

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER
THE PROTECTED DISCLOSURES ACT 2014 AND CERTAIN OTHER
MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND
SEANAD ÉIREANN ON 16 FEBRUARY 2017

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1921, ON 17 FEBRUARY 2017

SOLE MEMBER: MR. JUSTICE PETER CHARLETON, JUDGE OF THE
SUPREME COURT

HELD IN DUBLIN CASTLE
ON MONDAY, 8TH JANUARY 2017 - DAY 39

39

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Services certify the
following to be a
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action.

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1 THE HEARING RESUMED, AS FOLLOWS, ON MONDAY, 8TH JANUARY
2 2018 AT 10:00AM:

3
4 MR. MCGUINNESS: Chairman, before the Tribunal starts
5 its business today, there are a number of parties who 10:06
6 have not appeared here before and it might be
7 appropriate for the record to take any new appearances
8 in respect of any such parties.

9 CHAIRMAN: Yes. Well, I think some parties have been
10 granted representation by way of correspondence, but if 10:06
11 anybody is here today who wasn't there before,
12 notwithstanding that there has been correspondence,
13 perhaps they would be so kind as to identify themselves
14 just from the point of view of the transcript, where
15 people are sitting, etcetera. So is that possible? 10:06
16 Yes, Mr. Rogers.

17 MR. ROGERS: I attend here today instructed by
18 Mr. Felix McTiernan of Noble Solicitors on behalf of
19 Mr. John Barrett. Also in attendance here is Mr. Quinn
20 of Noble Solicitors. This is the first time we have 10:07
21 attended here and I have seen a letter which granted a
22 right of representation in respect of certain matters.

23 CHAIRMAN: Yes. Right. Thank you for that. As I
24 understand it, it's limited to one particular thing,
25 which is Mr. Barrett and a conversation he had with a 10:07
26 witness who is giving evidence today. Thank you very
27 much for telling me that, Mr. Rogers. So is there
28 anybody else?

29 MR. MCCANN: Patrick McCann, Chairman. I have

1 representation on behalf of the former Department of
2 Justice witnesses, if I put it in that way; that is the
3 former minister Frances Fitzgerald, Michael Flahive,
4 Ken O'Leary, Noel Waters, Christopher Quattrociochi
5 and Martin Power. And Gerard Meehan BL is my junior 10:08
6 counsel, and Charles Wallace from the Chief State
7 Solicitor's Office is attending.

8 CHAIRMAN: Sorry, can I just get counsel first, if you
9 wouldn't mind. So was there anything else?

10 MR. SREENAN: Chairman, I appear with Ellen Gleeson and 10:08
11 Catherine Donnelly on behalf of Colm Smyth, Senior
12 Counsel, Garret Byrne and Michael MacNamee, junior
13 counsel, instructed by Gleeson McGrath Baldwin.

14 MR. Ó HOISÍN: Chairman, I appear with Peter Shanley,
15 instructed by Mary Cummins of the Chief State 10:08
16 Solicitor's Office. We appear for Annemarie Ryan of
17 the Chief State Solicitor's Office.

18 CHAIRMAN: Right. Is that it, ladies and gentleman?
19 Yes, sir.

20
21 [THE TRIBUNAL DEALT WITH ANOTHER ISSUE]

22
23 CHAIRMAN: So is there any other representation of
24 which we are unaware so far? Is that it? Okay,
25 Mr. McGuinness, where do we go from here? 10:19

26 MR. MCGUINNESS: Chairman, I thought I should outline
27 in public the state in which disclosure and discovery
28 has been made to the Tribunal in relation to relevant
29 matters.

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As you will appreciate, this Term of Reference relates to the O'Higgins Commission and, in particular, Commissioner O'Sullivan's instructions and actions in relation to the Commission. And in that regard, we originally received an affidavit of discovery on behalf of the Commissioner from Eugene Corcoran dated 3rd November 2017. In conjunction with that, it's been followed by what is a late process of discovery and disclosure emerging from two strands on behalf of the Garda Commissioner. One strand is coming through the Chief State Solicitor's Office and the other strand is coming through the -- An Garda Síochána. And I do have to stress, of course, that they have engaged a number of documentary counsel; they have added to that number of documentary counsel a number of times in order to streamline and to fast-track the amount of disclosure that has been made to the Tribunal. In fairness to those documentary counsel, I should say that the volumes that are coming are very well presented, they are very well indexed and scheduled. But there's been a very large and increasing number of material disclosed to the Tribunal in relation to Sergeant McCabe generally, and all matters perceived to be relevant or potentially relevant to Sergeant McCabe and the Tribunal, so it has resulted in an accumulation of a very substantial number of boxes of material. We received three further boxes on the 11th; another tranche of material from Superintendent Walsh on the

1 3rd of the 11th; two further boxes on the 29th; three
2 tranches of electronic discovery from the Department of
3 Justice relating to the O'Higgins Commission and a lot
4 of the documentation presented therewith; three further
5 boxes from An Garda Síochána on the 13th of the 12th; 10:22
6 another file from the Chief State Solicitor's Office on
7 the 13th; four more boxes on the 18th from An Garda
8 Síochána; 11 more boxes on the 29th December; five more
9 boxes on the 2nd January; another lever-arch folder
10 from the Chief State Solicitor's Office on the 2nd; and 10:22
11 five more boxes last Friday evening.

12
13 The net result of this process, Chairman, is that, for
14 good or ill, the process of the Tribunal's review of
15 this disclosure is still ongoing and has not been 10:22
16 complete to date, as of today. It does have
17 consequences for the immediate running of the schedule.
18 What I am proposing, Chairman, is that we would open
19 the Terms of Reference, and Ms. Leader has prepared an
20 opening which will put the inquiries of the Tribunal 10:23
21 into context and will place them in the context of the
22 documents which the Tribunal has received to date, what
23 they apparently establish on their face as at the
24 moment, and it's going to include playing very relevant
25 portions of the hearing from two particular days of the 10:23
26 O'Higgins Commission, which will give a very full
27 insight into the scope of the work of the Tribunal at
28 this point in time. Parties may wish, if -- having
29 heard that, they may wish to make any comment, or

1 otherwise, about the module or any particular witnesses
2 that might be called during the module, but the opening
3 will speak for itself. It's then proposed to call one
4 witness who is scheduled for today, Mr. Cyril Dunne,
5 who is a witness whom we are taking out of turn as he 10:24
6 is otherwise unavailable for a number of weeks, due to
7 circumstances that I won't go into. And then, at the
8 conclusion of Mr. Dunne's evidence, it's proposed that
9 the Tribunal will then rise and resume its hearings,
10 recommencing again this week on Friday morning, I 10:24
11 think, Chairman, if that suits you.

12 CHAIRMAN: All right. Well, Mr. McGuinness, thank you
13 for those observations. I'm aware of the situation,
14 and indeed I had thought of doing something dramatic -
15 I'm speaking light-heartedly here, if I may - in 10:24
16 putting all the boxes that we have received over the
17 break/national shutdown that constitutes the Christmas
18 holidays, in front of us, so people could see the
19 volume of material that we're dealing with, but I
20 decided that maybe this kind of dramatic gesture would 10:25
21 get us nowhere. The facts speak for themselves. I'm
22 not here to blame anybody about anything. I appreciate
23 discovery is an ongoing matter. I also am aware that
24 we have a number of statements coming in in relation to
25 matters that are actually directly relevant to the 10:25
26 Terms of Reference, from people who perhaps ought to
27 have known that, last February, these things were
28 called for and that this was also relevant. So it has
29 held us up. Rather than blaming anyone, in fact what I

1 want to say is a word of thanks to counsel and
2 solicitor on behalf of the Tribunal and to our
3 documentary counsel and also my own two legal
4 assistants and our administrative staff and office
5 manager and the registrar, you've had to cope with an 10:25
6 absolutely enormous volume of material. And the
7 difficulty, of course, about saying, well, I will
8 delegate the reading of that box, or whatever, to
9 somebody else, is that counsel really are the only
10 people who are on top of the material and who know what 10:26
11 is relevant, and consequently there's been an enormous
12 burden of reading, which is going to continue for the
13 next three days. That is so that we are sure that we
14 are doing the right thing, and that is only the right
15 way to go about things. So, it is necessary, I'm 10:26
16 afraid, to lose three days this week to catch up on
17 that. But as I say, I'm not blaming anybody; rather,
18 I'm thanking those involved in the Tribunal for their
19 efforts over the recent holiday. Yes, Mr. McGuinness.
20 MR. MCGUINNESS: I therefore invite Ms. Leader to 10:26
21 commence.
22 CHAIRMAN: Yes, yes. All right. Well, unless there
23 was anything else, there was just one other thing that
24 I wanted to say, and that is this: when we come to the
25 end of this, I want submissions. By that, I mean when 10:27
26 we come to the end of this particular bit I want
27 submissions. I don't think any of us know when Niamh
28 Chinn Óir might come galloping across the waves to pick
29 us up, but we have a situation now where I finished

1 hearing a module, as they call it, last July; it is
2 difficult to expect anyone of ordinary intellectual
3 powers to retain that over a period of what is now six
4 months and maybe more. That, of course, concerned the
5 mix-up of the allegation of Ms. Y with the allegation 10:27
6 of Ms. D. And it has been said, when I called for
7 submissions before, that it is impossible for you to
8 decide that until such time as you hear everything.
9 Well, I have reviewed the transcript and I have
10 reviewed all the documents in the intervening period, 10:28
11 and I actually honestly don't think so. I want to be
12 in a position where an interim report on that and on
13 this can be issued at any time, because I want to get
14 it done. So people may well have a view that there are
15 certain aspects that require me to hear evidence down 10:28
16 the line. I'm not sure I'm very sympathetic to that
17 point of view, but I will certainly have an open mind.
18 But this time I'm not taking no for an answer. If you
19 don't want to make submissions in relation to the
20 module that concerned Tusla and the, what is called in 10:28
21 the Terms of Reference, false allegation of sexual
22 abuse against Sergeant Maurice McCabe, you're entitled
23 to say 'I don't want to make submissions', but you're
24 not entitled to say 'we're going to put this off for a
25 year or put this off for another several months'. So 10:29
26 when we have heard submissions in relation to this, I
27 will then hear submissions in relation to that, and, as
28 I have said, I'm not at this time taking no for an
29 answer. If you don't wish to make submissions in

1 relation to that, well, then, that means you're
2 declining to make submissions. That may well seem like
3 a tough stance, but there has to be some reality to
4 getting this matter done, and I intend to follow that
5 up as best I can, and I would earnestly seek your 10:29
6 cooperation in that regard, which has been forthcoming
7 so far. And again, I'm not blaming anybody in relation
8 to this; it just seems to me that it is utterly
9 unrealistic to suggest that I can re-analyse this
10 material up to a year after the evidence was concluded. 10:29
11 So that's how it's going to happen, and we will put the
12 date on the website as soon as we know that. So,
13 Ms. Leader.

14
15 OPENING STATEMENT BY MS. LEADER IN RESPECT OF TERM OF 10:30
16 REFERENCE (e):

17 MS. LEADER: Sir, we're now embarking on the public
18 hearings concerning term of reference (e). This is
19 closely related, perhaps, to the main issue into which
20 you are mandated to inquire; namely, the allegation 10:30
21 made by Superintendent David Taylor that there was a
22 plan in Garda Headquarters to discredit Sergeant
23 Maurice McCabe. That is not to say that what you
24 decide in this should influence you on the larger
25 issue. The point we are making is the issue in this 10:30
26 section of the Tribunal's work is akin to the bigger
27 issue that you have to decide.

28
29 Perhaps, in case of misunderstanding, we should also

1 make a personal comment. While we have looked at
2 thousands of documents and while matters have been
3 cross-checked, we hope to avoid error. The point of
4 this, in any event, is to give people a guide, but also
5 to state facts from documents in the hope of bringing 10:31
6 focus and also to invite correction. Any view we
7 express is ours, it is not yours, and, in any event, it
8 is a view from papers, while you will hear the actual
9 evidence.

10
11 You're tasked in term of reference (e) to investigate 10:31
12 whether the false allegations of sexual abuse, or any
13 other unjustified grounds, were inappropriately relied
14 on by Commissioner O'Sullivan to discredit Sergeant
15 Maurice McCabe at the Commission of Investigation into 10:31
16 certain matters in the Cavan-Monaghan district under
17 the Chairmanship of Mr. Justice Kevin O'Higgins.

18
19 You will note that the Tribunal is limited to inquiring
20 as to whether Commissioner Nóirín O'Sullivan relied 10:31
21 upon such inappropriate grounds to discredit Sergeant
22 Maurice McCabe before the O'Higgins Commission. In
23 doing so, it may also be appropriate to look at
24 contacts between Commissioner O'Sullivan, An Garda
25 Síochána and the Government, other State entities and 10:32
26 the media. These may be relevant. As you know, sir,
27 there was communication in relation to this matter in
28 May and July 2015, which communication will be examined
29 in the wider context of all of the documentation which

1 is in the Tribunal's possession.

2
3 As you are aware, sir, a Commission of Investigation
4 was established on the 3rd February 2015 under the
5 chairmanship of Mr. Justice Kevin O'Higgins. On the 10:32
6 25th April 2016, Mr. Justice O'Higgins sent his final
7 report to the Minister for Justice. The Commission of
8 Investigation heard 34 days of evidence. Sir, having
9 read the O'Higgins report, Mr. Justice O'Higgins was
10 inquiring into police conduct and competence in the 10:33
11 Cavan-Monaghan division of An Garda Síochána in respect
12 of incidents dating from February to December 2007.

13
14 Now, sir, we will shortly outline those issues.
15 However, it is important to remember that this Tribunal 10:33
16 is not mandated to re-examine those issues, nor is this
17 Tribunal an appeal from the findings and report of
18 Mr. Justice O'Higgins. Sir, were you to do that, you
19 would clearly be breaching the Terms of Reference of
20 this Tribunal. If the Oireachtas wished you to do so, 10:33
21 it would have explicitly stated same.

22
23 what should, however, be borne in mind as we outline
24 these issues to you, is that very few of the O'Higgins
25 Commission's findings were about what Sergeant McCabe 10:34
26 did or didn't do or was supposed to do. Instead, the
27 inquiry was into how others had addressed their work as
28 police officers. Facts were established in that
29 inquiry and these were mainly independent of the

1 evidence of Sergeant McCabe. There is one exception of
2 which we are aware; namely, the inquiry into the
3 missing computer which was seized during the course of
4 an investigation into offences committed by Fr. Molloy.
5 There, certainly, an issue arose as to whether Sergeant 10:34
6 McCabe was or was not exhibits officer or otherwise had
7 responsibility for custody of that computer. That is
8 one example. If there are others, then it is time for
9 those who were aware of same to elucidate what these
10 are. 10:34

11
12 The matters the Commission of Investigation was
13 directed to investigate and the findings of the
14 Commission can be summarised as follows:

15 10:35
16 On the 25th February 2007, a lady driving a late-night
17 bus for a living contacted the Gardaí concerning public
18 order and assault offences. The issues involved
19 passengers not paying, insulting women passengers with
20 "filthy tall and talking about their privates", 10:35
21 assaulting a girl in a sexual manner, assaulting
22 another girl and creating general mayhem on the bus.
23 Despite a Garda investigation some weeks later, this
24 woman was contacted and told there was essentially no
25 point in her going to court. She was later offered a 10:35
26 meal voucher in compensation through the Gardaí from
27 one of those identified as being involved, which she
28 declined. Then she was asked by the Gardaí to
29 calculate the loss of earnings and was given a brown

1 envelope containing €150 and a note of apology. She
2 was then presented with a pre-written statement
3 withdrawing her complaints. Mr. Justice O'Higgins
4 concluded that the driver of the bus was entitled,
5 having undergone a harrowing experience, to have the 10:36
6 matter dealt with professionally and competently by the
7 Gardaí and that her legitimate expectations in that
8 regard were not met.

9
10 On the 13th April 2007, there was an assault in a hotel 10:36
11 in Virginia, County Cavan. The person assaulted
12 probably lost consciousness. There was a failure to
13 access video footage and to properly investigate the
14 incident, which could correctly be classified as an
15 assault causing harm. Mr. Justice O'Higgins found that 10:36
16 the investigation of the incident was one characterised
17 by delay and resulted in the undermining of the
18 prosecution of the case.

19
20 On the 30th April 2007, a lady taxi driver took a man 10:36
21 to an isolated location near Virginia, County Cavan.
22 He then got out of the taxi and savagely assaulted the
23 taxi driver, whose injuries included bruising to her
24 left eye and puncture marks to the shoulder and, in
25 addition, clumps of her hair had been pulled out at the 10:37
26 scalp. The perpetrator was later arrested but denied
27 the assault. Following an admission, the most minor
28 charge of assault possible was proffered and the
29 defendant was released on station bail on his own bond

1 in the sum of €300. It was claimed that the minor
2 assault charge had been proffered on the directions of
3 the DPP, but this was not so. Later, that official
4 directed that more serious charges be proffered because
5 of "the savagery of the attack". While on bail, the 10:37
6 accused committed further offences, including murder.
7 Mr. Justice O'Higgins found that the investigation of
8 the assault offence was characterised by delay and a
9 lack of effective supervision. The victim was denied
10 the right to be present when the matter was ultimately 10:38
11 dealt with in court. There was a lamentable failure to
12 effectively communicate the correct information. When
13 the case was ultimately correctly dealt with in court,
14 the closest relation of the murder victim seeking
15 information was left in the dark for an excessive 10:38
16 period by the Gardaí.

17
18 On the 5th August 2007, three men went into a
19 restaurant in Bailieboro. One of the men emptied the
20 contents of a vinegar bottle and replaced it with 10:38
21 urine. This was shocking. Ultimately, having pleaded
22 guilty, all three were ordered to pay compensation,
23 which the owner of the restaurant asked to be forwarded
24 to the Garda Benevolent Trust Fund.

25 10:38
26 Such investigation as was carried out was extremely
27 poor, and, as Mr. Justice O'Higgins found, the victim
28 was left feeling let down by the Gardaí.
29

1 On the 2nd September 2007, a teenage girl was walking
2 home in the early hours of the morning in Cootehill,
3 County Cavan, and a man grabbed her, put his hand over
4 her mouth and attempted to pull her towards an isolated
5 area. When the suspect was arrested, he was 10:39
6 interviewed for only 22 minutes and released without
7 charge. No prosecution resulted. Mr. Justice
8 O'Higgins found that the victim was not well-served by
9 this investigation's lack of an identification parade;
10 the interview was not prepared or conducted well; 10:39
11 information reported by the victim's father as to
12 sightings of the assailant was not properly passed on;
13 and the legal basis for the arrest and detention of the
14 suspect was doubtful.

15
16 On 27th December 2007, a car driven by an individual
17 who, together with others, had been ejected from a
18 hotel in Virginia, County Cavan, was driven at speed
19 towards a crowd, hitting three people who fortunately
20 received only minor injuries. There was confusion and 10:40
21 uncertainty as to who had been appointed to take charge
22 of the investigation and the wrong officer was
23 described in the Garda system in that regard.
24 Mr. Justice O'Higgins also characterised the
25 investigation as flawed due to delays which resulted in 10:40
26 the appropriate charge being statute-barred by the time
27 the Garda had been directed to investigate.

28
29 On the 23rd May 2007, a man was assaulted in a public

1 house in Bailieboro, County Cavan, suffering injuries
2 to his head and face. Ultimately, for some reason, a
3 garda persuaded the victim to withdraw the complaint of
4 assault and a statement of the withdrawal was prepared.
5 Mr. Justice O'Higgins found that the garda had let down 10:40
6 the public so that the trust of the victim and his
7 family in the Gardaí was not justified.

8
9 On the 11th September 2007, a man made a complaint that
10 a Catholic priest had sexually abused his son. In July 10:40
11 2009, the priest pleaded guilty to one count of
12 defilement of a child under the age of 15 years, one
13 count of defilement of a child under the age of 17
14 years and one count of possession of child pornography
15 on a computer. The computer in question was apparently 10:41
16 a parish computer and the priest's bishop sought its
17 return from the Gardaí in September 2010. It contained
18 parish records, presumably. By then, despite the fact
19 that it was officially a Garda exhibit, it had
20 disappeared. Mr. Justice O'Higgins found that, 10:41
21 notwithstanding a seriously flawed investigation, the
22 accused was nonetheless convicted of serious offences.

23
24 This last incident was one of the main examples of
25 which we are now aware where it could be said that 10:41
26 Sergeant McCabe was in conflict with others and
27 potentially had questions to answer as to the
28 disappearance of the computer, as it was said that he
29 was assigned responsibility for the safe custody of the

1 computer. Ultimately, as Mr. Justice O'Higgins stated
2 in his report, Sergeant McCabe was "quite rightly
3 exonerated".
4

5 Sir, we are not, however, re-running these matters, as 10:42
6 we have already indicated. There has already been an
7 investigation into those matters, and findings have
8 been made.
9

10 The next question which has to be addressed is what 10:42
11 exactly was the case that was made on behalf of
12 Commissioner O'Sullivan during the course of the
13 O'Higgins Commission; what, in other words, was her
14 approach in particular as to how Sergeant McCabe would
15 be treated or dealt with. Allied to that issue is how 10:42
16 someone, who is not a lawyer, namely Sergeant McCabe,
17 but felt as a person who was voluntarily coming forward
18 and risking the disquiet of colleagues and superiors in
19 order to seek an improvement in police standards, at
20 such a case being made. So what was the approach? Was 10:43
21 that approach justified? And did it conform with the
22 stated position of the Garda Commissioner?
23

24 The relevant transcript references would appear to be
25 those of the first week of hearings of the O'Higgins 10:43
26 Commission. We have days and days of transcripts, and,
27 while we have read them all, you are only concerned
28 with some extracts, and these, in turn, are related to
29 each other. At that time, week one, the Commission was

1 inquiring into the investigation by An Garda Síochána
2 of a public order incident and possible sexual assault
3 on a bus in Kingscourt, County Cavan, on 25th February
4 2007, and the investigation by AN Garda Síochána and
5 GSOC of Garda disciplinary issues arising out of same. 10:43
6 During the course of Chief Superintendent Rooney, who
7 was at the relevant time in charge of the
8 Cavan-Monaghan district, answering questions put to him
9 by his own counsel, who was also counsel for the Garda
10 Commissioner, the following exchange took place. And I 10:44
11 think what we plan to do, sir, is to play that exchange
12 and what happened thereafter from day 1. It just might
13 take a little time.

14 CHAIRMAN: well, the orchestra is clearly just tuning
15 up. Maybe, Ms. Ní Ghabhann, you might be so kind as to 10:46
16 find the extract, because it is important for us to
17 listen to the actual words and tone of voice.

18 MS. LEADER: It might be appropriate to rise just for
19 about two minutes, sir.

20 CHAIRMAN: Do you think? I think I'm going to stay 10:46
21 where I am. I'm told I have to rise.

22
23 AFTER A SHORT ADJOURNMENT THE HEARING RESUMED, AS
24 FOLLOWS:

25 MS. LEADER: So hopefully what we are now about to hear 10:58
26 is an extract from the transcript of the O'Higgins
27 Commission from day 2, which was 15th May 2015.
28
29

1 "Q... But before you retired did have you contact with
2 him?

3 A. Yeah, Sergeant McCabe came to see me, sought and
4 appointment to come and see me in my office in
5 Monaghan. He contacted my office and made an
6 appointment and I saw him. He came to me. He was very
7 angry, he was very annoyed and he was very upset.

8 Q. MR. JUSTICE O'HIGGINS: When was this?

9 A. It was in late 2006...

10 Q. MR. SMYTH: Do you think in December or
11 November, was it late in 2006, was it winter time?

12 A. No, I am sorry, Judge, it was 2007.

13 Q. Was it late 2007?

14 A. It was probably late 2007, yes, definitely. He came
15 to my office and he was in that state and he demanded
16 of me that I write to the Director of Public
17 Prosecutions and I challenge a decision that Director
18 of Public Prosecutions had made in respect of him.

19
20 MR. GILLANE: I don't mean to cut across the
21 witness but I think just in relation to this matter,
22 unless the parties have a different view, I think it's
23 evidence concerning a matter that the Commission isn't
24 directed to investigate, whether it's relevant or not
25 is a matter for the parties.

26
27 MR. JUSTICE O'HIGGINS: Yes.

28
29 MR. SMYTH: Can I say, Judge, perhaps you

1 should hear us since this is a private hearing. The
2 relevance may be in context of motivation for certain
3 facts or for certain matters or, indeed, credibility in
4 relation to the certain matters.

5
6 MR. MCDOWELL: Judge, I wonder could I be
7 heard?

8
9 MR. JUSTICE O'HIGGINS: The matter is délicat. I will
10 rise for 10 minutes.

11
12 MR. MCDOWELL: I want Mr. Smyth to inform,
13 since this process is happening now in front of my
14 client, I want Mr. Smyth to formally inform you, Judge,
15 that he is asking these questions on the firm
16 instructions of the Commissioners and that he knows the
17 answers that he is seeking from this witness and that
18 on his view as a professional Senior Counsel it is
19 relevant to the module that we are dealing with now. I
20 want that clarified because I will deal with it. I want
21 to consult my own legal team in any event but --

22
23 MR. GILLANE: I think Mr. McDowell wants to be
24 the heard on the issue.

25
26 MR. JUSTICE O'HIGGINS: I think that might be
27 reasonable enough but I intend to abide by my original
28 intention and rise for ten minutes. The matter can be
29 perhaps clarified after that.

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(Short adjournment)

MR. GILLANE: Yes, Judge, sorry for interrupting the flow of evidence. I interrupted on the basis that I apprehended a line of questioning in relation to an area or areas that are not relevant to this module or to any module to which the Commission is concerned. I wish to emphasise obviously I hold no brief for or against any party before the Commission but I interrupted on that basis. And I was mindful of the fact that the Oireachtas has directed the Commission to exercise discretion in relation to the scope and intensity of the investigation that is considered necessary. In the circumstances which arise I recommend to the Commission that Mr. McDowell might be invited to make such a legal objection as arises if it does arise in relation to the apprehended line of questioning and that Mr. Smyth might set out a basis for the line of questioning if he wishes to pursue it and that in relation to both in terms of the topic that is to be canvassed, no detail in relation to it is necessary and it could be dealt with in legal terms.

MR. MCDOWELL: Judge, in relation to the line of questioning which we had arrived at just before the Commission arose, I apprehend that Mr. Smyth is asking this witness questions which relate to my client, his motivation and his character. And if that is to be

1 done, I want to have it very clearly understood that as
2 the Commission stated in the first opening lines, so to
3 speak, this is not an adversarial forum, this is not
4 one in which anything is being investigated except the
5 module which is the nature of the adequacy of the Garda
6 investigation of the dealings in relation to
7 Ms. Lorraine Brown by Garda Ferghal McCarthy and what
8 transpired as a consequence. That is what I understood
9 to be the parameters of the investigation that we are
10 dealing with here today.

11
12 In relation to that, my client Sergeant Maurice McCabe
13 has a very, very limited role. In fact, it was not
14 clear to me that he would be either testifying or that
15 I would be asking any questions based on the core book
16 that is available but the Commission I think can see on
17 a fairly, on a growing naked basis that Mr. Smyth is
18 asking a line of questions, which he is entitled to do,
19 to suggest that the problems that arose in relation to
20 the probationer Garda Ferghal McCarthy are the
21 responsibility in substantial measure, if not largely,
22 of my client Sergeant McCabe.

23
24 We have come here to assist the Tribunal or the
25 Commission but not here to be and to give relevant
26 evidence but not to have our character or our
27 motivation impugned save insofar as that is necessary.
28 I have absolutely no notice that the Commissioner of An
29 Garda Síochána, Nóirín O'Sullivan, has ever suggested

1 in public or in private that the problems that arise in
2 relation to this particular matter which we are dealing
3 with here are or may be the responsibility of my
4 client, none whatsoever.

5
6 I have to say that although crude and rather inept
7 efforts have been made, in my view, and I will be
8 asking the Commission to take that view in the fullness
9 of time, to suggest that somehow Sergeant McCabe was
10 directly responsible for the inadequacy of the actions
11 of probationer Garda McCarthy and the follow up on foot
12 of that and crude efforts have been made to shoehorn
13 him into a position of direct responsibility by people
14 who I think should know better. And no effort
15 whatsoever has been made by Mr. Smyth on behalf of the
16 Commissioner to either request the presence here of
17 Sergeant Burke or to inquire into what he in fact did
18 or did not do. He is content to make elliptical
19 criticisms by way of questions of my client throughout
20 this process. I am happy to deal with that as long as
21 it stops at that, because I think there is no substance
22 to it and it is a childish and unworthy line of
23 cross-examination of witnesses. I am shocked that it
24 is coming from counsel instructed by the Commissioner
25 for a variety of reasons, very, very deeply shocked
26 that this line of questioning is coming this way, but
27 so be it, we can deal with that.

28
29 But if now his character and his motivation is about to

1 be impugned, I am entitled as a matter of simple
2 constitutional and natural justice, firstly, to have
3 full notice of the attack that is going to be made on
4 his character or his credibility or his motivation and
5 I must be in a position to know what is coming, not to
6 have a collusive effort between the Commissioner and
7 senior ex-Gardaí to have examination and
8 cross-examination or, sorry, cross-examination directed
9 to these topics with a view to raising these issues
10 without any notice to my client that this was coming.
11 I haven't been here. Sergeant McCabe is not the
12 complainant here. And his legal team have stressed to
13 him at great length that it is not up to him to do the
14 Commission's work. It is for the Commission to
15 inquire. This is not an adversarial forum in which he
16 must somehow discharge some onus of proof or impugn the
17 investigation or criticise other Gardaí or whatever,
18 and he has not done that. And the Commission will note
19 that I have simply, in my cross-examination, confined
20 myself to clarifying his role as, for instance as, his
21 non-role as supervisory sergeant and the role of others
22 in that way and the sequence of events in relation to
23 what has happened. But if it is the case now, and I
24 can well imagine where this is going, if it is the case
25 that Mr. Smyth is instructed by Nóirín O'Sullivan, the
26 commissioner of An Garda Síochána, to impugn his
27 credibility, his motivation and his behaviour in
28 relation to this matter, first of all I want that
29 clearly stated before questions are put along those

1 lines.

2
3 Secondly, if my client's credibility is being called
4 into issue or his motivation, bearing in mind that my
5 client has been told by his own legal advisers that his
6 presence here is largely marginal and his contribution
7 on the facts is going to be marginal in the whole
8 process, that if a collateral attack on his credibility
9 is now going to be launched that Mr. Smyth fully
10 establish his entitlement to do that, bearing in mind
11 what the Commission has indicated is the extent of this
12 module. If it is the Commissioner's case that in this
13 multilateral mode of the Commission that that material
14 must be ventilated and those kind of questions must be
15 asked, if that is the Commissioner's case then the
16 entire basis of my participation in this, the
17 requirements of natural and constitutional justice as
18 to notice, as to the nature of the charge that the
19 Commissioner is going to lay against Sergeant McCabe
20 should be very, very clear, because in the end, as the
21 Commission well knows, it is an exception to this
22 scheme of the statute that people are given the right
23 to cross-examine anybody else and it is done to
24 protect, it's done to protect their rights. It is done
25 to protect their rights. This is not an adversarial
26 process where the truth is supposed to be elicited by
27 cross-examination by other people's counsel. The
28 purpose, as I submit to the Commission, is very simply
29 that in according the parties which have been summoned

1 to this session the right to cross-examine it is so as
2 to protect them, not to impugn others, unless that was
3 absolutely necessary for the purpose of protecting the
4 party in question. And I find it astonishing that the
5 Commissioner should feel that in some sense upholding
6 her rights involves questioning the motive and the
7 credibility and the behaviour of Sergeant McCabe in
8 this matter. I find it absolutely astonishing and
9 happily this is event is in private, though semi
10 private, there are so many people here but nonetheless
11 it is self-contained.

12
13 MR. JUSTICE O'HIGGINS: It is in private.

14
15 MR. McDOWELL: It is in private. But I find it, Judge, 11:17
16 deeply wrong, that the commissioner would, without any
17 notice to me, use a witness, a retired witness with a
18 view to launching an attack on my client. And what I
19 am asking for is, firstly, absolutely firm confirmation
20 from Mr. Smyth that is instructed by nobody else but 11:18
21 the Commissioner to impugn my client's credibility, to
22 question my client's motivation or to question my
23 client's behaviour in relation to these matters, and to
24 ask questions of other witnesses, as he has been doing,
25 in a mild manner, but now is obviously getting to more 11:18
26 substantial matters, along those lines. I want that
27 confirmation first. And secondly, if those are his
28 instructions, the second thing is to show how it is
29 remotely admissible or relevant to these proceedings

1 whether, how -- what my client's motives or behaviour
2 or standards or credibility could be bearing in mind
3 that, as I say, this module could well have taken place
4 without my presence here at all.

5
6 MR. JUSTICE O'HIGGINS: Just one or two preliminary
7 matters. First of all, insofar as you canvassed the
8 question about the efforts to put responsibility on
9 Sergeant McCabe in relation to these matter, they are
10 matters to be considered by this module and no doubt
11 you will make those points in relation -- they will be
12 better made in relation to your submissions on the
13 module rather than in the course of this application.

14
15 MR. McDOWELL: I only say in relation to that, that we
16 have had no notice that that was their intention.

17
18 MR. JUSTICE O'HIGGINS: Secondly, the matters that you
19 have raised are important in relation to this. It is
20 an inquiry. It is not an adversarial thing. The
21 question of credibility of witnesses can be probed in
22 the normal fashion in relation to -- clearly the
23 accuracy of somebody's memory bears on the credibility
24 of their evidence and so forth. But if it goes beyond
25 that, if it is the Commissioner's case that she wishes
26 to impugn the motivation and the integrity of Sergeant
27 McCabe, if those are the instructions that you have,
28 Mr. Smyth, I think you should say so in so many words.
29 If they are not your instructions, that is a different

1 matter. If those are your instructions, that Sergeant
2 McCabe acted out of improper motivation and that his
3 character is -- so be it, if those are your
4 instructions, but if not -- if they are, I think the
5 Commission, bearing the nature of the inquiry, should 11:20
6 be appraised of that. If that stage is arrived at,
7 then the question of notice to other parties or whether
8 they were taken by surprise will be dealt with by the
9 Commission. As I indicated in my opening statement,
10 nobody is going to be ambushed. But that doesn't arise 11:21
11 at the moment. I think in view of the particular
12 nature of the matters under discussion that it is not
13 unreasonable of Mr. McDowell to say whether an attack
14 on the integrity and motivation of Sergeant McCabe
15 forms part of your case or whether you are saying that 11:21
16 no, he is inaccurate or mistaken.

17
18 MR. SMYTH: Do you want me to respond?

19
20 MR. JUSTICE O'HIGGINS: Please. 11:21

21
22 MR. SMYTH: I have instructions from the Commissioner,
23 Judge. This is an inquiry dealing with allegations of
24 malpractice and corruption on a grand scale by members
25 of An Garda Síochána. 11:22

26
27 MR. JUSTICE O'HIGGINS: No. This part of the inquiry,
28 no.
29

1 MR. SMYTH: I appreciate that. But my instructions are
2 to challenge the integrity certainly of Sergeant McCabe
3 and his motivation.

4
5 MR. JUSTICE O'HIGGINS: The integrity? 11:22

6
7 MR. SMYTH: His motivation and his credibility in
8 mounting these allegations of corruption and
9 malpractice.

10 11:23
11 MR. JUSTICE O'HIGGINS: There is a difference. In
12 relation to the question of credibility, as I have
13 already indicated, that is an everyday matter. One can
14 suggest to a witness that his evidence shouldn't be
15 believed because of something, but an attack on 11:23
16 somebody's credibility, on his motivation or integrity,
17 is something that really doesn't form part of this
18 inquiry. It would be necessary, I think, for you to go
19 further and say that the complaints and the actions of
20 Sergeant McCabe on your instructions were motivated 11:23
21 by -- his motivation was dishonest or wrong. In other
22 words, that he made these allegations not in good faith
23 but because he was motivated by malice or some such
24 motive and that impinges on his integrity. If those
25 are your instructions from the Commissioner, so be it. 11:23

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27 MR. SMYTH: So be it. That is the position, Judge.

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29 MR. JUSTICE O'HIGGINS: Those are your --

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MR. SMYTH: Yes. As the evidence will demonstrate, Judge.

MR. JUSTICE O'HIGGINS: Okay, those are your -- 11:24

MR. SMYTH: If we are allowed to proceed.

MR. JUSTICE O'HIGGINS: Those are your instructions from the Commissioner? 11:24

MR. SMYTH: Those are my instructions, Judge.

MR. JUSTICE O'HIGGINS: Very good. 11:24

MR. SMYTH: I mean, this isn't something that I am pulling out of the sky, Judge. And I mean, I can only act on instructions.

MR. JUSTICE O'HIGGINS: If those are the instructions, so be it. We will have to deal with them then. 11:24

MR. McDOWELL: If that is the case, Judge, I must have advance knowledge of the so-called evidence. I cannot be in a position -- 11:24

MR. JUSTICE O'HIGGINS: I am just going on to that, Mr. McDowell. You are entitled to have knowledge of those matter and a reasonable time can be given to you

1 to take instructions on those matters. However, that
2 right that you have - and it will be respected and you
3 will not be ambushed and you will not be taken by
4 surprise - in the particular, if I can use the horrible
5 phrase, factual matrix of this inquiry, the obtaining 11:25
6 of such instructions might not take as long in the
7 particular circumstances than it might if the factual
8 matrix were different.

9
10 MR. MCDOWELL: I fully accept, Judge, that -- 11:25

11
12 MR. JUSTICE O'HIGGINS: Yeah. So, you will be given
13 time to deal with these matters. What I am suggesting
14 is that you may not require as much time as somebody
15 who may not have been familiar with the factual matrix 11:25
16 of this inquiry. So, where do we go from there?

17
18 MR. MCDOWELL: Well, can I respectfully submit the
19 following. Judge, as I understood it, we were
20 inquiring into Garda Ferghal McCabe's [sic] 11:26
21 investigation into relation to a public order incident
22 and it was, as I understood it, a fairly discrete issue
23 in which my client's factual input would be relatively
24 limited. Because I think that it is common case -- I
25 haven't heard a disputed fact yet in relation to his -- 11:26
26 what has happened here and I haven't contradicted
27 people on the facts, save in relation to the role and
28 function of the sergeant in charge vis-à-vis
29 supervisory sergeants or unit sergeants or whatever.

1 So I would respectfully submit that the Commission
2 proceeds to deal with the facts of the public order
3 incident, the investigation and the like, and that this
4 witness be stood down until such time as I am given
5 advanced knowledge of the questions... the issues on 11:27
6 which Mr. Smyth proposes, on the instructions of the
7 Commissioner, to cross-examine. Because it seems to me
8 that - and I think the Commission will probably agree
9 with this readily - that the point being made now or
10 the line of territory now being traversed would apply 11:27
11 to any module in this whole Commission.

12
13 MR. JUSTICE O'HIGGINS: Yes. It seems, unless I am
14 mistaken, Mr. Smyth, that your case is that in relation
15 to the matters under investigation, subject only 11:28
16 perhaps to matters to deal with general staffing
17 levels, the condition of the Garda station in
18 Bailieboro, that most of the matters deal with factual
19 issues and you are saying that Garda McCabe's complaint
20 on your instructions are motivated -- that they are not 11:28
21 properly motivated, that they are not genuine, that
22 they are done for improper motives.

23
24 MR. SMYTH: Whatever the reasons are for it on his side
25 and it runs right through all of the -- 11:28
26

27 MR. JUSTICE O'HIGGINS: But you are attacking his
28 motivation and you are attacking his integrity.
29

1 MR. SMYTH: Right the way through.

2

3 MR. JUSTICE O'HIGGINS: Full stop.

4 S

5 MR. SMYTH: Yes, full stop. 11:28

6

7 MR. JUSTICE O'HIGGINS: So be it.

8

9 MR. SMYTH: Yes.

10 11:29

11 MR. JUSTICE O'HIGGINS: Now, in the context of this
12 particular limited module, and I have at the very
13 outset said that I considered it to be a limited
14 module, do you think it is necessary to pursue this
15 particular line of questioning or could this particular 11:29
16 line of questioning be kept for another module, in
17 which case there would be more time for it to be dealt
18 with? In other words, it does appear on the face of it
19 that Sergeant McCabe's involvement in this particular
20 module is very limited indeed, though -- it is limited 11:29
21 indeed, and you have made the point that well, he
22 should bear responsibility for supervision. And those
23 are obviously genuine points that I will adjudicate on
24 in due course. But I am asking you do you believe it
25 necessary to pursue the allegations that these were -- 11:30
26 the challenges to his integrity in this particular
27 module or not?

28

29 MR. SMYTH: Are relevant, Judge, are relevant because

1 for the simple, Judge, there is evidence already
2 adduced that Sergeant McArdle and Sergeant McCabe went
3 to Lorraine Browne and encouraged her, although there
4 is a debate as to whether it was encouragement or
5 suggestion or otherwise, to go to GSOC. And I say that 11:30
6 that is a matter which is -- the bullet has to be
7 bitten on this, Judge, and I think this is the
8 witness --

9
10 MR. JUSTICE O'HIGGINS: well, the bullet is that 11:31
11 Mr. McDowell made an objection.

12
13 MR. SMYTH: Yes.

14
15 MR. JUSTICE O'HIGGINS: And he said that if you are so 11:31
16 instructed that the integrity and the motivation of
17 Sergeant McCabe is, on the instructions of the
18 Commissioner, to be attacked or to be questioned, you
19 are entitled to do it and the question then arises in
20 relation to the question of notice. 11:31

21
22 MR. MCDOWELL: There is a slight addition to this
23 point. I have just heard Mr. Smyth say that Sergeant
24 McCabe and Sergeant McArdle went to Lorraine Browne and
25 encouraged her to go to the Ombudsman. That's the 11:31
26 evidence that he says has been adduced. I don't
27 remember and I haven't seen that evidence on the
28 transcript yet, that that happened, but regardless,
29 maybe he wants to put that to my client.

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MR. JUSTICE O'HIGGINS: In relation to that, there has been evidence in relation to the circumstances in which Ms. Browne went to the --

11:32

MR. McDOWELL: I have seen the evidence.

MR. JUSTICE O'HIGGINS: And there has been a difference in emphasis as to precisely what the circumstances were. On one hand it had been contended that there was some encouragement, on the other hand it is being suggested that it was something a little more neutral, less strong.

11:32

MR. McDOWELL: Indeed. I heard her evidence, I heard her being cross-examined on that this morning. But the issue is this: I don't know on what point of fact Mr. Smyth believes that he is going to differ in any way with Sergeant McCabe if he is called to assist the Commission. I have no idea what in relation to those events -- in relation to these events that we are dealing with --

11:32

11:33

MR. JUSTICE O'HIGGINS: And it is precisely because --

11:33

MR. McDOWELL: And the reason I want to mention that is that, if there were a conflict of fact between him and others as to what Garda McCarthy did or did not do or whether it was or was not adequate in the circumstances

1 or proper in the circumstances of that, if there was an
2 issue of fact then an issue of credibility would arise.
3 But if there is no conflict on the facts, it is not
4 proper to raise the issue of credibility...

11:33

5
6 MR. JUSTICE O'HIGGINS: If there is no difference in
7 fact, the issue of credibility doesn't arise.

8
9 ...

11:33

10
11 MR. McDOWELL: It seems to me that there has to be some
12 issue of fact before credibility of cross-examination
13 can come an issue. And I don't see it. I don't see
14 Mr. Smyth --

11:34

15
16 MR. JUSTICE O'HIGGINS: That is a fair observation and
17 we will see what Mr. Smyth has to say.

18
19 MR. SMYTH: That is all well and good, Judge, but I
20 have no control over the manner in which the witnesses
21 were called and this witness had to be called well in
22 advance of Sergeant McCabe.

23
24 MR. JUSTICE O'HIGGINS: No, but what I meant by that
25 is if you could clarify what issues of fact --

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27 MR. SMYTH: Certainly thus far the issue of fact that
28 does raise its head, even at this stage, is the issue
29 of --

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MR. JUSTICE O'HIGGINS: Is the issue of responsibility or supervision.

MR. SMYTH: Yes, yes. Not necessarily supervision, Judge, but the whole issue surrounding the reason why for nearly one year, or in fact it was over one year, it was May 2008, for the first time that Sergeant McCabe has any hand, act or part in relation to what happened in relation to this incident in Kings Court. He marches off or rings up or makes contact in some shape or form, I don't know precisely how he does, he hasn't given evidence, but we know from Regina McArdle that both himself and Regina McArdle made contact with a member of the public and encouraged them to go to GSOC.

MR. JUSTICE O'HIGGINS: There is a difference of emphasis at least on that.

MR. SMYTH: There may well be. I have to raise this. I could be criticised.

MR. JUSTICE O'HIGGINS: No, I'm asking you if you believe there are, on your instructions, issues of fact between you and Sergeant McCabe.

MR. SMYTH: On this module, Judge, I believe there is.

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MR. MCDOWELL: Well, can we hear some?

MR. SMYTH: And, as I said to you, Judge, the fact of the matter is that we have heard nothing from Sergeant McCabe about any of the incidents of May 2008 and he decides then -- and if you had heard, Judge, if you had heard the evidence, and an objection was raised at a very early stage to the evidence of this witness, but if you heard what he had to say it would become clear that there was a confluence between what was said and demanded of him and the next step in what Sergeant McCabe does. That is to the --

MR. JUSTICE O'HIGGINS: I have a certain understanding of what the position is.

MR. GILLANE: If it is of assistance to the Commission and the parties I should have indicated because I am in control of the witness obviously. Just in relation to Sergeant McCabe, it wasn't the intention of me or counsel for the Commission to ask him any questions at all about any engagement, in this module, with the chief superintendent, although that might arise in the future. Questions were going to be strictly limited to his contact in fact with Sergeant McArdle and then Lorraine Browne and the fact that a complaint was made. So it was to be limited to that, if that's of any assistance.

1 MR. JUSTICE O'HIGGINS: Well, it should be.
2
3 MR. SMYTH: Sorry, Judge, I'm getting instructions.
4
5 MR. JUSTICE O'HIGGINS: Would you like me to rise? 11:36
6
7 MR. SMYTH: If I just had five minutes, Judge.
8
9 MR. JUSTICE O'HIGGINS: Before we rise you might
10 consider, maybe we are not in a position to listen at 11:37
11 the time, just the last remarks made by Mr. Gillane,
12 who said that he had anticipated that in relation to
13 this module that the evidence that he was going to --
14 that sergeant, to call Sergeant McCabe was essentially
15 confined to the circumstances in which Lorraine Browne 11:37
16 went to GSOC and matters of that nature. If that were
17 the case, it might be that the issues of integrity,
18 motivation and so forth that you say you are instructed
19 are to be levied against you might not arise in this
20 particular module. In other words, Mr. Gillane is 11:37
21 indicating that as far as Sergeant McCabe is concerned
22 in relation to this module he will essentially be
23 confining himself to the circumstances of meeting
24 Lorraine Browne and encouraging her or otherwise to go
25 to GSOC. So that might be of some help. Okay, look, I 11:38
26 realise this matter has arisen, I don't want -- would
27 ten minutes be enough for you? Very good.
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29 (SHORT ADJOURNMENT)

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MR. SMYTH: My instructions are reconfirmed.

MR. JUSTICE O'HIGGINS: Very good. Your instructions, as I understand them, are that Sergeant McCabe acted as he did for improper motives.

MR. SMYTH: Yeah.

MR. JUSTICE O'HIGGINS: Okay. And that his integrity is being challenged in that respect.

MR. SMYTH: In that respect.

MR. JUSTICE O'HIGGINS: Okay, fine, so be it. What arises then are two things, initially anyway. The first is the question of notice to Mr. McDowell's client and secondly, the question of the limits of cross-examination in respect of this issue. As has been emphasised, Module 1 is very limited in scope. The differences between apparently what Sergeant McCabe is likely to say concerns the circumstances in which Ms. Browne went to GSOC and the matters you have already agitated in relation to the question of responsibility or supervision and all of this. Now, if the suggestion, out of the instructions, that the motivation for the conversations with Lorraine Browne, whether there would be suggestions, encouragement or whatever, that's a matter for me, it seems to me that

11:38

11:39

11:39

1 those matters could be dealt with in cross-examination
2 by putting that the motive for the actions was X, as a
3 result of X conversation Sergeant McCabe got somebody,
4 described him as being very angry and upset and
5 agitated, and that was the motivation, without going 11:40
6 into unnecessary details in relation to the background
7 of that, because the background or other substance of
8 those allegations does not appear to me, unless
9 otherwise persuaded, to be germane to this or indeed
10 any other module of this inquiry. In other words, that 11:40
11 would seem to be permissible to say that Sergeant
12 McCabe acted out of improper motives or whatever, if
13 those are your instructions, and they are, but the
14 detail in relation to those does not seem to me to be a
15 very relevant matter of cross-examination, but we will 11:41
16 have to wait and see that and I can rule on that if and
17 when it comes. Now, in relation then to the question
18 of notice, I'd like you to do one thing and that is: I
19 think you should persuade me of the relevance of those
20 issues to this particular module. I think I would also 11:41
21 like to be addressed by Mr. McDowell on the question of
22 notice and maybe you could respond to that. I would
23 like to hear you on those things and we may then
24 consider the matters over the weekend.

25
26 MR. SMYTH: The first thing, Judge, in relation to this
27 notice, I don't have any power to take statements, in
28 this Commission of Inquiry to take statements off any
29 witnesses. That would be a matter for the Commission,

1 to take statements and to give notice of what was said
2 by certain witness to Mr. McDowell. Because that's not
3 a function that I have. I am not entitled to do that
4 under the terms of the Commission. So the second thing
5 is, Judge, in relation to the --

11:43

6
7 MR. JUSTICE O'HIGGINS: Mr. McDowell is entitled to
8 know what adverse allegations are being made against
9 him.

10
11 MR. SMYTH: He certainly is. Yes. But you are asking
12 me, Judge, can I take statements from witnesses, that's
13 not -- I don't have -- I have no control over that.

11:43

14
15 MR. JUSTICE O'HIGGINS: No, I didn't ask you to do
16 that.

11:43

17
18 MR. SMYTH: But I can certainly give in a general way
19 notice to Mr. McDowell, I suppose in writing, as to
20 what certain witnesses will say. That's as far as I
21 can take it.

11:43

22
23 MR. MCDOWELL: How can he say that, with respect,
24 unless he has been conferring with a witness? And that
25 does call into question what is happening here. If he
26 has been consulting with witnesses in relation -- and I
27 believe that Mr. Smyth may not have been doing it, but
28 others I do believe have, consulting with witnesses as
29 to what they will say if they are asked certain

11:44

1 questions, then in my respectful submission I am
2 entitled to have notice of what the questions they are
3 intending to put to those witnesses relevant to these
4 issues.

5
6 MR. JUSTICE O'HIGGINS: I think you are entitled to be
7 furnished with the substance of material, substance of
8 material that is likely to be adverse to you in order
9 that you could respond.

10
11 MR. MCDOWELL: I want to make one thing clear, Judge.
12 I have emphasised to my client, as has Mr. Costello and
13 Mr. Gordon, that he is not here to sustain any case
14 whatsoever. That is the first thing.

15
16 MR. JUSTICE O'HIGGINS: Mr. McDowell, you made that
17 point already and I can tell you that is taken on board
18 and I accept it.

19
20 MR. MCDOWELL: I want to say the following: That, as
21 far as I know he proposes to make no criticism of any
22 other person in this room, save to say what he actually
23 did, right, if he is called to give evidence. That's
24 what he proposes to do. Now the Commission may invite
25 him to make criticism of others, but it wasn't his
26 intention to proffer them or to volunteer criticism in
27 general terms of other people's behaviour. That's the
28 first thing. The second thing is, in relation to this
29 matter what he proposed to do -- I mean, it's obviously

1 for Mr. Gillane to lead his evidence, such as it is.

2
3 what he had in mind to do, so that everybody will be
4 clear about this, was to say what his interaction with
5 probationer Garda Ferghal McCarthy was in relation to 11:45
6 this issue, and it will be very small, very, very
7 short. When we first heard that there was a problem
8 from sergeant McArdle. I think two conversations or
9 three that had he had in relation to these matters, one
10 with Lorraine Browne, and that is the extent of his 11:46
11 proposed evidence. And that's the beginning, middle
12 and end of the evidence he proposes to give.

13
14 Some people may here think that he is going to lay into
15 everybody and try and attack their integrity and their 11:46
16 reputation or whatever, that is not his function in
17 this inquiry. So if people think they have to get
18 their retaliation in first, to use the football thing,
19 that's completely misguided. Unless the Commission
20 leads him into territory and asks his opinions on 11:46
21 matters, which may or may not be relevant, because in
22 large measure it's the opinion of the Commission and
23 the facts that I think is much more relevant than
24 Sergeant McCabe's view of facts, because he wasn't
25 appointed to the Commission. 11:47

26
27 It seems to me that there is a misconception here that
28 somehow he is the man who is going to lay about and
29 criticise, accuse and the like, and he is not. He has

1 done that. He is coming here to answer questions that
2 Mr. Gillane puts to him.

3
4 MR. JUSTICE O'HIGGINS: Two things. I am grateful for
5 that observation, Mr. McDowell, and I just want to add 11:47
6 that any impression such as you refer to certainly
7 didn't emanate from the Commission.

8
9 MR. MCDOWELL: No, no. I'm saying if people are
10 getting defensive -- the Commission as I understand it 11:47
11 is here to investigate the facts and to draw
12 conclusions. It is not interested in Sergeant McCabe's
13 view of the facts, which are about as relevant as
14 anybody else's view of the facts here. This is an
15 inquisitorial process where the facts are established 11:48
16 by the Commission and the inferences from those facts
17 are made by the Commission and drawn by the Commission,
18 and it's not a question of there being some quasi
19 accusatorial process here where my client is coming in
20 here with an agenda. He is not. 11:48

21
22 MR. JUSTICE O'HIGGINS: I think I have stressed the
23 inquisitorial nature many times.

24
25 MR. MCDOWELL: Yes. I am not suggesting you haven't. 11:48
26

27 MR. JUSTICE O'HIGGINS: No, no. I know that. And I
28 intend to do so again and again because I think it is
29 very, very important that this is not us against them.

1 This is an inquiry. And I did demand at the outset
2 assistance of everybody, and that wasn't an empty
3 formula of words.

4
5 MR. MCDOWELL: It might assist you, Judge, it just 11:48
6 occurs to me it might assist you that if my client was
7 to put on one page what factually he did.

8
9 MR. JUSTICE O'HIGGINS: Yes.

10 11:49
11 MR. MCDOWELL: So that everybody will know what is
12 coming as far as he is concerned and leave his opinions
13 out of these matters out of the matter. And it just
14 might, because I mean, if we are going to have
15 credibility brought into issue, credibility can only be 11:49
16 relevant to determine questions of fact.

17
18 MR. JUSTICE O'HIGGINS: Yes.

19
20 MR. MCDOWELL: Whether my client was correct originally 11:49
21 to take the steps he did to bring these matters into
22 the public domain is not the substance of this
23 Commission. This Commission is looking at these
24 matters afresh.

25 11:49
26 MR. JUSTICE O'HIGGINS: well, credibility does only
27 arise in cases of a question of a conflict in relation
28 to the facts. I gently hinted that perhaps the issue
29 in relation to the motivation of Sergeant McCabe, which

1 could go to his credibility, might more suitably be
2 canvassed in another module of this, where there may be
3 more severe conflict in relation to the facts. That
4 was a suggestion that I made in ease of everybody, but
5 it was only a suggestion. I would, however, ask -- I 11:50
6 think you are entitled to notice of the substance of
7 any allegations against you that are adverse to your
8 good reputation, that you are entitled to be furnished
9 with those so that you can deal with them.

10
11 MR. McDOWELL: Subject to the underlying purpose of
12 them being relevant to the Tribunal's activities and to
13 the module itself.

14
15 MR. JUSTICE O'HIGGINS: In this regard I think, 11:51
16 Mr. Smyth, I would invite some submission by you -
17 perhaps over the weekend, we may need time to consider
18 the matter - as to precisely the relevant of the
19 allegations or the motivations in relation specifically
20 to this module, where, if Mr. McDowell is correct, 11:51
21 there doesn't seem to be a difference of fact very
22 much. And if there is no difference of fact the
23 question of credibility, which of course you are
24 entitled to canvass, doesn't really arise.

25
26 MR. SMYTH: Can I say, Judge, first of all, it's a 11:52
27 Commission of Inquiry, I have no control over the
28 calling of witnesses. I cannot call witnesses. I have
29 to seek permission to cross-examine witnesses. Those

1 are the rules. This witness, when he has given his
2 evidence and when he has been cross-examined he can up
3 and away and I have no power to call him back. This is
4 the first opportunity we'll have, and I could be
5 criticised for not raising it at this stage with this 11:52
6 witness as to what conversation he had with Sergeant
7 McCabe, what was the result of that conversation, what
8 was the outcome and what flowed from that thereafter.
9 That's the first opportunity I've had to do this. If
10 this witness is cross-examined and away, I have no 11:53
11 power to bring him back. I have merely only a side
12 role in this. I am subject entirely to the Commission.
13 And it has to be raised, this point, and I could be
14 criticised if I had waited until module -- I think it's
15 module (i), to raise this issue. Mr. McDowell would be 11:53
16 up on his feet and saying, look, he never raised it,
17 this is the first we've heard of it.

18
19 MR. JUSTICE O'HIGGINS: If you say that there are
20 issues where credibility arises, that is in relation to 11:53
21 where facts are in conflict, perhaps you'd -- and I am
22 not, I am not trying to take you by surprise, perhaps
23 you'd state where those areas of perceived or
24 anticipated conflict are in order that it could be
25 adjudicated as to whether the question of credibility 11:53
26 arises in this particular module.

27
28 MR. SMYTH: I think the issue of credibility arises in
29 all modules. Sergeant McCabe has raised serious

1 allegations of malpractice and corruption against An
2 Garda Síochána --

3
4 MR. JUSTICE O'HIGGINS: In this module.

5
6 MR. SMYTH: And in this module, Judge. Because he made
7 an allegation about the investigation about the number
8 of -- the investigation of this particular offence that
9 occurred in Kings Court, the management of Bailieboro.

10
11 MR. JUSTICE O'HIGGINS: In this module we are inquiring
12 into the investigation of a certain --

13
14 MR. SMYTH: Incident in Kings Court.

15
16 MR. JUSTICE O'HIGGINS: And the investigation, it would
17 be a matter for the Commission to determine the quality
18 of that particular investigation on the evidence that
19 it has heard.

20
21 MR. SMYTH: And within this module there is evidence
22 thus far, limited and all that it is, that he has taken
23 an avert act, such as contacting a member of the public
24 who was involved in the incident over a year later and
25 has encouraged or certainly suggested to that witness
26 that they should make a complaint to GSOC, and it is
27 the motivation for that, Judge, and it is the --

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29 MR. JUSTICE O'HIGGINS: Credibility is --

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MR. SMYTH: Credibility.

MR. JUSTICE O'HIGGINS: But credibility only arises where there is a conflict in relation to facts. Is there any conflict which so far, or anticipated, about the fact that -- just one second -- that Sergeant McCabe talks with Lorraine Browne, so did Sergeant McArdle, they suggested, encouraged or informed, we have had the evidence, it is for me to decide, that she go to GSOC, that seems to be the common case.

MR. SMYTH: Judge, can I say this, and I don't mean to be tedious or to be difficult about this. I have no control of the calling of witnesses. This witness is up and away once he has finished his cross-examination, and I cannot recall him. If Sergeant McCabe had been called, you would be very much aware of what the serious issues are in relation to fact as between my side of the house and Sergeant McCabe.

MR. JUSTICE O'HIGGINS: And again, it is not any side of the house. This is an inquiry and we are all on the same side helping me.

MR. SMYTH : I don't mean to be disrespectful, it is just a phrase I used.

MR. JUSTICE O'HIGGINS: Don't worry about that.

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MR. SMYTH: If you look at the terms, if you look, Judge, at the --

MR. JUSTICE O'HIGGINS: Mr. Smyth, please, just in relation to this one thing, there doesn't seem -- I don't anticipate from what I have been told, there doesn't seem to be any conflict that Sergeant McCabe and Sergeant McArdle went to Lorraine Browne and asked, encouraged or suggested that she go to GSOC. You say that, the other side are going to say that. 11:56
11:57

MR. SMYTH: It's not just that, Judge. Sergeant McCabe is critical of the failure to complete an investigation file. He is critical thus far on the evidence. 11:57

MR. JUSTICE O'HIGGINS: There is not any conflict in relation that there was a failure to complete an investigation file and Garda McCarthy himself, in the documents that I have, has said that he failed to complete and he was sorry about it. 11:57

MR. SMYTH: And insofar as the module is concerned, Judge, he will also be saying, as I understand it, if the Guerin Report is to be followed, that the Pulse record was falsified and he described Garda McCarthy's actions as disgraceful. And if he is giving evidence he is going to be challenged in relation to those issues and there will be disputes in relation to the 11:57

1 facts and it's then of course that the issue of
2 credibility arises. And as I say, Judge, it's a
3 premature application in the sense, what am I to do?
4 If this witness leaves the box, he's up and running and
5 I can never get him back. If Sergeant McCabe had been 11:58
6 called first in line this would become apparent as to
7 where the issues and where the dispute arises between
8 me and Sergeant McCabe on facts --

9
10 MR. JUSTICE O'HIGGINS: Well certainly, it is likely 11:58
11 that that there will be an issue over whether the Pulse
12 records were falsified or not or whether that was the
13 correct term, I don't know. There may be a legitimate
14 question as to the characterisation of the actions of
15 Garda McCarthy being disgraceful. There does not seem 11:58
16 to be an issue in relation to the facts that Garda
17 McCarthy failed to complete his report. And that was,
18 to put a neutral word on it, unfortunate. He accepted
19 criticisms in that regard before Superintendent Heller.
20 So the factual issues in dispute are very limited. 11:59

21
22 MR. SMYTH : Judge, you are anticipating, but the fact
23 of the matter is that he is also critical, as I
24 understand it, of Superintendent Cunningham and his
25 handling of matters. And you are asking me, Judge, to 11:59
26 spell out the facts as they are. If the evidence of
27 Sergeant McCabe is given, I will be challenging
28 Sergeant McCabe in strong terms and there will very
29 quickly appear to be dispute between -- I hope there

1 will be, you will see that there is a serious dispute
2 on the facts from which issue then of credibility
3 arises to determine which version of events is likely
4 to be the correct one. I mean, that is the position,
5 Judge. If this was a normal trial --

12:00

6
7 MR. JUSTICE O'HIGGINS: Just one second. It is not a
8 trial, it is not a normal rule, and it is not a trial
9 at all.

10
11 MR. SMYTH: If it was in the normal way, if this was a
12 hearing in the normal way, the matter would be dealt
13 with in a much different way by me. I wouldn't be
14 making this application. I am forced, my hand is
15 forced, because this witness is up and away. This is a
16 crucial witness to give evidence as to what was said
17 between himself and Sergeant McCabe.

12:00

12:00

18
19 MR. JUSTICE O'HIGGINS: Just one second. We are
20 talking about a conflict in relation to facts.

12:00

21
22 MR. SMYTH: To the facts.

23
24 MR. JUSTICE O'HIGGINS: If it emerges the fact that
25 Sergeant McCabe characterised your or Garda McCarthy's
26 actions as disgraceful, clearly you can --

12:00

27
28 MR. SMYTH: And that he falsified the Pulse, Judge.

29

1 MR. JUSTICE O'HIGGINS: I think you can take it that I
2 am aware of the general nature of the -- but we are
3 just trying to sort out the specific problem. I am not
4 trying to preclude you from making your case. You have
5 nailed your colours to the mast and said that Sergeant 12:01
6 McCabe acted as he did out of not legitimate motives,
7 if you like. And you are entitled to pursue that.
8 What I am trying to tease out is whether that -- and
9 you are entitled to put those matters in relation to
10 his credibility. What I am trying to tease out is to 12:01
11 the relevance of the questions of credibility in
12 relation to this module alone. Now certainly you are
13 entitled to probe this, for example, the question of
14 whether such and such conduct was disgraceful, but that
15 doesn't necessarily -- may not involve issues of 12:02
16 credibility, no. The question of an allegation in
17 relation to the falsification of Pulse, there may be no
18 factual difference between the parties as to what
19 happened. So it may be a question of how they were
20 characterised. 12:02

21
22 MR. SMYTH: And it certainly will arise, Judge, in
23 relation to his criticism of the superintendent in his
24 handling of the matter as to why he should make the
25 criticism of that superintendent. 12:02

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27 MR. JUSTICE O'HIGGINS: But those criticisms may or
28 maybe justified, but they don't seem, as of now, to be
29 questions of fact.

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MR. SMYTH: well, Judge, we don't know that until such time as we have heard the evidence with respect.

MR. JUSTICE O'HIGGINS: No, no, that is precisely the point I am making. And I am making the point that in relation to the question of cross-examination in relation to credibility, it only arises if and when there is a conflict in relation to the facts. 12:02

MR. SMYTH: One other problem I have, Judge, is this witness is then -- are you saying I am not entitled to pursue the line and ask him questions about what conversation he had with Sergeant McCabe? Or, he is to be recalled at a later stage? Or, how is the Commission to proceed in relation to this matter? 12:03

MR. JUSTICE O'HIGGINS: well, there are two or three possibilities. One is that you might be permitted to cross-examine in the terms that were suggested. That you suggest that Sergeant McCabe acted as he did as a result of his disappointment with the decision made by the Chief Superintendent Rooney. Full stop. Without the necessity of canvassing matters that are alien to this or any other module of the inquiry. 12:03
12:04

MR. SMYTH: I am not going to necessarily go into the graphic detail of what the investigation was but I am entitled to. This witness is going to suggest, as I

1 understand it, that it was demanded of him to put
2 pressure on another superintendent to write to the DPP
3 and to have the DPP write a letter in certain terms in
4 respect of Sergeant McCabe. So that has to be put, if
5 I am allowed to do it. He was about to say, everybody 12:04
6 jumps up and raises an objection, that is the tenor of
7 what he was saying --

8
9 MR. JUSTICE O'HIGGINS: well, it might have been too
10 late to raise the objection if the evidence was already 12:04
11 given. As you will appreciate, there are certain
12 delicate matters that, if necessary, they will have to
13 be canvassed but at the moment it doesn't appear that
14 they need to be canvassed in any detail, but rather
15 than suggesting that the motive for doing X, Y or Z is 12:05
16 because he was dissatisfied with some decision by
17 Superintendent Rooney, Chief Superintendent Rooney, to
18 do this or not to do that. And I don't think that
19 would inhibit -- I don't at this stage see any
20 necessity that the matter be probed in detail other 12:05
21 than that.

22
23 MR. SMYTH: well, Judge, if you are asking me am I
24 going to probe for the sake of being gratuitously
25 offensive to Sergeant McCabe about some investigation 12:06
26 that was conducted, that he was the subject of, that
27 doesn't really concern me. I am more concerned with
28 his demand that he made of this witness to contact
29 another superintendent, a superintendent to have that

1 superintendent do something.

2
3 MR. MCDOWELL: Judge, now he is putting the material
4 before the -- my client has his good name to protect in
5 this matter. That is the first thing. And secondly, 12:06
6 Judge, Mr. Smyth, as I understand it, has been directed
7 by the Commission to put in writing what line it is
8 that he wants to deal with, the material he wants to
9 deal with and to give me notice of it. He is now
10 trying to circumvent it and to adumbrate it before the 12:06
11 Commission. It is very simple, if he has some material
12 that he wants to put to this witness concerning -- and
13 let us be clear about what he has said, he said he is
14 impugning my client's integrity, motivation and
15 credibility. 12:07

16
17 MR. JUSTICE O'HIGGINS: Yes.

18
19 MR. MCDOWELL: If that is what he is doing, if he wants
20 to put that, in my respectful submission I am entitled 12:07
21 to advance knowledge of the line of cross-examination
22 that he is going to take in relation to this matter in
23 relation to this witness. And there is no point in
24 debating this any longer, in my respectful submission.
25 Let him do it, let him write this letter. We will be 12:07
26 writing to the Commissioner in all probability tomorrow
27 as well, but before we get to that point we want to
28 know what it is that Mr. Smyth wants to elicit from
29 this witness about my client's behaviour.

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MR. SMYTH: Not only this witness, Judge, but other witnesses.

MR. MCDOWELL: Well sorry, and any other witnesses.
And any other witnesses.

12:07

MR. JUSTICE O'HIGGINS: Yes, I think that is not unreasonable and you have no problem with that.

12:07

MR. SMYTH: No difficulty.

MR. JUSTICE O'HIGGINS: Well, we have reached that anyway. I think that in the circumstances it might be a good idea to adjourn now and if you could furnish -- they don't have to be exhaustive but they do have to contain the substance of the matter, so that it can be dealt with. I think we will leave it there. Unfortunately, Superintendent Rooney, you will have to come back. Thanks very much indeed."

12:07

12:08

Sir, that concludes the extract from the second day of the Commission before Mr. Justice O'Higgins. It just strikes me that it was just a little bit indistinct the exchange that occurred immediately after the second adjournment and I will just read out a short extract in relation to that.

12:08

Mr. Smyth came back after the short adjournment and

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said:

"My instructions are re-confirmed.

MR. JUSTICE O'HIGGINS: Very good. Your instructions, 12:08
as I understand them, are that Sergeant McCabe acted as
he did for improper motives.

MR. SMYTH: Yes.

MR. JUSTICE O'HIGGINS: Okay. And that his integrity 12:09
is being challenged in that respect.

MR. SMYTH: In that respect."

And I think thereafter it was fairly clear. 12:09

Now coming to the end of the second day of the
O'Higgins Commission of inquiry, sir, you may wonder
what counsel were about, having heard what you have 12:09
heard. In this regard statements have been made by all
of counsel for the Commissioner. Mr. Smyth, senior
counsel, explains that:

"Commissioner O'Sullivan gave instruction to counsel to 12:09
challenge the credibility and motivation of Sergeant
McCabe following counsel's advice which was furnished
in an email to the Commissioner dated 15th May 2015."

1 The matter is put as follows by Michael McNamee BL, who
2 was junior counsel for the Commissioner, or one of the
3 junior counsel:

4
5 "Prior to the commencement of Module 1 of the O'Higgins 12:10
6 Commission, the core booklets and statement of facts
7 from Module 1 remained available and consultations were
8 arranged with individual client officers who were
9 listed as witnesses to appear to give evidence before
10 the O'Higgins Commission in that module. Commissioner 12:10
11 Nóirín O'Sullivan was not present at these
12 consultations but was represented by Superintendent
13 Fergus Healy, who attended all consultations as well as
14 each of the oral hearings undertaken by the O'Higgins
15 Commission. It is my understanding that Chief 12:10
16 Superintendent Healy kept the Commissioner fully
17 briefed as the consultations and eventually the oral
18 hearings progressed.

19
20 However, it is not the case that Superintendent Healy 12:10
21 or the Commissioner offered any factual instructions as
22 to the conduct of the case other than those contained
23 in the email of the 15th May 2015.

24
25 When the Commission commenced oral hearings on Friday, 12:11
26 15th May 2015, Colm Smyth, senior counsel, raised the
27 issue of the motivation and credibility of Sergeant
28 McCabe, which was met with an objection from senior
29 counsel acting for Sergeant McCabe, Michael McDowell,

1 senior counsel. The latter sought clarification that
2 the Commissioner had provided instructions to her legal
3 team to put issues to Sergeant McCabe regarding his
4 credibility and motivation. The O'Higgins Commission
5 rose, during which time my colleagues and I prepared an 12:11
6 email providing recommendations and taking unequivocal
7 confirmation of instructions as had been agreed before
8 the recess.

9
10 Superintendent Healy, having received and duly 12:11
11 transmitted the email to Commissioner O'Sullivan,
12 reverted with verbal instructions to proceed as
13 suggested in the email."

14
15 Sir, the Tribunal has been provided with a copy of the 12:12
16 email sent to Commissioner O'Sullivan on 15th May 2015.
17 It reads as follows:

18
19 "Dear Superintendent Healy

20 12:12
21 As counsel appointed to represent the interests of An
22 Garda Síochána before the O'Higgins Commission, it is
23 our view that it is appropriate and necessary that the
24 conduct of any member of the force be challenged by way
25 of cross-examination if and to the extent necessary. 12:12

26
27 It is likely that in the course of this process, which
28 is a private hearing, it will become necessary to put
29 to Sergeant Maurice McCabe certain background issues

1 which touch upon and concern the history of his
2 dealings with members of Garda Management. In
3 particular, we consider it necessary and in the
4 interests of fair and balanced examination of the
5 subject-matter of the investigation that specific 12:13
6 issues be put to Sergeant McCabe regarding his conduct
7 and interactions with senior management following the
8 completion of a formal Garda investigation into a
9 complaint against Sergeant McCabe which resulted in a
10 direction by the DPP that no further action was to be 12:13
11 taken against Sergeant McCabe.

12
13 The purpose of such a line of inquiry is to open to the
14 Commission of Investigation the full factual background
15 grounding the complaints made by Sergeant McCabe so 12:13
16 that all the circumstances are clearly put before the
17 Commission for consideration.

18
19 Yours sincerely."

20
21 And that email was sent by the three counsel for the
22 Garda Commissioner.

23
24 while it is not entirely clear, sir, when the
25 Commissioner of An Garda Síochána saw this email, it is 12:13
26 the case, sir, that she did confirm on the 15th May
27 2015 that counsel were to challenge the motivation of
28 Sergeant McCabe at the Commission of Investigation. In
29 this regard the notes made by Superintendent Healy

1 this. Chief Superintendent Healy was at that point the
2 Garda Liaison Officer for the O'Higgins Commission. He
3 was the single point of contact for An Garda Síochána
4 to the Commission. His notes of the 15th May are as
5 follows:

12:14

6
7 "Made several telephone conversations with Commissioner
8 O'Sullivan to get instructions on the questioning of
9 Sergeant Maurice McCabe at the Commission.

10
11 The requirement was to question the "motive" of the
12 member for the making of various complaints.

12:14

13
14 Commissioner sought time to speak to DOJ.

15
16 Then returned with instructions that we:

12:14

17 1. In light of developments on the front that Sergeant
18 McCabe had issues with now working in Mullingar and his
19 welfare could we seek a deferral until we seek advice.

20
21 Commissioner then rang a second time and advised that
22 on reflection if it came out in the course of
23 questioning then counsel should explore it and it was
24 her view that if he (counsel) was advising that we
25 explore the area of motive and that it was necessary
26 then she was inclined to give instructions to him to
27 explore that issue. It would be remiss of her not to
28 instruct him to proceed. Therefore, Commissioner
29 instructed counsel to pursue that specific line of

12:15

12:15

1 questioning."

2
3 what, sir, was the background to this line of
4 questioning? You will recall, sir, that in December
5 2006, a young lady (Ms. D), whose father was a garda, 12:15
6 made an allegation against Sergeant McCabe about an
7 encounter on a couch during a game of hide and seek.
8 This complaint was investigated by the then Inspector
9 Noel Cunningham who expressed scepticism about it, as
10 did the local state solicitor in a file forwarded to 12:16
11 the Director of Public Prosecutions. Ultimately the
12 DPP ruling in relation to the matter was made on the
13 5th April 2007, which was to the effect that:

14
15 "I agree with you and the Guards, that the evidence 12:16
16 does not warrant a prosecution. There are no
17 admissions. The incident as described by the injured
18 party is vague. It appears that it was only when she
19 was 11/12 that she decided that whatever occurred was
20 sexual in nature. Even if there wasn't a doubt about 12:16
21 her credibility, the incident that she describes does
22 not constitute a sexual assault or indeed an assault.
23 Further, the account given to her cousin differs in a
24 number of respects to that given to her parents and the
25 Guards." 12:17

26
27 Naturally people were upset about such an allegation.
28 Sergeant McCabe was ultimately told of the DPP's
29 directions on an informal basis by the state solicitor.

1 He was formally informed of the DPP's directions by
2 Inspector Noel Cunningham on 8th May 2007. Sir,
3 confusion may be liable to arise here. The prospect of
4 a mistake looms that people may consider reading the
5 transcript that there was a plan afoot by counsel on 12:17
6 the express instructions of the Garda Commissioner to
7 accuse Sergeant McCabe of the very offence from which
8 he had been exonerated by the DPP. No one ever had
9 that plan, it seems to us on the basis of the
10 transcript and such documents as the Tribunal has 12:17
11 possession of. Were anyone to pursue an allegation of
12 that kind in this context it would have been very
13 wrong. The entire point that seems to have been in
14 mind, referring here to the mind of counsel, as
15 instructed by the Garda Commissioner, was the aftermath 12:18
16 of the DPP's letter. It dismissed the complaints of
17 Ms. D. But many people in Cavan and indeed in Garda
18 headquarters would have known of it. Hence, it might
19 be that the person accused might want people to know
20 that the complaint had been analysed and dealt with by 12:18
21 the DPP in a particular fashion. Sergeant McCabe
22 wanted the DPP's letter to be circulated. He asked for
23 that again and again. But standard procedures
24 apparently intervened and it was never circulated. We
25 now turn to the circumstances. 12:18
26

27 On the 15th October 2007, Mrs. D confronted
28 Sergeant McCabe at Bailieboro courthouse in relation to
29 the alleged Ms. D incident. This must have created a

1 very public fuss. Following same, on 17th October
2 2007, Ms. D stated that once she found out that there
3 was to be no prosecution in relation to her allegation
4 against Sergeant McCabe, Mrs. D asked her what she
5 wanted to do next and she stated that she wished to 12:19
6 confront Sergeant McCabe. Mrs. D drove her to
7 Bailieboro Garda Station, and when Ms. D saw Sergeant
8 McCabe on the street she jumped out of the car and ran
9 towards him and shouted at him saying he had ruined her
10 life. Sergeant McCabe, no doubt to avoid yet another 12:19
11 public scene, ran away from her into the Garda station.
12 Another Garda had seen Ms. D follow Sergeant McCabe and
13 tried to calm the situation and brought her back to
14 Mrs. D. Not surprisingly after these two public
15 displays word got around of the allegation that Ms. D 12:20
16 made against Sergeant McCabe. His attitude, when told
17 of the DPP's letter by the local state solicitor, must
18 have been one of relief. Indeed, it appears that the
19 text of the letter had been read to him over the
20 telephone. He later met Inspector Cunningham and, 12:20
21 perhaps punctiliously, he told him the kind of minimal
22 information that would be given to any person
23 investigated by the Gardaí: that the case was not being
24 pursued for "lack of evidence". Sir, you have already
25 heard from Superintendent Cunningham on this issue. 12:20
26 Sergeant McCabe, however, felt that given that he had
27 been made a public show of, in addition to the stress
28 of a very thorough investigation, as many as knew of
29 the accusation should also be informed of the

1 vindication of him by the DPP. Was that just the D
2 family or was it serving Garda officers who knew of it
3 or was it the general way in which a circulated letter
4 becomes general knowledge? Certainly he wanted it much
5 more widely known. But Garda procedures would allow no 12:21
6 such thing, it appears, and this, perhaps advisedly,
7 perhaps wrongly, perhaps correctly, we do not know, was
8 the attitude adopted and followed by senior management
9 in the division. We move on now to 2008.

10
11 Superintendent Clancy was probably the ultimate 12:21
12 authority in this respect. He felt and perhaps he was
13 right that the DPP directions could not be circulated.
14 On the 25th August 2008 there had been a meeting in
15 Mullingar which was attended by Sergeant McCabe, 12:21
16 Superintendent Noel Cunningham and Sergeant Yvonne
17 Martin. The purpose of that meeting was ostensibly so
18 as Superintendent Cunningham could discuss the
19 allegation made by Sergeant McCabe in his report dated
20 25th February 2008 to Superintendent Clancy. These 12:22
21 allegations concerned Mr. D, his Garda colleague, and
22 the father of Ms. D. This report, it would appear,
23 sir, had been compiled by Sergeant McCabe so as he
24 could present a case to Superintendent Clancy in
25 relation to the circulation of the directions of the 12:22
26 DPP. The entire point of this report was to chronicle
27 how Sergeant McCabe felt about the issues he had with
28 the D family and to make a case in light of all of
29 that, surely the letter from the DPP ought to be

1 circulated. He made a reasonable case. Whether it
2 would have been compelling enough to overcome standard
3 Garda procedures, or if that could ever happen, is
4 perhaps an issue in the matter for you, sir.

12:22

5
6 On 12th September 2008, Superintendent Noel Cunningham
7 reported on his meeting as follows:

8
9 "Sergeant McCabe stated that this report was composed
10 by him to highlight matters that occurred in Bailieboro 12:23
11 district while he was sergeant in charge at Bailieboro
12 Garda Station. He stated that the report was a bid by
13 him to have the full DPP directions conveyed to him and
14 the Ms. D family in relation to the allegations made
15 against him by Ms. D and the subsequent investigation." 12:23

16
17 It transpired that Sergeant McCabe recorded this
18 meeting. A transcript of that recording reveals as
19 follows:

12:23

20
21 "Maurice: Had you known about it, Mick Clancy, Mick
22 Clancy told me that if I can put a good case forward he
23 would send the file to the DPP and he will ask that
24 each of the parties get the full directions.

12:24

25
26 Noel: Oh yes.

27
28 Maurice: So that is why I done that. And I said to
29 Mick Clancy I reported all of these into Noel

1 Cunningham.

2

3 Noel: But what I am saying to you is this, this is a
4 written report by you, okay, in relation to and at the
5 beginning you refer to an actual investigation I did 12:24
6 and at the end of it you said all you want is to ask
7 the DPP to allow the full DPP directions to be conveyed
8 to me and the other party, that file in particular to
9 Mrs. D, okay. Now I understand that and that. But
10 what I'm saying is the middle bit is what I have to 12:24
11 pursue now."

12

13 And later on:

14

15 "Noel: well, what do you call it? I don't know, if 12:24
16 you want to... what I am saying is this, I need to know
17 what I am doing in relation to this.

18

19 Maurice: well, here is what you are doing. I reported
20 most of these issues, except [redacted] one, in 12:25
21 December '06. I informed my wife and my solicitor and
22 a best friend of mine and I made notes in relation to
23 this and all the issues and it was my understanding
24 that they were going to be highlighted on the DPP file
25 for Garda management to know and they would be fully 12:25
26 aware of it and suddenly the opposite has to happen.

27

28 Noel: But you reported this, Maurice, in February
29 2008?

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Maurice: I didn't write a complaint. I wrote to Mick Clancy, on Mick Clancy's advice highlighting the problems I had with Mr. D. That is what Mr. Clancy advised me to do.

12:25

Noel: And so, what do you want?

Maurice: All I wanted was for the DPP direction to be shown to each party.

12:25

Noel: Is that where this stands now, are you saying? Do you want to make a report or statement to that effect now to say to me that the reason you outlined these was in response in a request from you then district officer, Superintendent Clancy, to highlight the difficulties that you were having with Mr. D in order that the DPP should be appraised of it, or whatever, or as a result of which the directions of the DPP would be made known to each.

12:26

12:26

Maurice: That's exactly it."

Essentially, sir, there you have it. The dispute was that Sergeant McCabe wanted those who were in the know about the allegation by Ms. D to also know what attitude had been taken by the DPP. In this, Sergeant McCabe did not succeed. So, here we are in the position that no one at the O'Higgins Commission could

12:26

1 have decided that Sergeant McCabe could be challenged
2 as to his credibility in the classic way: vis, where a
3 witness is asked a question to the effect that evidence
4 given by him implicating someone else is not correct
5 because that witness has an animus against that person 12:27
6 because of a completely unrelated issue between them.
7 An example might be to ask a witness whether he was
8 being influenced in his evidence consciously or
9 unconsciously by bad blood over an objection to
10 planning permission made by the person he is testifying 12:27
11 against. Here the idea is not that Sergeant McCabe is
12 to be believed because he was accused of sexual
13 violence, but rather that when he was vindicated by the
14 DPP he was upset that the letter vindicating him was
15 blocked from circulation by senior Garda officers. 12:27
16 Even so, sir, the inquiry under Mr. Justice O'Higgins
17 was not, perhaps with the exception of the Father
18 Molloy computer, about Sergeant McCabe. The facts of
19 the issues under investigation either stood up or did
20 not, irrespective of any attitude that Sergeant McCabe 12:28
21 might or might not take. It is in this context that it
22 might be difficult to see how any issue of credibility
23 could properly arise at all.

24
25 Sir, whatever your findings on this may ultimately be, 12:28
26 it would appear to be against the above background that
27 the following document was prepared over the weekend by
28 counsel for the Garda commissioner which purported to
29 set out what matters were to be relied on by the Garda

1 Commissioner at the Commission of Investigation. This
2 document was produced on the morning of Monday, 18th
3 May 2015, following the row on the previous Friday.
4 This is the document dated 18th May 2015, to Mr. David
5 J O'Hagan, solicitor for the Commission of
6 Investigation, re the Commission of Investigation:

12:29

7
8 "Dear Mr. O'Hagan

9
10 As directed by the Judge in the course of hearing on
11 Friday, 15th May 2015 we hereby provide the factual
12 issues to be put to Sergeant Maurice McCabe:

12:29

13
14 1. In summer 2004, both Sergeant McCabe and a
15 colleague applied for the vacant position of sergeant
16 in charge of Bailieboro Garda Station. Sergeant McCabe
17 was successful and took up the duties of sergeant in
18 charge in October 2004.

12:29

19
20 2. In January 2006, Sergeant McCabe made a complaint
21 against this colleague which resulted in a disciplinary
22 sanction being imposed on the colleague.

12:29

23
24 3. The colleague applied for a transfer to another
25 Garda station in December 2006 which request was
26 refused for operational reasons due to the supervisory
27 needs of Bailieboro station.

12:30

28
29 4. In December 2006 the colleague and his wife on

1 behalf of their daughter made a complaint against
2 Sergeant McCabe. Chief Superintendent Colm Rooney duly
3 appointed Inspector (now Superintendent) Noel
4 Cunningham to carry out a formal Garda investigation
5 into the complaint. 12:30

6
7 5. Inspector Cunningham completed his investigation
8 and forwarded the Garda investigation file to the
9 office of the DPP on or about the 19th February 2007.
10 Inspector Cunningham stated in his report to the DPP: 12:30
11 "Taking all matters into consideration, including the
12 question of whether the event happened constituted a
13 breach of the criminal law, it is felt that there is no
14 ground for a criminal prosecution."

15 12:31
16 6. The DPP communicated the decision not to initiate
17 any form of action against Sergeant McCabe and the
18 observation was made that it was doubtful that the
19 allegation could constitute a crime at all. The said
20 directions were issued by way of a letter dated 5th 12:31
21 April 2007 to the Cavan state solicitor. Inspector
22 Cunningham had requested that the directions from the
23 DPP were to be forwarded for his attention rather than
24 addressed in the usual way to the station and he
25 received the directions as he had requested marked for 12:31
26 his attention.

27
28 7. Upon receipt of said directions, Inspector
29 Cunningham undertook the task of informing the parties

1 to the complaint of the outcome of the investigation
2 and the directions of the DPP. He advised the
3 colleague and his wife on 24th April 2007.
4

5 8. On the same day, the 24th April 2007, Inspector 12:32
6 Cunningham sought to make an appointment with Sergeant
7 McCabe to similarly advise him of the outcome of the
8 investigation and the reasons from the DPP. However,
9 Sergeant McCabe was on sick leave from the 24th April
10 2007 to the 21st May 2007. Sergeant McCabe initially 12:32
11 refused but subsequently agreed to meet on the 8th May
12 2007.

13
14 9. On the 8th May 2007 Inspector Cunningham met with
15 Sergeant McCabe by appointment at the Bailie Hotel. 12:32
16 Inspector Cunningham was alone but Sergeant McCabe was
17 accompanied by Sergeant Regina McArdle who was present
18 initially as AGSI representative and then welfare
19 officer. Inspector Cunningham duly informed
20 Sergeant McCabe of the outcome of the investigation and 12:33
21 the responses/directions of the DPP.

22
23 10. On 15th and 17th October 2007 there were two
24 incidents in which Sergeant McCabe had an encounter
25 with the wife and daughter, respectively, of Mr. D. 12:33
26 Following these incidents Sergeant McCabe raised with
27 Superintendent Clancy the issue of dissemination of the
28 DPP's directions which were given at the conclusion of
29 an investigation into an allegation of assault against

1 Sergeant McCabe. Sergeant McCabe stated that he was of
2 the view that the colleague's family were unaware of
3 the DPP directions. He stated he was aware that
4 Inspector Cunningham had met the colleague's family
5 concerning the outcome of the DPP's directions. As a 12:33
6 consequence, on the 22nd October 2007, Superintendent
7 Clancy sent a minute to Inspector Cunningham in
8 Monaghan seeking his observations on the issue.

9
10 11. Superintendent Clancy recalls having a meeting 12:34
11 with Sergeant McCabe at the beginning of February 2008.
12 At that meeting Superintendent Clancy ascertained from
13 Sergeant McCabe that he had no desire to have the
14 colleague's family prosecuted for the incidents he
15 complained about. Superintendent Clancy asked Sergeant 12:34
16 McCabe to convey his attitude in this matter by way of
17 a written report as the superintendent wished to have
18 his views reported on file. Sergeant McCabe stated
19 that he would forward a report indicating that he did
20 not wish to have the colleague's family prosecuted. At 12:34
21 the same meeting, Superintendent Clancy informed
22 Sergeant McCabe that he had been in contact with
23 Inspector Cunningham on the issue of the dissemination
24 of the DPP's directions. Superintendent Clancy
25 informed Sergeant McCabe that Inspector Cunningham had 12:35
26 communicated the DPP's directions to the colleague's
27 family on 24th April 2007. Sergeant McCabe then stated
28 that he wished to view the actual written direction
29 given by the DPP. Sergeant McCabe stated he felt that

1 he should be exonerated by the DPP. Sergeant McCabe
2 stated that he would make written application to the
3 superintendent to have the DPP's written directions
4 shown to him. On 7th February 2008, Superintendent
5 Clancy sent a minute to Sergeant McCabe giving the
6 outcome of his inquiries with Inspector Cunningham on
7 the issue of dissemination of the DPP's directions.
8

12:35

9 12. On Tuesday, 26th February 2008 Superintendent
10 Clancy received an envelope marked personal containing
11 a report dated 25th February 2008 from Sergeant McCabe.
12 In this report Sergeant McCabe made a number of
13 allegations of incidents which allegedly occurred as
14 far as back as 2004 against Mr. D and other unnamed
15 members of Bailieboro Garda Station. Sergeant McCabe
16 acknowledged that he had received Superintendent
17 Clancy's minute of the 7th February 2008. Sergeant
18 McCabe asked for a full disclosure of the DPP's
19 directions. "I urge you, if you did, to ask (sic) the
20 DPP to allow the full DPP directions to be conveyed to
21 me and the other party, in particular Mrs. D, in this
22 particular case due to the fact that all parties work
23 in close proximity and I would really appreciate it.
24 That is all I am asking."
25

12:36

12:36

12:36

26 13. Superintendent Clancy immediately forwarded this
27 report to the divisional officer, Chief Superintendent
28 Colm Rooney, recommending that the allegations made by
29 Sergeant McCabe be investigated. In the meantime

12:36

1 Superintendent Clancy sought sight of the written
2 directions as given by the DPP. Having carefully
3 viewed the content of the DPP's directions the
4 superintendent decided that he would adhere to the
5 DPP's guidelines and that he would not request release 12:37
6 of the document. On 11th March 2008 Superintendent
7 Clancy met Sergeant McCabe and gave him the outcome of
8 his decision.

9
10 14. Sergeant McCabe was unhappy with the outcome of 12:37
11 the decision of the DPP as he believed that the
12 decision ought to have completely exonerated him,
13 rather than recording that there was not sufficient
14 evidence to proceed against him.

15 12:37
16 15. In or around the same time Sergeant McCabe
17 presented Superintendent Clancy with a series of
18 operational issues for his attention, which were of a
19 type which would normally with have been dealt with by
20 the sergeant in charge of the station. 12:38

21
22 16. Sergeant McCabe sought an appointment to see Chief
23 Superintendent Rooney and this was facilitated in June
24 July 2007. At the meeting Sergeant McCabe expressed
25 anger and annoyance towards the DPP. He demanded that 12:38
26 Chief Superintendent Rooney communicate with the DPP to
27 seek a declaration of innocence from the DPP in
28 relation to the allegation. Chief Superintendent
29 Rooney advised Sergeant McCabe of the policy of the DPP

1 in dealing with such issues. A policy which Sergeant
2 McCabe was himself professionally aware of. Chief
3 Superintendent Rooney told Sergeant McCabe that he
4 would not seek such a declaration on Sergeant McCabe's
5 behalf from the DPP. 12:39

6
7 Chief Superintendent Rooney pointed out to Sergeant
8 McCabe that from his own experience of dealing with
9 criminal files to the DPP he was aware of the DPP's
10 role to determine if sufficient evidence was available 12:39
11 on a file to direct a prosecution. Chief
12 Superintendent Rooney advised Sergeant McCabe that it
13 is not the Garda Commissioner's policy that An Garda
14 Síochána challenge the Director of Public Prosecutions
15 on his decisions. Chief Superintendent Rooney further 12:39
16 pointed out to Sergeant McCabe that as a private
17 citizen it was open to him to write to the Director of
18 Public Prosecutions if he so wished to seek the
19 declaration he required.

20 12:39
21 17. In March 2008 Sergeant McCabe applied to be
22 redeployed from his position as sergeant in charge of
23 Bailieboro Garda Station and this request was granted.
24

25 18. Pursuant to the complaint made by Sergeant McCabe 12:39
26 on the 26th February 2008 to Superintendent Clancy,
27 Chief Superintendent Colm Rooney appointed Inspector
28 Noel Cunningham to carry out an investigation.
29

1 19. Having been appointed to investigate
2 Sergeant McCabe's complaint against Superintendent
3 Clancy, now Superintendent Noel Cunningham, having
4 attempted on a number of occasions to meet with
5 Sergeant McCabe, eventually met with Sergeant McCabe by 12:40
6 appointment on the 25th August 2008 in Mullingar Garda
7 Station to receive details of his formal complaint.
8 Superintendent Cunningham was accompanied to this
9 meeting by Sergeant Yvonne Martin. Notes were taken at
10 the meeting and countersigned by Sergeant Martin and a 12:40
11 detailed report of the meeting was prepared by
12 Superintendent Cunningham and its contents agreed with
13 sergeant Martin and forwarded to Chief Superintendent
14 Rooney. In the course of this meeting Sergeant McCabe
15 advised Superintendent Cunningham that the only reason 12:41
16 he made the complaints against Superintendent Clancy
17 was to force him to allow Sergeant McCabe to have the
18 full DPP directions conveyed to him.

19
20 20. It is understood that Sergeant McCabe had further 12:41
21 interactions with Assistant Commissioner Derek Byrne
22 and Chief Superintendent Terry McGinn prior to the
23 investigation carried out by them.

24
25 Yours faithfully." 12:41
26

27 Sir, you will no doubt have noticed that the matters
28 which were discussed on 25th August 2008 did not
29 concern complaints against Superintendent Clancy as set

1 out in paragraph 19 of the letter of the 18th May 2015.
2 This matter will be returned to shortly. It was
3 instead about whether, as whether McCabe requested, the
4 letter from the DPP refusing to prosecute him for the
5 Ms. D allegation and stating plainly the reasons for 12:42
6 that refusal should be circulated. That letter to the
7 O'Higgins Commission sent on behalf of the Garda
8 Commissioner got this wrong.

9 CHAIRMAN: Okay, Ms. Leader, I think it's been a long
10 enough morning. We can break for an hour and then the 12:42
11 intention is to finish this, which is now just more
12 than halfway through and to hear the witness and to
13 hear any questions that may be asked of the witness by
14 other parties, which I'm sure will be short enough in
15 any event. So we will sit until necessary in order to 12:42
16 facilitate that witness.

17
18 THE TRIBUNAL THEN ADJOURNED FOR LUNCH

19
20
21 THE HEARING CONTINUED AFTER LUNCH AS FOLLOWS:

22
23 MR. MCGUINNESS: Chairman, before you resume the
24 opening, I should draw to your attention that we have
25 received some correspondence this morning in relation 13:48
26 to Mr. Dunne, who is due to be a witness, and it raises
27 issues in relation to some documentation which one of
28 the parties feels should be considered, and we've
29 looked at that issue and without giving any commitment

1 in that regard, we are going to continue to see the
2 relevance or otherwise of some of that material, but it
3 also highlights another area now that has arisen in
4 relation to Mr. Dunne, which is a logistical issue.
5 It's unlikely that at the stage we would reach him this 13:49
6 afternoon that he would be available because he has, as
7 it were, travel plans which could be impacted, so we
8 have made the decision, Chairman, to defer his evidence
9 to another day when he will be available, and when any
10 concerns that might have to be addressed, will be 13:49
11 properly addressed, if need be. Thank you for that,
12 Chairman.

13 MS. LEADER: Sir, just resuming on the opening. When
14 the Commission of Investigation commenced on Monday,
15 18th of May, the following exchange took place. And we 13:49
16 again hope to play the audio in relation to this, sir.

17
18 "MR. JUSTICE O'HIGGINS: Good morning, ladies and
19 gentlemen. First of all, there is a letter received
20 this morning from the Chief State Solicitor's Office's
21 mentioning a number of --

22 MR. MCDOWELL: I received nothing, Judge. Nothing has
23 been given to me.

24 MR. JUSTICE O'HIGGINS: Thanks, Mr. McDowell. A letter
25 received by the Commission this morning from the Chief
26 State Solicitor's Office's referring to certain
27 documents on which the Commissioner wished to rely.
28 One of those documents has not been given to the
29 Commission as of now. And That is a source of

1 considerable annoyance... Very good...

2
3 MR. MCDOWELL: Judge, before you rise, I want to
4 indicate on behalf of Sergeant McCabe that I want to
5 make an application in private to you.

6
7 MR. JUSTICE O'HIGGINS: Very good. Thank you very much.

8
9 (SHORT ADJOURNMENT)

10
11 MR. MCDOWELL: Yes, I want to make an application to
12 you in private, Judge.

13
14 ...

15
16 Can I say, Judge, the Commissions of Investigation Act
17 was never conceived with a hearing of this nature, a
18 multiparty hearing of this nature as part of it.
19 That's my first proposition. And I will say this in
20 front of Mr. Smyth, it doesn't worry me in the
21 slightest. The entire basis of that Act was that there
22 would not be multiparty hearings except in unusual
23 circumstances and that everything would be done in
24 private on a one-to-one basis between the Inquiry and a
25 witness.

26
27 MR. JUSTICE O'HIGGINS: Where does the Act say that? I
28 understand the point you are making, that normally
29 there may be a one-to-one basis and the substance then

1 be circulated to the other parties and so forth.

2
3 MR. MCDOWELL: No other Commission of Investigation
4 that I know of has ever proceeded on this basis... So
5 I am making the point that this is a highly unusual
6 arrangement, that all communication between the
7 Commission and the individual people who want to be
8 heard by it has to be conducted not in public but in a
9 hearing of this kind before other people. There is no
10 basis in the institute for that.

11
12 I am entitled to make a submission in private to this
13 Commission and others are not entitled to listen to my
14 submission as of right. There is no -- I mean, I don't
15 know why the Commissioner is represented here at all,
16 unless she is to be a witness. I don't know where in
17 the Act it is provided that the Commissioner is
18 entitled to have legal representation and to listen to
19 the evidence that is put and to decide whether or not
20 to apply to cross-examine it.

21
22 I am saying, Judge, that we came into this on the basis
23 of a degree of reluctance. We have no notice of what
24 was happening and we had no clear picture of what my
25 client's participation was, he not having been asked to
26 make a statement relative to this module.

27
28 We are now in a position, and I mean I don't mind
29 saying it in this format, but I do believe that I

1 should be allowed to elaborate on it in private, that I
2 am being pushed to deal with matters in circumstances
3 where I submit as a matter of law the Act never
4 contemplated that anything like this would ever happen.
5

6 MR. JUSTICE O'HIGGINS: Very good.
7

8 MR. MCDOWELL: I don't see any reason why, for
9 instance, Judge --
10

11 MR. JUSTICE O'HIGGINS: Sorry, Mr. McDowell, could you
12 expand on that because I think the Act gives the
13 Commission wide discretionary powers as to how it
14 proceeds. I would agree that the procedure that we
15 have adopted is unusual but it has been adopted after
16 deep consideration and for particular reasons.
17

18 MR. MCDOWELL: Judge, I will start by saying
19 that section 11(a) says: "A Commission shall conduct
20 its investigation in private unless (a) a witness
21 requests that all or part of his other her evidence be
22 heard in public and the Commission grants the request;
23 or, (b) the Commission is satisfied that it is
24 desirable in the interests of both the investigation
25 and fair procedures to hear all or part of the evidence
26 of a witness in public."
27

28 So there is a clear mandate that it must be done in
29 private.

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MR. JUSTICE O'HIGGINS: It is being done in private.

MR. MCDOWELL: With respect, it's not, Judge, because everything that I say to the Commission is immediately heard by Counsel for the Commissioner and Counsel for other people. That's not being done in private.

MR. JUSTICE O'HIGGINS: Very good.

MR. MCDOWELL: It is not just an in camera ruling, have an adversarial hearing in camera, that's not what --

MR. JUSTICE O'HIGGINS: It is not an adversarial hearing, Mr. McDowell, as I have been at pains to point out.

MR. MCDOWELL: Well, Judge, I have received this morning, at a quarter past 10, a document, which if it is not adversarial, I don't know what it is. It is a remarkable document. 14:01

MR. JUSTICE O'HIGGINS: Yes. 14:01

MR. MCDOWELL: I have to say, Judge, and I hope that this does get back to the Commissioner, because it is utterly and completely inexplicable bearing in mind the things she has said and done in public in relation to

1 my client, including appointing him to the professional
2 standards unit of An Garda Síochána on a limited basis
3 in recent times. I find this a despicable document, I
4 have to say.

5
6 MR. JUSTICE O'HIGGINS: Are you referring to the
7 document dated --

8
9 MR. MCDOWELL: This letter.

10
11 ...It is a conflation of falsehoods, evasions and
12 untruths. My client, my client, Judge, and I want to
13 make it clear unless anybody here has any other view,
14 my client will deal 100% with all allegations made
15 against him of impropriety of any kind whatsoever. He
16 is quite prepared to deal with that. But what he is
17 not prepared to deal with, Judge, and I want to make it
18 very, very clear to you, he is not prepared to be
19 ambushed in this way, in bad faith by a Commissioner
20 who is not a witness in this Tribunal and has no right
21 to have counsel sit in and listen to a guards' evidence
22 in a disciplined force and receive an ongoing
23 transcript of what's happening. This is not what this
24 Act was all about and it is not what this Commission
25 should be doing. I want to put it in the strongest
26 possible terms to you, Judge.

27
28 MR. JUSTICE O'HIGGINS: First of all, can I say that
29 the document that I received, on the face of it the

1 contents seem to be inadmissible to the Inquiry.

2
3 MR. MCDOWELL: Well, I am glad to hear that.

4
5 MR. JUSTICE O'HIGGINS: Well, on the face of it, 14:03
6 subject to argument, because it doesn't seem to me --

7
8 MR. MCDOWELL: It has been handed around, everybody in
9 this room has now seen it as far as I can see.

10 14:03
11 MR. JUSTICE O'HIGGINS: Yes. It doesn't seem to me
12 that the matters contained in the document are relevant
13 to the matters the subject matter of this module.

14
15 MR. MCDOWELL: I mean obviously I am glad to hear that, 14:03
16 Judge. I can come down off my high horse slightly. I
17 am happy about that, but I entirely agree it is
18 irrelevant in the module.

19
20 MR. JUSTICE O'HIGGINS: That's how it appears at the 14:03
21 moment and unless otherwise persuaded that's what I
22 intend to do --

23
24 MR. MCDOWELL: I want to be clear, Judge, that the 14:03
25 process that is being happening here has from the very
26 beginning been perplexing. The Commissioner of An
27 Garda Síochána has asked to be represented by a senior
28 counsel. She is not a witness as far as I know and yet
29 she has the facility of having a legal team here, on

1 what basis I am not quite clear, but granted that she
2 is here. That itself, it is a bit like if Judge Yvonne
3 Murphy had granted the Archbishop of Dublin the right to
4 listen to all the evidence before her Commission of
5 Investigation. It's a most unusual step, bearing in 14:04
6 mind what is happening because members of a disciplined
7 forces subject to discipline are being required to give
8 evidence here knowing that everything they say is
9 reported back to the Commissioner. That is most
10 unusual and in my view is not a private hearing at 14:04
11 alien concept and I am just making that point --
12

13 MR. JUSTICE O'HIGGINS: Maybe we will deal with that of
14 perhaps it might be productive to deal with the
15 contents -- 14:04
16

17 Mr. McDowell: I don't particularly want to have a
18 hearing before 40 people on the contents.
19

20 MR. JUSTICE O'HIGGINS: No, sorry, it seems to me on 14:05
21 the face of it that the contents of this are irrelevant
22 to this module and if they are, I will make a ruling to
23 that effect. To some extent that might be productive
24 and helpful.
25

26 MR. MCDOWELL: It makes what I am saying moot. 14:05
27

28 MR. JUSTICE O'HIGGINS: Pardon?
29

1 MR. MCDOWELL: It makes what I am saying moot.

2

3 MR. JUSTICE O'HIGGINS: I would like to deal with that
4 matter now. In relation, it would appear on the face
5 of it, Mr. Smyth, that the contents of this document 14:05
6 are irrelevant to the terms of reference in relation to
7 this module. I have to make --

8

9 MR. MCDOWELL: Sorry, Judge, there is one other point
10 before you ask Mr. Smyth to respond. If allegations 14:06
11 are going to be made on behalf of the Commissioner, I
12 will require the Commissioner personally to be
13 available for me for cross-examination and I don't
14 think she will enjoy the experience.

15

16 MR. JUSTICE O'HIGGINS: That's not for me to on. But
17 in relation to this module I will have to make certain
18 findings and on the face of it, Mr. Smyth, it would
19 seem to me that the matters contained in this document
20 are irrelevant to any findings that I might have to 14:06
21 make in this module. Could you address me on that?

22

23 MR. SMYTH: Well thus far, Judge, you are hearing the
24 evidence of Colm Rooney, ex-Chief Superintendent Colin
25 Rooney, he will be giving evidence in other modules, I
26 assume related modules. I am laying the ground for, in
27 this module and other modules, for conversation that
28 Sergeant McCabe had with ex-Chief Superintendent Rooney
29 and in particular without saying too much to offend

1 sensitivities of Mr. McDowell in relation to this --

2
3 MR. JUSTICE O'HIGGINS: Well, it is not just the
4 sensitivities of Mr. McDowell.

5
6 MR. SMYTH: He just wished me to say too
7 much in front 40 people, that's what he has indicated.

8
9 MR. JUSTICE O'HIGGINS: I want to know how the contents
10 of this document are relevant.

11
12 MR. SMYTH: It is relevant in this way, Judge, because
13 I say that Sergeant McCabe was motivated to do certain
14 things, to make certain allegations based on the fact
15 that he required clarification from the DPP
16 on certain matters touching on his situation.

17
18 MR. JUSTICE O'HIGGINS: That much I understand --

19
20 MR. SMYTH: And there was a meeting
21 between --

22
23 MR. JUSTICE O'HIGGINS: That much I understand because
24 that has already been -- what I want to know is how the
25 contents of this document are relevant to my Inquiry
26 into this particular module.

27 MR. SMYTH: Because he made complaints directed to
28 Superintendent Clancy. There was a letter
29 of 28th February 2008. He told inspector or Colin

1 Rooney, he will be giving evidence in other modules, I
2 assume related modules. I am laying the ground for, in
3 this module and the modules, for conversation that
4 Sergeant McCabe had with ex chief Chief Superintendent
5 Rooney and in particular without saying too much to 14:07
6 offend sensitivities of Mr. McDowell in relation to
7 this --

8 MR. JUSTICE O'HIGGINS: Well it is not just the
9 sensitivities of Mr. McDowell.

10
11 Mr. SMYTH: He just wished me to say too much in front
12 of 40 people, that's what he has indicated.

13 MR. JUSTICE O'HIGGINS: I want to know how the contents
14 of this document are relevant.

15
16 Mr. SMYTH: It is relevant in this way Judge, because I
17 say that Sergeant McCabe was motivated to do certain
18 things, to make certain search allegations based on the
19 fact that he required clarification from the DPP on
20 certain matters touching on his situation. 14:07

21 MR. JUSTICE O'HIGGINS: That much I understand

22
23 Mr. SMYTH: And there was a meeting between --

24 MR. JUSTICE O'HIGGINS: That much I understand because
25 that has already been -- what I want to know is how the 14:08
26 contents of this document are relevant to my inquiry
27 into this particular module.

28
29 MR. SMYTH: Because he made complaints directed to

1 Superintendent Clancy. There was a letter of 28th
2 February 2008. He told inspector or Superintendent
3 Cunningham who will be one of the next witnesses in
4 this module that he was withdrawing. He only made
5 those complaints on the basis that he wished 14:08
6 Superintendent Clancy to seek further clarification
7 from the DPP.

8
9 MR. JUSTICE O'HIGGINS: Well, that doesn't seem to
10 address the relevance of contents of this document to 14:08
11 the inquiry that I have to conduct into this module.

12
13 MR. SMYTH: It does, Judge, because the complaints he
14 was making were complaints about the working and about
15 the administration and about the management and about 14:08
16 issues touching on probationer Garda in Bailieborough
17 station and are relevant to this module as much as they
18 are relevant to other modules. It flows right through
19 all modules, the motivation and the credibility of
20 Sergeant McCabe in making the allegations he made. And 14:09
21 he withdrew, he was prepared to -- the only reason we
22 have Yvonne apparently Sergeant Yvonne Martin who is a
23 witness to a statement that he made. The only reason
24 he made the allegation she made on 28th of February in
25 a letter which was sent to Superintendent Clancy 14:09
26 ultimately was that he was making those allegations to
27 force the hand of Superintendent Clancy to seek further
28 clarification from the DPP.

1 MR. JUSTICE O'HIGGINS: Very good.

2

3 MR. SMYTH: when he knew that was clearly and patently
4 wrong.

5

6 MR. JUSTICE O'HIGGINS: well, it seems to me the
7 contents of this document are irrelevant to any matters
8 that I have to inquire into in this module in relation
9 to the question motivation, the motivation I am not
10 certain that it can be excluded as a background

14:09

11 consideration. I will allow you to establish this much
12 and no more, that Sergeant McCabe had a real or
13 perceived grievance against somebody. Full stop, no
14 more, and the contents of this document I am ruling are
15 irrelevant to this module.

14:10

14:10

16

17 MR. SMYTH: Judge, I am permitted to pursue with this
18 witness the conversation he had with Sergeant McCabe.

19

20 MR. JUSTICE O'HIGGINS: No, you are permitted to
21 establish, although I think it has been established
22 already, that Sergeant McCabe had a grievance real or
23 perceived in arising out of a conversation with
24 Superintendent, Chief Superintendent Rooney full stop.
25 His motivation, as I say, is only peripheral, very
26 peripheral, but his motivation you are suggesting was
27 out of a grievance he had. The details of that
28 grievance do not appear to me to be relevant.

14:10

14:10

29

1 MR. SMYTH: No, I don't intend to go into the details
2 of the background but I need to establish that there
3 was a grievance of it, it has to be sanitised, it has
4 to be sanitised in some shape or form. I don't want to
5 parade all of background information.

14:11

6
7 MR. JUSTICE O'HIGGINS: I will allow you to establish
8 that he had a grievance, real or perceived, and no
9 further so the contents of this document are irrelevant
10 for this module. That's my ruling on that."

14:11

11
12 MS. LEADER: There was then a short adjournment. On
13 recommencing, sir, it would appear that counsel for the
14 Garda Commissioner was of the view that Mr. Justice
15 O'Higgins had somehow exceeded his jurisdiction, how we
16 cannot imagine, and that a judicial review might
17 follow. Here is the exchange:

14:12

18
19 "MR. SMYTH: I reserve my position, Judge, in relation
20 to any adverse findings that may be made against the
21 Commissioner in this module. Findings that we say,
22 perhaps, wouldn't have been made if this evidence that
23 we set out in this letter had been adduced

14:12

24 MR. JUSTICE O'HIGGINS: Very good. I have ruled as I
25 have ruled and the question of motivation seems to me
26 to be very peripheral and I will allow you to do
27 exactly what I said and no more. Thanks."

14:12

28
29 MS. LEADER: After Judge O'Higgins ruled as he did,

1 Chief Superintendent Rooney was recalled and gave the
2 following evidence in respect of his meeting with
3 Sergeant McCabe:

4
5 MR. SMYTH: Chief Superintendent Rooney. You had a 14:13
6 conversation with Sergeant McCabe?

7
8 CHIEF SUPERINTENDENT ROONEY: I had, Judge, June/July.

9
10 MR. JUSTICE O'HIGGINS: You are aware of the ruling of 14:14
11 the Court and the parameters of it.

12
13 CHIEF SUPERINTENDENT ROONEY: Yes, Judge. In June/July
14 2007 Sergeant McCabe sought a meeting with me and I
15 facilitated him in that regard and I saw him at my 14:14
16 office in Monaghan Station.

17
18 MR. SMYTH: Arising out of that did you get the
19 distinct understanding that he had a grievance?

20
21 CHIEF SUPERINTENDENT ROONEY: I did, Judge. 14:14

22
23 MR. SMYTH: Just that we don't go into the background
24 of that grievance, but that the grievance unrelated to
25 matters that he was complaining about regarding 14:14
26 administration in Bailieborough?

27
28 CHIEF SUPERINTENDENT ROONEY: Yes, Judge.

29

1 MR. SMYTH: It was a grievance outside of that, a
2 separate matter altogether, is that correct?

3
4 CHIEF SUPERINTENDENT ROONEY: well it was twofold.

14:14

5
6 MR. SMYTH: You don't have to tell us what it was?

7
8 MR. JUSTICE O'HIGGINS: I don't want the details of the
9 grievance.

10
11 CHIEF SUPERINTENDENT ROONEY: Yes.

12
13 MR. SMYTH: It was unrelated to the complaint he was
14 making about -- unrelated -- administration in
15 Bailieborough and about other complaints about a
16 probationer Garda, and so on.

17
18 CHIEF SUPERINTENDENT ROONEY: Yes."

19
20 MS. LEADER: Later on in the day, Superintendent
21 Cunningham was questioned as follows by his own counsel
22 and counsel for the Garda Commissioner:

14:15

23
24 "Q. MR. SMYTH: Superintendent, you were aware that
25 Sergeant McCabe had a personal grievance with the
26 guards, you don't have to say what that grievance was
27 but were you aware of that?

14:15

28
29 A. SUPERINTENDENT CUNNINGHAM: I was aware, sir.

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Q. MR. SMYTH: Could you put a timeframe of when you became aware of the personal grievance?

A. SUPERINTENDENT CUNNINGHAM: Early 2007, Judge.

14:15

Q. MR. SMYTH: 2007.

A. SUPERINTENDENT CUNNINGHAM: 2007... if I am not mistaken I think it was September 2008 or something like that? I'm not sure, Judge... I think it was June, I think around August 2008, around August 2008."

14:16

Sergeant McCabe then gave evidence and denied to counsel for the Garda Commissioner, Mr. Smyth, Senior Counsel, that he had any personal grievance with the Gardaí. He continued and said he was extremely happy with the decision made by the DPP in relation to the allegation made by Ms. D. In a somewhat confused exchange, where counsel may have been at cross-purposes with the witness, Sergeant McCabe told the Commission that he was annoyed that Superintendent Cunningham delay (as he saw it) in communicating the DPP's directions to him and he complained to Chief Superintendent Rooney in relation to this delay. He continued and told the Commission that he accepted the decision of Superintendent Clancy not to make the DPP's directions available. Following that, there was a further exchange between his counsel, the Commission

14:16

14:16

14:16

1 and counsel for the Garda Commissioner. After that
2 exchange, Sergeant McCabe was further questioned in the
3 following terms about his meeting with Superintendent
4 Cunningham in Mullingar in August 2008:

5
6 "MR. SMYTH: I don't want to waste more time on it.
7 Just very briefly two questions I want to ask you,
8 Sergeant McCabe, the first one is on 26th February 2008
9 you sent a letter to Superintendent Clancy containing a
10 number of complaints that you had, is that correct? 14:17

11
12 SERGEANT MCCABE: Yeah.

13
14 MR. SMYTH: One matter I want to ask you again, just
15 arising, finally, out of that, I think that 14:17
16 Superintendent Cunningham met you for the purpose of
17 discussing that, is that correct?

18
19 SERGEANT MCCABE: He met me on the last day that I was
20 sergeant in charge. 14:18

21
22 MR. SMYTH: He met you in Mullingar on 25th August
23 2008?

24
25 SERGEANT MCCABE: Yes. 14:18

26
27 MR. SMYTH: This is an issue of credibility I want to
28 put to you.
29

1 SERGEANT MCCABE: Okay.

2

3 MR. SMYTH: There was a meeting there in Mullingar
4 Garda Station and that meeting was the sergeant -- and
5 at that meeting was Sergeant Yvonne Martin, is that 14:18
6 correct?

7

8 SERGEANT MCCABE: That is correct.

9

10 MR. SMYTH: I think there were notes taken at that 14:18
11 meeting?

12

13 SERGEANT MCCABE: There was, by each side.

14

15 MR. SMYTH: A detailed report was prepared by 14:18
16 Superintendent Cunningham, there is no dispute about
17 that.

18

19 SERGEANT MCCABE: There is, I didn't see it, he has
20 given his version. 14:18

21

22 MR. SMYTH: All right. It was forwarded, that report,
23 to Superintendent Rooney, this is the issue I want to
24 ask you about.

25 14:18

26 SERGEANT MCCABE: Yeah.

27

28 MR. SMYTH: In the course of that meeting, Sergeant,
29 you advised Superintendent Cunningham that the only

1 reason you made a complaint against Superintendent
2 Clancy was to force him to allow you to have the full
3 authority directions conveyed to you?
4

5 SERGEANT MCCABE: That is absolutely false. 14:19

6
7 MR. SMYTH: Right.

8
9 SERGEANT MCCABE: Absolutely, Judge.

10 14:19
11 MR. SMYTH: The only reason, and this will be the
12 evidence of Superintendent Cunningham, the only reason
13 that you wrote those list of complaints for
14 Superintendent Clancy, do you understand, that you made
15 the complaints about Superintendent Clancy was that you 14:19
16 wanted to put pressure on Superintendent Clancy to get
17 the full directions from the authority conveyed to you.
18

19 SERGEANT MCCABE: That is absolutely false.
20 Absolutely. 14:19

21
22 MR. SMYTH: Fair enough.

23
24 SERGEANT MCCABE: I have a clear recollection of that
25 meeting..." 14:19

26
27 Sir, from the point of view of accuracy, we should
28 intervene here. The meeting in Mullingar was
29 tape-recorded by Sergeant McCabe. We have that tape.

1 It clearly demonstrates, as the extract already quoted
2 bears out, that Sergeant McCabe was not at that meeting
3 making any complaint against Superintendent Clancy.

4 what he was doing was simply asking that the DPP letter
5 be circulated. This was not accompanied by any threat. 14:20

6 One supposes, sir, that when later in the hearings of
7 the O'Higgins Commission the tape was produced on day
8 four to the Commission, having previously been

9 disclosed by Sergeant McCabe, the matter of a threat at
10 Mullingar meeting was negatived. Hence, sir, we are 14:20
11 not rehearing the Mullingar meeting because the tape is
12 not otherwise contradicted.

13
14 The following day, which was day four of the Commission
15 (the 19th May 2015) at the request of Mr. Smyth, Senior 14:20
16 Counsel, both Chief Superintendent Rooney and
17 Superintendent Cunningham were recalled to give
18 evidence.

19
20 During the testimony of Superintendent Cunningham, an 14:21
21 issue arose with regard to the circulation of
22 documentation which led to Superintendent Cunningham
23 not completing his evidence on that day. The
24 Commission resumed on the 24th June 2015. As already
25 noted, by that time a recording of the meeting which 14:21
26 took place on 25th of August 2008, made available to
27 Commission by Sergeant McCabe, had been analysed. As a
28 result of same, one presumes, the following exchange
29 took place:

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"MR. JUSTICE O'HIGGINS: ... Very good. Just before we start, there is a matter I want to mention to you, Mr. Smyth.

14:21

MR. SMYTH: Certainly, Judge.

MR. JUSTICE O'HIGGINS: There is a statement furnished by the Chief State solicitor's Office dated the 22 May, and at paragraph 19 thereof it is stated:

14:21

'Having been appointed to investigate Sergeant McCabe's complaints against Superintendent Clancy, now Superintendent Noel Cunningham, having attempted on a number of occasions to meet with Sergeant McCabe, eventually we met with Sergeant McCabe by appointment on the 25th August 2008 in Mullingar Garda Station to receive details of his formal complaint.

14:22

Superintendent Cunningham was accompanied to this meeting by Sergeant Yvonne Martin. Notes were taken at the meeting and countersigned by Sergeant Martin and a detailed report of this meeting was prepared by Superintendent Cunningham and its contents agreed with Sergeant Martin and forwarded to Chief Superintendent Rooney. In the course of this meeting, Sergeant McCabe advised Superintendent Cunningham that the only reason he made the complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have the full DPP directions conveyed to him.'

14:22

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On first flush, this appears to us to be incorrect. I am not saying definitely, but on first flush it seems to us to be incorrect. It seems to be incorrect for the following reasons: It does not appear that Superintendent Cunningham was not appointed to investigate a complaint against Superintendent Clancy. The meeting was not about complaints against Superintendent Clancy but concerned a request to him. No complaints were made about him. Neither in the report of Superintendent Cunningham nor in his note of the meeting is there reference to a complaint about Superintendent Clancy. Neither is such a contention supported by the transcript of the recording of the meeting.

14:23

14:23

14:23

This meeting was concerned with observations that had been made by Sergeant McCabe on the 25th February, not about any matters with which this inquiry is concerned but with comments made by Sergeant McCabe about incidents on the 15th and 17th October et al. In the course of that letter, Sergeant McCabe said: 'I urge you, if you can, to ask the DPP to allow full DPP directions to be conveyed to me and the other party, in particular Mrs. D in this particular case, due to the fact that all parties were in close proximity and I would really appreciate it. This is all I am asking.' Superintendent Cunningham's report dated the 17th September contains the following passage: 'He said

14:23

14:24

1 that the report was a bid by him to have the full DPP
2 directions conveyed to him and the Ds in relation to
3 the allegations against him by Ms. D and the subsequent
4 investigation.' It seems to us, therefore, that on the
5 meeting of the 28th August and the superintendent's 14:24
6 subsequent report on it, that they had nothing to do
7 with the complaints against Chief Superintendent
8 Clancy. We can't see, therefore, how reliance can be
9 placed on them in support of a contention that the only
10 reason Sergeant McCabe made complaints against 14:25
11 Superintendent Clancy was to force him to allow
12 Sergeant McCabe to have the full DPP instructions. In
13 other words, it seems to us that the matters relied on
14 in paragraph 19 of the Chief State Solicitor's letter
15 are referable, it seems to us, to matters not 14:25
16 concerning complaints against Chief Superintendent
17 Clancy.

18
19 I bring that to your attention, that is something that
20 I like you to address. 14:25

21
22 MR. SMYTH: Judge, so that you understand the position
23 I will have to take, because this tape came up somewhat
24 by surprise to us during the course of the examination
25 by me of Superintendent Cunningham, I am going to have 14:25
26 to take him through this transcript.

27
28 SUPERINTENDENT NOEL CUNNINGHAM, HAVING BEEN SWORN, WAS
29 FURTHER CROSS-EXAMINED AS FOLLOWS BY MR. SMYTH:

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MR. SMYTH: Superintendent Cunningham, there is a transcript, which has now been made available by Sergeant McCabe, of a conversation that took place between you and Sergeant McCabe and Sergeant Yvonne Martin at Mullingar Garda Station on 25th August 2008?

14:26

SUPERINTENDENT CUNNINGHAM: That is correct, yeah.

Q. Have you had an opportunity to consider that transcript in full?

14:26

A. I have, Judge.

Q. Does it accurately record what you remember of that meeting and what you have noted of that meeting?

A. Well, I have only brief notes, but what I would say is, it would reflect what I would remember of what went on, and it's my language, it's my conversation, it's my type of language, yes, Judge.

14:26

Q. And are you fully satisfied with the content of that transcript?

14:27

A. I have no difficulty with it, Judge."

Sir, later on during the course of Mr. Smyth taking Superintendent Cunningham through the transcript, the following was said:

14:27

"MR. SMYTH: So be it, Judge. Can I just ask you about the next paragraph then, which is the response then from you. It is not punctuated and maybe some people -

1 you are better at explaining the next paragraph than
2 anybody else, because it's in your own words. Just
3 read what that says.
4

5 SUPERINTENDENT CUNNINGHAM: 'Is that where it stands 14:27
6 now? Are you saying do you want to make a report or a
7 statement to the effect now to say to me that the
8 reason you outlined these was in response to a request
9 from your then district officer, Superintendent Clancy,
10 to highlight the difficulties that you were having with 14:27
11 Mr. D, in order that the DPP should be appraised of it,
12 or whatever, or as a result of which the directions of
13 the DPP should be known to each?

14 Q. So your interpretation, what are you saying there?

15 A. What I am saying is, Judge, and I gave it in my 14:28
16 evidence-in-chief the last day and I sent it in my
17 report to Chief Superintendent Clancy that I believe
18 from this meeting with Sergeant McCabe I believed it in
19 2008 and I believe it today, Judge, having been given a
20 transcript of the tape that I didn't know was being 14:28
21 made, that the only reason that Sergeant Maurice McCabe
22 was making these allegations was --
23

24 MR. JUSTICE O'HIGGINS: what allegations? The 14:28
25 allegations in this report of the 28th February.
26

27 MR. JUSTICE O'HIGGINS: Not against Clancy.
28

29 SUPERINTENDENT CUNNINGHAM: No, against Mr. D was to,

1 in some way, the result of it would be that the DPP's
2 directions, which I had received and had been given,
3 would be made available to himself and to the D family.
4

5 MR. JUSTICE O'HIGGINS: Yes. I think we are covering 14:29
6 ground that has already been covered on a number of
7 occasions.
8

9 SUPERINTENDENT CUNNINGHAM: I am sorry, I was asked a
10 question, Judge. 14:29
11

12 MR. SMYTH: Except, Judge, we didn't have this
13 transcript.
14

15 MR. JUSTICE O'HIGGINS: Does it change anything? As 14:29
16 Superintendent Cunningham put in his report. He said
17 in his report what he thought the motivation of
18 Sergeant McCabe in making the observations and the
19 request on February the 28th, he says what he thought.
20 The transcript would appear to offer some support for 14:29
21 Superintendent Cunningham's view of it."
22

23 A short time later:
24

25 "MR. SMYTH: The question I am asking you is this, that 14:29
26 again it seems evident that at all times he was anxious
27 to get these directions, shown to both the D family as
28 well as have the directions, the full directions
29 divulged to himself.

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SUPERINTENDENT CUNNINGHAM: Yes, Judge.

Q. That couldn't be done for obvious reason, is that correct?

A. That is correct, Judge.

14:30

Q. Was there a change in Sergeant McCabe, did you find, following that?

MR. JUSTICE O'HIGGINS: Following what?

14:30

MR. SMYTH: Following the refusal by you to give him the directions?

SUPERINTENDENT CUNNINGHAM: Yes, Judge.

Q. What did you interpret that change to be?

14:30

A. Well, Judge, I had known Sergeant Maurice McCabe for years, 15, maybe 20, years. I'd say even to this day that I haven't had a cross word with Maurice McCabe, in fact the opposite. I would respectfully suggest that I have supported him in everything he did. I have ample incidents that I can write with that, Judge. I was now meeting him, a man I had known for years, he was taping me. He was, if you see even questions put to me: 'No, let's talk off the record'. Maurice McCabe knows me well. I don't do 'off the record'. You know what I mean, I would deal with things in the way I am supposed to deal with it as a policeman. The professional way I am supposed to deal with these things. I don't do 'off the record'. I

14:30

14:30

1 don't do agendas. I don't do any of that, Judge, I do
2 my job as best I can. That is what I do. I felt that
3 Maurice McCabe's attitude to me changed completely
4 after I was directed to carry out an investigation and
5 I was directed to it, Judge, in 2006. It wasn't my
6 choice to do that. 14:31

7 Q. What way did his behaviour change towards you?

8 A. His attitude to me changed, Judge. He said it
9 himself even in conversations, that he didn't trust
10 anybody any more. It had impacted on his life. It 14:31
11 affected him. But he had no reason not to trust me,
12 Judge. I had never in any of my time with Maurice
13 McCabe tried to treat him other than with complete and
14 total professionalism and support. Yet, here was a
15 man, as I said, taping me without my knowledge. Trying 14:31
16 to steer me -- and it is clear, Judge, in it --

17
18 MR. JUSTICE O'HIGGINS: Yes. So you are saying that
19 Sergeant McCabe's attitude towards you seemed to
20 change? 14:32

21
22 SUPERINTENDENT CUNNINGHAM: It did, Judge.

23
24 MR. JUSTICE O'HIGGINS: Yes, okay." 14:32

25
26 Counsel for the O'Higgins Commission then had the
27 opportunity to re-examine Superintendent Cunningham.
28 This was an attempt to pin him down, to use a wrestling
29 term, what had been a not so very clear exchange and to

1 enable a definitive case to be made to the Commission.

2
3 "MR. GILLANE: Superintendent Cunningham, I ask the
4 question lest we lose sight of a particular issue and
5 it may well be that just the wrong end of the stick has 14:32
6 been grabbed, and if it has, whether by me or anybody
7 else, we might need to loosen it. On the last occasion
8 Sergeant McCabe was asked, or it was put to him, that
9 in relation to this August meeting with you and Garda
10 Martin that, and I am quoting: 'The only reason he 14:32
11 made a complaint against Superintendent Clancy was to
12 force you to allow him have the full directions of the
13 DPP.' And Sergeant McCabe said: 'That is absolutely
14 false.'

15
16 Are we all in agreement now that Sergeant McCabe is
17 correct in relation to that?

18
19 MR. JUSTICE O'HIGGINS: Do you understand the question?

20
21 A. I am sorry, pardon me.

22
23 MR. GILLANE: In other words, if it was put to Sergeant
24 McCabe, and I question, but I just want to be as
25 accurate as I can, it was put to Sergeant McCabe that 14:33
26 he had said to you that the only reason he made a
27 complaint against Superintendent Clancy was to force
28 the release of the DPP's directions, Sergeant McCabe
29 said that was absolutely false. It just seems from

1 your evidence this morning that we are all in agreement
2 that he is correct about that. Am I right?

3
4 MR. JUSTICE O'HIGGINS: Do you understand what
5 Mr. Gillane is asking you? 14:33

6
7 A. The allegations are against Mr. D in his report of
8 the 25th February.

9
10 MR. GILLANE: All right. 14:34

11
12 A. He made it clear, and it is clear in the
13 transcript, that the reason that he made the
14 allegations was on the instruction of Superintendent
15 Mick Clancy and to force - force may be the wrong word 14:34
16 - to have the DPP's directions made available to
17 himself and to the D family, to both parties.

18
19 MR. JUSTICE O'HIGGINS: Can I intervene and ask you to
20 agree or disagree that all these conversations and your 14:34
21 report and the transcript were in the context not of
22 any complaints against Superintendent Clancy, but
23 rather in the context of the D episode and a request to
24 Superintendent Clancy. In other words, you weren't
25 investigating any complaints against Superintendent 14:34
26 Clancy?

27
28 A. The only thing I would say in relation to that,
29 Judge, is page 3 of the report of Sergeant McCabe, the

1 final page, which it says: 'Garda authorities'.
2

3 MR. JUSTICE O'HIGGINS: Yes.
4

5 A. And that is not Mr. D. 14:35
6

7 MR. JUSTICE O'HIGGINS: Go ahead.
8

9 A. Garda authorities are and were fully aware and are
10 informed of all of the above. 14:35
11

12 MR. JUSTICE O'HIGGINS: Yes.
13

14 A. Now, his authority at that time was Superintendent
15 Clancy and previously other superintendents also; do 14:35
16 you know what I mean?
17

18 MR. JUSTICE O'HIGGINS: Is this advanced by you in
19 support of a claim that the matters of the 28th
20 February were in fact in some way a complaint against 14:35
21 Superintendent Clancy?
22

23 A. No, I am not saying that, Judge. No, I would never
24 say that, Judge.
25

26 MR. JUSTICE O'HIGGINS: What I am asking you to agree 14:35
27 or disagree is that the conversation of the 28th
28 February, your subsequent conversation with Sergeant
29 McCabe, your subsequent report, were all arising not

1 about complaints against Superintendent Clancy but
2 about the observations and the matters dealt with in
3 the document of the 28th February.

4
5 A. Yes, Judge. Yes, Judge. 14:36

6
7 MR. JUSTICE O'HIGGINS: I am not putting words in your
8 mouth.

9
10 MR. GILLANE: Can I then ask you, following on from 14:36
11 that, Superintendent, it's that that there is no point
12 in us wasting our time in relation to a matter if it
13 doesn't arise, and I know you didn't write this letter
14 but again I infer from your evidence that in relation
15 to paragraph 19 of the letter written by the Chief 14:36
16 State Solicitor that has been referred to this morning,
17 that following then is, I put no higher than this, the
18 wrong end of the stick, in the course of this meeting
19 Sergeant McCabe advised superintendent the only reason
20 he made the complaint against Superintendent Clancy was 14:36
21 to force him to allow Sergeant McCabe to have the full
22 DPP directions conveyed to him. That just doesn't
23 appear to be right.

24
25 A. That's correct. 14:36

26
27 Q. Yes, and that is fine. We needn't waste time on a
28 matter if it's not right. Just to go back then to the
29 report that Sergeant McCabe made in February '08 to

1 Superintendent Clancy and your reference to the
2 authorities in relation to that report and we will come
3 to some of those aspects in due course, that's an
4 account of issues that Sergeant McCabe appears to be
5 raising from 2004 onward and, in fact, many of them 14:37
6 predate Superintendent Clancy's tenure in
7 Bailieborough, isn't that right?

8
9 A. That's correct, Judge."

10
11 Sir, after a short time, Superintendent Noel
12 Cunningham, who was still in the witness-box, addressed
13 Mr. Justice O'Higgins directly in the following terms:

14
15 "Judge, if I may, just the last question asked of me, 14:37
16 if I may just refer to my report of the 12th September
17 2008 to the chief superintendent, which I think is a
18 question raised by Mr. Gillane, and it clearly says:

19
20 'Sergeant McCabe stated that this report was composed 14:37
21 by him to highlight matters that occurred in
22 Bailieborough where he was Sergeant in Charge in
23 Bailieborough station. He stated the report was a bid
24 by him to have the full directions of the DPP conveyed
25 to him and the Ds in relation to the allegations made 14:38
26 against him by Ms. D and subsequent investigation.'

27
28 That was my account of that meeting with Sergeant
29 McCabe and that, I would respectfully say, Judge, is

1 what the taped transcript shows.

2

3 MR. GILLANE: We are still in agreement.

4

5 MR. JUSTICE O'HIGGINS: We are still in agreement in 14:38
6 relation to Ms. D.

7

8 MR. GILLANE: I understand the point you are making.

9

10 MR. MCDOWELL: I don't want to delay the Commission any 14:38
11 further on this issue at this juncture, but I do want
12 to state that if the allegation of motivation arises at
13 a later stage, my client obviously wishes to reserve
14 his position. If any of this resurfaces again, my
15 client wants to reserve his position very much in 14:39
16 relation to that, because otherwise he would wanted to
17 be recalled in rebuttal.

18

19 MR. JUSTICE O'HIGGINS: Does anybody want to clarify
20 the very last sentence said by this witness? 14:39

21

22 SUPERINTENDENT NOEL CUNNINGHAM WAS FURTHER
23 CROSS-EXAMINED, AS FOLLOWS, BY MR. MCDOWELL:

24

25 MR. MCDOWELL: The very last sentence, I mean, I take 14:39
26 it that you mean, when you say -- when you look at the
27 last paragraph of the letter of the 18th May, I think
28 you have seen that letter, isn't that right, the Chief
29 State solicitor's letter?

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SUPERINTENDENT NOEL CUNNINGHAM: Sorry.

Q. Sorry, paragraph 19.

14:39

A. No, I haven't seen any letter of the 18th May, as has been referred to.

Q. It reads as follows.

14:39

MR. JUSTICE O'HIGGINS: He might want a copy of it.

SUPERINTENDENT CUNNINGHAM: I don't have it, Judge.

MR. JUSTICE O'HIGGINS: The letter of the Chief State Solicitor's Office. (Same Handed)

14:39

MR. MCDOWELL: Is it the position, Superintendent Cunningham, that you haven't been furnished with a copy of that letter, had you not?

14:40

A. I have it now.

Q. No, had you before?

14:40

A. No.

Q. Yes, so you didn't actually --

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A. I don't remember seeing it, possibly.

Q. You didn't see the text at paragraph 19 before it was sent, isn't that right?

14:40

A. I don't want to catch anybody short by saying something that I -- I have so many documents given to me, Judge, with respect, so many documents in a short period of time.

14:40

MR. JUSTICE O'HIGGINS: Paragraph 19.

A. I don't want to suggest --

MR. JUSTICE O'HIGGINS: Do you see paragraph 19 of that letter? 14:40

A. This is the first time I believe I am reading this, paragraph 19, 'Having been appointed...' I suppose, Judge, the operative word there is against, if we look at the second-last line. 14:40

'... made the complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have full DPP directions conveyed to him.' 14:41

MR. MCDOWELL: In the spirit of agreement can we say that completely misrepresents your understanding of the meeting, he was not saying that he was making a

1 complaint against Superintendent Clancy for the
2 purposes of blackmailing Superintendent Clancy into
3 changing his mind.
4

5 A. Well, no, I've never heard the word blackmailing 14:41
6 until there now.

7
8 Q. No, but I mean to force him. The gist of that last
9 sentence is he was making a complaint solely motivated
10 to force this man to change his mind, isn't that right? 14:41
11

12 A. Yes, and I still believe that. His sole motivation
13 for making this complaint, sure isn't that what's --
14

15 MR. JUSTICE O'HIGGINS: What complaint? 14:41
16

17 A. The complaint against the letter of the 25th
18 against Mr. D. As I said, the only word that I would
19 have --
20

21 MR. JUSTICE O'HIGGINS: Just one second. As I 14:42
22 understand the case that's being made on behalf of your
23 clients or all of them, is that insofar as the question
24 of motivation is relevant at all and it might impinge
25 on credibility, that your case is fairly and squarely 14:42
26 that, one fine day, Sergeant McCabe, because he was
27 refused his request or demand, however you like to put
28 it, in relation to the DPP's direction, from that,
29 because of that he started to make complaints against

1 Chief Superintendent Clancy. That's your case, as I
2 understand it, and tell me if I am wrong.

3
4 MR. SMYTH: The question that was -- I think the
5 superintendent puts it eloquently, indeed the 14:42
6 difference is between the words 'to' and 'against' and
7 certainly I put the question, I used the word 'against'
8 and I have to accept that the report was made to
9 Superintendent Clancy to force him to allow Sergeant
10 McCabe to have the full directions. 14:43

11
12 MR. MCDOWELL: well just...

13
14 MR. SMYTH: I still contend that the report, the use of
15 the word 'against' is not the correct word but the 14:43
16 report was made to Superintendent Clancy to force him
17 to allow Sergeant McCabe to have the full directions
18 conveyed to him and indeed to --

19
20 MR. JUSTICE O'HIGGINS: In relation to the D affair. 14:43

21
22 MR. SMYTH: Yes, in relation to the D.

23
24 MR. JUSTICE O'HIGGINS: And not the complaints against
25 Superintendent Clancy with which we are dealing in this 14:43
26 inquiry.

27
28 MR. SMYTH: well, we're not in this module dealing with
29 complaints --

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MR. JUSTICE O'HIGGINS: We are not dealing with anything to do with the D affair in this inquiry. Your case can only be in relation to matters covered by this Commission of Investigation, and the D affair is not a matter within the remit. 14:43

MR. SMYTH: That's absolutely correct, but it's in the context of motivation or credibility, as you say, in relation to the complaints made by Sergeant McCabe, that's why it was raised. 14:44

MR. JUSTICE O'HIGGINS: This document, the 28th of February, and the subsequent tape and the subsequent report are in the context of not of any complaint against Superintendent Clancy but a request to Superintendent Clancy in relation to matters arising out of the D affair. 14:44

MR. SMYTH: Directions of the DPP and that deals with the motivation. 14:44

MR. JUSTICE O'HIGGINS: This does not deal with any complaint against Superintendent Clancy with which we are concerned in this investigation. 14:44

MR. SMYTH: I think this has been established, Judge.

MR. JUSTICE O'HIGGINS: Okay, that's fine."

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So, sir, it would appear from the above exchange that Superintendent Cunningham never maintained that Sergeant McCabe had made complaints against Superintendent Clancy so as to force him to circulate the directions of the DPP. Rather, what was inserted into the letter of the 18th of May 2015 was an error made by someone other than Superintendent Cunningham. This, sir, would seem to be confirmed by the statements made by the lawyers for the Garda Commissioner. In this regard, Mr. Smyth, Senior Counsel, says:

14:44

14:45

"A misunderstanding in instructions which came from clients other than Commissioner O'Sullivan resulted in an inaccuracy related to an interaction with Sergeant McCabe on 25th August 2008 in Mullingar Garda Station. Those instructions as initially understood were accurately reflected in paragraph 19 of the letter of the CSSO to the Commission of Investigation dated the 18th May 2015. The said complaint made by Sergeant McCabe was against Mr. D and not Superintendent Clancy. The inaccuracy in question was that the complaint being made by Sergeant McCabe was against Superintendent Clancy. The complaint had in fact been forwarded to Superintendent Clancy. This complaint came to be investigated by Superintendent Noel Cunningham. This error was corrected but did not alter the substance of the matter being put to Sergeant McCabe about the meeting in Mullingar on the 25th of August 2008 and

14:45

14:45

14:46

1 which Sergeant McCabe accepts."

2
3 In relation to Sergeant Yvonne Martin, she has made a
4 statement to the Tribunal and explained as follows:

5
6 "- I was requested to attend a meeting on 25th August
7 2008 with Superintendent Noel Cunningham and Sergeant
8 Maurice McCabe at Mullingar Garda Station. The purpose
9 of my attendance at this meeting was to witness the
10 notes taken by Superintendent Cunningham. 14:46

11 - I did not take part in the discussion between
12 Superintendent Cunningham and Sergeant Maurice McCabe.

13 - In May 2015, nearly 7 years later, I received a
14 telephone call from Superintendent Cunningham who
15 informed me that he had given Chief Superintendent 14:47

16 Fergus Healy my phone number and that I would be
17 receiving a call from him regarding the above meeting.

18 - Subsequently I received a telephone call from Chief
19 Superintendent Fergus Healy who told me that I might be
20 required to attend at the O'Higgins Commission of 14:47
21 Investigation to give evidence in relation to the above
22 meeting.

23 - I received no further communication from Chief
24 Superintendent Healy, Superintendent Noel Cunningham or
25 anyone connected with the Commission. 14:47

26 - The contents of this statement are based on my memory
27 of the meeting and a review of the documentation
28 relevant to the Commission which has been provided to
29 me by the Chief State Solicitor's Office on foot of a

1 High Court Order.

2 - For completeness, I never attended at the Commission
3 of Investigation, nor have I ever, to this day, been
4 contacted by the Garda Commissioner, her legal team,
5 GSOC or the media, to clarify my involvement in or 14:48
6 recollection of the above meeting. Further, I was
7 never stationed in Bailieborough Garda Station nor did
8 I have any dealings with any of the members attached to
9 it."

10
11 Her statement continues in some detail, sir. 14:48

12
13 Sir, we have studied the materials and documentation
14 available to the Tribunal and have no reason to doubt
15 what she says. We are happy to state as much publicly, 14:48
16 as is only right.

17
18 So, sir, there matters would appear to have remained
19 until the day Commissioner O'Sullivan gave evidence at
20 the O'Higgins Commission. That was on the 4th of 14:48
21 November 2015. On that day, Commissioner O'Sullivan
22 was due to give evidence and, prior to her being sworn,
23 Mr. Justice O'Higgins sought clarification from counsel
24 for Commissioner O'Sullivan. The exchange was
25 as follows: 14:49

26
27 "MR. JUSTICE O'HIGGINS: Before we commence, there is
28 one matter that I would like a bit of assistance and
29 clarification on from you, Mr. Smyth. It is in

1 relation to a question that has been dormant for some
2 time, concerning the integrity of Sergeant McCabe and
3 his mala fides or bona fides in making his complaints.
4 Now, I formed the impression from those parts of the
5 transcript, rightly or wrongly, that the integrity and 14:49
6 the motivation and the bona fides of Sergeant McCabe
7 were being attacked. Was I right or was I wrong in
8 forming that impression?

9
10 MR. SMYTH: Judge, first of all, I say that my 14:49
11 instructions at all times were to challenge the
12 motivation and the credibility of Sergeant McCabe and
13 those remain my instructions. I never used the words
14 mala fides, those were the words that in the first
15 instance came from Mr. McDowell and then were 14:50
16 introduced by yourself in interpreting what my
17 instructions were. I gave my instructions to you
18 clearly, I said that I have to challenge the
19 motivation.

20 14:50
21 MR. JUSTICE O'HIGGINS: And the integrity of Sergeant
22 McCabe?

23
24 MR. SMYTH: Yes, in making the allegations of
25 corruption and malpractice. I never used the words 14:50
26 mala fides.

27
28 MR. JUSTICE O'HIGGINS: That's so, but you are
29 attacking his motivation and you are attacking his

1 integrity.

2
3 MR. SMYTH: In relation to the corruption and
4 malpractice allegations, yes. He has alleged
5 corruption on the grand scale against Superintendent 14:50
6 Clancy as he then was and Superintendent Cunningham and
7 also against former Commissioner Callinan... among
8 others. He indeed also made allegations of corruption
9 against Assistant Commissioner Byrne and Chief
10 Superintendent McGinn. He withdrew these allegations 14:50
11 but he was invited to withdraw allegations of
12 corruption against former Commissioner Callinan and he
13 refused to do so...

14
15 MR. JUSTICE O'HIGGINS: In other words, that he made 14:51
16 these allegations not in good faith but because he was
17 motivated by malice or some such motive that impinges
18 on his integrity. If those are your instructions from
19 the Commissioner so be it.

20
21 MR. SMYTH: That, Judge, was your interpretation of 14:51
22 what my instructions were.

23
24 MR. JUSTICE O'HIGGINS: You said 'so be it. That is
25 the position, Judge'. 14:51

26
27 MR. SMYTH: As far as the Commissioner was concerned at
28 all stages I had instructions to challenge Sergeant
29 McCabe in relation to motivation and credibility.

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MR. JUSTICE O'HIGGINS: And integrity.

MR. SMYTH: No, there was no mention of integrity.

14:51

MR. JUSTICE O'HIGGINS: Yes, there was because he was motivated by malice or some such motive that impinges on his integrity. If those are your instructions from the Commissioner, so be it. 'Mr. Smyth: So be it, that is the position, Judge.'

14:52

MR. SMYTH: Can I just refer you to page 190 from which you are reading at the moment. If you see at the top page you introduce the words integrity. I appreciate that the integrity, his motivation and his credibility in mounting these allegations of corruption and malpractice. That is what I said his motivation and his credibility in mounting these allegations of corruption and malpractice and you said there is a difference.

14:52

14:52

MR. JUSTICE O'HIGGINS: Sorry, Mr. Smyth, that is not really quite correct. If you look at page 189, the last sentence: 'I appreciate that but my instructions are to challenge the integrity certainly of Sergeant McCabe.'

14:52

MR. SMYTH: No.

1 MR. JUSTICE O'HIGGINS: But the clarification that I am
2 seeking from you is are your instructions to challenge
3 the integrity of Sergeant McCabe?
4

5 MR. SMYTH: My instructions are contained at his 14:53
6 motivation and his credibility only.

7
8 MR. JUSTICE O'HIGGINS: Well. Okay. So this
9 clarification I am seeking from you. His motivation is
10 being challenged. His integrity is not now being 14:53
11 challenged and if I formed the impression because you
12 said my instructions are to challenge the integrity.
13 That was an --

14
15 MR. SMYTH: That was an error. 14:53

16
17 MR. JUSTICE O'HIGGINS: So the motivation of Sergeant
18 McCabe is being challenged. His credibility is being
19 challenged but his integrity is not now being
20 challenged. 14:53

21
22 MR. SMYTH: That was certainly an error and I think my
23 instructions are quite clearly set out at the top of
24 page 190, at the top of page 190 where I say that his
25 motivation and credibility in mounting the allegations 14:53
26 of corruption and malpractice.

27
28 MR. JUSTICE O'HIGGINS: And insofar as you said that my
29 instructions are to challenge the integrity certainly

1 of Sergeant McCabe that is an error.

2

3 MR. SMYTH: That is an error on my part.

4

5 MR. JUSTICE O'HIGGINS: Well, that's the clarification 14:54
6 that I sought. So the position now is that his motive
7 is under attack, his credibility is under attack from
8 the Commissioner but not his integrity.

9

10 MR. SMYTH: Just to be clear about it the credibility 14:54
11 insofar as he made these allegations of corruption and
12 malpractice is under attack, there is no question about
13 that.

14

15 MR. JUSTICE O'HIGGINS: No question about that. 14:54

16

17 MR. SMYTH: Yes.

18

19 MR. JUSTICE O'HIGGINS: Is his motivation under attack
20 now? 14:54

21

22 MR. SMYTH: Yes.

23

24 MR. JUSTICE O'HIGGINS: So his motivation and
25 credibility are under attack but not his integrity. 14:54

26

27 MR. SMYTH: Yes, that's correct, Judge, the
28 Commissioner has a duty of care to all members. She
29 wasn't acquiescing and then she has to hold the balance

1 between on the one part she has Sergeant McCabe who she
2 has a concern for and for his welfare. And on the
3 other hand she has a concern for superintendents who
4 are under her control and she has to hold the balance.
5 She cannot come down on the side of Sergeant McCabe and 14:55
6 say I agree with everything he says without challenge
7 or I am simply acquiescing [to] everything he says
8 without challenge or I am simply acquiescing to
9 everything he says.

10
11 MR. GILLANE: I wonder, Judge, if I could just, sorry
12 for interrupting My Friend, but it just may save time
13 if I understand the position correctly that as matters
14 stand in terms of the current Commissioner's position
15 there is no case being made that Sergeant McCabe either 14:55
16 lacks integrity or acted mala fides in bringing his
17 complaints and other matters remain live.

18
19 MR. SMYTH: And I said I never uttered the words mala
20 fides in relation to Sergeant McCabe. 14:55

21
22 MR. JUSTICE O'HIGGINS: I heard you the first time and
23 the second time. Very good.

24
25 Mr. Gillane: I don't know if my expression of the 14:55
26 current position is accurate.

27
28 MR. JUSTICE O'HIGGINS: Good. Well that is clarified."
29

1 Sir, while it is a matter for you, perhaps some kind of
2 preliminary summary should here be attempted. Firstly,
3 we rule out that anyone ever intended on behalf of
4 Commissioner Nóirín O'Sullivan, or on behalf of anyone,
5 to put to Sergeant McCabe while giving evidence before 14:56
6 the O'Higgins Commission that he had once abused a
7 child. While the transcript may at times be confusing,
8 there is nothing there that we can point to suggest
9 that this was ever close to happening. Had someone
10 done that, had that been authorised by Commissioner 14:56
11 O'Sullivan or by anyone in the Department of Justice,
12 it would have been totally wrong. What that would have
13 done would be to take the allegation and divorce it
14 from the DPP's ruling that despite credibility issues
15 around the Ms. D allegation itself, no sexual assault, 14:56
16 nor indeed any assault, had taken place. But that did
17 not happen. So, it might be asked what did happen?

18
19 Well, secondly, the transcript records language used by
20 counsel as to the place of credibility in matters. 14:57

21
22 Thirdly, and for some reason that now on the papers is
23 very unclear, a serious error seems to have been made
24 as to the purport of the Mullingar meeting of the 25th
25 of August 2008. Where did the notion come from that 14:57
26 Sergeant McCabe turned up to that meeting and announced
27 that his issues with Superintendent Clancy had been
28 manufactured by him in order to create some kind of a
29 pressure wave so that senior management would bow to

1 his demand that the DPP's letter exonerating him would
2 be circulated? This idea, which somehow got into
3 paragraph 19 of counsel's letter to the Commission on
4 behalf of Commissioner Nóirín O'Sullivan, is not
5 contained in the report of Superintendent Cunningham 14:58
6 and it does not accord with the tape that Sergeant
7 McCabe had made of the meeting. How did that happen?
8

9 Finally, and fourthly, sir, we are asking you to
10 consider how these series of matters impacted on 14:58
11 Sergeant McCabe. He was there to give evidence, but
12 his integrity was impugned.
13

14 Sir, you will no doubt have noted on the 15th of May
15 2015, when the matter of the Commissioner's 14:58
16 instructions was first questioned at the Commission of
17 Investigation, Commissioner O'Sullivan sought time so
18 as to telephone the Department of Justice on the
19 matter. It would appear that Commissioner O'Sullivan
20 was not the only person who was alerting the Department 14:58
21 of Justice as to what had transpired at the Commission
22 of Investigation.
23

24 What transpired at the Commission on the 15th of May
25 2015 was communicated to Mr. Michael Dreelan, who was 14:58
26 at that time advisory counsel with the Attorney
27 General's Office with responsibility for the file in
28 relation to representation of An Garda Síochána at the
29 O'Higgins Commission by Ms. Anne Marie Ryan, who was at

1 that time the solicitor representing the Garda
2 Commissioner at the Commission. Ms. Ryan explained
3 that "the purpose of these calls was to inform them --"
4 that is the AG's office "-- of what was happening and
5 what had happened, as is the normal practice." 14:59

6 Mr. Dreehan recalls the matter as follows:

7
8 "I understood that the AGS thesis, proposed to be
9 shortly advanced at the O'Higgins Commission, was that
10 Sergeant McCabe deeply resented the suspicion of 14:59
11 colleagues and the investigative process into the [D]
12 allegations. I was informed that the AGS would put it
13 to Sergeant McCabe that he was motivated to raise the
14 issues before the O'Higgins Commission by a sense of
15 having been treated unjustly. I was informed that this 15:00
16 approach had Garda management sanction but the AGO was
17 being informed lest it wished to make any observation.

18
19 I considered this information to be of the highest
20 importance and, notwithstanding the hands-off approach 15:00
21 of the office on the file, was a matter that the
22 Attorney General personally should be made aware of
23 lest she wished to make any intervention. I believe I
24 was first informed of both matters, i.e. the [D]
25 allegations and the proposed approach of the AGS, on 15:00
26 the same occasion... the 15th May 2015. I sought my
27 group leader, Richard Barrett, and having established
28 that he was aware that allegations had been made
29 against Sergeant McCabe, briefed him fully on my

1 conversation."

2
3 Mr. Barrett, who is the deputy director general in the
4 Office of the Attorney General, explained that he dealt
5 with the matter as follows: 15:01

6
7 "On 15th May 2015 I was informed by my colleague,
8 Michael Dreehan, that he had a telephone conversation
9 from the solicitor from the CSSO representing Garda
10 Síochána at the Commission, informing him that there 15:01
11 had earlier been a dispute at the Commission between
12 lawyers for the Gardaí and the lawyers for Sergeant
13 McCabe about the expressed intention of the Gardaí
14 lawyers to question the motivation of Garda McCabe. It
15 was explained that the question of motivation would be 15:01
16 linked to an earlier allegation of a criminal offence
17 by Sergeant McCabe. It was anticipated that the
18 dispute could result in judicial review proceedings by
19 the Gardaí or indeed by Sergeant McCabe. Soon after
20 this, I made a telephone call to Michael Flahive in the 15:01
21 Department of Justice to inform him of the dispute and
22 the possibility of judicial review proceedings which
23 could have the effect of putting into the public domain
24 the allegation of a sexual offence."

25 15:02
26 Mr. Flahive, who is an assistant secretary in the
27 Department of Justice, on receipt of the above
28 information from Mr. Barrett sent the following email
29 to the then Minister for Justice's private secretary:

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"Chris,

Could you pass this on to the Minister for information, please.

15:02

I took a call this afternoon from Richard Barrett in relation to the O'Higgins Commission of Investigation (which is investigating the matters identified by the Guerin Report).

15:02

The O'Higgins Commission has started hearings and the Garda Síochána are represented by counsel, as is Sergeant McCabe (in this case, Michael McDowell, SC).

15:02

Richard wanted to let me know that counsel for the Garda Síochána has raised as an issue in the hearings an allegation made against Sergeant McCabe which was one of the cases examined by the IRM. The allegation had been that a serious criminal complaint against Sergeant McCabe (which he has always denied) had not been properly investigated by the Garda Síochána. The IRM found that an investigation file on the case had in fact been submitted to the DPP who had directed no prosecution, and the IRM, which because of the seriousness of the allegation had been considering whether to recommend its inclusion in the O'Higgins terms of reference, in the end recommended no further action by the Minister.

15:03

15:03

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Presumably the Garda Síochána are raising the matter on the basis, they could argue (and Sergeant McCabe would deny), that it is potentially relevant to motivation. Richard advised me that counsel for Sergeant McCabe objected to this issue being raised, and asked whether the Garda Commissioner had authorised this approach. Richard also told me that the Garda Commissioner's authorisation had been confirmed (although I understand separately that this may be subject to any further legal advice).

15:03

15:04

Richard and I agreed that this is a matter for the Garda Commissioner, who is being legally advised, and that neither the Attorney nor the minister has a function relating to the evidence a party to a Commission of Investigation may adduce.

15:04

Regards,

15:04

Michael."

This email, sir, would not appear to be entirely accurate. What did the email mean in referring to "an allegation made against Sergeant McCabe"? That was not what was going on. Was this a confusion as to his reaction to being investigated? Certainly, that was in the letter of counsel. But, perhaps in shorthand, things were truncated since the point of the e-mail was

15:04

1 fundamentally to reassure the Minister for Justice and
2 Equality that no action was required. Mr. Flahive puts
3 the matter in his statement as follows:
4

5 "On 15 May 2015 I sent an email to the Minister's 15:05
6 private secretary... as it relates, that afternoon I
7 had taken a phone call from Richard Barrett... Richard
8 told me at the O'Higgins Commission, the issue was
9 raised of the allegation of sexual assault that had
10 previously been made against Sergeant McCabe. Richard 15:05
11 also told me that counsel for Sergeant McCabe had
12 objected to this being raised, and had asked whether
13 the Garda Commissioner had authorised this which was
14 confirmed... However, while I felt that I had to inform
15 the minister, and senior colleagues, of this 15:05
16 development, I was extremely reluctant to overtly refer
17 to an allegation of sexual assault in the email. While
18 I knew that the DPP had directed no prosecution and the
19 matter was closed, even the fact that such an
20 allegation had been made was obviously highly 15:06
21 sensitive, and I didn't want to directly link Sergeant
22 McCabe's name with such an allegation. It is true that
23 my email was purely internal and at a very high level
24 but with emails there is always the risk that they can,
25 through inadvertence or mistake, be forwarded or copied 15:06
26 more widely than they ought to be, and I was concerned
27 at the potential risk that such highly sensitive
28 information might spread beyond the initial small
29 circulation.

1
2 Equally, I could not, of course, make my email so bland
3 that the message got lost. That is why I referred to a
4 serious criminal complaint and linked it to a case that
5 had been referred to the independent review mechanism, 15:06
6 a link that was intended to be a coded reference to the
7 underlying issue which would be understood by those
8 with a knowledge of the IRM.

9
10 In my email, I said that I presumed that the matter was 15:07
11 being raised on the basis that it could be argued to be
12 potentially relevant to motivation, although Sergeant
13 McCabe would deny this. I cannot remember whether this
14 presumption was informed by anything Richard said to me
15 during our phone call but in any event it was clear to 15:07
16 me that the allegation that had been made against
17 Sergeant McCabe was not relevant to any of the
18 O'Higgins terms of reference and the potential
19 relevance to any motivation may simply have appeared to
20 be the most likely possibility. I made clear, however, 15:07
21 that it was a presumption. I had no knowledge of any
22 statements, written or oral, made to the O'Higgins
23 Commission by the Garda Commissioner or any other
24 member, and I had no knowledge of any legal advice
25 available to the Garda Commissioner. 15:07

26
27 I might clarify the basis on which I wrote in brackets
28 in my email that I understood separately that the Garda
29 Commissioner's authorisation of the approach being

1 taken might be subject to any further legal advice.
2 Before sending my email I spoke to the Deputy Secretary
3 General, Ken O'Leary, and advised him of the phone call
4 I had received from Richard Barrett. My recollection
5 is that in turn Ken mentioned to me that around the 15:08
6 same time the Garda Commissioner had phoned him to let
7 him know that a row had broken out at the O'Higgins
8 Commission of Investigation, and had indicated that she
9 would continue to engage with her legal team on the
10 matter. I believe that this information informed the 15:08
11 words in brackets in my email.

12
13 I concluded my email by saying that Richard and I had
14 agreed that this was a matter for the Garda
15 Commissioner, who was being legally advised, and that 15:08
16 neither the Attorney nor the Minister had a function
17 relating to the evidence a party to a Commission of
18 Investigation might adduce."

19
20 The D allegation against Sergeant McCabe, in itself, 15:09
21 was not raised as an issue in the O'Higgins Commission;
22 this is something perhaps which can be explored with
23 Mr. Flahive. It would appear also, sir, that
24 Mr. Flahive had spoken to Mr. Ken O'Leary, former
25 Deputy Secretary of the Department of Justice and 15:09
26 Equality, about the matter, who had in turn, it would
27 appear received two phone calls from the Garda
28 Commissioner about the matter. It would also appear
29 that Mr. O'Leary was also of the view that it was not a

1 matter in which the Department or the Minister could
2 have any involvement. Mr. O'Leary, in his statement
3 dated the 14th of December 2017, said as follows:
4

5 "On the afternoon of the 15 May 2015, former Garda 15:09
6 Commissioner O'Sullivan contacted me in relation to a
7 matter which had arisen at the O'Higgins Commission
8 that day... My understanding from what the
9 then-Commissioner said was that counsel for Sergeant
10 McCabe had reacted strongly to an issue which had 15:10
11 arisen at the Commission that somehow related to a
12 previous criminal complaint made against Sergeant
13 McCabe and that counsel for Sergeant McCabe had asked
14 whether this issue was being raised on the instructions
15 of the Commissioner. 15:10

16
17 I had no prior knowledge of what evidence An Garda
18 Síochána intended to, or were in a position to, present
19 at the Commission or any case that they proposed
20 making. 15:10

21
22 I can recall being acutely conscious during the
23 conversation of the proper position of the Department
24 in relation to the O'Higgins Commission and I
25 specifically remember mentioning to the then Garda 15:10
26 Commissioner at an early stage of our discussion that
27 the Department could not become involved in, or attempt
28 to influence in any way, the approach of An Garda
29 Síochána to the Commission which was entirely a matter

1 for her as Garda Commissioner, taking into account the
2 legal advice available. The then Commissioner fully
3 accepted this. It was against that background that I
4 did not seek any further clarification of what had
5 arisen at the commission (the conduct of which I was 15:11
6 aware was confidential) or information as to what
7 evidence it was intended to present to the Commission
8 or the nature of any legal case to be made.

9
10 The focus of our conversation related to the question 15:11
11 of evidence and I do not recall it touching on any
12 overall legal strategy counsel for the Commissioner
13 might indicate to the Tribunal (as set out in the
14 transcripts which subsequently entered the public
15 domain and as referred to by counsel for the Tribunal 15:11
16 in his opening statement where counsel for An Garda
17 Síochána had made again comments in relation to their
18 approach to Sergeant McCabe).

19
20 while clearly accepting that the Department could have 15:11
21 no role in determining the Garda position in relation
22 to the Commission, the Commissioner asked me if, based
23 on my experience, anything occurred to me which she
24 might need to be mindful of in addressing this
25 particular issue with her legal advisors. I suggested 15:12
26 that she would have to be guided by her legal advice in
27 these matters, but against the background that the
28 Department was not in a position to express any views
29 on the position of An Garda Síochána at the Commission,

1 there was a discussion of factors of which she might
2 need to be mindful in the context of the discussions
3 with her legal advisers. To the best of my
4 recollection, matters mentioned were the need for
5 sensitivity in relation to protecting the position of 15:12
6 Sergeant McCabe, the position of other people at the
7 Commission against whom serious allegations had been
8 made, the likely adverse reaction of the Commission to
9 the introduction of matters which it might consider
10 inappropriate and the overall duty on the Garda 15:12
11 Commissioner to assist the Commission in whatever way
12 possible to establish the facts of what the Commission
13 had been asked to investigate. The Commissioner was
14 then going to discuss these matters with her legal
15 advisors and I think I reiterated the view that she 15:13
16 would have to be guided by the legal advice available
17 to her. I also believe I suggested that, from her
18 point of view, it might be helpful if it was possible
19 to gain more time so that she could consider the matter
20 more fully with her legal advisers. 15:13

21
22 To the best of my recollection, I received a further
23 call shortly afterwards from the then Garda
24 Commissioner (I think that at least for some of that
25 call she was also on the phone to the Garda 15:13
26 Headquarters' legal officer at the O'Higgins
27 Commission. As I understood it the Commissioner was
28 being advised that her legal representatives at the
29 Commission had to respond more or less immediately to

1 the issue which had arisen earlier and the view of her
2 legal team was that in discharging her obligation to
3 the Commission there was a legal duty on her to raise
4 matters which had arisen. I believe that, in the
5 circumstances, the Commissioner indicated to the effect 15:14
6 that her legal team should maintain their position that
7 afternoon but there would be further detailed
8 consultations with her legal team subsequently about
9 the matter.

10
11 ...I do not believe that at any stage I alerted the 15:14
12 Minister to the discussion which I had with the Garda
13 Commissioner. My recollection is that I took the view
14 that the Minister should not have any involvement in
15 any matters relating to the case to be made by one of 15:14
16 the parties to a Commission which she had established
17 and in any event, I was satisfied that she would be
18 informed of the fact that a dispute had arisen between
19 counsel by Mr. Flahive's email."

20
21 On the evening of the 15th May 2015, the Commissioner's 15:14
22 private secretary replied to Mr. Flahive informing him
23 that he would flag the issue to the Minister. On the
24 25th of May 2015 at 12:21 the Commissioner's private
25 secretary sent a further email to Mr. Flahive informing 15:15
26 him that the Minister had noted his email of the 15th
27 of May 2015. Minister Fitzgerald in a statement made
28 to the Tribunal has set out her position as follows:
29

1 "I established the O'Higgins Commission and awaited its
2 outcome. Other than establishing the Commission I was
3 not involved in the Commission as Minister. It would
4 have been inappropriate for me as Minister for Justice
5 to establish a Commission of Investigation and to 15:15
6 interfere in any way with the legal strategy which
7 might be adopted by parties to that Commission, or with
8 the evidence which might be given to the Commission.
9 To illustrate this point, I was not aware of the
10 representation at the Commission or indeed 15:15
11 members/numbers of staff who would be giving evidence
12 as witnesses at the Commission, including the fact that
13 some officials in the Department were granted
14 representation in October 2015. I believe it would
15 have been totally incorrect for me to interfere with 15:16
16 the Commission of Investigation, chaired by an eminent
17 judge, or with its work...

18
19 As stated in the email, Mr. Flahive asked my private
20 secretary to bring the email to my attention as 15:16
21 Minister for information... the normal meaning of the
22 term for information in the Department of Justice was
23 that the official forwarding it had indicated it was
24 for information only, as opposed to action needed, part
25 of official submission, or government memo, or 15:16
26 requiring further information or follow up steps to be
27 taken. In the case of this email, the email commenced
28 by stating that it was for information purposes only
29 and concluded that "neither the Attorney nor the

1 Minister had a function relation the evidence of any
2 party, including the Garda Commissioner". The email
3 made it clear that no action arose on my part, as I had
4 no function in these circumstances...

5
6 As I now read the email of 15th May 2015, it strikes me
7 that the email is confusingly written because it
8 conflated two separate issues. One was an issue that
9 arose at the Commission, another was an issue that had
10 arisen from the independent review mechanism. I 15:17
11 probably read the email very briefly initially, and
12 then I would have gone back to it later and noted it.
13 Often I would scroll through an email remotely and in
14 relation to this specific email, while I do not
15 recollect receiving it, I believe it most likely saw 15:17
16 the advice that no further action was required by me
17 and thus came back to me later. I believe that at the
18 time it have struck me as being really a matter for the
19 Garda Commissioner and indeed the Commission itself. I
20 was not entitled to interfere in the Commission and I 15:18
21 did not know the legal strategy being pursued by the
22 Garda Commissioner, nor had I any role in relation to
23 it. Indeed I was not aware of any legal strategy being
24 pursued by any party to the Commission and I had no
25 knowledge of any legal strategy being pursued by the 15:18
26 Garda Commissioner."

27
28 As to whether there were other consultations, this will
29 be explored in evidence before the Tribunal.

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Sir, why are we examining these matters? If there was a plan to berate Sergeant McCabe, should it have been stopped? Sir, there appears to have been no plan at any time to accuse him of the D allegations before the O'Higgins Commission. But where did any questioning by counsel for Commissioner O'Sullivan of his integrity and his motivation come from? Eventually, after much hot air, a degree of clarity was brought to the matter through counsel's letter of the 18th May 2015 to the Commission. Anybody reading that, and one can be sure Sergeant McCabe read it, would understand that no one was accusing him of sexually assaulting Ms. D. Rather, the issue raised was as to how he had reacted to outcome and fallout of the investigation into the Ms. D allegation conducted under then Inspector Noel Cunningham. How had he reacted? He could not have been pleased since any such allegation and its aftermath can fairly be described as nightmarish. The Gardaí had a duty to fulfil and you have already heard evidence about that. Sergeant McCabe had a point of view, which was that the DPP's letter of the 5th of April 2007 should have been distributed. Sir, it is a valuable tool of counsel to challenge someone as to their credibility. It is respectable to do so, provided counsel have the factual material. So, even though it can be done, one wonders could it arise here? In that context, a person's reason for giving evidence, or their bad antecedents, if there are any, and there

1 are not here against Sergeant McCabe, can be put to a
2 witness. Cross-examination as to credit then ends. So
3 perhaps if his upset over the non-circulation of the
4 DPP letter was ever relevant at all, it would have to
5 be factually relevant to some relevant issue. Sir, you 15:20
6 might also consider whether a clarification such
7 that is in the letter of counsel of the 18th of May
8 2015 ought to have been given right from the start? It
9 helps to put matters down in writing. What is
10 appointing, perhaps, is that an error was made in 15:20
11 ascribing to Superintendent Cunningham a view that
12 Sergeant McCabe had told him that he had made
13 allegations against Superintendent Clancy.

14
15 Sir, it does appear from Chief Superintendent Healy 15:21
16 that Commissioner O'Sullivan had authorised the
17 questioning of Sergeant McCabe's prior motive to the
18 issue arising at the Commission on the 15th May 2015.
19 She sought written advice in relation to this during
20 the hearing and appears to have consulted in the time 15:21
21 available during the adjournment of the hearing on the
22 15th of May, after which she confirmed her
23 instructions. This is essentially the issue under
24 consideration.

25 CHAIRMAN: Thank you very much, Ms. Leader. There is a 15:21
26 tremendous amount of work in that and it probably needs
27 to be digested. Now, I am not against anybody if they
28 wish to make a statement stating what their position
29 might be about things, making such a statement but it's

1 possibly ill-advised at this point, in the sense there
2 is a lot to be thought about and there is a lot of
3 documents to be looked at, but that gives us a basis
4 upon which I think we can proceed with a focused
5 examination of this matter as opposed to something that 15:22
6 might not be so well focused.

7
8 As Mr. McGuinness indicated at the commencement of
9 today's hearing at 10:00, there is a lot, let's just
10 put it that way, of material that counsel want to read, 15:22
11 and I want them to read it, so that is what we are
12 going to spend the next three days doing. And in the
13 event that there is anything extra that needs to be
14 circulated, we will circulate that extra stuff, but the
15 examination of about 15 of the boxes so far has yielded 15:22
16 only a couple of, what one might call, gems but they
17 may turn out to be semi-precious stones or perhaps
18 less.

19
20 Can I just perhaps end today with one word of warning, 15:22
21 which is made in the context of correspondence recently
22 received. This particular term of reference, which is
23 (e), says that I am to investigate "whether false
24 allegations of sexual abuse or any other unjustified
25 grounds were inappropriately relied upon by" and it 15:23
26 names only "Commissioner O'Sullivan to discredit
27 Sergeant Maurice McCabe in the Commission of
28 Investigation into certain matters in the
29 Cavan-Monaghan district under the chairmanship of

1 Mr. Justice Kevin O'Higgins". It is a reasonable
2 lead-in to the other matters which are principally
3 centred around the allegation of detective -- sorry, of
4 Superintendent David Taylor and that is how we intend
5 to proceed until such time as we complete everything. 15:23
6 But I ask people to remember, whether they are sending
7 correspondence forward or not, I am not inquiring into
8 whether Garda Headquarters acted correctly or not in
9 relation to general policing in this country. I am
10 solely tasked with and have jurisdiction solely in 15:24
11 relation to the terms of reference. Now, as I
12 indicated earlier today, and I want to reiterate it
13 again just for fear there is any mistake, I intend to
14 receive oral submissions at the end of this particular
15 hearing about this. I will then be in a position to 15:24
16 write a report, if I want to, if I feel that's the
17 right thing to do. In relation to the matter which we
18 have had before, that is to say (c) -- sorry, (d), that
19 is to say "the creation, distribution and use by Tusla
20 of a file containing false allegations of sexual abuse 15:24
21 against Sergeant Maurice McCabe", as I indicated this
22 morning, I am not taking no for an answer. No means
23 that you don't want to make submissions in relation to
24 that matter, but any submissions in relation to that,
25 including from Tusla and the HSE, will be heard 15:24
26 immediately after the submissions in relation to this
27 and then I will be in a position to write and, if I
28 feel it's right, distribute a report. That is the only
29 correct way to do things to make progress.

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It may be that parties wonder whether lengthy written submissions would help, but we have got an awful lot of paper in this Tribunal so far, and I am not saying that I don't want any more but I'm not sure that it helps very much. What actually does help is for someone to stand up or sit down or whatever they want to do, and to tell me, look, arising out of this, we believe the following is what happened. Now in the event that people want me to give an indicative overview of what I think the issues are that arose in relation to that particular module which finished hearing as long ago as July 2017, and it does seem a lot of water has passed under the bridge since then, of course I will do so if that helps anybody, but my strong preference is to receive oral submissions indicating what people's position is on the matter, and actually a very good model of that is the submissions that were made by the parties orally in relation to the Garda Keith Harrison affair, which were indeed very helpful.

So that's, I think, where we stand today and we will adjourn until Friday, unless there is any other application.

MR. SREENAN: Chairman, can I just raise one matter? I am not going to take up your invitation to make an opening statement, but on three occasions counsel on behalf of the Tribunal this morning and this afternoon referred to counsel's letter to the Commission on

1 behalf of Commissioner Nóirín O'Sullivan and the letter
2 that she is referring to was the 18th of May 2015
3 letter. That is, of course, a letter not from counsel
4 but from the Chief State Solicitor's Office. It was
5 drafted by counsel. The draft was sent on the evening 15:26
6 of Saturday the 16th of May, it appears at page 762,
7 the email sending it, of the brief, with advice to
8 ensure the factual accuracy of the draft. I just want
9 to clarify that in case there is a misunderstanding.

10 CHAIRMAN: No, that is fine. Mr. Sreenan, I 15:27
11 appreciate, and I think everyone listening to the
12 opening will appreciate, that that particular letter,
13 the long letter with the 19 paragraphs, one of which
14 was completely wrong, another of which I doubt the
15 accuracy of but I said nothing about it, we will 15:27
16 consider it during the course of the hearing, of course
17 came from the Chief State Solicitor's Office and was
18 directly addressed to Mr. Justice O'Higgins at the
19 Commission, the purpose of which was to say insofar as
20 we are going to pursue this issue of, I am just going 15:27
21 to use the word "credibility" for the moment in
22 inverted commas, it will be pursued in this manner and
23 against this background. And that all came from
24 counsel but of course came, as you say, through that
25 channel. But that was clear to me but thank you for 15:27
26 saying that anyway. All right. Thank you very much.

27
28 THE HEARING WAS THEN ADJOURNED TO FRIDAY, 12TH OF
29 JANUARY 2018, AT 10:00AM

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