivation affecting 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 in prison for as long as possible.
26. It further held that, in the case of Christopher McCarthy, the need for scrutiny arose because of his relationship with Lisa Collins and because of her fears. The Special Criminal Court, therefore, felt it necessary to give itself a warning that the evidence of Lisa Collins and Christopher McCarthy must be subjected to a very high level of scrutiny. It also concluded that the evidence of April Collins did not add anything of probative value to the case.
27. I say that, as a result of the aforementioned findings, Nathan Killeen was convicted primarily on the basis of forensic and CCTV evidence and Wayne Dundon was convicted primarily on the basis of the evidence of Anthony McCarthy (who was not a witness in the trial of the appellant).
28. The phone recordings were in existence at the time when core disclosure was made to the representatives of the appellants, and were within the power or procurement of the State. The transcript did not form part of the core disclosure,

notwithstanding that they were relevant to a key issue in the case, i.e. the credibility and motivation of April Collins, Lisa Collins and Christopher McCarthy.

29. I say and believe and am advised that had the aforementioned phone transcripts been disclosed to the defence at the trial of the appellant (as it was at the subsequent trial of Wayne Dundon and Nathan Killeen) then it may have served to decisively undermine the credibility of the evidence given by Christopher McCarthy, Lisa Collins and April Collins.
 30. If the transcripts had been disclosed to the legal team for the appellant they might have had a material and important influence on the result of the trial in the context of the cross examinations of Christopher McCarthy, Lisa Collins and April Collins, and the failure of the prosecution to disclose them, or identify them as relevant, renders the conviction of the appellant unsafe".
19. Mr. Moylan's affidavit concludes with a prayer for relief in the terms of the Notice of Motion.

The Replying Affidavit of Mr. Patrick Geraghty

20. An affidavit in reply to that of Mr. Moylan was sworn by Mr. Patrick Geraghty, a solicitor in the office of the Director of Public Prosecutions (i.e., "DPP"), on the 18th of January 2024.
21. In his said affidavit, Mr. Geraghty said that he had examined the following files held by the DPP's office:
- A. The **DPP v John Dundon** files, being the trial and appeal files, related to the murder of Mr. Shane Geoghegan on the 9th of November, 2008.
 - B. The **DPP v Wayne Dundon & Nathan Killeen** files, being the trial and appeal files, related to the murder of Mr. Roy Collins on the 7th of April, 2009.
 - C. The **DPP v John Dundon and Wayne Dundon** files, being the trial and appeal files, related to threats to kill witnesses April Collins, Alice Collins and other Collins family members.
22. Mr. Geraghty further stated:
- "5. I say that it would appear that the transcribed prison call recordings, which are the subject of the application to add a new ground of appeal 13, were not disclosed as part of the extensive disclosure in this case DPP v John Dundon (the murder of Mr. Shane Geoghegan).
 6. I say that prior to the trial commencing, a letter from Madden & Finucane Solicitors dated 12th of June, 2013 sought disclosure of prison recordings relative to Christopher McCarthy. The DPP responded to this request on the

28th of June, 2013 and advised Madden & Finucane Solicitors, in relation to the specific request for recordings, that *'this is a matter for the Irish Prison Service'*.

7. I say that subsequently, however, on 26th of June, 2013, Madden & Finucane Solicitors gave notice to the Prosecution and the Clerk of the Special Criminal Court of their intention to come off record for the accused following his expressed wish to discharge his legal team. The accused subsequently engaged the services of John Devane Solicitor (RIP), Brendan Nix SC (RIP), and Lawrence Boucher BL. I say that the issue of prison recordings was not pursued by this new legal team during the trial.
8. I say that from my preliminary examination of the files, it would appear that these prison call recordings were not in the possession of the Gardaí or the Director of Public Prosecutions when the trial of **DPP v John Dundon** (for the murder of Mr. Shane Geoghegan) was taking place in July and August of 2013.
9. I say that from my examination of the above files it would appear that the prison call recordings were only obtained by the Gardaí on foot of an order for disclosure made by the Special Criminal Court in the case of **DPP v Wayne Dundon & Nathan Killeen** (the murder of Mr. Roy Collins) on 29th of April, 2014. Disclosure of that nature appears to have been raised by the Defence legal team at a 'for mention' listing in the case of **DPP v Wayne Dundon & Nathan Killeen** (the murder of Mr. Roy Collins) before the Special Criminal Court on 19th of March, 2014. It would appear that the Special Criminal Court indicated that this material should be provided.
10. Pursuant to this 'ruling' by the Special Criminal Court, the Gardaí wrote to the Irish Prison Service on 25th of March, 2014 seeking the recordings. The Gardaí received a response back from the Irish Prison Service solicitor that, on the advice of the Attorney General's Office, this request could not be complied with unless there was a court order to that effect. Arising from this, the Defence were asked to provide a list of what they were looking for and on the 29th of April, 2014 the Special Criminal Court issued an order directing the Irish Prison Service to release this material to the Gardaí. I beg to refer to a copy of that order [which he exhibits as "PGI"].
11. I say that following the order of the Special Criminal Court, for the disclosure of specified documents and recorded telephone calls held in the possession of the Irish Prison Service, the Gardaí obtained this material at IPS Headquarters, Longford on the evening of 30th of April, 2014. This material included phone calls of all the prisoners who were named in the order and for the relevant blocks of dates. That data was downloaded onto a portable hard drive by Irish Prison Service personnel for the Gardaí. The Gardaí transcribed this material and a copy of these transcripts were delivered by hand to the Office of the Director of Public Prosecutions on the 1st of May, 2014. This material consisted of some 59 recordings.

12. I say that the Gardaí reviewed this material and Counsel's advices were sought in relation to the contents of two of these recordings. It would appear that both the recordings of those prison calls and the transcripts made by the Gardaí of those recordings were disclosed to the Defence sometime after the 1st of May, 2014 and after the commencement of the trial in this matter, because they were referenced in both the Special Criminal Court hearing transcripts and in the Court of Appeal judgment dismissing their murder conviction appeals.
13. In light of the foregoing, it would appear that the transcripts of, and/or recordings of, telephone conversations between two of the key prosecution witnesses, Christopher McCarthy and Lisa Collins, while Christopher McCarthy was in prison in 2011 were not in the possession of the Gardaí, or, indeed, the Office of the Director of Public Prosecutions, at the time of the Appellant's trial in July/August 2013. It appears that this material only came into the possession of the Gardaí after an order was made by the Special Criminal Court on 29th of April, 2014 in the separate case of **DPP v Wayne Dundon and Nathan Killeen** (for the murder of Mr. Roy Collins), some 8 months after Mr. Dundon's trial for the murder of Mr. Shane Geoghegan.
14. I say, therefore, that the transcripts of, and/or recordings of, telephone conversations between two of the key prosecution witnesses, Christopher McCarthy and Lisa Collins, while Christopher McCarthy was in prison in 2011 could not have been the subject of the disclosure undertaking given by [the DPP's counsel] to the Supreme Court on 25th of June, 2013."
23. Mr. Geraghty concludes his affidavit by commending to this Court that it should refuse the relief sought in the appellant's Notice of Motion.

Submissions on behalf of the Appellant

24. On 13th August 2013, the Special Criminal Court (i.e., "SCC") found the appellant guilty of the murder. Delivering judgment on behalf of the SCC, Kearns P. had made it clear that the prosecution's case was dependant on the credibility of the three principal witnesses for the prosecution, April Collins, Lisa Collins and Christopher McCarthy. It was submitted to the Court of Appeal that Kearns P. had then examined the roles played by April Collins, Lisa Collins and Christopher McCarthy in the events leading to the murder of Shane Geoghegan and having done so, stated that the SCC had concluded that April Collins, Lisa Collins and Christopher McCarthy must be treated as accomplices in the murder. He had gone on to explain that the SCC had therefore been obligated to warn itself of the dangers of relying on accomplice evidence and to be mindful of the principle that the evidence of one accomplice cannot corroborate that of another.
25. Our attention was drawn to the fact that Kearns P. had later described how the appellant had based his defence entirely on the issue of credibility and had summarised the attacks, which the defence made on the credibility of the prosecution case, particularly on the credibility of the principal prosecution witnesses, April Collins, Lisa Collins and Christopher

McCarthy. Kearns P. had concluded by stating that, despite treating the main prosecution witnesses as accomplices to the killing of Shane Geoghegan, the SCC accepted the truthfulness and accuracy of each individual account as each individual account was supported by independent evidence of a corroborative nature.

26. We were referred in some detail to the judgment of the SCC in the case of *Wayne Dundon and Nathan Killeen*. Many of the *personae dramatis* featuring in the present case also feature in the judgement in that case. A common denominator is that April Collins, Lisa Collins and Christopher McCarthy also gave evidence for the prosecution in that case. Unlike in the present case, however, they were not deemed to be accomplices in the murder the subject matter of that case (i.e. the murder of Roy Collins).
27. The defence in that case had been furnished, by way of disclosure, with transcripts of recorded prison phone call conversations between Christopher McCarthy, Lisa Collins and various other members of the Collins and McCarthy families. The circumstances in which this disclosure was made was that (almost a year after the trial of the appellant in the present case had taken place) a court order was obtained by the defence legal team in the *Wayne Dundon and Nathan Killeen* case, requiring the Irish Prison Service (who had been advised by the Attorney General not to release such recordings without such a court order), to make the recordings at issue available to the DPP, who in turn, upon being provided with them, duly furnished them to the defence by way of disclosure. The phone calls were recorded in April/May, 2011 around the time that John Dundon and Wayne Dundon were taken into custody on foot of April Collins' allegation of a threat to kill. The disclosed recordings were deployed by the defence in the *Wayne Dundon and Nathan Killeen* case during the cross examination of the controversial witnesses for the purposes of attacking their credibility.
28. Specifically, at page 30 of its judgment in that case, the SCC held:

"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."
29. However, the SCC then expressed the view that it was clear that, in the circumstances of the case, the motivation of each of the witnesses must be scrutinised very carefully because of the strong possibility that other factors may have influenced their testimony.
30. It was submitted that it was clear from the said phone call conversations that the Collins and McCarthy families bore a large amount of animus towards Nathan Killeen, Wayne

Dundon and the appellant. The SCC concluded that the transcripts were admissible as tending to show the state of mind of the Collins family in relation to Wayne Dundon. The SCC also concluded that a certain number of calls were of potential relevance in an assessment of the motivation and truthfulness of the witnesses in question, and in fact recited excerpts from the transcripts in the judgment.

31. The written submissions to the Court of Appeal filed on behalf of the appellant in the present case rehearse in some detail the law relating to the duties of the prosecution to furnish disclosure. It is unnecessary for the purposes of this judgment to rehearse the submissions as it is not in controversy between the parties that the prosecution owed such a duty to the defence in respect of any relevant material in their possession; or indeed that "*relevant material*" comprises that which, in the words of the late Carney J in *DPP v. Special Criminal Court* [1999] 1 I.R. 60 at 76, "*might help the defence case, help to disparage the prosecution case or give a lead to other evidence.*". Further, we were referred to an acknowledgement in the DPP's Guidelines for Prosecutors 2019 that disclosable material should be made available to the defence sufficiently in advance of the trial to enable the accused to consider the material disclosed. Again, none of this is controversial.
32. The gravamen of the appellant's submission in support of the motion now brought is that the material in controversy which the appellant says ought to have been disclosed, but which the appellant contends was improperly not disclosed, was relevant and material to the credibility of the three prosecution witnesses in the present case with which we are concerned, namely April Collins, Lisa Collins and Christopher McCarthy, and that if the appellants legal team had had that material at the time of the appellant's trial it could have been deployed by defence counsel in the cross examination of those witnesses to attack their credibility.
33. It was submitted on behalf of the appellant that it is clear from the judgment of the SCC in the present case that the central defence advanced by the appellant was an attack on the credibility and motivation of April Collins, Lisa Collins and Christopher McCarthy. Indeed, as Kearns P. stated: "*this case is all about credibility. While that may be said of many criminal cases, it is particularly true in this case*".
34. It was submitted that as the telephone recordings that were deployed in the case of *Wayne Dundon and Nathan Killeen*, and which the appellant says it should have been disclosed to his legal team in advance of his trial, all relate to the same time period, involve the same prosecution witnesses (Christopher McCarthy, Alice Collins and April Collins) with the same motivations, involve the same family of accused (the Dundon brothers) and relate to the same falling-out or dispute between the two families (the Collins/McCarthys and the Dundons) it is axiomatic that, if the phone recordings had been available to the defence in the present case, they would have served to seriously undermine the credibility of the evidence of April Collins, Alice Collins and Christopher McCarthy in much the same way as occurred in the case against Wayne Dundon and Nathan Killeen.

35. Furthermore, counsel for the appellant suggested, it is reasonable to assume that, had the phone recordings been available in the trial in the present case, they would have in fact been much more damaging to the prosecution case than they were in the case against Wayne Dundon and Nathan Killeen. This was said to be due to the fact that, in marked contrast to the case against Wayne Dundon and Nathan Killeen, the evidence of April Collins, Alice Collins and Christopher McCarthy in the present case was already deemed to be highly suspect by virtue of the fact that the SCC held that all three were accomplices in the murder.
36. Therefore, counsel for the appellant submitted, if one were to apply the reasoning used by the SCC in the trial of Dundon and Killeen to the present case, then the SCC would have been obligated to give itself two warnings in respect of the evidence of Lisa Collins and Christopher McCarthy; an accomplice warning and the warning that the Court in Dundon and Killeen felt obliged to give itself on foot of the phone recordings.
37. It was submitted that on that account, the phone recordings, when utilised by the defence in cross-examination in the present case, would certainly have served to seriously, if not fatally undermine the credibility of the evidence of all three witnesses.
38. It was suggested that it is inconceivable that the phone recordings would not have been utilized by Brendan Nix SC in cross-examination. However, there is no indication that Madden & Finucane's request for phone recordings was brought to Mr. Nix or his colleagues' attention by the prosecution. Material that the SCC in the *Wayne Dundon and Nathan Killeen* case considered very germane to the credibility of Christopher McCarthy and Lisa Collins was not available to the SCC in the appellant's case a year earlier. It was submitted that the material would have been "gold" in the hands of an experienced advocate such as Mr. Nix, and might have resulted in a different outcome, had the trial court been aware of it.
39. It was urged upon us that Mr. Nix and his colleagues, burdened as they were by the need to read the Book of Evidence and thousands of pages of general disclosure in a matter of days and in circumstances where the opening speech by the prosecution was made before they had even had a chance to look at any documentation at all, could not have been reasonably expected to locate and follow up on the correspondence from the previous legal team seeking disclosure, and that this represented an unfairness which rendered the trial unsatisfactory and the verdict that resulted unsafe.
40. Specifically, it is complained that prosecuting counsel never made the defence aware (in terms) of Madden and Finucane's request to the DPP to be provided by way of disclosure with the recordings of the telephone conversations in controversy, and of the prosecution's position that this was not material that the DPP was under any obligation to provide to the defence in circumstances where that material had not come into the DPP's possession, but rather was in the possession of the Irish Prison Service (who, it would later emerge, would not have been amenable to releasing it without a court order).

41. It was suggested that had the late Mr. Nix and the other members of the new legal team been made aware of all of that, they would likely have attempted to have secured a court order directing the release of the material in question, as was done by the defence legal team in the case of *Wayne Dundon and Nathan Killeen*. It was further submitted that there can be no question of the appellant's legal team making a tactical decision not to seek the phone records. Counsel for the appellant submits that if they had been informed of the request for phone records, and if they had had sufficient time to pursue the issue, they would certainly have done so as it is clear that they would have had little to lose and potentially lots to gain from such a course of action.
42. Anticipating a possible *Cronin* objection from the respondent, counsel for the appellant submitted that his client should not be precluded from making the argument that he now wishes to make on the basis that the point was not taken at trial. He suggests that his client should be allowed to argue the point on the basis that an injustice would occur if the appellant was denied the opportunity of doing so. It was submitted that even if this Court were to take the view that the appellant himself is partly to blame, by changing his legal team at the 11th hour, the fact remained that key material was unavailable to the defence which might have had an impact on the outcome of the trial. Consequently, it was suggested, the conviction is unsafe.
43. The appellant submitted that the court should allow him to argue his proposed new ground and that the appeal should be allowed.

Submissions on behalf of the Respondent

44. Counsel for the respondent has submitted that at no stage has an argument been advanced to the effect that the voluminous disclosure that was provided to the defence prior to the trial, and which was the subject of the Supreme Court undertaking, contained something of relevance, which was not discovered in sufficient time, or which was not deployed during the trial due to the lateness of its provision. There is no suggestion that that the tardiness of the disclosure furnished to the defence had any adverse impact on the trial or the ultimate conviction of the appellant.
45. Counsel for the respondent submitted that his client did not err in the manner in which it responded to the request by the appellant's former Solicitor for Christopher McCarthy's prison telephone call recordings. Rather, in response to this specific disclosure request, the appellant's Solicitor was advised correctly and accurately that the request was one which would have to be taken up with the Irish Prison Service. The material requested was not in the possession, power or procurement of the DPP and, therefore, the respondent was not in a position to disclose what was sought.
46. Further, as outlined in the Affidavit of Patrick Geraghty, responding to the appellant's application to expand the grounds of appeal, the prison call recordings the appellant currently takes issue with were only obtained by An Garda Síochána on foot of an order for disclosure made by the SCC in the case of *Wayne Dundon & Nathan Killeen* on the

29th of April 2014, almost a year after the trial in respect of the appellant in the present case took place. Seemingly, the Irish Prison Service had not been amenable to releasing the recordings in question in the absence of a court order.

47. While the appellant relies on the judgment of the SCC in the case of *Wayne Dundon & Nathan Killeen* and suggests that the prison telephone recordings adduced in evidence had a significant impact on how the SCC viewed the evidence of April Collins, Lisa Collins and Christopher McCarthy, counsel for the respondent submits that having considered the detailed judgment it is not at all clear that the recordings played such a pivotal role or, more importantly, that they would have availed the appellant in his trial.

48. The respondent submitted that in addressing the prison call transcripts adduced in evidence, the SCC emphasised at the outset that the transcripts had to be treated with a degree of caution, with much of the content amounting to nothing more than gossip and hearsay:

“The transcripts are dated only by reference to a range of dates of up to several weeks. The Court considers that these transcripts need to be treated carefully. In the first place, there is the fact that the exact dates are not known, making it more difficult to be sure of the context. Since the participants know that they are being recorded, the conversations are often guarded and elliptical. Speculation as to the meaning of some passages would be just that – speculation. The transcripts were typed up by a third party and the meaning of certain parts could vary with a change in the punctuation. Finally, the contents are, on occasion, nothing more than gossip and hearsay.”

49. It was submitted that the SCC then went on to quote certain portions of the transcripts of prison calls, which it felt were of “*potential relevance in an assessment of the motivation and truthfulness of the witnesses in question.*” Later in its judgment, the SCC addressed the credibility of certain witnesses, including Christopher McCarthy, Lisa Collins and April Collins and indicated that “*as a result of the events outlined at the start of this judgment*” the most likely motivation affecting these witnesses was the fear of the Dundon brothers and consequently a desire to get them imprisoned for as long as possible. Notably, the SCC did not specifically link this conclusion on motivation to evidence gleaned from prison telephone calls. In the present case there was abundant other evidence that the controversial witnesses were in fear of the appellant specifically and of his brothers.

50. It was submitted that the SCC went on to outline that it had a duty to reject untruthful evidence and/or unreliable evidence and to act only on evidence it accepted beyond reasonable doubt to be true. Pertinently, even following its assessment of the motivation of Lisa Collins in giving evidence, in deciding the case against Nathan Killeen, the SCC accepted the veracity of her evidence, in circumstances where it was corroborated by other evidence. They said:

“*The court further finds that the presence of Nathan Killeen’s DNA on the two wash basket hoodies corroborates 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, and its location, is not such as could be explained by transfer from some other unidentified item in the basket. The court therefore finds that there is corroboration for her evidence that Nathan Killeen told her that he was going to shoot Steve Collins and accepts that evidence.”.

51. It was submitted that in the appellant’s trial it was also abundantly apparent that the three main prosecution witnesses were in immense fear of the Dundon family, and in particular the appellant. The testimony of all witnesses was replete with references to the fear they had for their own safety and that of their family.
52. In his submissions, the appellant had argued that the prison telephone call recordings, had they been available to the defence team in advance of the trial, would have served to undermine the credibility of the three main prosecution witnesses. Counsel for the respondent submitted that the appellant has not identified which telephone call content would have been “gold” in the hands of Brendan Nix SC, but rather draws parallels with the transcript portions cited by the SCC in *Wayne Dundon and Nathan Killeen*. The only telephone calls between Christopher McCarthy and Lisa Collins cited in that judgment, are set out at page 23. The content relates to a conversation about the threats made to April Collins and how long “*the two of them*” would get:

“See April’s is only threatening, Chris”

“Yeah”

“Threatening to kill” “Hmmm”

“Do you get me...the two of them” “Yeah”

“Yeah”

“That’s not long enough they’ll get ten for that and then...”

“No we know that but once they are picked up and in for that then the rest we can whatever”

“Hmmm”

“They ain’t coming back you know what I mean”.

53. The point is made that after setting out this portion of transcript, the SCC also set out what Lisa Collins and Christopher McCarthy’s responses were when they were asked to comment on the telephone call transcripts:

“Asked to comment on this, Lisa Collins said that the first part meant that once the Dundons were in for “that” (the threats to kill April), the rest of them could come forward with what they knew. She said that 10 years was not enough for Wayne

Dundon because if any of them, meaning the Dundons, got out "we would be killed". She said she did not know what she meant by "They ain't coming back" Christopher McCarthy said that he did not remember the call."

54. It was submitted that while in its judgment in the Dundon and Killeen case the SCC identified the fear of the Dundon family as being the most likely motivation affecting (the testimony of) April Collins, Lisa Collins and Christopher McCarthy, and that conclusion was arrived at with the benefit of having had an opportunity to consider the transcripts of the prison telephone recordings which the appellant says should have been disclosed to him, the real difficulty for the appellant is that the SCC's conclusion in that regard supports the prosecution case against the appellant, in the sense of bolstering the credibility of the prosecution witnesses in controversy who had claimed to have been in fear. We were reminded that in the defence closing address in the present case April Collins was described as "*this woman who would tell us she was so terrified*", and that it was suggested instead that she was engaged in "*a conspiracy to do somebody down*".
55. It was submitted that the availability of the transcripts of Christopher McCarthy's prison call recordings would not have enhanced the defence case in any way, since they tended to confirm the truth of the fear of the Dundons that all three main prosecution witnesses were labouring under, of which they had given evidence in both examination-in-chief and cross-examination, and which the defence sought to undermine.
56. Finally, the respondent relies upon *The People (DPP) v. Cronin No 2* [2006] 4 I.R. 329 to say that it is not open to the appellant to raise any point on appeal that was not relied upon in his defence at trial or by way of requisition on the judge's charge. The point is made that, bearing in mind the submissions made above about the effect of the call transcripts in supporting the prosecution case, it cannot be said, as in *The People (DPP) v. Noonan* [1998] 2 IR 439 that the issue now sought to be raised is "*crucial to a fundamental aspect of the defence*".
57. In conclusion, the respondent submits that the proposed new grounds of appeal should not be entertained and the motion should be refused.

Discussion and Decision

58. In oral submissions at the hearing of the appeal, senior counsel for the appellant sought to emphasize that he was not asking this Court to decide that the material at issue would have been determinative of issues as to whether the three witnesses concerned, or any of them, were to be regarded as credible and reliable. He was merely asking this Court to recognise that the material at issue was relevant and potentially could have had a bearing on that issue, and to determine that on that account its absence gives rise to a concern that the appellant did not have a fair trial or that his conviction might not be safe.

59. While the evidence establishes that the appellant's previous legal team had adverted to the potential importance of the telephone transcripts, and had written to the prosecution to request that disclosure be made of it, the matter was not pursued by the new legal team. Counsel for the appellant says that the fact that they did not pursue it has to be seen against the background of coming late into the case and of having limited time to prepare. However, there is simply no evidence that that was the reason for their failure to pursue the issue and we consider that there is no basis for the drawing of any inference as to their reasons.
60. Such evidence as is before this court establishes that, at the time at which disclosure of the telephone transcripts was sought, the material was simply not in the possession, power or procurement of the DPP and he/she was not under any duty to provide it by way of disclosure. The circumstances in which it came to be disclosed in the *Wayne Dundon and Nathan Killeen* case were entirely different to those in the present case. In that case there had been an application to the Court of trial seeking its assistance in obtaining disclosure of that material and that Court had directed that the material should be made available. It is not necessary to go into the precise circumstances in which such an order was made, or the precise circumstances on foot of which the SCC felt able to make such an order. The fact is there was such an order.
61. What can be said is that in the present case we are satisfied that there was no breach of the duty of disclosure owed by the DPP to the appellant either before his trial, or during his trial. The fact that controversial material may have subsequently come into the possession, or within the power or procurement, of the DPP, almost a year later, has no bearing on that.
62. Moreover, and in any event, in circumstances where there was in the present case a great deal of other evidence of fear of the Dundons, including of the appellant, and of grounds for resentment towards them, on the part of the three controversial witnesses whose conversations were captured on the recordings/transcripts at issue, we do not see how having possession of the recordings/transcripts at issue in time for the trial would have further assisted the defence either in undermining the credibility and reliability of those witnesses, or in establishing *animus* against the Dundons. In the circumstances we are not persuaded that the appellant's trial was unsatisfactory or that his verdict was unsafe because of the recordings/transcripts in question not having been available to the defence.
63. The SCC approached the testimony of the witnesses in question with great caution. It decided to treat each of the witnesses in question as accomplices, and warned itself in regard to the danger of relying on their uncorroborated testimony (as it happens, there was, as counsel for the DPP identified in his oral submissions to this Court, a good deal of evidence tending to corroborate their testimony). Again, we do not think that their approach would have been any different if evidence of the phone conversations captured on the recordings now in controversy had been before them.

64. In the circumstances we are disposed to refuse the relief sought in the appellant's Notice of Motion and will not permit the late addition of the proposed additional ground of appeal. All other grounds of appeal having been in effect abandoned; the appeal is dismissed.