

Sir, we are now embarking on the public hearings concerning term of reference [e]. This is closely related, perhaps, to the main issues into which you are mandated to enquire, namely the allegation made by Superintendent David Taylor that there was a plan in Garda headquarters to discredit Sergeant Maurice McCabe.

That is not to say, that what you decide on this should influence you on the larger issue; the point we are making is the issue in this section of the Tribunal's work is akin to the bigger issue that you have to decide.

Perhaps, in case of misunderstanding, we should also make a personal comment. While we have looked at thousands of documents and while matters have been cross-checked, we hope to avoid error. The point of this, in any event, is to give people a guide but also to state facts from documents in the hope of bringing focus and also to invite correction. Any view we express is ours, it is not yours and in any event it is a view from papers, while you will hear the actual evidence.

You are tasked in term of reference [e]:

to investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into certain matters in the Cavan/Monaghan district under the chairmanship of Mr Justice Kevin O'Higgins

You will note that the Tribunal is limited to enquiring as to whether Commissioner Nóirín O'Sullivan relied upon such inappropriate grounds to discredit Sergeant Maurice McCabe before the O'Higgins Commission. In doing so it may also be appropriate to look at contacts between Commissioner O'Sullivan, An Garda Síochána and the Government, other state entities and the media. These may be relevant. As you know, Sir, there was communication in relation to this matter in May and July 2015, which communication will be examined in the wider context of the all of the documentation which is in the Tribunal's possession.

As you are aware, Sir, a Commission of Investigation was established on the 3rd of February 2015 under the chairmanship of Mr Justice Kevin O'Higgins. On the 25th of April 2016, Mr Justice O'Higgins sent his final report to the Minister for Justice. The Commission of Investigation heard 34 days of evidence. As you know, Sir, having read the O'Higgins report, Mr Justice O'Higgins was enquiring into police conduct and competence in the Cavan/Monaghan division of An Garda Síochána in respect of incidents dating from February to December 2007.

Now Sir, we will shortly outline those issues. However, it is important to remember that this Tribunal is not mandated to re-examine those issues, nor is this Tribunal an appeal from the findings and report of Mr Justice Kevin O'Higgins. Sir, were you to do that you would clearly be breaching the terms of reference of this Tribunal. If the Oireachtas wished you to so do, it would have explicitly stated same.

What should however be borne in mind as we outline these matters to you is that very few of the O'Higgins Commission findings were about what Sergeant McCabe did or didn't do or was supposed to do. Instead, the enquiry was into how others had addressed their work as police officers. Facts were established in that enquiry and these were mainly independent of the evidence of Sergeant McCabe. There is one exception of which we are aware, namely the enquiry into the missing computer, which was seized during the course of an investigation into offences committed by Father Molloy. There, certainly, an issue arose as to whether Sergeant McCabe was or was not exhibits officer or otherwise had responsibility for custody of that computer. That is

one example. If there are others then it is time for those who are aware of same to elucidate what these are.

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

On the 25th of February 2007, a lady driving a late-night bus for a living contacted the gardaí concerning public order and assault offences. The issues involved passengers not paying, insulting women passengers with “filthy talk and talking about their privates”, assaulting a girl in a sexual manner, assaulting another girl and creating general mayhem on the bus. Despite a garda investigation, some weeks later this woman was contacted and told there was essentially no point in her going to court. She was later offered a meal voucher in compensation, through the gardaí, from one of those identified as being involved, which she declined. Then she was asked by the gardaí to calculate the loss of earnings and was given a brown envelope containing €150 and a note of apology. She was then presented with a pre-written statement withdrawing her complaints. Mr Justice O'Higgins concluded that the driver of the bus was entitled, having undergone a harrowing experience, to have the matter dealt with professionally and competently by the gardaí and that her legitimate expectations in that regard were not met.

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

On the 30th of April 2007, a lady taxi driver took a man to an isolated location near Virginia, County Cavan. He then got out of the taxi and savagely assaulted the taxi driver whose injuries included bruising to her left eye and puncture marks to the shoulder and in addition, clumps of her hair had been pulled out of the scalp. The perpetrator was later arrested but denied the assault. Following an admission, the most minor charge of assault possible was proffered and the defendant was released on station bail on his own bond in the sum of €300. It was claimed that the minor assault charge had been proffered on the directions of the Director of Public Prosecutions but this was not so. Later, that official directed that more serious charges be proffered because of “the savagery of the attack”. While on bail, the accused committed further offences, including murder. Mr Justice O'Higgins found that the investigation of the assault offence was characterised by delay and a lack of effective supervision. The victim was denied the right to be present when the matter was ultimately dealt with in court. There was a lamentable failure to effectively communicate the correct information. When the case was ultimately correctly dealt with in court, the closest relation of the murder victim seeking information was left in the dark for an excessive period by the gardaí.

On the 5th of August 2007, three men went into a restaurant in Bailieboro. One of the men emptied the contents of a vinegar bottle and replaced it with urine. This was shocking. Ultimately, having pleaded guilty, all three were ordered to pay compensation, which the owner of the restaurant asked to be forwarded to the garda benevolent trust fund. Such investigation as was carried out was extremely poor and, as Mr Justice O'Higgins found, the victim was left feeling let down by the gardaí.

On the 2nd of September 2007, a teenage girl was walking home in the early hours of the morning in Cootehill, County Cavan and a man grabbed her, put his hand over her mouth and attempted to pull her towards an isolated area. When the suspect was arrested, he was interviewed for only 22 minutes and released without charge. No prosecution resulted. Mr Justice O'Higgins found

that the victim was not well served by this investigation's lack of an identification parade, the interview was not prepared or conducted well, information reported by the victim's father as to sightings of the assailant was not properly passed on and the legal basis for the arrest and detention of the suspect was doubtful.

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

On the 23rd of May 2007, a man was assaulted in a public house in Bailieboro, County Cavan, suffering injuries to his head and face. Ultimately, for some reason, a garda persuaded the victim to withdraw the complaint of assault and a statement of the withdrawal was prepared. Mr Justice O'Higgins found that the gardaí had let down the public so that the trust of the victim and his family in the gardaí was not justified.

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

This last incident was one of the main examples of which we are now aware where it could be said that Sergeant McCabe was in conflict with others and potentially had questions to answer as to the disappearance of the computer, as it was said that he was assigned responsibility for the safe custody of the computer. Ultimately, as Mr Justice O'Higgins stated in his report, Sergeant McCabe "was, quite rightly, exonerated."

Sir, we are not however re-running these matters as we have already indicated. There has already been an investigation into those matters and findings have been made.

The next question which has to be addressed, is what exactly was the case that was made on behalf of Commissioner O'Sullivan during the course of the O'Higgins Commission; what, in other words was her approach, in particular as to how Sergeant McCabe would be treated or dealt with? Allied to that issue is how somebody who is not a lawyer, namely Sergeant McCabe, would have felt as a person who was voluntarily coming forward and risking the disquiet of colleagues and superiors in order to seek an improvement in police standards, at such a case being made. So, what was the approach, was that approach justified and did it conform with the stated position of the Garda Commissioner?

The relevant transcript references would appear to be those of the first week of hearings of the O'Higgins Commission. We have days and days of transcripts and while we have read them all, you are only concerned with some extracts and these in turn are related to each other. At that time, week one, the Commission was enquiring into the investigation by An Garda Síochána of a public order incident and possible sexual assault on a bus in Kingscourt, County Cavan on the 25th of February 2007 and the investigation by An Garda Síochána and GSOC of garda

disciplinary issues arising out of same.. During the course of Chief Superintendent Rooney, who was at the relevant time in charge of the Cavan/Monaghan District, answering questions put to him by his own counsel who was also counsel for the Garda Commissioner, the following exchange took place:

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

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

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

A. It was in late 2006....

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

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

Q. Was it late 2007?

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

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

MR. JUSTICE O'HIGGINS: Yes.

MR. SMYTH: Can I say, Judge, perhaps you should hear us since this is a private hearing. The relevance may be in context of motivation for certain facts or for certain matters or, indeed, credibility in relation to the certain matters.

MR. McDOWELL: Judge, I wonder could I be heard?

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

MR. McDOWELL: I want Mr. Smith to inform, since this process is happening now in front of my client, I want Mr. Smith to formally inform you, Judge, that he is asking these questions on the firm instructions of the Commissioner and that he knows the answers that he is seeking from this witness and that on his view as a professional Senior Counsel it is relevant to the module that we are dealing with now. I want that clarified because I will deal with it. I want to consult my own legal team in any event but –

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

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

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

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

We have come here to assist the Tribunal or the Commission but not here to be and to give relevant evidence but not to have our character or our motivation impugned safe insofar as that is necessary. I have absolutely no notice that the Commissioner of An Garda Síochána, Nóirín O'Sullivan, has ever suggested in public or in private that the problems that arise in relation to this particular matter which we are dealing with here are or maybe the responsibility of my client, none whatsoever.

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

But if now his character and his motivation is about to be impugned, I am entitled as a matter of simple constitutional and natural justice, firstly, to have full notice of the attack that is going to be made on his character or his credibility or his motivation and I must be in a position to know what is coming, not to have a collusive effort between the Commissioner and senior ex-Gardaí to have examination and cross-examination or, sorry, cross-examination directed to these topics with a view to raising these issues without any notice to my client that this was coming, I haven't been here. Sergeant McCabe is not the complainant here. His legal team have stressed to him at great length that it is not up to him to do the Commission's work, it is for the Commission to enquire-- this is not an adversarial forum in which he must somehow discharge some onus of proof or impugn the investigation or criticise other Gardaí or whatever and he has not done that. And the Commission will note that I have simply in my cross-examination confined myself to clarify his role as, for instance as, his non-role as supervisory sergeant and the role of others in that way and the sequence of events in relation to what has happened. But if it is the case now, and I can well imagine where this is going, if it is the case that Mr. Smyth is instructed by Nóirín O'Sullivan, the Commissioner of An Garda Síochána, to impugn his credibility, his motivation and his behaviour in relation to this matter, first of all I want that clearly stated before questions are put along those lines.

Secondly, if my client's credibility is being called into issue or his motivation, bearing in mind that my client has been told by his own legal advisers that his presence here is largely marginal and his contribution on the facts is going to be marginal in the whole process, that if a collateral attack on his credibility is now going to be launched that Mr. Smyth fully establish his entitlement to do that bearing in mind what the Commission has indicated is the extent of this module. If it is the Commissioner's case that in this multilateral mode of the Commission that that material must be ventilated and those kind of questions must be asked, if that is the Commissioner's case then the entire basis of my participation in this, the requirements of natural and constitutional justice as to notice, as to the nature of the charge that the Commissioner is going to lay against Sergeant McCabe should be very, very clear because in the end, as the Commission well knows, it is an exception to this scheme of the statute that people are given the right to cross-examine anybody else and it is done to protect, it's done to protect their rights. It is done to protect their rights. This is not an adversarial process where the truth is supposed to be elicited by cross-examination by other people's counsel. The purpose, as I submit to the Commission, is very simply that in affording the parties which have been summoned to this session the right to cross-examine it is so as to protect them, not to impugn others, unless that was absolutely necessary for the purpose of protecting the party in question. I find it astonishing that Commissioner should feel that in some sense upholding her rights involves questioning the motive and the credibility and the behaviour of Sergeant McCabe in this matter. I find it absolutely astonishing and happily this event is in private, though semi private, there are so many people here but nonetheless it is self contained

MR. JUSTICE O'HIGGINS: *It is in private.*

MR. McDOWELL: *It is in private but I find it, Judge, I find it deeply wrong that the Commissioner would without any notice to me use a witness, a retired witness with a view to launching an attack on my client. What I am asking for is firstly absolutely firm confirmation from Mr. Smyth that he is instructed by nobody else but Commissioner to impugn my client's credibility, to question my client's motivation or to question my client's behaviour in relation to these matters and to ask questions of other witnesses as he has been doing in a mild manner but now is obviously getting to more substantial matters, along those lines. I want that confirmation first. Secondly, if those are his instructions, the second thing is to show how it is remotely admissible or relevant to these proceedings whether how, what my client's motives or behaviour or standards*

or credibility could be bearing in mind that, as I say, this module could well have taken place without my presence here at all.

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

MR. McDOWELL: *I only say in relation to that that we have had no notice that that was their intention*

MR. JUSTICE O'HIGGINS: *Secondly, the matters that you have raised are important in relation to this -- it is an inquiry. It is not an adversarial thing. The question of credibility of witnesses can be probed in the normal fashion in relation to clearly the accuracy of somebody's memory bears on the credibility of their evidence and so forth but if it goes beyond that, if it is the Commissioner's case that she wishes to impugn the motivation and the integrity of Sergeant McCabe, if those are the instructions that you have Mr. Smyth, I think you should say so in so many words. If they are not your instructions, that is a different matter. If those are your instructions that Sergeant McCabe acted out of improper motivation and that his character is -- so be it if those are your instructions but if not -- if they are, I think the Commission bearing the nature of the Inquiry should be appraised of that if that stage is arrived at, then the question of notice to the other parties or whether they were taken by surprise will be dealt with by the Commission. As I indicated in my opening statement, nobody is going to be ambushed. But that doesn't arise at the moment I think in view of the particular nature of the matters under discussion that it is not unreasonable of Mr. McDowell to say whether an attack on the integrity and motivation of Sergeant McCabe forms part of your case or whether you are saying that, no, he is inaccurate or mistaken.*

MR. SMYTH: *Do you want to me to respond?*

MR. JUSTICE O'HIGGINS: *Please.*

MR. SMYTH: *I have instructions from the Commissioner, Judge. This is an inquiry dealing with allegations of malpractice and corruption on a grand scale by members of an Garda Síochána*

MR. JUSTICE O'HIGGINS: *No, this part of the Inquiry --*

MR. SMYTH: *I appreciate that but my instructions are to challenge the integrity certainly of Sergeant McCabe and his motivation.*

MR. JUSTICE O'HIGGINS: *The integrity?*

MR. SMYTH: *His motivation and his credibility in mounting these allegations of corruption and malpractice.*

MR. JUSTICE O'HIGGINS: *There is a difference. In relation to the question of credibility, as I have already indicated, that is an everyday matter. One can suggest to a witness that his evidence shouldn't be believed because of something but an attack on somebody's credibility, on his motivation or integrity is something that really doesn't form part of this Inquiry. It would be necessary I think for you to go further and say that the complaints and the actions of Sergeant McCabe on your instructions were motivated by, his motivation was dishonest or wrong. In other*

words that he made these allegations not in good faith but because he was motivated by malice or some such motive and 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.*

MR. JUSTICE O'HIGGINS: *Those are your –*

MR. SMYTH: *Yes, as the evidence will demonstrate, Judge.*

MR. JUSTICE O'HIGGINS: *Okay, those are your –*

MR. SMYTH: *If we are allowed to proceed.*

MR. JUSTICE O'HIGGINS: *Those are your instructions from the Commissioner.*

MR. SMYTH: *Those are my instructions, Judge.*

MR. JUSTICE O'HIGGINS: *Very good.*

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 your instructions, so be it, we will have to deal with them then.*

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

MR. JUSTICE O'HIGGINS: *I am just going on to that, Mr. McDowell. You are entitled to have knowledge of those matters and a reasonable time can be given to you to take instructions on those matters. However, that right that you have, and it will be respected and you will not be ambushed and you will not be taken by surprise, in the particular if I can use the horrible phrase factual matrix of this Inquiry, the obtaining of such instructions might not take as long in particular circumstances than it might if the factual matrix were different.*

MR. McDOWELL: *I fully accept, Judge, that –*

MR. JUSTICE O'HIGGINS: *So you will be given time to deal with these matters. What I am suggesting is that you may not require as much time as somebody who may not have been familiar with the factual matrix of this Inquiry. So where do we go from there?*

MR. McDOWELL: *Could I respectfully submit the following: Judge, as I understood it we were inquiring into Garda Ferghal McCabe's (sic) investigation in relation to a public order incident and it was, as I understood it, a fairly discrete issue in which my client's factual input would be relatively limited because I think that it is common case, I haven't heard a disputed fact yet in relation to what has happened here and I haven't contradicted people on the facts save in relation to the role and function of the sergeant in charge vis-a-vis supervisory sergeants or unit sergeants or whatever. So I would respectfully submit that the Commission proceeds to deal with the facts of the public order incident, the investigation and the like and that this witness be stood down until such time as I am given advanced knowledge of the questions...the issues on which Mr. Smyth proposes*

on the instructions of the Commissioner to cross-examine because it seems to me that, and I think the Commission will probably agree with this readily, that the point being made now or the line of territory now being traversed would apply to any module in this whole Commission.

MR. JUSTICE O'HIGGINS: *Yes. It seems unless I am mistaken, Mr. Smyth, that your case is that in relation to the matters under investigation subject only perhaps to matters to deal with general staffing levels, the condition of the Garda station in Bailieborough that most of the matters deal with factual issues and you are saying that Garda McCabe's complaints on your instruction are motivated, that they are not properly motivated, that they are not genuine, that they are done for improper motives.*

MR. SMYTH: *Whatever the reasons are for it on his side and it runs right through all of the --*

MR. JUSTICE O'HIGGINS: *But you are attacking his motivation and you attacking his integrity.*

MR. SMYTH: *Right the way through.*

MR. JUSTICE O'HIGGINS: *Full stop.*

MR. SMYTH: *Yes, full stop.*

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

MR. SMYTH: *Yes.*

MR. JUSTICE O'HIGGINS: *Now, in the context of this particular limited module and I have at the very outset said that I considered it to be a limited module, do you think it is necessary to pursue this particular line of questioning or could this particular line of questioning be kept for another module in which case there would be more time for it to be dealt with? In other words, it does appear on the face of it that Sergeant McCabe's involvement in this particular module is very limited indeed though -- it is limited indeed and you have been made the point that, well, he should bear responsibility for supervision. Those are obviously genuine point that I will to adjudicate on in due course. But I am asking you do you believe it necessary to pursue the allegations that these were --the challenges to his integrity in this particular module or not?*

MR. SMYTH: *Are relevant, Judge, are relevant because for the simple reason, Judge, there is evidence already adduced that Sergeant McArdle and Sergeant McCabe went to Lorraine Browne and encouraged her, although there is a debate as to whether it encouragement or suggestion or otherwise, to go to GSOC, and I say that that is the matter which is -- the bullet has to be bitten on this, Judge, and I think this is the witness --*

MR. JUSTICE O'HIGGINS: *Well, the bullet is that Mr. McDowell made an objection.*

MR. SMYTH: *Yes.*

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

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

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

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 being suggested that it was something a little more neutral, less strong.*

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 these events that we are dealing with –*

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

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

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

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

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

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

MR. JUSTICE O'HIGGINS: *What I'm asking perhaps is if you would clarify what issues of fact –*

MR. SMYTH: *Certainly thus far the issues of fact that does raise its head even at this stage –*

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

MR. SMYTH: *Yes, well not necessarily the 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 the incident in the King Court. He marches off or rings up or makes contact in some shape or form, I don't know how precisely he does as he hasn't given evidence but we know from Regina*

McArdle that both himself and Regina McArdle make contact with a member of the public and encourages them to go to GSOC.

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

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

MR. JUSTICE O'HIGGINS: *I am asking you if you believe there are, on your instructions issues of fact between you and Sergeant McCabe.*

Q. On this module, Judge, I believe there is.

MR. McDOWELL: *Can we hear some?*

MR. SMYTH: *As I said to you, Judge, the fact of the matter is that we have heard nothing from Sergeant McCabe about any of these incidents of May 2008 and he decides then -- if you had heard, Judge, if you 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 is a confluence between what was said and demanded of him and the next step in what Sergeant McCabe does. That is 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 witnesses obviously. Just in relation to the Sergeant McCabe, it wasn't the intention of me as counsel for the Commission to ask him any questions at all about any engagement in this module with the Chief Superintendent, although that might rise in the future, questions were going to be strictly limited to his contact with in fact Sergeant McArdle and then Lorraine Browne and the fact that a complaint was made so it was to the limited to that, if that's of any assistance.*

MR. JUSTICE O'HIGGINS: *Well it should be.*

MR. SMYTH: *Sorry, Judge, I am just getting instructions.*

MR. JUSTICE O'HIGGINS: *Would you like me to rise?*

MR. SMYTH: *If I had five minutes, Judge.*

MR. JUSTICE O'HIGGINS: *Before you rise you might consider, maybe we are not in position to listen at the time, just the last remarks made by Mr. Gillane who said that he had anticipated that in relation to this module that the evidence that he was going to — that sergeant, to call Sergeant McCabe was essentially confined to the circumstances in which Lorraine Browne went to GSOC and matters of that nature. If that were the case it might be that the issues of integrity, motivation and so forth that you say you are instructed or to be levied against you might not arise in this particular module. In other words, Mr. Gillane is indicating that as far as Sergeant McCabe is concerned in relation to this module he will essentially be confining himself to the circumstances of meeting Lorraine Browne and encouraging her, or otherwise, to go to GSOC. So that might be of some help. Okay look, I realise this matter has arisen I don't want -- would ten minutes be enough for you? Very good.*

(short adjournment)

MR. SMYTH: *My instructions are re-confirmed.*

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. 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, I am under 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 those matters could be dealt with in cross-examination by putting that the motive for the actions was X, as a result of an X conversation, Sergeant McCabe got somebody, described him as being very angry, upset and agitated and that was the motivation without going into unnecessary details in relation to the background of that, because the background or other substance of those allegations does not appear to me, unless otherwise persuaded, to be germane to this or, indeed, any other module of this Inquiry. In other words, that it would seem to be permissible to say that Sergeant McCabe acted out of improper motives or whatever, if those are your instructions, and they are, but the detail in relation to those does not seem to me to be a very relevant matter of cross-examination, but we will have to wait and see that and I can rule on if and when it comes. Now, in relation then to the question of notice. I would like you to do one thing and that is, I think you should persuade me of the relevance of those issues to this particular module. I think I would also like to be addressed by Mr. McDowell on the question of notice and maybe you could respond to that. I would like to be hear you on those things and we may then consider the matters over the weekend.*

MR. SMYTH: *The first thing, Judge, in relation to notice, I don't have any power to take statements in this Commission of Inquiry to take statements off any witness, that would be at matter for the Commission, to take statements and to give notice of what was said by certain witness to Mr. McDowell, because that's not a function that I have, I am not entitled to do that under the terms of the Commission. So the second thing is, Judge, in relation to the –*

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

MR. SMYTH: *Yes, but you are asking me, Judge, can I take statements from witnesses, I don't have that -- I have no control over that.*

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

MR. SMYTH: *But I can certainly give in a general way notice to Mr. McDowell, as it was, in writing as to what certain witnesses will say. That's as far as I can take it.*

MR. McDOWELL: *How can he say that, with respect, unless he has been conferring with a witness. That does call into question what is happening here. If he has been consulting with witnesses in relation --and I believe that Mr. Smyth may not have been doing it, but others I do believe have, consulting with witnesses as to what they will say if they are asked certain questions. Then, in my respectful submission, I am entitled to have notice of what questions they are intending to put to those witnesses relevant to these issues*

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

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

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

MR. McDOWELL: *I want to saying following: That as far as I know he proposes to make no criticism of any other person in this room, save to say what he actually did, right, if he is called to give evidence. That's what he proposes to do. Now the Commission may invite him to make criticism of others but it wasn't his intention to proffer them or to volunteer criticism in general terms of other people's behaviour. That's the first thing. The second thing is, in relation to this matter what he proposed to do, I mean it's obviously for Mr. Gillane to lead his evidence, such as it is.*

What he had in mind to do, so that everyone will be clear about this, was to say what his interaction with probation Garda Ferghal McCarthy was in relation to this issue, and it will be very small, very, very short. When we first heard that there was a problem from Sergeant McArdle, I think two conversations or three that he had in relation to these matters, one with Ms. Lorraine Browne, and that is the extent of his proposed evidence. That's the beginning, middle and end of the evidence he proposes to give.

Some people here may think here that he is going to lay into everybody and try and attack their integrity or their reputation or whatever, that is not his function in this Inquiry. So if people think they have to get their retaliation in first, to use the football thing, that's completely misguided. Unless the Commission leads him into territory and asks his opinions on matters, which may or may not be relevant, because in large measure it's the opinion of the Commission and the facts that I think is much more relevant than Sergeant McCabe's view of the facts, because he wasn't appointed to the Commission.

It seems to me that there is a misconception here that somehow he is the man who is going lay about and criticised, accuse and the like, and he is not, he has done that. He is coming here to answer questions that Mr. Gillane puts to him.

MR. JUSTICE O'HIGGINS: *Two things. I am grateful for that observations, Mr. McDowell, and I just want to add that any impression such as you refer to certainly didn't emanate from the Commission.*

MR. McDOWELL: *No, no. I am saying that if people are getting defensive -- the Commission, as I understand it, is here to investigate the facts and to draw conclusions, it is not interested in Sergeant McCabe's view of the facts, which are about as relevant as anybody else's view of facts here. This is an inquisitorial process where the facts are established by the Commission and the inferences from*

those facts are made by the Commission and drawn by the Commission and it's not a question of there being some quasi-accusatorial process here where my client is coming in here with an agenda, he's not.

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

MR. McDOWELL: *I am not suggesting that you haven't*

MR. JUSTICE O'HIGGINS: *No, no, I know that. I intend to do so again and again because I think it is very, very important that is not us against them, this is an Inquiry. I did demand at the outset the assistance of everybody and that wasn't an empty formula of words.*

MR. McDOWELL: *It might assist you, Judge, and it just occurs to me, it might assist you if my client was to put on one page what factually he did.*

MR. JUSTICE O'HIGGINS: *Yes.*

MR. McDOWELL: *So that everybody will know what is coming as far as he is concerned and leave his opinions of these matters out of the matter. It just might, because if we are going to have credibility brought into issue, credibility can only be relevant to determine questions of fact.*

MR. JUSTICE O'HIGGINS: *Yes.*

MR. McDOWELL: *Whether my client was correct originally to take the steps he did to bring these matters into the public domain is not the substance of this Commission. This Commission is looking at these matters afresh.*

MR. JUSTICE O'HIGGINS: *Well, credibility does only arise in cases of a question of a conflict in relation to the facts. I gently hinted that perhaps the issue in relation to the motivation of Sergeant McCabe which could go to his credibility might more suitably be canvassed in another module of this, where there may be a more severe conflict in relation to the facts. That was a suggestion that I made in ease of everybody but it was only a suggestion. I would, however, ask, I think are you entitled to notice of the substance of any allegations against you that are adverse to your good reputation, that you are entitled to be furnished with those so that you can deal with them.*

MR. McDOWELL: *Subject to the underlying purpose of them being relevant to the tribunal's activities and the to the module itself.*

MR. JUSTICE O'HIGGINS: *In this regard I think, Mr. Smyth, I would invite some submission by you, perhaps over weekend, we may need time to consider the matter, as to precisely the relevance of the allegations or the motivations in relation specifically to this module, where, if Mr. McDowell is correct, there doesn't seem to be a difference of fact very much. If there is no difference of fact, the question of credibility, which of course you are allowed to canvas, doesn't really arise.*

MR. SMYTH: *Can I say, Judge, first of all it's a Commission of Inquiry, I have no control over the calling of witnesses, I cannot call witnesses, I have to seek permission to cross-examine witnesses, those are the rules. This witness, when he has given his evidence and when he has been cross-examined he can up and away and I have no power to call him back. This is the first opportunity we'll have and I could be criticised for not raising it at this stage with this witness as to what conversation he had with Sergeant McCabe, what was the result of that conversation, what was the outcome and what flowed from that thereafter. That's the first opportunity I have to do this, if this witness is*

cross-examined and away, I have no power to bring him back. I have merely only a side role in this, I am subject entirely to the Commission. It has raised that point and I could be criticised if I had waited until module, I think it's Module (i) to raise this issue. Mr. McDowell would be up on his feet and saying, look, he never raised it, this is the first we've heard of it.

MR. JUSTICE O'HIGGINS: *If you say that there are issues where credibility arises that is in relation to where facts are in conflict. Perhaps you would -- and I am not, I am not trying to take you by surprise, perhaps you'd state where those areas of perceived or anticipated conflict are in order that it could be adjudicated as to whether the question of credibility arises in this particular module.*

MR. SMYTH: *I think the issue of credibility arises in all modules. Sergeant McCabe has raised serious allegations of malpractice and corruption against An Garda Síochána --*

MR. JUSTICE O'HIGGINS: *In this module.*

MR. SMYTH: *In this module, Judge, because he made an allegation about the investigation about the number of -- the investigation of this particular offence that occurred in Kings Court, the management of Bailieborough.*

MR. JUSTICE O'HIGGINS: *In this module we are enquiring into the investigation of a certain --*

MR. SMYTH: *Incident in Kings Court.*

MR. JUSTICE O'HIGGINS: *The investigation would be a matter for the Commission to determine the quality of that particular investigation on the evidence that it has heard.*

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

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

MR. SMYTH: *Credibility.*

MR. JUSTICE O'HIGGINS: *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 talked 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 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 controlling of the calling of witness, this witness is up and away once he has finish the 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 enquiry and we are all on the same side helping me.*

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

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

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. 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 that asked, encouraged or suggested that she go to GSOC. You say that, the other side are going to the say that.*

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.*

MR. JUSTICE O'HIGGINS: *There is not any conflict that there was at 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.*

MR. SMYTH: *And in so far as this module is concerned, Judge, he will also be saying as I understand if the Guerin report is to be followed that the PULSE record was falsified and he described Garda McCarthy's actions as disgraceful. If he is giving evidence he is going to be challenged in the relation to those issues and there will be disputes in relation the facts and it is then of course that the issue of credibility will arise. And as I say, Judge, it's a premature application in a sense what am I to do if this witness leaves the box he is up and gone I can never get him back. If Sergeant McCabe had been called first in line this would become apparent as to where the issues and where the dispute arises between me and Sergeant McCabe on facts –*

MR. JUSTICE O'HIGGINS: *Well certainly, it is certainly likely that there will be an issue over whether the PULSE records were falsified or not or whether that was the correct term, I don't know. There may be a legitimate question as to the characterisation of the actions of Garda McCarthy being disgraceful. There does not seem to be an issue in relation to the facts that Garda McCarthy failed to complete his report and that was, to put a neutral word on it, unfortunate. He accepted criticisms in that regard before Superintendent Heller so the factual issues in dispute are very limited.*

MR. SMYTH: *Judge, you are anticipating, but the fact of the matter is that he is also critical, as I understand it, of Superintendent Cunningham and his handling of matters. You are asking me, Judge, to spell out the facts as they are. If the evidence of Sergeant McCabe is given, I will be challenging Sergeant McCabe in strong terms and there will very quickly appear to be dispute between -- I hope there will be, you will see that there is a serious dispute on the facts from which the issue then of credibility arises to determine which version of events is likely to be the correct one. That is the position, Judge, if this was the normal trial –*

MR. JUSTICE O'HIGGINS: *Just one second, it is not a trial, it is not a normal trial and it is not a trial at all.*

MR. SMYTH: *If it was in the normal way, if this was a hear in the normal way, the matter would be dealt with in much different way by me. I wouldn't be making this application, I am forced, my hand is forced, because this witness is up and way this is a crucial witness to give evidence as to what was said between himself and Sergeant McCabe.*

MR. JUSTICE O'HIGGINS: *Just one second, we are talking about a conflict in relation to the facts.*

MR. SMYTH: *To the facts.*

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

MR. SMYTH: *And that he falsified the PULSE, Judge.*

MR. JUSTICE O'HIGGINS: *I think you can take it that I am aware of the general nature of the -- but we are just trying to sort out a specific problem. I am not trying to preclude you from making your case, you have nailed your colours to the mast and said that Sergeant McCabe acted as he did out of not legitimate motives if you like. You are entitled to pursue that. What I am trying to tease out is whether that you are entitled to put those matters in relation to his credibility. What I am trying to tease out is to the relevance of the questions of credibility in relation to this module alone. Now certainly you are entitled to probe his, for example, the question of whether such a conduct was disgraceful but that doesn't necessarily and may not involve issues of credibility at all. The question of if an allegation in relation to the falsification of PULSE there may be no factual difference between the parties as to what happened. So it may be a question of how they were characterised.*

MR. SMYTH: *And it certainly will arise, Judge, in relation to his criticism of the Superintendent in his handling of the matter as to why he should make the criticism of that superintendent.*

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

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

MR. JUSTICE O'HIGGINS: *That is precisely the point I am making. 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.*

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 witness?*

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 enquiry.*

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 understand it, that it was demanded of him to put pressure on another superintendent to write to the DPP and to have the DPP write a letter in certain terms in respect of Sergeant McCabe. So that has to be put if I am allowed to do it. He was about to, everybody jumps up and raises an objection, that is the tenor of what he was saying –*

MR. JUSTICE O'HIGGINS: *Well, it might have been too late to raise the objection if the evidence was already given as you will appreciate, there are certain delicate matters that it is, if necessary, they will have to be canvassed but at the moment it doesn't appear that they need be canvassed in any detail but rather than suggesting that the motive for doing X, Y and Z is because he was dissatisfied with some decision by Chief Superintendent Rooney to do this or not to do that. And I don't think*

that would inhibit -- I don't at this stage see any necessity that the matter be probed in detail other than that.

MR. SMYTH: *Judge, if are you asking am I going to probe for the sake of being gratuitously offensive to Sergeant McCabe about some investigation that was conducted that he was a subject of, that doesn't really concern me. I am more concerned with his demand that he made of this witness to contact another superintendent, a superintendent to have that superintendent do something*

MR. McDOWELL: *Now he is putting the material before the -- my client has the good name to protect in this matter. That is the first thing. Secondly, Judge, Mr. Smyth, as I understand it, has been directed by the Commission to put in writing what line it is that he wants to deal with, the material he wants to deal with, and to give me notice of it. He is now trying to circumvent it before the Commission. It is very simple, if he has some material he wants to put to this witness concerning and let us be clear what he said -- he said that he is impugning my client's integrity, motivation and credibility.*

MR. JUSTICE O'HIGGINS: *Yes.*

MR. McDOWELL: *If that is what he is doing, if he wants to do in my respectful submission, I am entitled to advance knowledge of the line of cross-examination that he is going to take in relation to this matter in relation to this witness. There is no point in debating this any longer in my respectful submission let him do it, let him write this letter. We will be writing to the Commissioner in all tomorrow as well. But before we get to that point we want to know what it is that Mr. Smyth wants to illicit from this witness about my client's behaviour.*

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

MR. McDOWELL: *And any other witnesses.*

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

MR. SMYTH: *No difficulty.*

MR. JUSTICE O'HIGGINS: *Well, we have reached that anyway. I think that in the circumstances it might be 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 Chief Superintendent Rooney, you will have to come back. Thanks very much indeed.*

Sir, you may wonder what were counsel about.

In this regard, statements have been made by all counsel for the Commissioner; Mr Smyth SC explains that:

Commissioner O'Sullivan gave instructions to counsel to challenge the credibility and motivation of Sgt. McCabe following counsel's advice which was furnished in an email to the Commissioner dated the 15th of May 2015.

The matter is put as follows by Michael McNamee BL:

Prior to the commencement of Module 1 of the O'Higgins Commission, the core booklets and statement of facts for module 1 were made available and consultations were arranged with individual client officers

who were listed as witnesses to appear to give evidence before the O'Higgins Commission in that module. Commissioner, Nóirín O'Sullivan was not present at these consultations but was represented by Superintendent Fergus Healy who attended all consultations as well as each of the oral hearings undertaken by the O'Higgins Commission. It is my understanding that Chief Superintendent Healy kept the Commissioner fully briefed as the consultations and eventually the oral hearings progressed. However it is not the case that Superintendent Healy or the Commissioner offered any factual instructions as to the conduct of the case other than those contained in the email of the 15th of May 2015.

When the Commission commenced oral hearings on day 1 on Friday the 15th of May 2015, Colm Smyth S.C. raised the issue of the motivation and credibility of Sergeant McCabe which was met with an objection from Senior Counsel acting for Sergeant McCabe, Michael McDowell S.C. The latter sought clarification that the Commissioner had provided instructions to her legal team to put issues to Sergeant McCabe regarding his credibility and motivation. The O'Higgins Commission rose, during which time my colleagues and I prepared an email providing recommendations and seeking unequivocal confirmation of instructions as had been agreed before the recess...

Superintendent Healy, having received and duly transmitted the email to Commissioner O'Sullivan reverted with verbal instructions to proceed as suggested in the email

Sir, the Tribunal has been provided with a copy of the email sent to Commissioner O'Sullivan on the 15th of May 2015, it reads as follows:

Dear Superintendent Healy,

As counsel appointed to represent the interests of an Garda Síochána before the O'Higgins Commission, it is our view that it is appropriate and necessary that the conduct of any member of the force be challenged by way of cross-examination if and to the extent necessary.

It is likely that in the course of this process, which is a private hearing, it will become necessary to put to Sgt. Maurice McCabe certain background issues which touch upon and concern the history of his dealings with members of Garda management. In particular, we consider it necessary and in the interests of a fair and balanced examination of the subject matter of the investigation, that specific issues be put to Sgt. McCabe regarding his conduct and interactions with senior management following the completion of a formal garda investigation into a complaint against Sgt. McCabe which resulted in a direction by the DPP that no further action was to be taken against Sgt. McCabe.

The purpose of such a line of inquiry is to open to the Commission of Investigation the full factual background grounding the complaints made by Sgt. McCabe so that all the circumstances are clearly put before the commission for consideration.

Yours sincerely....

While it is not entirely clear when the Commissioner of An Garda Síochána saw this email, it is the case Sir, that she did confirm, on the 15th of May 2015, that counsel were to challenge the "motivation" of Sergeant McCabe at the Commission of Investigation; in this regard, the notes made by Superintendent Healy record this. The now Chief Superintendent Fergus Healy was at that point the Garda liaison officer for the O'Higgins Commission; he was "the single point of contact for An Garda Síochána" to the Commission. His notes of the 15th of May 2015 are as follows:

Made several telephone conversations with Commissioner O'Sullivan to get instructions on the questioning of Sergeant Maurice McCabe at the Commission-

The requirement was to question the 'motive' of the member for the making of various complaints

Commissioner sought time to speak to DOJ

Then returned with instructions that we

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

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

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

I agree with you and the guards, that the evidence does not warrant a prosecution. There are no admissions. The incident as described by the injured party is vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn't a doubt about her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault. Further the account given to her cousin...differs in a number of respects to that given to her parents and the guards

Naturally, people were upset about such an allegation. Sergeant McCabe was ultimately told of the DPP's directions on an informal basis by the State Solicitor. He was formally informed of the DPP's directions by Inspector Noel Cunningham on the 8th of May 2007. Sir, confusion may be liable to arise here. The prospect of a mistake looms that people may consider, reading that transcript, that there was a plan afoot by counsel, on the express instructions of the Garda Commissioner, to accuse Sergeant McCabe of the very offence from which he had been exonerated by the DPP. No one ever had that plan, it seems to us on the basis of the transcript and such documents as the tribunal has possession of. Were anyone to pursue an allegation of that kind in this context, it would have been very wrong. The entire point that seems to have been in mind, referring here to the mind of counsel as instructed by the Garda Commissioner, was the aftermath of the DPP's letter. It dismissed the complaint of Ms D. But, many people in Cavan, and indeed in Garda Headquarters, would have known of it. Hence, it might be that the person accused might want people to know that the complaint had been analysed and dealt with by the DPP in a particular fashion. Sergeant McCabe wanted the DPP's letter to be circulated. He asked for that again and again. But standard procedures apparently intervened and it was never circulated. We turn now to the circumstances.

On the 15th of October 2007, Mrs D confronted Sergeant McCabe at Bailieboro court house in relation to the alleged Ms D incident. This must have created a very public fuss. Following same, on the 17th of October 2007, Ms D stated that once she found out that there was to be no prosecution in relation to her allegation against Sergeant McCabe, Mrs D asked her what she wanted to do next and she stated that she wished to confront Sergeant McCabe. Mrs D drove her to Bailieboro garda station and when Ms D saw Sergeant McCabe on the street, she jumped out of the car and ran towards him and shouted at him, saying that he had ruined her life. Sergeant

McCabe, no doubt to avoid yet another public scene, ran away from her into the garda station. Another garda had seen Ms D follow Sergeant McCabe and tried to calm the situation, and brought her back to Mrs D. Not surprisingly, after these two very public displays, word got around of the allegation that Ms D made against Sergeant McCabe. His attitude, when told of the DPP's letter by the local state solicitor must have been one of relief. Indeed, it appears that the text of the letter had been read to him over the telephone. He later met Inspector Cunningham and, perhaps punctiliously, he told him the kind of minimal information that would be given to any person investigated by the gardaí: that the case was not being pursued "for lack of evidence". Sir, you have already heard from Superintendent Cunningham on this issue. Sergeant McCabe, however, felt that given that he had been made a public show of, in addition to the stress of the very thorough investigation, as many as knew of the accusation should also be informed of the vindication of him by the DPP. Was that just the D family, or was it serving garda officers who knew of it or was it the general way in which a circulated letter becomes general knowledge? Certainly, he wanted it much more widely known. But, garda procedures would allow no such thing, it appears and this, perhaps advisedly, perhaps wrongly, perhaps correctly, we do not know, was the attitude adopted and followed by senior management in the division. We move on now to 2008.

Superintendent Clancy was probably the ultimate authority in this respect. He felt, and perhaps he was right, that the DPP directions could not be circulated. On the 25th of August 2008, there had been a meeting in Mullingar which was attended by Sergeant McCabe, Superintendent Noel Cunningham and Sergeant Yvonne Martin. The purpose of that meeting was ostensibly so as Superintendent Cunningham could discuss the allegations made by Sergeant McCabe in his report dated the 25th of February 2008 to Superintendent Clancy. These allegations concerned Mr D, his Garda colleague and the father of Ms D. This report, it would appear Sir, had been compiled by Sergeant McCabe, so as he could present a case to Superintendent Clancy in relation to the circulation of the directions of the DPP. The entire point of this report was to chronicle how Sergeant McCabe felt about the issues he had with the D family and to make a case that in light of all of that, surely the letter from the DPP ought to be circulated. He made a reasonable case. Whether it would have been compelling enough to overcome standard garda procedures, or if that could ever happen, is perhaps an issue in the matter for you, Sir.

On the 12th of September 2008, Superintendent Noel Cunningham reported on this meeting as follows:

Sergeant McCabe stated that this report was composed by him to highlight matters that occurred in Bailieboro District while he was Sergeant in charge at Bailieboro garda station. He stated that the report was a bid by him to have the full D.P.P. directions conveyed to him and the Ms D family in relation to the allegations made against him by Ms. D and the subsequent investigation.

It transpired that Sergeant McCabe recorded this meeting; a transcript of that recording reveals as follows:

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

Noel: Oh yes

Maurice: So that is why I done that. And I said to Mick Clancy I reported all these into Noel Cunningham

Noel: But what I'm saying to you is this, this is a written report by you, ok, in relation to and at the beginning you refer to an actual investigation I did and at the end of it you said all you want is to ask

the DPP to allow the full DPP directions to be conveyed to me and the other party, that file in particular to Mrs D, OK. Now I understand that and that. But what I'm saying is the middle bit is what I have to pursue now

...

Noel: Well what do you call it, I don't know, if you want to...what I'm saying to you is this? I need to know what I'm doing in relation to this.

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

Noel: But you reported this Maurice in February 2008?

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's what Mick Clancy advised me to do.

Noel: And so what do you want

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

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

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 have decided that Sergeant McCabe should be challenged as to his credibility in the classic way: vis, where a witness is asked a question to the effect that evidence given by him implicating someone else is not correct because that witness has an animus against that person because of a completely unrelated issue between them. An example might be to ask a witness whether he was being influenced in his evidence, consciously or unconsciously, by bad blood over an objection to planning permission made by the person he is testifying against. Here, the idea is not that Sergeant McCabe is not to be believed because he was accused of sexual violence, but rather that when he was vindicated by the DPP, he was upset that the letter vindicating him was blocked from circulation by senior garda officers. Even so, Sir, the enquiry under Mr Justice O'Higgins was not, perhaps, with the exception of the Father Molloy computer, about Sergeant McCabe. The facts of the issues under investigation either stood up or did not, irrespective of any attitude that Sergeant McCabe might or might not take. It is in that context that it might be difficult to see how any issue of credibility could properly arise at all at all.

Sir, whatever your findings on this may ultimately be, it would appear to be against the above background that the following document was prepared over the weekend by counsel for the Garda Commissioner which purported to set out what matters were to be relied on by the Garda Commissioner at the Commission of Investigation. This document was produced on the morning of Monday the 18th of May 2015, following the row on the previous Friday:

18th May 2015

Mr. David J. O'Hagan,

Re: *The Commission of Investigation...*

Dear Mr. O'Hagan,

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

1. *In summer 2004, both Sergeant McCabe and a colleague applied for the vacant position of Sergeant in Charge of Bailieboro Garda Station. Sergeant McCabe was successful and took up the duties of Sergeant in Charge in October 2004.*
2. *In January 2006, Sergeant McCabe made a complaint against this colleague which resulted in a disciplinary sanction being imposed on the colleague.*
3. *The colleague applied for a transfer to another Garda station in December 2006 which request was refused for operational reasons due to the supervisory needs of Bailieboro station.*
4. *In December 2006, the colleague and his wife, on behalf of their daughter, made a complaint against Sergeant McCabe. Chief Superintendent Colm Rooney duly appointed Inspector (now Superintendent) Noel Cunningham to carry out a formal Garda investigation into the complaint.*
5. *Inspector Cunningham completed his investigation and forwarded the Garda Investigation file to the office of the DPP on or about the 19th of February 2007. Inspector Cunningham stated in his report to the DPP "taking all matters into consideration, including the question of whether the event happened, constituted a breach of the criminal law, it is felt that there is no ground for a criminal prosecution."*
6. *The Director Of Public Prosecutions communicated the decision not to initiate any form of action against Sergeant McCabe and the observation was made that it was doubtful that the allegation could constitute a crime at all. The said directions were issued by way of a letter dated 5th April 2007 to the Cavan State Solicitor. Inspector Cunningham had requested that the directions from the DPP were to be forwarded for his attention rather than addressed in the usual way to the station and he received the directions, as he had requested, marked for his attention.*
7. *Upon receipt of said directions, Inspector Cunningham undertook the task of informing the parties to the complaint of the outcome of the investigation and the directions of the DPP. He advised the colleague and his wife on the 24th April 2007.*
8. *On the same day (the 24th April 2007) Inspector Cunningham sought to make an appointment with Sergeant McCabe to similarly advise him of the outcome of the investigation and the reasons from the DPP. However Sergeant McCabe was on sick leave from the 24th of April 2007 to the 21st of May 2007. Sergeant McCabe initially refused but subsequently agreed to meet on the 8th of May 2007.*
9. *On the 8th May 2007, Inspector Cunningham met with Sergeant McCabe by appointment at the Bailie Hotel. Inspector Cunningham was alone but Sergeant McCabe was accompanied by Sergeant Regina McArdle who was present initially as AGSI representative and then welfare officer. Inspector Cunningham duly informed Sergeant McCabe of the outcome of the investigation and the responses/directions of the DPP.*
10. *On 15th and 17th October 2007, there were two incidents in which Sergeant McCabe had an encounter with the wife and daughter, respectively, of Mr D. Following these incidents, Sergeant McCabe*

raised with Superintendent Clancy the issue of dissemination of the DPP's directions which were given at the conclusion of an investigation into an allegation assault against Sergeant McCabe. Sergeant McCabe stated that he was of the view that the colleague's family were unaware of the DPP's directions. He stated that he was aware that Inspector Cunningham had met the colleague's family concerning the outcome of the DPP's directions. As a consequence, on the 22nd October 2007, Superintendent Clancy sent a minute to Inspector Cunningham in Monaghan seeking his observations on the issue.

11. *Superintendent Clancy recalls having a meeting with Sergeant McCabe at the beginning of February 2008. At that meeting, Superintendent Clancy ascertained from Sergeant McCabe that he had no desire to have the colleague's family prosecuted for the incidents he complained about. Superintendent Clancy asked Sergeant McCabe to convey his attitude in this matter by way of a written report as the Superintendent wished to have his views recorded on file. Sergeant McCabe stated that he would forward a report indicating that he did not wish to have the colleague's family prosecuted. At the same meeting, Superintendent Clancy informed Sergeant McCabe that he had been in contact with Inspector Cunningham on the issue of the dissemination of the DPP's directions. Superintendent Clancy informed Sergeant McCabe that Inspector Cunningham had communicated the DPP's directions to the colleague's family on 24th April 2007. Sergeant McCabe then stated that he wished to view the actual written direction given by the DPP. Sergeant McCabe stated he felt that he should be 'exonerated' by the DPP. Sergeant McCabe stated that he would make written application to the Superintendent to have the DPP's written directions shown to him. On 7th February 2008, Superintendent Clancy sent a minute to Sergeant McCabe giving the outcome of his enquiries with Inspector Cunningham on the issue of dissemination of the DPP's directions.*

12. *On Tuesday, 26th February 2008, Superintendent Clancy received an envelope marked personal containing a report dated the 25th February 2008 from Sergeant McCabe. In this report, Sergeant McCabe made a number of allegations of incidents which allegedly occurred as far back as 2004 against Mr D and other unnamed members of Bailieboro Garda Station. Sergeant McCabe acknowledged that he had received Superintendent's Clancy's minute of 7th February 2008. Sergeant McCabe asked for full disclosure of the D.P.P.'s directions. "I urge you, if you can, to asked[sic] the DPP to allow the full DPP directions to be conveyed to me and the other party, in particular Mrs. D., in his particular case due to the fact that all parties work in close proximity and I would really appreciate it. That is all I am asking."*

13. *Superintendent Clancy immediately forwarded this report to the divisional officer, Chief Superintendent Colm Rooney, recommending that the allegations made by Sergeant McCabe be investigated. In the meantime, Superintendent Clancy sought sight of the written directions as given by the DPP. Having carefully viewed the content of the DPP's directions, the Superintendent decided that he would adhere to the DPP's guidelines and that he would not request release of the document. On 11th March 2008, Superintendent Clancy met Sergeant McCabe and gave him the outcome of his decision.*

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

15. *In or around the same time Sergeant McCabe presented Superintendent Clancy with a series of operational issues for his attention, which were of a type which would normally have been dealt with by the Sergeant in Charge of the station.*

16. *Sergeant McCabe sought an appointment to see Chief Superintendent Colm Rooney and this was facilitated in June/July 2007. At the meeting Sergeant McCabe expressed anger and annoyance towards the DPP. He demanded that Chief Superintendent Rooney communicate with the DPP to seek a declaration of innocence from the DPP in relation to the allegation. Chief Superintendent Rooney advised Sergeant McCabe of the policy of the DPP in dealing with such issues, a policy which Sergeant*

McCabe was himself professionally aware of. Chief Superintendent Rooney told Sergeant McCabe that he could not seek such a declaration on Sergeant McCabe's behalf from the DPP.

Chief Superintendent Rooney pointed out to Sergeant McCabe that from his own experience of dealing with criminal files to the DPP he was aware of the DPP's role to determine if sufficient evidence was available on a file to direct a prosecution. Chief Superintendent Rooney advised sergeant McCabe that it is not the Garda Commissioner's policy that An Garda Síochána, challenge the Director of Public Prosecutions on his decisions. Chief Superintendent Rooney further pointed out to Sergeant McCabe that, as a private citizen, it was open to him to write to the Director of Public Prosecutions if he so wished to seek the declaration he required.

17. *In March 2008 Sergeant McCabe applied to be redeployed from his position as Sergeant in Charge of Bailieboro Garda Station and this request was granted.*

18. *Pursuant to the complaint made by Sergeant McCabe on the 26th February 2008 to Superintendent Clancy, Chief Superintendent Colm Rooney appointed Inspector Noel Cunningham to carry out an investigation.*

19. *Having been appointed to investigate Sergeant McCabe's complaint against Superintendent Clancy, now Superintendent Noel Cunningham, having attempted on a number of occasions to meet with Sergeant McCabe, eventually met with Sergeant McCabe by appointment on the 25th August 2008 in Mullingar Garda Station, to receive details of his formal complaint. 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 the 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 complaints against Superintendent Clancy was to force him to allow sergeant McCabe to have the full DPP directions conveyed to him.*

20. *It is understood that Sergeant McCabe had further interactions with assistant commissioner Derek Byrne and Chief Superintendent Terry McGinn prior to the investigation carried out by them.*

Yours faithfully...

Sir, you will no doubt have noticed that the matters which were discussed on the 25th of August 2008, did not concern complaints against Superintendent Clancy as set out in paragraph 19 of the letter of the 18th. This matter will be returned to shortly. It was instead about whether, as Sergeant McCabe requested, the letter from the DPP refusing to prosecute him for the Ms D allegation and stating plainly the reasons for that refusal, should be circulated. That letter to the O'Higgins Commission, sent on behalf of the Garda Commissioner, got this wrong.

When the Commission of Investigation commenced on Monday the 18th of May the following exchange took place:

MR. JUSTICE O'HIGGINS: Good morning, ladies and gentlemen. First of all, there is a letter received this morning from the Chief State Solicitor's Office's mentioning a number of –

MR. McDOWELL: I received nothing, Judge, nothing has been given to me.

MR. JUSTICE O'HIGGINS: Thanks, Mr. McDowell. A letter received by the Commission this morning from the Chief State Solicitor's Office's referring to certain documents on which the Commissioner wished to rely. One of those documents has not been given to the Commission as of now. That is a source of considerable annoyance. ... Very good, I will rise for five minutes.

MR. McDOWELL: Judge, before you rise, I want to indicate on behalf of Sergeant McCabe that I want to make an application in private to you.

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

Short adjournment

....
MR. McDOWELL: Yes, I want to make an application to you in private, Judge.

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

MR. JUSTICE O'HIGGINS: Where does the Act say that? I understand the point you are making, that normally there may be a one-to-one basis and the substance then be circulated to the other parties and so forth.

MR. McDOWELL: No other Commission of Investigation that I know of has ever proceeded on this basis. ...So I am making the point that this is a highly unusual arrangement, that all communication between the Commission and the individual people who want to be heard by it has to be conducted not in public but in a hearing of this kind before other people. There is no basis in the institute for that. I am entitled to make a submission in private to this Commission and others are not entitled to listen to my submission as of right. There is no -- I mean, I don't know why the Commissioner is represented here at all, unless she is to be a witness. I don't know where in the Act it is provided that the Commissioner is entitled to have legal representation and to listen to the evidence that is put and to decide whether or not to apply to cross-examine it. I am saying, Judge, that we came into this on the basis of a degree of reluctance. We have no notice of what was happening and we had no clear picture of what my client's participation was, he not having been asked to make a statement relative to this module. We are now in a position, and I mean I don't mind saying it in this format but I do believe that I should be allowed to elaborate on it in private, that I am being pushed to deal with matters in circumstances where I submit as a matter of law the Act never contemplated that anything like this would ever happen.

MR. JUSTICE O'HIGGINS: Very good.

MR. McDOWELL: I don't see any reason why, for instance, Judge --

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

MR. McDOWELL: Judge, I will start by saying that Section 11(a) says: "A Commission shall conduct its investigation in private unless (a) a witness requests that all or part of his other her evidence be heard in public and the Commission grants the request; or, (b), the Commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public." So there is a clear mandate that it must be 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.*

MR. JUSTICE O'HIGGINS: *Yes.*

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

MR. JUSTICE O'HIGGINS: *Are you referring to the document dated –*

MR. McDOWELL: *This letter.*

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

MR. JUSTICE O'HIGGINS: *First of all can I say that the document that I received, on the face of it the contents seem to be inadmissible to the Inquiry.*

MR. McDOWELL: *Well, I am glad to hear that.*

MR. JUSTICE O'HIGGINS: *Well, on the face of it, subject to argument, because it doesn't seem to me –*

MR. McDOWELL: *It has been handed around, everybody in this room has now seen it as far as I can see.*

MR. JUSTICE O'HIGGINS: *Yes. It doesn't seem to me that the matters contained in the document are relevant to the matters the subject matter of this module.*

MR. McDOWELL: *I mean obviously I am glad to hear that, Judge, I can come down off my high horse slightly, I am happy about that, but I entirely agree it is irrelevant in the module.*

MR. JUSTICE O'HIGGINS: *That's how it appears at the moment and unless otherwise persuaded that's what I intend to do –*

MR. McDOWELL: *I want to be clear, Judge, that the process that is being happening here has from the very beginning been perplexing. The Commissioner of An Garda Síochána has asked to be represented by a senior counsel. She is not a witness as far as I know and yet she has the facility of having a legal team here, on what basis I am not quite clear, but granted that she is here. That itself is remarkable it is a bit like if Judge Yvonne Murphy had granted the Archbishop of Dublin the right to listen to all evidence before her Commission of Investigation. It is a most unusual step bearing in mind what is happening because members of a disciplined forces subject to discipline are being required to give evidence here knowing that everything they say is reported back to the Commissioner. That is most unusual and in my view is not a private hearing at alien concept and I am just making that point –*

MR. JUSTICE O'HIGGINS: *Maybe we will deal with that point of perhaps it might be productive to deal with the contents –*

MR. McDOWELL: *I don't particularly want to have a hearing before 40 people on the contents.*

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

MR. McDOWELL: *It makes what I am saying moot.*

MR. JUSTICE O'HIGGINS: *Pardon?*

MR. McDOWELL: *It makes what I am saying moot.*

MR. JUSTICE O'HIGGINS: *I would like to deal with that matter now. In relation, it would appear on the face of it, Mr. Smyth, that the contents of this document are irrelevant to the Terms of Reference in relation to this module. I have to make –*

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

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

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

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

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

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

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

MR. JUSTICE O'HIGGINS: *That much I understand –*

MR. SMYTH: *And there was a meeting between—*

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

MR. SMYTH: *Because he made complaints directed to Superintendent Clancy. There was a letter of 28th February 2008. He told inspector or Superintendent Cunningham who will be one of the next witnesses in this module that he was withdrawing. He only made those complaints on the basis that he wished Superintendent Clancy to seek further clarification from the DPP.*

MR. JUSTICE O'HIGGINS: *Well, that doesn't seem to address the relevance of contents of this document to the Inquiry that I have to conduct into this module.*

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

MR. JUSTICE O'HIGGINS: *Very good.*

MR. SMYTH: *When he knew that was clearly and patently wrong.*

Sir, the matter was ultimately resolved by Mr Justice O'Higgins as follows:

MR. JUSTICE O'HIGGINS: *Well, it seems to me the contents of this document are irrelevant to any matters that I have to inquire into in this module in relation to the question motivation, the motivation I am not certain that it can be excluded as a background consideration. I will allow you to establish this much and no more, that Sergeant McCabe had a real or perceived grievance against somebody. Full stop, no more and the contents of this document I am ruling are irrelevant to this module.*

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

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

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

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

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

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

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

After, Mr Justice O'Higgins ruled as he did, Chief Superintendent Rooney was recalled and gave the following evidence in respect of his meeting with Sergeant McCabe:

MR. SMYTH: *Chief Superintendent Rooney. You had a conversation with Sergeant McCabe?*

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

MR. JUSTICE O'HIGGINS: *You are aware of the ruling of the Court and the parameters of it.*

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

MR. SMYTH: *Arising out of that did you get the distinct understanding that he had a grievance.*

CHIEF SUPERINTENDENT ROONEY: *I did, Judge.*

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

CHIEF SUPERINTENDENT ROONEY: *Yes, Judge.*

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

CHIEF SUPERINTENDENT ROONEY: *Well it was twofold.*

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

MR. JUSTICE O'HIGGINS: *I don't want the details of the grievance.*

CHIEF SUPERINTENDENT ROONEY: *Yes.*

MR. SMYTH: *It was unrelated to the complaint he was making about -- Unrelated. -- administration in Bailieborough and about other complaints about a probationer Garda, and so on.*

CHIEF SUPERINTENDENT ROONEY: *Yes, Judge.*

Later on in the day, Superintendent Cunningham was questioned as follows by his own counsel and counsel for the Garda Commissioner:

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

A. SUPERINTENDENT CUNNINGHAM: I was aware, Judge, yes.

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

A. SUPERINTENDENT CUNNINGHAM: Early 2007, Judge.

Q. MR. SMYTH: 2007.

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

Sergeant McCabe then gave evidence and denied to counsel for the Garda Commissioner, Mr Smyth SC, 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 delayed (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 and counsel for the Garda Commissioner. After that exchange, Sergeant McCabe was further questioned in the following terms about his meeting with Superintendent Cunningham in Mullingar in August 2008:

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

SERGEANT McCABE: *Yeah.*

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

SERGEANT McCABE: *He met me on the last day that I was Sergeant in Charge.*

...

MR. SMYTH: *He met you in Mullingar on 25th August 2008?*

SERGEANT McCABE: *Yes.*

MR. SMYTH: *This is an issue of credibility I want to put to you?*

SERGEANT McCABE: *Okay.*

MR. SMYTH: *There was a meeting there in Mullingar Garda Station and that meeting was the Sergeant Yvonne Martin, is that correct?*

SERGEANT McCABE: *That is correct.*

MR. SMYTH: *I think there were notes taken at that meeting?*

SERGEANT McCABE: *There was, by each side.*

MR. SMYTH: *A detailed report was prepared by Superintendent Cunningham, there is no dispute about that?*

SERGEANT McCABE: *There is, I didn't see it, he has given his version.*

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

SERGEANT McCABE: *Yeah*

MR. SMYTH: *In the course of that meeting, Sergeant, you advised Superintendent Cunningham that the only reason you made a complaint against Superintendent Clancy was to force him to allow you to have the full authority directions conveyed to you?*

SERGEANT McCABE: *That is absolutely false.*

MR. SMYTH: *Right?*

SERGEANT McCABE: *Absolutely Judge.*

...

MR. SMYTH: *The only reason, and this will be the evidence of Superintendent Cunningham, the only reason that you wrote those list of complaints for Superintendent Clancy, do you understand, that you made the complaints about Superintendent Clancy was that you wanted to put pressure on Superintendent Clancy to get the full directions from the authority conveyed to you.*

SERGEANT McCABE: *That is absolutely false. Absolutely.*

MR. SMYTH: *Fair enough?*

SERGEANT McCABE: *I have a clear recollection of that meeting. ...*

From the point of view of accuracy, we should intervene here. The meeting in Mullingar was tape recorded by Sergeant McCabe. We have that tape. It clearly demonstrates, as the extract already quoted bears out, that Sergeant McCabe was not at that meeting making any complaint against Superintendent Clancy. What he was doing was simply asking that the DPP letter be circulated. This was not accompanied by any threat. One supposes, Sir, that when later in the hearings of the O'Higgins Commission the tape was produced, on day four, to the Commission, having previously been disclosed by Sergeant McCabe, the matter of a threat at Mullingar meeting was negated. Hence, Sir, we are not rehearing the Mullingar meeting because the tape is not otherwise contradicted.

The following day, which was day four of the Commission (the 19th of May 2015) at the request of Mr Smyth SC, both Chief Superintendent Rooney and Superintendent Cunningham were recalled to give evidence.

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

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

. MR. SMYTH: *Certainly, Judge.*

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

"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. 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 meetings was prepared by Superintendent Cunningham and its contents agreed with Sergeant Martin and forwarded to Chef 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."

On first flush, this appears to us to be incorrect. I am not saying definitively 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.

This meeting was concerned with observations that had been made by Sergeant McCabe on the 25th February, not about any matters with which this enquiry 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 Director of Public Prosecutions to allow full DPP directions to be conveyed to me and the other party, in particular Mrs D in this particular case, due the fact that all parties were in close proximity and I would really appreciate it. That is all I am asking." Superintendent Cunningham's report dated the 17th September contains the following passage: "He said that the report was a bid by him to have the full DPP directions conveyed to him and the D's in relation to the allegations against him by Ms D and the subsequent investigation." It seems to us, therefore, that on the meeting of the 28th August and the superintendent's subsequent report on it, that they had nothing to do with complaints against Chief Superintendent Clancy. We can't see, therefore, how reliance can be placed on them in support of a contention that the only reason Sergeant McCabe made complaints against Superintendent Clancy was to force him to allow Sergeant McCabe to have the full DPP instructions. In other words, it seems to us that the matters relied on in paragraph 19 of the chief State Solicitor's letter are referable, it seems to us, to matters not concerning complaints against Chief Superintendent Clancy.

I bring that to your attention, that is something that I would like you to address

....

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

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

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?

SUPERINTENDENT CUNNINGHAM: That is correct, yeah.

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

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.

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

A. I have no difficulty with it, Judge.

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

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

SUPERINTENDENT CUNNINGHAM: *"Is that where it stands now? Are you saying, do you want to make a report or a statement to the effect now to say to me that the reason you outlined these was in response to a request from your 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 should be known to each?"*

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

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

MR. JUSTICE O'HIGGINS: *What allegations? The allegations in this report of the 28th February.*

MR. JUSTICE O'HIGGINS: *Not against Clancy.*

SUPERINTENDENT CUNNINGHAM: *No, against Mr. D was to, in some way, the result of it would be that the DPP's directions, which I had received and had given him would be made available to himself and to the D family.*

MR. JUSTICE O'HIGGINS: *Yes. I think we are covering ground that has already been covered on a number of occasions.*

SUPERINTENDENT CUNNINGHAM: *I am sorry, I was asked a question, Judge.*

MR. SMYTH: *Except, Judge, we didn't have this transcript.*

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

And a short time later:

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

SUPERINTENDENT CUNNINGHAM. *Yes, Judge.*

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

A. That is correct, Judge.

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

MR. JUSTICE O'HIGGINS: *Following what?*

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?

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 things. I don't do "off the record". I don't do agendas. I don't do any of that, Judge. I do my job as best I can. That is what I do. I felt that Maurice McCabe's attitude to me changed completely after I was directed to carry out an investigation and I was directed to do it, Judge, in 2006. It wasn't my choice to do that.

Q. What way did his behaviour change towards you?

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

....

MR. JUSTICE O'HIGGINS: *Yes. So you are saying that Sergeant McCabe's attitude towards you seemed to change?*

SUPERINTENDENT CUNNINGHAM: *It did, Judge.*

MR. JUSTICE O'HIGGINS: *Yes, okay.*

Counsel for the O'Higgins Commission then had the opportunity to re-examine the witness. This was an attempt to pin down, to use a wrestling term, what had been a not so very clear exchange and to enable a definitive case to be made to the Commission.

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

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

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

A: *I am sorry, pardon me.*

MR. GILLANE: *In other words if it was put Sergeant McCabe, and I question, but I just want to be as accurate as I can, it was put to Sergeant McCabe that he had said to you that the only reason he made a complaint against Superintendent Clancy was to force the release of the DPP's direction. Sergeant McCabe said that was absolutely false.*

It just seems from your evidence this morning that we are all in agreement that he is correct about that. Am I right?

...

MR. JUSTICE O'HIGGINS: *Do you understand what Mr. Gillane is asking you?*

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

MR. GILLANE: *All right.*

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

MR. JUSTICE O'HIGGINS: *Can I intervene and ask you to agree or disagree that all these conversations and your report and the transcript were in the context not of any complaints against*

Superintendent Clancy, but rather in the context of the D episode and a request to Superintendent Clancy. In other words you weren't investigating any complaints against Superintendent Clancy?

A. The only thing I would say in relation to that, Judge, is page 3 of the report of Sergeant McCabe, the final page, which it says: "Garda authorities."

MR. JUSTICE O'HIGGINS: *Yes.*

A. And that is not Mr. D.

MR. JUSTICE O'HIGGINS: *Go ahead.*

A. Garda authorities are and were fully aware and informed of all of the above.

MR. JUSTICE O'HIGGINS: *Yes.*

A. Now his authority at the time was Superintendent Clancy and previously other superintendents also; do you know what I mean?

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

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

MR. JUSTICE O'HIGGINS: *What I am asking you to agree or disagree is that the conversation of the 28th February, your subsequent conversation with Sergeant McCabe, your subsequent report were all arising not about complaints against Superintendent Clancy but about the observations and the matters dealt with in the document of the 28th February.*

A. Yes, Judge. Yes, Judge.

MR. JUSTICE O'HIGGINS: *I am not putting words in your mouth.*

MR. GILLANE: *Can I then ask you, following on from that, Superintendent, it's just that there's no point in us wasting our time in relation to a matter if doesn't arise, and I know you didn't write this letter but again I infer from your evidence that in relation to paragraph 19 of the letter written by the Chief State Solicitor that has been referred to this morning, that following then is, I put no higher than this, the wrong end of the stick, in the course of this meeting Sergeant McCabe advised Superintendent 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. That just doesn't appear to be right.*

A. That's correct.

Q. Yes, and that is fine. We needn't waste time on a matter if it's not right. Just to go back then to the report that Sergeant McCabe made in February '08 to Superintendent Clancy and your reference to the authorities in relation to that report and we will come to some of those aspects in due course, that's

an account of issues that Sergeant McCabe appears to be raising from 2004 onward and, in fact, many of them predate Superintendent Clancy's tenure in Bailieborough, isn't that right?

A. That's correct Judge

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

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

"Sergeant McCabe stated that this report was composed by him to highlight matters that occurred in Bailieborough where he was Sergeant in Charge in Bailieborough station. He stated the report was a bid by him to have the full directions of the DPP conveyed to him and the Ds in relation to the allegations made against him by Ms D and subsequent investigation."

That was my account of that meeting with Sergeant McCabe and that, I would respectfully say, Judge, is what the taped transcript shows.

MR. GILLANE: We are still in agreement.

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

MR. GILLANE: I understand the point you are making

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

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

SUPERINTENDENT NOEL CUNNINGHAM WAS FURTHER CROSS-EXAMINED, AS FOLLOWS, BY MR. McDOWELL:

MR. McDOWELL: The very last sentence. I mean, I take it that you mean, when you say -- when you look at the last paragraph of the letter of the 18th May, I think you have seen that letter, isn't that right, the Chief state Solicitors letter.

Superintendent Noel Cunningham: Sorry.

Q. Sorry, paragraph 19.

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

Q. It reads at follows

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 Solicitors Office. (Same Handed).

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

A. I have it now.

Q. No, had you before?

A. No.

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

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?

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.

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.

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,

"...made the complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have full DPP directions conveyed to him."

MR. McDOWELL: In the spirit of agreement, can we say that that completely misrepresents your understanding of the meeting, he was not saying that he was making a complaint against Superintendent Clancy for the purpose of blackmailing Superintendent Clancy into changing his mind.

A. Well, no, I've never heard the word blackmailing until there now.

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

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

MR. JUSTICE O'HIGGINS: What complaint?

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

MR. JUSTICE O'HIGGINS: *Just one second. As I understand the case that's being made on behalf of your clients or all of them, is that insofar as the question of motivation is relevant at all and it might impinge on credibility, that your case is fairly and squarely that, one fine day, Sergeant McCabe, because he was refused his request or demand, however you like to put it, in relation to the DPP's direction, from that, because of that he started to make complaints against Chief Superintendent Clancy. That's your case, as I understand it and tell me if I am wrong.*

MR. SMYTH: *The question that was -- I think the superintendent puts it eloquently, indeed the difference is between the words "to" and "against" and certainly I put the question, I used the word "against" and I have to accept that the report was made to Superintendent Clancy to force him to allow Sergeant McCabe to have the full directions.*

MR. McDOWELL: *Well just.... --*

MR. SMYTH: *I still contend that the report the use of the word "against" is not the correct word but the report was made to Superintendent Clancy to force him to allow Sergeant McCabe to have the full directions conveyed to him and indeed to --*

MR. JUSTICE O'HIGGINS: *In relation to the D affair.*

MR. SMYTH: *Yes, in relation to the D*

MR. JUSTICE O'HIGGINS: *And not the complaints against Superintendent Clancy with which we are dealing in this inquiry.*

MR. SMYTH: *Well, we're not in this module dealing with complaints --*

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.*

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.*

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

MR. SMYTH: *Directions of the DPP, and that deals with the motivation.*

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

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

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

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 SC says:

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 the 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 which sergeant McCabe accepts.

In relation to Sergeant Yvonne Martin; she has made a statement to the Tribunal and explained as follows:

- *I was requested to attend a meeting on 25th August 2008 with Superintendent Noel Cunningham and Sergeant Maurice McCabe at Mullingar Garda Station. The purpose of my attendance at this meeting was to witness the notes taken by Superintendent Cunningham.*
- *I did not take part in the discussion between Superintendent Cunningham and Sergeant Maurice McCabe.*
- *In May 2015, nearly 7 years later, I received a telephone call from Superintendent Cunningham who informed me that he had given Chief Superintendent Fergus Healy my phone number and that I would be receiving a call from him regarding the above meeting.*
- *Subsequently I received a telephone call from Chief Superintendent Fergus Healy who told me that I might be required to attend at the O'Higgins Commission of Investigation to give evidence in relation to the above meeting.*
- *I received no further communication from Chief Superintendent Healy, Superintendent Noel Cunningham or anyone connected with the Commission.*
- *The contents of this statement are based on my memory of the meeting and a review of documentation relevant to the Commission which has been provided to me by the Chief State Solicitor's Office on foot of a High Court Order.*
- *For completeness I never attended at the Commission of Investigation, nor have I ever, to this day, been contacted by the Garda Commissioner, her legal team, GSOC or the media, to clarify my involvement in or recollection of the above meeting. Further, I was never stationed in Bailieboro Garda Station nor did I have any dealings with any of the members attached to it.*

Sir, we have studied the material and documentation available to the Tribunal and have no reason to doubt what she says. We are happy to state as much publicly, as is only right.

So Sir, these matters would appear to have remained until the day Commissioner O'Sullivan gave evidence at the O'Higgins Commission. That was on the 4th of November 2015. On that day, Commissioner O'Sullivan was due to give evidence and, prior to her being sworn, Mr Justice O'Higgins sought clarification from counsel for Commissioner O'Sullivan. The exchange was as follows:

MR. JUSTICE O'HIGGINS: *Before we commence, there is one matter that I would like a bit of assistance and clarification on, from you, Mr. Smyth. It is in relation to a question that been dormant for some time, concerning the integrity of Sergeant McCabe and his mala fides or bona fides in making his complaints. Now, I formed the impression from those parts of the transcript, rightly or wrongly, that the integrity and the motivation and the bona fides of Sergeant McCabe were being attacked. Was I right or was I wrong informing that impression?*

MR. SMYTH: *Judge, first of all, I say that my instructions at all times were to challenge the motivation and the credibility of Sergeant McCabe and those remain my instructions. I never used the words mala fides, those were the words that in the first instance came from Mr. McDowell and then were introduced by yourself in interpreting what my instructions were. I gave my instructions to you clearly, I said that I have to challenge the motivation*

--
MR. JUSTICE O'HIGGINS: *And the integrity of Sergeant McCabe?*

MR. SMYTH: *Yes, in making the allegations of corruption and malpractice. I never used the words mala fides.*

MR. JUSTICE O'HIGGINS: *That's so, but you are attacking his motivation and you are attacking his integrity.*

MR. SMYTH: *In relation to the corruption and malpractice allegations, yes. He has alleged corruption on the grand scale against Superintendent Clancy as he then was and Superintendent Cunningham and also against former Commissioner Callinan ... among others. He indeed also made allegations of corruption against Assistant Commissioner Byrne and Chief Superintendent McGinn. He withdrew these allegations but he was invited to withdraw allegations of corruption against former Commissioner Callinan and he refused to do so...*

MR. JUSTICE O'HIGGINS: *In other words that he made these allegations not in good faith but 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: *That Judge was your interpretation of what my instructions were.*

MR. JUSTICE O'HIGGINS: *You said "so be it. That is the position Judge."*

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

MR. JUSTICE O'HIGGINS: *And integrity.*

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

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."*

MR. SMYTH: *Can I just refer to you page 190 from which you are reading at the moment. And 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's what I said his motivation and his credibility in mounting these allegations of corruption and malpractice and you said there is a difference.*

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

MR. SMYTH: *No.*

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

MR. SMYTH: *My instructions are contained at his motivation and his credibility only.*

MR. JUSTICE O'HIGGINS: *Well. Okay. So this clarification I am seeking from you. His motivation is being challenged. His integrity is not now being challenged and if I formed the impression because you said my instructions are to challenge the integrity. That was an –*

MR. SMYTH: *That was an error.*

MR. JUSTICE O'HIGGINS: *So the motivation of Sergeant McCabe is being challenged. His credibility is being challenged but his integrity is not now being challenged.*

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

MR. JUSTICE O'HIGGINS: *And insofar as you said that my instructions are to challenge the integrity certainly of Sergeant McCabe that is an error.*

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

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

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

MR. JUSTICE O'HIGGINS: *No question about that.*

MR. SMYTH: *Yes.*

MR. JUSTICE O'HIGGINS: *Is his motivation under attack now?*

MR. SMYTH: *Yes.*

MR. JUSTICE O'HIGGINS: *So his motivation and credibility are under attack but not his integrity.*

MR. SMYTH: *Yes, that's correct, Judge the Commissioner has a duty of care to all members. She wasn't acquiescing and then she has to hold the balance between on the one part she has Sergeant McCabe who she has a concern for and for his welfare. And on the other hand she has a concern for superintendents who are under her control and she has to hold the balance. She cannot come down on the side of Sergeant McCabe and say I agree with everything he says without challenge or I am simply acquiescing [to] everything he says without challenge or I am simply acquiescing everything he says.*

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

MR. SMYTH: *And I said I never uttered the words mala fides in relation to Sergeant McCabe.*

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

MR. GILLANE: *I don't know if my expression of the current position is accurate.*

MR. JUSTICE O'HIGGINS: *Good. Well that is clarified.*

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

Well, secondly, the transcript records language used by counsel as to the place of credibility in matters.

Thirdly, and for some reason that now on the papers is very unclear, a serious error seems to have been made as to the purport of the Mullingar meeting of the 25th of August 2008. Where did the notion come from that Sergeant McCabe turned up to that meeting and announced that his issues with Superintendent Clancy had been manufactured by him in order to create some kind of a pressure wave so that senior management would bow to his demand that the DPP's letter exonerating him would be circulated? This idea, which somehow got into paragraph 19 of counsel's letter to the Commission on behalf of Commissioner Nóirín O' Sullivan, is not contained in the report of Superintendent Cunningham and it does not accord with the tape that Sergeant McCabe had made of the meeting. How did that happen?

Finally, and fourthly, Sir, we are asking you to consider how these series of matters impacted on Sergeant McCabe. He was there to give evidence, but his integrity was impugned.

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

What transpired at the Commission on the 15th of May 2015 was communicated to Mr Michael Dreelan who at that time was advisory counsel with the Attorney General's Office with responsibility for the file in relation to representation of An Garda Síochána at the O'Higgins Commission by Ms Annmarie Ryan, who was at that time the solicitor representing the Garda Commissioner at the Commission. Ms Ryan explained that "the purpose of these calls was to inform them of what was happening and what had happened as is the normal practice". Mr Dreelan recollects the matter as follows:

I understood that the AGS thesis, proposed to be shortly advanced at the O'Higgins Commission, was that Sergeant McCabe deeply resented the suspicion of colleagues and the investigative process into the [D] allegations. I was informed that the AGS would put it to Sergeant McCabe that he was motivated to raise the issues before the O'Higgins Commission by a sense of having being treated unjustly. I was informed that this approach had Garda management sanction, but the AGO was being informed lest it wished to make any observation.

I considered this information to be of the highest importance and, notwithstanding the hands off approach of the office on the file, was a matter that the Attorney General personally should be aware of lest she wish to make any intervention. I believe I was first informed of both matters, i.e. the [D] allegations and the proposed approach of the AGS, on the same occasion...the 15th May 2015. I sought my group leader, Richard Barrett, and having established that he was aware that allegations had been made against Sergeant McCabe, briefed him fully on my conversation.

Mr Barrett, who is the deputy director general in the Office of the Attorney General, explained that he dealt with the matter as follows:

On 15th May 2015 I was informed by my colleague Michael Dreelan that he had a telephone conversation from the solicitor from the CSSO representing the Garda Síochána at the Commission, informing him that there had earlier been a dispute at the Commission between lawyers for the Gardai and the lawyers for Sergeant McCabe about the expressed intention of the Gardai lawyers to question the motivation of Garda McCabe. It was explained that the question of motivation would be linked to an earlier allegation of a criminal offence by Sergeant McCabe. It was anticipated that the dispute could result in judicial review proceedings by the Gardai or indeed by Sergeant McCabe. Soon after this, I made a telephone call to Michael Flahive in the department of Justice to inform him of the dispute and the possibility of judicial review proceedings which could have the effect of putting into the public domain the allegation of a sexual offence.

Mr Flahive, who is an assistant secretary in the Department of Justice, on receipt of the above information from Mr Barrett sent the following email to the then Minister for Justice's private secretary:

Chris,

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

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)

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

Richard wanted to let me know that counsel for the Garda Siochana 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 Siochana. 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.

Presumably the Garda Siochana 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).

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.

Regards,

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

On 15 May 2015 I sent an email to the Minister's private secretary...As it relates, that afternoon I had taken a phone call from Richard Barrett...Richard told me that at the O'Higgins Commission, the issue was raised of the allegation of sexual assault that had previously been made against Sergeant McCabe. Richard also told me that counsel for Sergeant McCabe had objected to this being raised, and had asked whether the Garda Commissioner had authorised this which was confirmed...However, while I felt that I had to inform the Minister, and senior colleagues, of this development, I was extremely reluctant to overtly refer to an allegation of sexual assault in the email. While I knew that the Director of Public Prosecutions had directed no prosecution, and the matter was closed, even the fact that such an allegation had been made was obviously highly sensitive, and I didn't want to directly link Sergeant McCabe's name with such an allegation. It is true that my email was purely internal, and at a very high level, but with emails there is always the risk that they can, through inadvertence or mistake, be forwarded or copied more widely than they ought to be, and I was concerned at the potential risk that such highly sensitive information might spread beyond the initial small circulation.

Equally, I could not of course make my email so bland that the message got lost. That is why I referred to a serious criminal complaint and linked it to a case that had been referred to the Independent Review Mechanism, a link that was intended to be a coded reference to the underlying issue which would be understood by those with a knowledge of the IRM.

In my email, I said that I presumed that the matter was being raised on the basis that it could be argued to be potentially relevant to motivation, although Sergeant McCabe would deny this. I cannot remember whether this presumption was informed by anything Richard said to me during our phone call, but in any

event it was clear to me that the allegation that had been made against Sergeant McCabe was not relevant to any of the O'Higgins Terms of Reference, and the potential relevance to any motivation may simply have appeared to me the most likely possibility. I made clear, however, that it was a presumption. I had no knowledge of any statements, written or oral, made to the O'Higgins Commission by the Garda Commissioner or any other member, and I had no knowledge of any legal advice available to the Garda Commissioner.

I might clarify the basis on which I wrote in brackets in my email that I understood separately that the Garda Commissioner's authorisation of the approach being taken might be subject to any further legal advice. Before sending my email, I spoke to the Deputy Secretary General Ken O'Leary and advised him of the phone call I had received from Richard Barrett. My recollection is that, in turn, Ken mentioned to me that, around the same time, the Garda Commissioner had phoned him to let him know that a row had broken out at the O'Higgins Commission of Investigation, and had indicated that she would continue to engage with her legal team on the matter. I believe that this information informed the words in brackets in my email.

I concluded my email by saying that Richard and I had agreed that this was a matter for the Garda Commissioner, who was being legally advised, and that neither the Attorney nor the Minister had a function relating to the evidence a party to a Commission of Investigation might adduce.

The D allegation against Sergeant McCabe, in itself, was not raised as an issue in the O' Higgins Commission; this is something perhaps which can be explored with Mr Flahive. It would appear also Sir, that Mr Flahive had spoken to Mr Ken O'Leary, former Deputy Secretary of the Department of Justice and Equality about the matter who had in turn it would appear received two phone calls from the Garda Commissioner about the matter. It would also appear that Mr O'Leary was also of the view that it was not a matter in which the Department or the Minister could have any involvement. Mr O'Leary in his statement dated the 14th of December 2017, said as follows:

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

I had no prior knowledge of what evidence An Garda Síochána intended to, or were in a position to, present at the Commission or any case that they proposed making.

I can recall being acutely conscious during the conversation of the proper position of the Department in relation to the O'Higgins Commission and I specifically remember mentioning to the then Garda Commissioner at an early stage of our discussion that the Department could not become involved in, or attempt to influence in any way, the approach of An Garda Síochána to the Commission which was entirely a matter for her as Garda Commissioner, taking into account the legal advice available other. The then Commissioner fully accepted this. It was against that background that I did not seek any further clarification of what had arisen at the Commission (the conduct of which I was aware was confidential) or information as to what evidence it was intended to present to the Commission or the nature of any legal case to be made.

The focus of our conversation related to the question of evidence and I do not recall it touching on any overall legal strategy counsel for the Commissioner might indicate to the Tribunal (as set out in transcripts which subsequently entered the public domain and as referred to by counsel for the Tribunal in his opening

statement where counsel for An Garda Síochána had made general comments in relation to their approach to Sergeant McCabe).

While clearly accepting that the Department could have no role in determining the Garda position in relation to the Commission, the Commissioner asked me if, based on my experience, anything occurred to me which she might need to be mindful of in addressing this particular issue with her legal advisers. I suggested that she would have to be guided by her legal advice in these matters but, against the background that the Department was not in a position to express any views on the position of An Garda Síochána at the Commission, there was a discussion of factors of which she might need to be mindful in the context of the discussions with her legal advisers. To the best of my recollection, matters mentioned were the need for sensitivity in relation to protecting the position of Sergeant McCabe, the position of other people at the Commission against whom serious allegations had been made, the likely adverse reaction of the Commission to the introduction of matters which it might consider inappropriate and the overall duty on the Garda Commissioner to assist the Commission in whatever way possible to establish the facts of what the Commission had been asked to investigate. The Commissioner was then going to discuss these matters with her legal advisers and I think I reiterated the view that she would have to be guided by the legal advice available to her. I also believe I suggested that, from her point of view, it might be helpful if it was possible to gain more time so she could consider the matter more fully with her legal advisers.

To the best of my recollection, I received a further call shortly afterwards from the then Garda Commissioner (I think that at least for some of that call she was also on the phone to the Garda HQ Legal Officer at the O'Higgins Commission). As I understood it the Commissioner was being advised that her legal representatives at the Commission had to respond more or less immediately to the issue which had arisen earlier and the view of her legal team was that in discharging her obligation to the Commission there was a legal duty on her to raise matters which had arisen. I believe that, in the circumstances, the Commissioner indicated to the effect that her legal team should maintain their position that afternoon but there would be further detailed consultations with her legal team subsequently about the matter.

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

On the evening of the 15th of May 2015, at 17.05 Mr Quattrociocchi replied to Mr Flahive informing him that he would “flag” the issue to the Minister. On the 25th of May 2015, at 12.21, Mr Quattrociocchi sent a further email to Mr Flahive informing him that the Minister had noted his email of the 15th of May 2015.

Minister Fitzgerald, in a statement made to the Tribunal has set out her position as follows:

I established the O'Higgins Commission and awaited its outcome. Other than establishing the Commission I was not involved in the commission as Minister. It would have been inappropriate for me as Minister for Justice to establish a Commission of Investigation and interfere in any way with the legal strategy which might be adapted by parties to that Commission, or with the evidence which might be given to the Commission. To illustrate this point, I was not aware of the representation at the Commission or indeed members/numbers of staff who would be giving evidence as witnesses at the Commission, including the fact that some officials in the Department were granted representation in October 2015. I believe it would have been totally incorrect for me to interfere with the Commission of Investigation, chaired by an eminent judge, or with its work...

As stated in the email, Mr. Flabive asked my private secretary to bring the email to my attention as Minister for information...the normal meaning of the term for information in the Department of Justice was that the official forwarding it had indicated it was for information only, as opposed to action needed, part of official submission, or Government memo, or requiring further information or follow up steps to be taken. In the case of this email, the email commenced by stating that it was for information purposes only and concluded that "neither the Attorney nor the Minister had a function relation the evidence of any party, including the Garda Commissioner. The email made it clear that no action arose on my part, as I had no function in these circumstances...

As I now read the email of 15th May 2015 it strikes me that the email is confusingly written because it conflated two separate issues. One was an issue that arose at the Commission, and another was an issue that had arisen from the independent review Mechanism. I probably read the email very briefly initially, and then I would have gone back to it later and noted it. Often I would scroll through emails remotely and in relation to this specific email, while I do not recollect receiving it, I believe it most likely saw the advice that no further action was required by me and thus came back to it later. I believe that at the time it would have struck me as being really a matter for the Garda Commissioner and indeed the Commission itself. I was not entitled to interfere in the commission and I did not know the legal strategy being pursued by the Garda Commissioner, nor had I any role in relation to it. Indeed I was not aware of any legal strategy being pursued by any party to the commission and I had no knowledge of any legal strategy being pursued by the Garda Commissioner.

As to whether there were other consultations; this will be explored in evidence before the Tribunal.

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

Sir, it does appear from Chief Superintendent Healy that Commissioner O'Sullivan had authorised the questioning of Sergeant McCabe's motive prior to the issue arising at the commission on the 15th of May 2015. She sought written advice in relation to this during the hearing and appears to have consulted in the time available during the adjournment of the hearing

on the 15th of May after which she confirmed her instructions. This is essentially the issue under consideration.