THE COURT OF APPEAL

Record No: 204/2021

Birmingham P.
Edwards J.
McCarthy J.

Between/

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

RESPONDENT

V

WILLIAM TWOMEY

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 25th of April 2023.

Introduction

1. On the 30th of September 2021 the appellant was convicted by the Special Criminal Court of the offences of (i) assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 (being count no. 10 on the indictment before the court); (ii) robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (being count no. 11 on the said indictment) and (iii) making a demand with menaces, contrary to s. 17 of the Criminal Justice (Public Order) Act 1994 (being count no. 12 on the said indictment).

2. On the 18th of October 2021 the appellant was sentenced to two years' imprisonment on count no. 10, and three years' imprisonment on each of count nos. 11 and 12, with the final one year of the said three-year sentences suspended upon conditions, all sentences to run concurrently and to date from the 29th of August 2021.

3. By a Notice of Appeal dated the 4th of November 2021 the appellant recites that he was convicted by the Special Criminal Court of the offences of assault causing harm and of demanding money with menaces. He makes no mention of his conviction for robbery. The Notice of Appeal gives notice of his intention to appeal against his "*said conviction*", on the grounds specified therein, namely:

    1. that the trial court erred in law in ruling that the searches of the flats at Havelock Place, Warrenpoint, Co Down on the 28th of March 2017 were lawful, and erred in

admitting into evidence the material recovered by the PSNI during the course of the said searches;

2. that the trial court erred in fact and in law in finding that the appellant had not withdrawn from the joint enterprise to commit the offences, by notifying the Gardaí and the PSNI of the threat to Eddie McAndrew.

4. We were informed in the written submissions filed in advance of the appeal hearing that the appellant would in fact only be relying on a single ground of appeal, namely the joint enterprise issue raised in his ground of appeal no 2.

5. While the Notice of Appeal lists only the appellant's convictions by the Special Criminal Court for assault causing harm, and for demanding money with menaces, and makes no mention of his conviction for robbery, the single point that he relies upon, were this court to uphold it, would potentially be equally impactful upon his conviction for robbery as upon his convictions for assault causing harm, and for demanding money with menaces. There is therefore no apparent logical reason as to why the appeal would be confined to just two of the three offences of which he was convicted. Moreover, the written submissions filed in the case, and the oral submissions made at the appeal hearing, were presented as though all matters of which he had been convicted had been validly appealed. Accordingly, we will proceed on the basis that the failure to refer to the robbery conviction was an inadvertent oversight and treat the appellant as appealing against all matters of which he had been convicted.

Background Circumstances

6. The factual circumstances of the case are fairly summarised in the written submissions of both parties, and the Court's summary will draw upon both. The Special Criminal Court heard evidence that the injured party, a Mr. Edward McAndrew, was a dealer in second-hand plant and machinery. At the material time, Mr. McAndrew was resident in Manchester. On the 2nd of December 2017, Mr. McAndrew was lured to a remote location in Cornamucklagh, Omeath, County Louth on the pretence that there were items of plant and machinery there for him to inspect and to potentially purchase. These supposedly included a Pegson Stone Crusher, a Komatsu shovel loader and a CAT 330 DL tracked excavator. Once there, Mr. McAndrew was confronted by a gang of masked men. He was falsely imprisoned, assaulted and robbed of property, including phones. A menacing demand for €50,000 was made on the basis that he would be released and not harmed further if he agreed to pay this sum. One of the masked men claimed to be from the Continuity IRA. The evidence was that Mr. McAndrew suffered significant facial injuries in the assault, requiring three sutures to a right cheek laceration, seven staples to a left parietal scalp laceration and three staples to an occipital scalp laceration.

7. Mr. McAndrew was ultimately released, and he received a further threatening message the following day. A week later, a property he owned in County Mayo was damaged by fire.

8. The appellant was an acquaintance of Mr. McAndrew. They had known each other for approximately 10 years. This relationship was a mixture of personal and business in nature. The prosecution alleged that the appellant blamed Mr. McAndrew for the bringing of criminal charges against him in Northern Ireland (which were subsequently not proceeded with), and that this provided a motive for him to intimidate Mr. McAndrew and also to find information to use against Mr. McAndrew.

9. The appellant is from this jurisdiction, but he was residing in Warrenpoint, County Down at the relevant time in 2017. A co-accused, a Mr. Tony Finglas, lived in a separate flat in the same building as the appellant. Mr. Finglas pleaded guilty before the Special Criminal Court to related offences, on the basis that he had been present and had been centrally involved in luring Mr. McAndrew to Cornamucklagh and in the events that occurred there.

10. The prosecution case was that the attack on Mr. McAndrew was the product of a joint enterprise involving the appellant, the aforementioned Mr. Finglas, a Mr. Thomas McGuinness, and possibly others, and that the appellant had played a significant part in the enterprise. Indeed the appellant, who gave evidence at the trial, accepted that there had been a joint enterprise with Mr. Finglas and a Mr. James McMulkin, who resided in Northern Ireland at the time, to extract money from Mr. McAndrew. The evidence established that the appellant recruited Mr. Finglas to participate in the enterprise, but the appellant maintained that his motive in doing so had been to recover money that the appellant believed was owed to Mr. McMulkin, the latter having been allegedly scammed by Mr McAndrew in the context of a business they had operated. Mr. McMulkin was said to have been an elderly man with a physical disability that the appellant claimed to feel protective towards. The Special Criminal Court had ultimately rejected this explanation, and it concluded that the prime motive for the appellant contacting Mr. McAndrew had been the appellant's own concerns and grievances rather than any money owed to Mr. McMulkin.

11. In furtherance of the joint enterprise, Mr. McAndrew had been sent numerous emails and photographs of the plant and machinery supposedly for sale through an account controlled by the appellant. The appellant personally composed and sent emails to the injured party on the 6th of September 2017 under a fake name. He made use of an email address (alanliverpoolfc@gmail.com) to initiate contact and sent three emails to the injured party on that date falsely claiming that the sender had preowned plant and machinery for sale. It was the appellant who sought out the various photographs and relevant technical details for the emails. The appellant also sent or facilitated the sending of further emails to the injured party on the 21st of October 2017 using his laptop computer making similar representations. This was for the purpose of regenerating the injured party's interest in a putative plant transaction as he had been informed by Mr. Finglas that the communication with the injured party had gone dead. Mr. McAndrew had later arranged to attend the meeting in Cornamucklagh through phone calls with a man who called himself "Barry", who it would appear was Mr. Finglas.

12. A third accused, Mr. McGuinness, was tried along with the appellant. He was alleged to have driven Mr. McAndrew to the site at Cornamucklagh. The only evidence against him was a purported visual identification by Mr. McAndrew. He was ultimately found not guilty. There was no known connection between the appellant and Mr. McGuinness.

13. The prosecution relied on the fact that material from the phone taken in the attack on Mr. McAndrew was subsequently found in the possession of the appellant at the time of his arrest on the 28th of March 2018, in particular a list of phone numbers. The appellant did not deny possession of this material but explained that it was downloaded onto a USB from two phones which had been offered to him by Mr. McMulkin at Newry library on the 14th of March 2018. The Court rejected this explanation and concluded that the material could only have been physically transcribed from the phone of Mr. McAndrew on a date between the 2nd of December and the 9th of December 2017, after which the data on the phone was wiped by Mr. Finglas who began to use the phone himself.

Evidence relevant to possible withdrawal from the joint enterprise

Evidence of the Appellant

14. The appellant gave evidence in his defence at trial. He testified that in autumn 2017 he had become concerned at Mr. Finglas's erratic and violent behaviour and he felt that matters had gone too far. He said that in early November 2017 he had abandoned participation in the enterprise by telling Mr. Finglas to cease pursuit of Mr. McAndrew. He said he was attacked by Mr. Finglas with a lantern as a result of doing so. The appellant then claimed to have contacted a Detective Garda Andrew Hayes (otherwise "D/Garda Hayes"), who was based in Shannon and to have told him of the risk of violence to Mr. McAndrew. He also claimed to have contacted an unidentified member of the PSNI to the same end.

15. In the course of his said testimony he stated *inter alia*:

"Q. In relation to your concerns, did you say or do anything about that?

A. I did, I was concerned about that and I contacted a guard who I had known maybe 10 years earlier, I don't know any guards, as such, he was probably the only one I knew and I contacted him and voiced my concern that there might be an aggressive action towards Edward McAndrew.

Q. Before we go into that, did you contact Mr McAndrew directly?

A. I didn't contact him directly, no.

Q. Is there any reason for that?

A. I would be concerned as to what he might say to who and who he might say it to and say that I rang him and I was more protecting myself that I didn't go down the road of telling him.

Q. And given that you and Mr Finglas were living in Northern Ireland, why did you go to a member of An Garda Síochána?

A. Because Edward McAndrew lived in the south of Ireland, in County Mayo.

Q. And what was the name of the guard you went to?

A. Andrew Hayes.

Q. And do you know where he was based?

A. He was based in Shannon.

Q. What was Garda Hayes's reaction?

PROSECUTING COUNSEL: Now, I wonder if we can be told is this witness going to be called? If he isn't --

MR JUSTICE HUNT: Yes, well --

DEFENCE COUNSEL: Yes.

MR JUSTICE HUNT: He is, all right, okay. Well, that's fair enough then.

DEFENCE COUNSEL: What was Garda Hayes's reaction?

A. His reaction was basically that this was something that may happen by a person in Northern Ireland and it was very much something for the PSNI. So, I was slightly disappointed in the -- that he did nothing about it, other than made that comment.

Q. And that having happened, did you contact anybody else?

A. I -- basically he advised me to contact the PSNI, so there is a general number for the Northern Ireland which I did contact but I essentially got -- that conversation didn't go very far, I essentially got similar from them, where they saw it as someone living in the south and it was a southern Ireland problem.

Q. And do you know on the PSNI line who you were talking to?

A. I don't know. It was one that you ring up, a generic type."

16. The appellant was not cross-examined by the prosecution concerning his alleged dealings with either D/Garda Hayes or with a representative of the PSNI.

<u>*The evidence of D/Garda Andrew Hayes*</u>

17. D/Garda Hayes was called as a defence witness, and gave the following evidence *inter alia*:

"Q. Okay. Detective, I just want to ask you please about a gentleman called William Twomey. Are you familiar with him?

A. He's known to me, yes.

Q. And I want to ask you in particular about a telephone conversation that you had with him a number of years ago. Do you remember him phoning you?

A. I do, yes.

Q. And are you able to put a date or time on that?

A. I'm not. It's a while ago, about four years ago, four and a half years ago but I did have a phone call with him.

Q. Okay. And just in terms of a year, can you give us that?

A. It would be in around 2017.

Q. Okay. And can you give us a time of year or a month?

A. No, I cannot.

Q. Okay. Was it -- do you remember if it was during the winter time or autumn or summer?

A. I can't recollect that.

Q. All right, okay. What -- at that point in time do you know where Mr Twomey was living?

A. It was -- the information I received that he was living in Warrenpoint, County Down….

Q. Detective, if you could perhaps tell us what were Mr Twomey's concerns? Why did he phone you?

A. A possible incident with a Mr Edward McAndrew, a possible incident that he may have been in danger.

Q. And did you give you any detail at all in relation to that?

A. No, it was brief. He -- the main reason for his phone call, it was advice of what to do. I asked him where this proposed incident, where would it -- where was -- may occur and he said it was in -- possibly in Northern Ireland.

Q. And what your reaction to that?

A. Well, I didn't know Mr McAndrew, I didn't -- so, I didn't -- I didn't know the circumstances of the incident. So, my advice to Mr Twomey was that ... my office or station and report the incident as it was outside the jurisdiction of An Garda Síochána.

Q. Detective, thank you very much. There may be some further questions for you.

A. Thank you."

18. D/Garda Andrew Hayes was very briefly cross-examined, as follows:

"Q. Detective Garda Hayes, I appear for the prosecution.

[…]

You've no idea what the date of this was? You told us you couldn't say?

A. No, I cannot.

PROSECUTING COUNSEL: Thank you very much."

Submissions to the court below on joint enterprise

19. In his closing address to the Special Criminal Court, counsel for the appellant submitted that, in light of the appellant's own testimony and the evidence of D/Garda Hayes, the trial court could not be satisfied beyond a reasonable doubt that his client had not withdrawn from the joint enterprise by the time at which the injured party was subjected to the assault causing harm, robbery and demanding with menaces offences, the subject matter of the indictment. On the contrary, it was submitted that on a fair assessment of the evidence the trial court could not foreclose on the possibility of withdrawal. The prosecution in turn argued that any evidence of supposed withdrawal was insufficient and could not withstand close analysis, and that the trial court could indeed be satisfied beyond a reasonable doubt as to the existence of a continuing and subsisting joint enterprise, to which the appellant was a party, at the relevant time.

The ruling of the court below on the joint enterprise issue

20. The Special Criminal Court, having considered the submissions made, rejected any defence of withdrawal by the appellant from the joint enterprise which they were satisfied on the evidence he had entered into, ruling:

> *"'The final issue to be decided is as to whether the prosecution have rebutted beyond a reasonable doubt the defence of withdrawal from the joint enterprise or common design raised by Mr Twomey. This is a matter to be decided on the facts of each case. What is required to effect withdrawal and avoid criminal responsibility will generally be positive acts proportionate to the extent of previous involvement with and contributions of the accused to the enterprise in question. The constitutionally prescribed objective of social order requires more than silent withdrawal and must involve reasonable steps to reverse the criminal enterprise previously embarked upon. The steps required may also differ depending on the*

spontaneity of the participation. In our view, an effective withdrawal requires at least the cancellation of the effects of previous participation and, if possible, prevention of the offence contemplated by the participant.

What is necessary to withdraw will also depend on the stage of the plan at which the withdrawal is said to have occurred. It may involve countermanding permission or going further, if the matter is more advanced, and reporting the matter to the authorities. Furthermore, there must be timely and unequivocal communication of notice of withdrawal from the common purpose to others who wish to continue with the matter. In this case Mr Twomey's participation was not spontaneous. On the contrary, he had recruited Mr Finglas to the plan devised by him and provided the directions, information, material and means to Mr Finglas to set the plot in motion by setting up the ruse to entice Mr McAndrew to a meeting at a remote location. By the 21st of October Mr Twomey had continued to involved himself after the initial contact with Mr McAndrew by facilitating and participating in the follow-up communication by way of the second set of emails and new photographs which were specifically directed to keeping the joint enterprise alive and in progress. The fact that Mr Twomey had subsequent qualms about the conduct of Mr Finglas would not be sufficient in itself to extricate Mr Twomey.

In his evidence he asserted that he became aware of various unsavoury incidents involving Mr Finglas and that his relationship with him: "Probably deteriorated thereafter." He said in early November that: "As regards your involvement with Jimmy McMulkin, you should cease on that." That is the extent of the directions that Mr Twomey said that he issued to Mr Finglas in that regard. Mr Twomey stated that he said this to him because he was concerned about where his behaviour might go and that the result of this conversation was that Mr Finglas assaulted him with a lantern and told Mr Twomey that he wasn't going to back off. Mr Twomey stated that he received injuries for which he attended Dr Mary Allen on the next day. Although Dr Allen was alluded to during the case, she was not ultimately called to give evidence concerning these injuries.

Mr Twomey then contacted a guard that he had known about 10 years earlier: "And voiced my concern that there might be an aggressive action towards Edward McAndrew." This was Detective Garda Andrew Hayes, who is based in Shannon. Mr Twomey did not contact Mr McAndrew directly because: "I would be concerned as to what he might do and who he might say it to and say that I rang him. And I was protecting myself and I didn't go down the road of telling him." Mr Twomey expressed himself slightly disappointed with Guard Hayes's view that the matter was one for the PSNI. Mr Twomey said that he then contacted the PSNI but this resulted in the view that this was something that was: "A southern Ireland problem." Garda Hayes gave evidence in which he recollected a phone call with Mr Twomey in or around 2017 but he was not able to be more specific as to the month or time of year when this occurred. He described that Mr Twomey was living in Warrenpoint at the time and that his concerns were: "A possible incident with a Mr

Edward McAndrew, a possible incident that he may have been in danger." He described the phone call as being brief and as being for the purpose of Mr Twomey seeking advice from him. He said that he asked Mr Twomey where this proposed incident might occur and was told that it was: "Possibly in Northern Ireland." On that basis his advice to Mr Twomey was that he should report the incident to his local station as it was outside jurisdiction of An Garda Síochána.

Although it is clear that Mr Twomey must have had some concerns in his mind to cause him to have this exchange with Garda Hayes, there remain unsatisfactory and incomplete aspects to this matter. Firstly, his conversation with Garda Hayes contained a very incomplete account of Mr Twomey's knowledge of the matter and his participation up to that time. Secondly, it is not clear how Mr Twomey was in a position to say at that time to Garda Hayes that the potentially dangerous incident involving Mr McAndrew, then resident in Manchester, might possibly happen in Northern Ireland, other than the fact that Mr Finglas lived there. Thirdly, it did not identify to Garda Hayes the crucial fact known to Mr Twomey, namely the precise source of danger to Mr McAndrew. In fact, the entire event that subsequently transpired involved locations straddling the border, events that occurred both in the Republic of Ireland and in Northern Ireland.

We are satisfied beyond a reasonable doubt that the steps taken by Mr Twomey were inadequate to implement his withdrawal from the common design that was extant and continuing as of November 2017. The first and most obvious step that would have been required to effect a full withdrawal would have been to warn Mr McAndrew directly of the danger to which he had been exposed as a result of Mr Twomey's conduct and which motivated him to call Garda Hayes in the first place. The fact that, on Mr Twomey's account, his instruction to Mr Finglas to cease and desist had been met with violence should in fact have underlined to him that the time for half-measures had passed. His explanation for not doing so is both unclear and inadequate. Insofar as Mr Twomey apparently referred to self-protection as a reason for not contacting the potential victim directly, at the very least he could have warned Mr McAndrew to ignore certain phone calls or emails inviting him to visit certain places to inspect plant for sale. It is our view that Mr Twomey was simply unwilling to face the fact that undoing his previous actions in a full and candid manner would then have involved potential unpleasantness for him from Mr McAndrew or from the authorities and that to take such steps might have led to adverse consequences. Mr Twomey was obliged to face up to those consequences if he wished to effect an adequate and proper withdrawal from this enterprise.

So far as his call to Garda Hayes is concerned, whilst this might be regarded as a factor going to mitigation, as a factor affecting liability it too is inadequate. A possession of the full facts would have allowed Garda Hayes to give more meaningful advice or to take more substantial steps to protect Mr McAndrew and to prevent the serious crimes that subsequently took place. Moreover, any wrong impression that Mr Twomey may have had as to the violent propensities of Mr

Finglas should have been dispelled as of early November if his account of being assaulted is correct. In short, his actions were not proportionate to the task of undoing his previous actions and of mitigating the risk that his actions had created for Mr McAndrew. Instead, he left Mr McAndrew ultimately exposed to a continuing risk and Mr McAndrew was, at the end of the day, obliged to pay the price of Mr Twomey's desire to protect himself from the consequences of his actions. What he did was insufficient to counteract, reverse and nullify the effect of his earlier activities. It seems to us that the impression that his evidence creates is that he hoped that his efforts would have been enough to forestall violence to Mr McAndrew, without the inconvenience of any searching inquiry into any previous wrongdoing on his own part. As it turned out, as a half-measure it was not in fact effective for any of these purposes. Therefore, we find that the common design was not effectively terminated prior to the 2nd of December 2017 and therefore remained in place at the time of the commission of the assault and the other crimes that occurred in relation to Mr McAndrew.

That conclusion is reached without the necessity of considering whether any of Mr Twomey's post-crime activities are in fact consistent with the external manifestations of full withdrawal from the common design. In fact, his actions in copying the contacts list from the stolen Samsung phone shortly after the 2nd of December underlined the fact that there was no withdrawal but in fact continued participation on his part. Even if there was a reasonable possibility that his account of his dealings with Mr McMulkin was accurate, which there is not, those actions would still be inconsistent with an unequivocal withdrawal from the common design many months earlier."

Submissions of the Appellant before the Court of Appeal

21. We were referred by counsel for the appellant to the following passages from Peter Charleton, Paul A. McDermott, Ciara Herlihy, and Stephen Byrne, *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury Professional 2020) :

"[8.88][…] the first question is whether the accused was part of a common purpose to commit the offence in issue. If that person was, but withdraws, the second question arises as to whether the accused in fact withdrew from it and as to whether as a matter of law the steps taken, if accepted by the jury, are sufficient in law to amount to a negation of the offence in which he or she was originally complicit.

[8.89] The defence of withdrawal is dependent on the facts of each case: what was done, was it timely, was it at least potentially undermining of the scheme? That, in turn, hinges on how far things have gone and what the accused needs to undo:

What will suffice in terms of withdrawal from a joint enterprise or from a situation in which a defendant has counselled and procured or aided and abetted a crime will vary markedly from case to case. It will involve an assessment of what was reasonable and practical in the circumstances. The

more the defendant has done by way of planning or providing information or items to enable completion of the crime, the more is likely to be required of him by way of withdrawal or countermand, if he is to avoid criminal responsibility. In some cases, particularly where the participation or aiding and abetting is spontaneous, withdrawal by leaving the scene, especially when coupled with advice or other indication to those who remain of the abandonment, or with the effluxion of time, might be sufficient.

[footnote reference to Sully [2019] SASCFC 9, [75]]

[8.90] Withdrawal may be verbal in the early stages of a criminal enterprise; it may involve countermanding permission to use a vehicle or withdrawing from confederacy in a plan to commit a crime. Where more advanced steps have been taken, such as supplying the poison in Gauthier [[2013] 2 SCR 403], withdrawal may only be valid where it counteracts the help given. This could be fulfilled by reporting the proposed crime to the authorities. At the more extreme stages of a criminal enterprise a withdrawal may only be effective where the accused takes positive action to thwart the plan by, for example, attempting to protect a potential victim from a murderous attack. If the accused is to withdraw, his or her duty is to reverse whatever has been the encouragement or assistance. This, in turn, depends on the degree of assistance or encouragement so far offered. In Eldredge v United States [(1932) 62 F 2d 449] the court pithily stated that a declared intention to withdraw from a conspiracy to dynamite a building is not enough if the fuse has been set: the person wishing to withdraw must step on the fuse."

Somewhat unsatisfactorily, the last sentence of para. [8.90], which we have included above in underlined text, was omitted from the appellant's written submissions. The omission is unexplained. Possibly it was for reasons of economy, but we feel that nonetheless it ought to have been included for completeness.

22. It was submitted that the repeated actions of the appellant were sufficient, as a matter of fact and law, to amount to a withdrawal from the criminal enterprise. Not only, it was suggested, did the appellant expressly convey his withdrawal to Mr. Finglas, and suffered violent consequences as a result of doing so; he went considerably further and approached the police authorities in both jurisdictions, to warn them of a threat to Mr. McAndrew. As it transpired, this did not have the effect the appellant had hoped for. But that could not have been anticipated by the appellant at the time. It was submitted that a person making such reports would expect that they would be acted upon.

23. It was complained that the trial court had criticised the appellant for what it described as his reluctance to go into the specifics of the threat, but it was submitted in response that there was no suggestion from the evidence of D/Garda Hayes that the appellant had been evasive. The appellant was not asked to give specifics; and the appellant submits that giving specifics would not have made a difference to the manner in which the police authorities ultimately dealt with the matter. The overall thrust of the evidence was that

the police authorities did not want to enquire further, since they had concluded that threat did not arise within their jurisdiction.

24. Issue was also taken with the suggestion by the trial court that the appellant ought to have confessed the extent of his own involvement. Counsel for the appellant urged upon us that it was never put to the appellant by either the prosecution or the Court that he had been reluctant to divulge further information to Gardaí. Again, it was submitted, there was no evidence that this was something which would have impacted on how the authorities dealt with the matter. The trial court had erred, it was submitted, in focusing on whether the appellant should have admitted his own criminal acts, rather than focusing on whether the elements of abandonment were present.

25. It was submitted that to make out the defence, the appellant was required to withdraw and to take steps to prevent the offence, not to ensure that he was prosecuted himself. By going to the police authorities, the appellant was clearly risking prosecution in any event. He did so anyway, in order to negate the threat to Mr. McAndrew.

26. It was submitted that the notification of the threat to Gardaí occurred at a relatively early stage of the joint enterprise. The threat was not imminent, and the plan might never have been proceeded with. Two rounds of emails had been sent to get Mr. McAndrew's attention and the appellant had been involved in this, including on the 21st of October 2017. But the steps to lure Mr. McAndrew to a particular location and to assault him there occurred at a later stage, and were carried out by way of telephone. By that time, other persons known to Mr. Finglas had become involved. As the trial court found, matters then appear to have escalated even beyond Mr. Finglas's expectation. It was submitted that there was no evidence that the appellant ever knew any other persons involved in the joint enterprise or knew that matters would escalate to the extent that they did. In giving evidence himself, he had described the assault as "*brutal*" and "*senseless*".

27. Counsel for the appellant maintained that the sufficiency of the appellant's acts of abandonment must be seen in this light. He feared some level of aggression towards Mr. McAndrew and acted appropriately in the circumstances. While the trial court had suggested that the appellant could have directly warned Mr. McAndrew of the threat after speaking to the authorities, it was submitted that the trial court underestimated the risk to the safety of the appellant from other persons, including Mr Finglas who had already assaulted him. Mr. McAndrew himself was also a volatile person capable of criminal acts. A diary recovered from the appellant, setting out his private thoughts, showed that the appellant had been anxious not to be seen as overtly antagonistic towards Mr. McAndrew as he still feared for his "*life and safety*" following an earlier incident involving Mr. McAndrew in February 2017.

28. It was submitted that in summary, and applying the principles set out in Charleton and McDermott, what the appellant did was "*reasonable and practical in the circumstances*": The withdrawal acts of the appellant were proportionate to the stage that the joint enterprise was then at, and the appellant's acts objectively demonstrated that he was no

longer taking part in or supporting the joint enterprise by the time he went to the police authorities.

29. The trial court had noted, however, that the appellant must have had access to the phone taken from Mr. McAndrew in the week immediately following the incident at Cornamucklagh. It considered this to be consistent with his continuing involvement in the joint enterprise. Counsel for the appellant has sought to engage with this by saying that apart from the appellant's possession of material from Mr. McAndrew's phone, there was no evidence consistent with the proposition that the appellant had taken a further part in the joint enterprise after contacting the Gardaí and PSNI. Further, counsel submitted that an alternative explanation for the possession of this material was not considered by the trial court: that the appellant was given access to this phone after the incident, and he opportunistically took advantage of the situation to pursue his own grievances with Mr. McAndrew. Mr. Finglas was still living downstairs from the appellant at the time, so there was a basis on which the appellant could have been approached with the phone.

30. It was complained that none of this was considered by the trial court, nor was it acknowledged that it was inherently unlikely that the appellant would have contacted the police authorities in November 2017 if he wished the joint enterprise to continue. Such contact would immediately have created a potential link to him, in the event that a criminal complaint was made by Mr. McAndrew.

31. Counsel for the appellant submitted that in all of these circumstances the Special Criminal Court had erred in failing to find, as a reasonable possibility, that the appellant had withdrawn from the criminal enterprise by early November 2017. In the circumstances, it was said, the conviction of the appellant is unsafe and unsatisfactory and ought to be quashed by this Court.

Submissions of the Respondent before the Court of Appeal

32. The respondent also placed reliance on the exposition of the law relating to withdrawal from / abandonment of a criminal joint enterprise contained in *Charleton & McDermott's Criminal Law and Evidence*, cited above at para. 21, from pp 385 to 390. We were referred by the respondent to para. [8.83] of that work wherein it is stated:

> *"[…] To be legally effective, that withdrawal must be (1) clear and unequivocal, (2) timely and (3) communicated either to the other parties or to the police. This may be translated into a requirement to clearly disavow the proposed wrong and to take reasonable steps to reverse the criminal enterprise embarked upon. Thus it is required that the accused 'took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralise or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence".*

33. It was submitted on behalf of the respondent that it was a question of fact whether the steps taken in pursuit of an alleged withdrawal were sufficient in countermanding involvement. This depended on how far things had gone and what the appellant needed

to undo. What was reasonable and practical in the circumstances fell to be considered in the context of the actions of the appellant in the furtherance of the common design.

34. It was submitted that the trial court correctly analysed the actions of the appellant in the light of the relevant legal principles and their finding was open to them on the totality of the evidence in the case.

35. Insofar as the appellant relied on his telephone conversation with D/Garda Hayes, the respondent says the information he imparted was vague, lacking in detail of the nature of any supposed "*danger*", silent as to the origins of same, and singularly unhelpful in how harm might be avoided by the injured party.

36. The respondent makes the point that it is common case that the appellant having received no comfort that anything was being, or would be, done on foot of assertions of "danger" by him, took no further action – he simply let the plot unfold. It is thus clear, so says the respondent, that the appellant was not committed to a withdrawal from the scheme. Rather, he failed to take the following steps which the respondent contends would have been reasonable and proportionate for him to take:-

    "i. Alert the injured party of the potential danger, anonymously or otherwise.

    ii. Warn the injured party not to buy plant machinery from alanliverpoolfc@gmail.com anonymously or otherwise.

    iii. Deactivate the email account from where the emails luring the injured party could be sent.

    iv. Alert the injured party that the email account was not bona fide.

    v. Clearly inform the PSNI and [An Garda Siochana] of the nature and identity of those who posed a threat to Mr. McAndrew and the nature of the lure being used."

37. Further, the respondent submitted, there were many complimentary and/or alternative steps that could have been taken by the appellant to thwart the scheme to hurt the injured party. He failed to do so because he had no serious settled inclination to withdraw. The defence case seemed to be that the appellant lacked the imagination to conceive of a plot to warn the injured party anonymously and was inhibited due his primary and overwhelming concern for his own welfare rather than that of the injured party who he had succeeded in putting in harm's way.

38. The respondent says that the appellant cannot benefit from weak specious gestures to avoid legal responsibility. He was required to care at least as much about the harm which was to be visited on the injured party as about his own welfare. More was required of him than vague assertions by telephone to a member of An Garda Síochana of "*a possible incident with a Mr. Edward McAndrew, a possible incident that he may have been in danger*" and seeking "*advice of what to do*".

39. The respondent contends that it is also, although it was not ultimately relied upon by the trial court, entirely inconsistent with an unequivocal withdrawal from an enterprise to show interest in the spoils of a successfully executed crime, as the appellant did when he received and processed information from the injured party's mobile phone after the incident.

40. The respondent submitted that in all the circumstances there was ample evidence to support the conviction in this case and there was no frailty in the findings of the trial court on the issue of the appellant's alleged withdrawal from the joint enterprise.

The Court's Analysis and Decision

41. We have arrived at a very clear view in this case that the appeal must be dismissed. In truth, there was no controversy between the parties concerning the applicable law, which is admirably set out in *Charleton & McDermott's Criminal Law and Evidence*, previously cited, pp 385 to 390. The controversy, such as it is, concerns the facts as found by the Special Criminal Court and the application of the uncontroversial legal principles in question to those facts.

42. The trial court was best placed to determine what were the facts. It heard the evidence first hand, and had the benefit of being able to form an overall impression as to the credibility and reliability of the evidence given by the witnesses who testified before it, based not just on what those witnesses said in the witness box, but on their presentation and demeanour in court, and how they responded to cross-examination, and the testing of their evidence by the opposing side's counsel where there was cross-examination.

43. Further, it is evident from the very detailed ruling given by the trial court that their analysis of the evidence was thorough and rigorous. We agree with counsel for the respondent that the factual findings that they made were findings that were open to them on the totality of the evidence in the case.

44. We reject the suggestion that the trial court erred, as was submitted on behalf of the appellant, by supposedly focussing on whether the appellant should have admitted his own criminal acts, rather than on whether the elements of abandonment were present. It is clear to us that the trial court's entire focus was on the sufficiency of the acts of the appellant which were said to provide evidence of withdrawal from the joint enterprise. There was a clear finding of insufficiency of the steps taken to reverse his complicity, one with which we agree, having regard to extent of the preparations that had already taken place towards the intended criminal conduct, and the extent of the appellant's involvement.

45. It was a question of the legal effectiveness of the steps taken by the appellant supposedly in furtherance of a claimed resolve to withdraw from the common design. As Charleton, McDermott et al point out at para. [8.83] of the previously cited work, to be legally effective the withdrawal must be (1) clear and unequivocal, (2) timely, and (3) communicated either to the other parties or to the police. The trial court was not satisfied that the appellant's steps in furtherance of the purported withdrawal satisfied these

requirements. Although they were a non-jury court they were required to consider, as though they were a jury, the evidence in support of the alleged common purpose/joint enterprise, and also the evidence being relied upon in support of the claim of effective withdrawal by the appellant, and then to determine (i) whether, on the totality of the evidence, they were satisfied beyond a reasonable doubt that a common purpose/joint enterprise, involving the appellant, had subsisted and was continuing at the time of the offences, and (ii) that the appellant had not withdrawn from the common purpose/joint enterprise, by clearly resiling from what was contemplated such that he was no longer a party thereto, and doing enough to undo or countermand the plan. The Special Criminal Court judges approached the matter entirely correctly in our view, and their conclusions, which were cogent and reasoned in detail, appear to us to have open to them on the evidence. They are unassailable in the circumstances.

46. We would dismiss the appeal.