

EDWARD MOSS

Paragraph (f) of the Terms of Reference requires the Tribunal to enquire into:

The circumstances surrounding the arrest and detention of Frank McBrearty, Jnr. on 4th February, 1997 and his subsequent prosecution in the Circuit Criminal Court in relation to an alleged assault in December, 1996 on Edward Moss with particular reference to the Garda investigation and the management of both the investigation and the role of the Gardaí in the subsequent prosecution.

Sir, you have already indicated on the 15th July, 2002, the manner in which you propose to approach this Term of Reference:

The information available to the Tribunal at present indicates that Mr. Frank McBrearty Jnr. was arrested and subsequently detained on the 4th February, 1997, at a time when he was attending at a Garda Station, apparently for the purpose of making a report or a complaint. He was apparently arrested in relation to an alleged assault in December, 1996 on an Edward Moss in respect of which he was subsequently prosecuted and acquitted. Allegations have been made that while he was in custody Mr. McBrearty Jnr. was assaulted, videotaped and otherwise improperly treated.

The Tribunal proposes to:

- (i) Enquire into and establish the facts in relation to this event;**
- (ii) Enquire into and examine the material which was then available to members of An Garda Síochána (if any) and consider whether such material had afforded members of An Garda Síochána grounds for reasonable suspicion for the arrest of Mr. McBrearty Jnr. on the 4th February;**
- (iii) Enquire into whether the member of An Garda Síochána alleged to have arrested Mr. McBrearty Jnr. on the 4th February, 1996 proceeded with the arrest only when satisfied that in respect of Mr. McBrearty Jnr. his suspicions were reasonable and/or that he had exercised all appropriate care, caution and diligence in deciding to make an arrest with due regard to the presumption of innocence attaching to Mr. McBrearty Jnr. and his right to fairness of procedures;**
- (iv) Enquire into all aspects of the arrest and detention of Mr. McBrearty Jnr. and his treatment whilst in custody;**
- (v) Consider whether the member of An Garda Síochána who allegedly made the arrest acted reasonably and in good faith;**
- (vi) Enquire into and examine the material which was available at the time as to whether the said material tended to implicate Mr. McBrearty Jnr. or justify his prosecution for the offence for which he was arrested;**

(vii) Ascertain whether any material available to members of An Garda Síochána in the course of their investigation came into their possession in accordance with lawful or unlawful practices or means;

(viii) Enquire into:

- a) The investigation into an alleged assault on Edward Moss by Frank McBrearty Jnr.;**
- b) Any report and/or material submitted to the Office of the Director of Public Prosecutions in relation to this investigation;**
- c) The reasons for the decision and the decision to prosecute Frank McBrearty Jnr. in relation to the alleged assault on Edward Moss;**
- d) The prosecution and, in so far as it may be relevant, the trial of Frank McBrearty Jnr. in relation to the alleged assault on Edward Moss.**

It should be noted that these matters will be investigated only in so far as they are relevant to the Terms of Reference of the Tribunal and it is no part of the Tribunal's function to question in any way the order of the Circuit Criminal Court in this regard;

(ix) Consider whether there was in all the circumstances any or any reasonable or probable cause upon which to initiate a prosecution against Mr. McBrearty in relation to the alleged assault on Edward Moss;

(x) Enquire into and establish the standard Garda procedure and practice in relation to the treatment of persons in custody and whether such procedures and practice were observed in the course of the arrest and detention and treatment of Frank McBrearty Jnr. following his arrest and detention on the 4th February, 1997, and further, the adequacy and fairness of such procedures and practice having regard to the facts which may be established in evidence at the Tribunal;

(xi) Enquire into the allegations made by Frank McBrearty Jnr. in relation to his treatment during the course of his arrest and detention;

(xii) Consider whether there was any use of informants and if there was the approach set out in relation to Term (B)(3) above will then apply;

(xiii) Consider whether there is any connection between the events covered by this Term of Reference and any other of the Terms of Reference."

The alleged facts relating to Paragraph (f) arise out of a complaint made by one Edward Moss of 49 Carn Road, Castlederg, Co. Tyrone at Raphoe Garda Station on the 31st December, 1997 to Sergeant John White. He claimed that he had been assaulted in Frankie's Night Club in Raphoe in the early hours of the 30th of December, 1996. A Garda investigation was initiated into this complaint and in particular into the alleged involvement of Frank McBrearty, Jnr., one Liam O'Donnell and a Martin McCallion (whom you will recall was one of those arrested in December, 1996 in relation to the investigation into

the death of Richard Barron). The subsequent Garda investigation resulted in the prosecution of Frank McBrearty, Jnr., Liam O'Donnell and Martin McCallion in respect of charges of serious assault on Edward Moss which were tried before the Circuit Criminal Court in Letterkenny on the 29th April, 1999. All of the accused were acquitted. The focus in this Term of Reference is on the Garda investigation into the alleged assault on Edward Moss, the subsequent arrest and detention of Frank McBrearty on the 4th of February, 1997, the management of the investigation and the role of the Gardaí in the subsequent prosecution of Frank McBrearty, Jnr., Liam O'Donnell and Martin McCallion. It is not, of course, intended to re-run the trial in respect of the complaints of Edward Moss but rather to present such evidence as has been, and will be, made available to us in respect of the actions, omissions and behaviour of all those concerned in the investigation and prosecution of this case.

To date the material available to us is contained in the file forwarded to the Deputy Commissioner, Operations, Patrick O'Toole and stamped August, 1999; a copy of the Book of Evidence in respect of "the Director of Public Prosecutions –v- Frank McBrearty, Jnr., Martin McCallion and Liam O'Donnell" and materials submitted to An Garda Síochána by Mr. William Flynn, a private investigator retained by the McBrearty Family; together with the materials assembled in respect of a complaint made by Frank McBrearty, Jnr. arising out of these events to the Garda Complaints Board in file number 971096.

It cannot be repeated too often that we would welcome information from any person who knows anything of the events relating to this Term of Reference and would invite any such person who has not already done so to furnish us with such information as soon as possible.

From a reading of the materials which are available to us it would appear that the events which gave rise to the complaint of Edward Moss occurred on Sunday, 29th December, and into the early hours of the morning of Monday, the 30th December, 1996. On the 29th December, 1996 Edward Moss, together with his then girlfriend, Ms. Pamela McCready of 29 Hillhead, Castlefin and with Mr. Larry Harper and his wife, Teresa, Castlefin all went to Frankie's in Raphoe. They arrived at the disco apparently shortly after midnight. In statements made subsequently to the Garda Síochána, Edward Moss indicates that he and his companions remained in Frankie's until approximately 1.45 a.m.; during which time they consumed a number of drinks. At that stage they went out onto the dance floor and remained there until 2 a.m. until the disco concluded with the playing of the National Anthem. At this stage Mr. Moss noticed that Mrs. Harper was becoming weak and seemed to be slipping to the ground and that Mr. Harper was trying to prevent her from hitting the ground. She ended up lying on the ground and appeared to be getting weaker. Mr. Moss states that he and Mr. Harper went to her assistance and carried her a distance of a few feet onto a carpet. At this stage it is alleged that a man pushed his way amongst them.

It is necessary to understand, Sir, why we now propose to outline in detail the allegations made by Edward Moss and a number of other non-Garda witnesses. Their statements appear in a Garda file that ultimately led to a decision by the Director of Public Prosecutions to prosecute the three persons referred to already and are, for the most part, contained in the Book of Evidence which was served on the three accused. Much of what is said by them is not accepted by the three persons who were ultimately prosecuted. It is outlined here so that the gravity of the complaints made, and the nature of the evidence coming from the civilian witnesses, can assist in the understanding of the context in which a Garda investigation was initiated and came to be focussed on Frank McBrearty, Jnr., Liam O'Donnell and Martin McCallion. In outlining these facts, we do not lose sight of the complaint made by Frank McBrearty, Jnr. that when arrested and detained on the 4th February, 1997 in respect of the assault on Edward Moss he was questioned primarily in respect of the death of Richard Barron and that his arrest on that date was in some way a pretext to continue the investigation and focus primarily on the death of Richard Barron rather than the assault on Edward Moss.

To return to the complaint made by Edward Moss. The man that is said to have pushed his way amongst the group was ultimately identified as Frank McBrearty, Jnr. who, it is claimed, said he knew first-aid. It is alleged that Mr. McBrearty pushed Mrs. Harper's head down between her legs and seemed to be handling her very roughly according to Mr. Moss. Mrs. Harper appears to have fainted. Frank McBrearty, Jnr. was told that Mr. Moss and Mr. Harper were going to take Mrs. Harper out for some air and he then got angry with Mr. Moss and it is alleged jumped up and squared up to Mr. Moss face-to-face. Mr. Moss goes on to describe how he was hit in the face by Frank McBrearty, Jnr. and was then grabbed by three men, dressed as bouncers, who grabbed him while Mr. McBrearty, Jnr. kept punching him on the upper body and head. Mr. Moss stated that he was held by his arms and around the throat.

His account continues and relates how he was then dragged towards the exit door and was pushed out by the bouncers and fell to the ground. In attempting to get off the ground, he realised that he had a severe pain in his right leg and was unable to stand on it. As he was raising his body up off the ground he alleges that Mr. McBrearty, Jnr. (who was now outside the exit door of Frankie's Night Club) hit him in the face and that he, Mr. Moss, fell to the ground. He received a number of injuries documented in medical reports, available in the papers furnished, including a spiral fracture of the lower end of the fibula, bruising below his right eye and around his nose and an abrasion on the lower aspect of the left side of his nose.

From other statements, taken from those present at the scene, it apparently emerged that one of the bouncers alleged to have grabbed Mr. Moss around the neck was identified as Liam O'Donnell and another bouncer alleged to have punched Mr. Moss in the face was Martin McCallion. Mr. Declan Dolan of Ardnasool, Ballindrait identified Mr. McCallion and Mr. McBrearty, Jnr. as having punched Mr. Moss before he was thrown out the exit door and

Mr. Liam O'Donnell as a person who pulled Mr. Moss by the neck towards the door. Another witness, Gregory O'Hagan, made a statement indicating that Liam O'Donnell was perhaps trying to protect Mr. Moss from McCallion's blows as he pulled him towards the door. Mr. Moss was helped away from the scene and was driven home with his partner to Castlefin by the Harpers. Later that day, Monday the 30th December, 1996 Mr. Moss attended the casualty department of Tyrone County Hospital at Omagh at 11.44 a.m. There he gave a history of having turned over on his ankle: he had a tender bruise over the medial aspect of the ankle. He was treated for a spiral fracture of the lower third of the right fibula. He was allowed home on the same day to be reviewed in the fracture clinic. He was seen again from time to time at the fracture clinic until the 14th February, 1997.

Mr. Moss attended at Raphoe Garda Station on Tuesday, 31st December, 1996 and made what was regarded as an official complaint and statement to Garda John O'Dowd. Witness statements, which have already been broadly summarised by us, were taken then from Ms. Pamela McCready, Mr. and Mrs. Larry Harper, Mr. Declan Dolan and Mr. Gregory O'Hagan between the 31st December, 1996 and the 9th January, 1997. The member-in-charge of the investigation appears to have been Sergeant John White assisted by Garda John O'Dowd. All of the civilian witness statements were made to Garda John O'Dowd with the exception of two supplementary statements made by Mr. Edward Moss; the first of which was made to Sergeant White and Garda O'Dowd and the second of which was made to Sergeant White.

Reference has already been made to the complaint made by Frank McBrearty, Jnr. to the effect that the motivation for the arrest on the 4th February, 1997 was a desire on the part of Garda O'Dowd and Sergeant White to re-interview him in respect of the death of Richard Barron. If Frank McBrearty, Jnr. was arrested on the 4th February, 1997 and further detained for that purpose this would constitute an abuse of the power of arrest and detention and also an attempt to circumvent the restrictions set out in Section 5 of the Criminal Justice Act, 1984 which have previously been referred to by us when considering the re-arrest of Mark McConnell in respect of Term of Reference (b). A person who has previously been detained in respect of an offence under Section 4 of the Criminal Justice Act, 1984 should not be re-arrested again for the same offence except on the authority of a District Court Judge who is satisfied, on information to be supplied on oath by a member of An Garda Síochána not below the rank of Superintendent, that further information has come to the knowledge of the Gardaí since the person's release as to his suspected participation in the offence for which the arrest is sought. It is only when such an application is made, and granted, that a person may be re-arrested in respect of the same offence and detained further under Section 4 unless it is intended to charge him. Though the case law would suggest that a person arrested and detained in respect of one offence may be questioned in relation to another, it does not envisage that the provisions of the Criminal Justice Act could be circumvented, as is alleged by Frank McBrearty, Jnr., by his arrest under common law and detention on suspicion of committing an assault on Edward Moss but made with the real purpose of interviewing him in respect of an alleged murder concerning which

he had been previously detained and questioned. Such an arrest, if made in bad faith, and a detention procured or granted in bad faith, would be regarded as unlawful.

On the other hand, a person may be suspected of involvement in a number of offences which are the subject of separate investigations. In those circumstances, even though Frank McBrearty, Jnr. had been arrested and detained on suspicion of murder, if he were also suspected on reasonable grounds of involvement in a serious assault on Edward Moss, contrary to Section 18 of the Offences Against the Person Act, 1861, he could lawfully be arrested and detained pursuant to Section 4 of the Criminal Justice Act, 1984, if it were deemed by the appropriate member-in-charge of the station that such detention was necessary for the proper investigation of that offence. It is, therefore, necessary to examine the focus of the investigation up to the time of the arrest of Frank McBrearty, Jnr. on the 4th of February, 1997 and examine material available to the arresting officer and on which the decision to arrest was based. It is also useful to look at the occasion of the arrest in this context.

There is also a related consideration. Some of the personalities involved in this investigation are the same as those involved in relation to many other matters to which the Terms of Reference relate. Therefore, it may be useful to bear in mind the relationship of the parties as it emerges in the evidence to be presented in respect of the other Terms of Reference; such as those relating to the death of Richard Barron; the arrests and detentions that followed in the course of that investigation; and the Term of Reference relating to the harassment of the McBrearty Family. It will be important to consider the motivations of those concerned in the investigation of the alleged assault on Edward Moss and whether that investigation was in any way affected by the previous interaction between these personalities.

We have already summarised the material which led to the initiation of the investigation into the alleged assault on Edward Moss and the material which implicated Frank McBrearty, Jnr., Liam O'Donnell and Martin McCallion in this assault. There appears to be nothing in the materials furnished to us to date to indicate that Edward Moss had any motive to make a false allegation against Frank McBrearty, Jnr. or that there was any history between Mr. Moss and the McBrearty Family, extended or otherwise, which might lead to the conclusion that there was any kind of 'bad blood' between them prior to December, 1996. The non-Garda statements tend to suggest that Mr. Moss was indeed assaulted by somebody in the early hours of the morning of the 30th of December, 1996 and that that assault appears to have taken place at Frankie's Night Club. As a result of that assault, Mr. Moss appears to have received injuries which are documented in the medical reports available. Those were serious, on an appraisal of those documents.

We have already referred to Mr. Moss's first complaint made on 31st December, 1996. On the 6th January, 1997 John Fahey, Solicitor of John Fahey & Co., Solicitors of 5 Church Street, Strabane, Co. Tyrone wrote to Garda John O'Dowd, who had taken Mr. Moss's statement, in respect of

the alleged assault and requested, from the Gardaí, a copy of the relevant statements taken from the witnesses. According to Mr. Moss, on that same day, Monday the 6th of January, 1997, Mr. Frank McBrearty, Snr., together with Ms. Josie Connolly, a neighbour of Mr. Moss's, who it is suggested worked with Mr. McBrearty, Snr. in Scotland for a number of years, visited Mr. Moss and purportedly blamed his son for being totally in the wrong. It is suggested that he wanted to come to an agreement with Mr. Moss to withdraw his complaint and not to take any civil action against him. Mr. Moss gives an account of this meeting, and a number of other meetings, in a statement made on the 21st January, 1997 to Sergeant John White at Raphoe Station. He states that no sum of money was mentioned; but there was an understanding that money would be paid to Mr. Moss for withdrawing the charges.

It should be noted that Mr. Moss states that, at the meeting on the 14th January, 1997, he signed a document which effectively settled his civil claim in respect of damages for assault (such as it was) against Mr. Frank McBrearty's Club (whatever person or entity owned it), his family and staff by agreeing not to take any action against them in respect of the injuries that he sustained. This meeting was allegedly attended by Mr. Moss's solicitor, Mr. John Fahey, Mr. Moss, and Frank McBrearty, Snr. Mr. Moss states that he was handed £15,000 (Sterling) in a plastic bag in consideration of this agreement. According to Mr. Moss there was a written document but he did not have a copy of it. It would be useful to the work of the Tribunal to obtain a copy of this document if it exists.

It is appropriate, Sir, to pause at this stage to consider the law relating to civil proceedings and the settlement or compromise of causes of action for the information of those who may not understand the principles applicable to such transactions. As you are aware, Sir, one may settle civil proceedings at any stage. It is quite acceptable and proper to settle a cause of action without acknowledging any liability on one's part and to pay a sum of money to a person proposing to issue proceedings if they agree not to do so and waive or compromise any cause of action on foot of which they believe themselves to be entitled to damages. The law of compromise, however, and the law relating to civil proceedings are to be viewed quite separately from criminal proceedings to which the law of compromise, of course, does not apply.

A person may make a complaint to the Garda Síochána and perhaps may, if they feel it appropriate, withdraw such a complaint, in which case there remains nothing for the Garda Síochána to investigate, if that be the only evidence available. Knowingly making a false statement, in the first instance is, as we know, a criminal offence. The Garda Síochána may also have other evidence which provides them with a basis for continuing their enquiries into an event in respect of which they believe a criminal offence was committed. The Garda Síochána in such circumstances have a public duty to investigate crime. An individual complainant does not necessarily determine when an investigation must end simply because he has withdrawn an original statement of complaint which gave rise to the investigation and, for whatever reason, now wishes that investigation to end. That is not a matter for him, it is

a matter for the Garda Síochána. Similarly, if the Director of Public Prosecutions initiates a prosecution against an individual it is not for the complainant to determine, by withdrawing his statement, that that prosecution should not proceed. If that were the case unscrupulous people could procure the withdrawal of a statement by inducement of money or threats and thereby frustrate a prosecution. That can not be in the public interest.

These considerations may become relevant because, following the meeting on the 14th January, 1997, a letter was received at Raphoe Garda Station from Mr. John Fahey informing the Gardaí that Mr. Moss had instructed them to formally withdraw his statement of complaint and to note that their client did not require any action on foot of the statement of complaint. Since this letter emanated from a solicitor, one must presume it was written on the instructions of the client, Mr. Edward Moss. As already noted, this does not necessarily determine whether an investigation proceeds or whether a prosecution is initiated. However, in many cases, practical considerations dictate that when a complaint is withdrawn, further investigation does not take place and consequently a prosecution is not initiated. In the case of Edward Moss, the withdrawal of his complaint clearly signals that the alleged victim of the assault will not cooperate further. Since he lives outside the jurisdiction at Castlederg, Co. Tyrone and is, therefore, not ordinarily compellable to attend court as a witness within this jurisdiction, the practical implications may be that it would be difficult, if not impossible, to continue an investigation and present a prosecution for assault against the alleged assailant. This was the scenario with which Garda O'Dowd and Sergeant White were apparently faced when Mr. Moss attended at Raphoe Garda Station on the 21st January, 1997 and informed them of the events which we have outlined and of his desire to withdraw his complaint.

At this meeting Mr. Moss indicated that he was advised by his solicitor that he should now withdraw any complaint of assault made on 31st December, 1996 to Garda O'Dowd and he was asking, in his statement of the 21st January, 1997, that this be done. However, Mr. Moss indicated on the same date that he would go to court if he were to be summonsed and that it was not really his idea to withdraw the complaint. Sergeant White, in his report stamped August, 1999, makes the comment that:

When Mr. Moss arrived in Raphoe Garda Station on 21.1.1997 he was certainly in a confused state of mind but was acting on his solicitor's instructions in requesting that he withdraw his statement of complaint. He clearly states in his statement that it was not his personal intention to withdraw it but felt that he was legally compelled to do so after he had accepted the money from Mr. McBrearty, Snr. When Sergeant White explained to him that this was not the case Mr. Moss assured the members that if the Director of Public Prosecutions took a case against Mr. McBrearty, Jnr. and the other doorman that assaulted him, that he would give evidence at their trial.

It should be noted that that is not quite what Mr. Moss says in his statement of the 21st January, 1997 though he does indicate that if the Gardaí brought a prosecution he would go to court if he were summonsed. The reference to money is made in a statement made by him subsequently on the 19th March, 1997. The report by Sergeant White states that Mr. Moss indicated that Mr. Fahey's advice was that he should not supply a copy of the agreement to the Gardaí as it would not be in his interest to do so. Apparently, Mr. Moss had never received a copy of this document from his solicitor. Mr. Moss felt that there was nothing in the written document about his withdrawing a complaint to the Gardaí and conveyed that this aspect of the agreement was made orally but not committed to writing. The odd aspect of the matter is that it is suggested in the report that the solicitor instructed Mr. Moss to attend the station and withdraw his complaint, whereas instructions usually come from the client to the solicitor. Sergeant White then went on, it appears, to advise a confused Mr. Moss that he was not legally obliged to withdraw his complaint and caused him to change his mind.

On the 19th March, 1997 the White Report indicates that Mr. Moss called to Raphoe Station and indicated "that he had given the matter a lot of thought and was now quite clear that he was not obliged in any way to withdraw his complaint against the men that had assaulted him on 30.12.1996". What he actually said was "I thought that because Frank McBrearty had paid me the £15,000 I had to withdraw my statement of complaint. I am now clear that this is not the case". He then goes on to indicate that he was very annoyed about the way he was, as he claimed, assaulted and that he wanted Mr. McBrearty, Jnr. and the other bouncers that assaulted him prosecuted and that he would give evidence at their trial. He was further interviewed by Sergeant John White and Garda John O'Dowd and made a statement to this effect.

What could be regarded as a peculiar development, is that on the 30th April, 1997, Mr. Moss's solicitors again wrote to the Gardaí at Raphoe stating the following:

Our client asserts that you have been continually harassing him by telephone and that you have insisted that he attend at the Garda Station to make further statements, which statements have not been made voluntarily. We hereby call upon you to desist from this course of action, otherwise we will be obliged to take the appropriate court proceedings to have you so restrained.

The clear suggestion is that Mr. Moss is being placed under some sort of duress in relation to this case; it will be a matter for further enquiry as to what occurred between the 19th March, 1997 and the 30th April, 1997 which caused such a letter to be written. It may be that the successful attempt to convince Mr. Moss to proceed with his complaint can be regarded as a legitimate, worthy police objective in two senses. Firstly, it would lead to the successful conclusion of an investigation into a serious assault and the likely prosecution of the alleged perpetrators. Secondly, in police terms, it could be viewed as effective policing by Sergeant White who, we understand from previous statements in relation to his instructions when assigned to Raphoe, was

directed to address public order issues. On the other hand, the pursuit by Sergeant White and Garda O'Dowd of an investigation concentrating on persons whom, it is alleged, they wish to harass at every opportunity may lead to the possibility that it caused them to exercise considerable energy in getting Mr. Moss to proceed with his complaint in circumstances in which, without it, it was likely that the investigation and the prosecution could not realistically have been pursued. Of course, the two alternatives are not mutually exclusive and events may have afforded a double opportunity to pursue both objectives.

The White Report in respect of the investigation contains a summary by Sergeant John White of the investigation and of events which occurred during its course. The main events relating to the alleged assault on Edward Moss are covered in the statements which have already been summarised by us. There are additional features of the report which may perhaps be regarded as unsupported by any statements, notes or memoranda. For example, the report contains pejorative references to Frank McBrearty, Snr. and his family. It is suggested that:

All possible witnesses questioned have made it very clear that they would not attempt to give evidence against any of the McBreartys or their staff as they would fear that they would be assaulted themselves or at the very least barred from the Club. Enquiries made with Mr. McBrearty, Snr. and other members of the staff had met with a wall of silence with Mr. McBrearty, Snr. denying the assault ever took place in his Club or that his son or any of his doormen had any involvement in same.

It may be, Sir, that one could understandably draw from this element of the report an implication that there are a number of witnesses who have been questioned and who have relevant testimony to offer in relation to the alleged assault but who are unwilling to give such evidence to the Garda Síochána or the courts. If a number of interviews took place with such “possible witnesses” and if they had relevant information to give in respect of this prosecution, it may be thought unusual that such material was never recorded, together with the nature and extent of the fears which were expressed. If it was relevant to the enquiry that Mr. McBrearty, Snr. had been interviewed, and had made a statement concerning the assault, and had relevant testimony to give, one would expect that this would be recorded by the investigating Gardaí. If a pejorative reference is being made against somebody in a report to the Director of Public Prosecutions one might perhaps expect that the statements upon which it is based would be recorded so that whatever substance lay behind the criticism could be examined. The payment of the £15,000 Sterling was categorised in the report as “an attempt to pervert the course of justice” in that it is suggested that pressure “both financial and pressure from his neighbours” was exerted by Mr. Frank McBrearty, Snr. It may be, Sir, that you wish to clarify, in the course of the enquiry, whether the report was drafted in a manner calculated to prejudice Mr. Frank McBrearty, Jnr. to the greatest possible extent in the eyes of those whose duty it was to review the papers in the Office of the

Director of Public Prosecutions and to decide whether a prosecution should be taken. Perhaps those references are merely rhetorical. Further material in the report involving an allegation against another person and touching upon the willingness of Mr. Moss to give evidence will also be investigated in the course of the enquiry.

There appears to be nothing in the papers which suggests that a plan was drawn up in the course of the investigation to arrest Frank McBrearty, Jnr. on the 4th February, 1997. Mr. McBrearty, Jnr. appears to have attended Raphoe Garda Station for an entirely different purpose just prior to his arrest. Frank McBrearty, Jnr. contends that he attended Raphoe Garda Station at approximately midday on the 4th February, 1997 in order to make a statement of complaint concerning difficulties he alleges he was having with Stephen Barron, the son of the Late Richard Barron. At Raphoe Garda Station, he met with Sergeant Hannigan and Garda John O'Dowd and he states that he made a statement to Garda John O'Dowd concerning his difficulties with Stephen Barron. He contends that Sergeant White came in and put on his uniform and walked outside. He goes on to contend that:

White had a video camera and he was videoing me. Garda O'Dowd followed me out and arrested me. He arrested me under Section 18. I asked him what was Section 18 but he wouldn't tell me. He told me to shut my mouth or something like that. I got into the patrol car in the back seat and Garda O'Dowd got in along with me.

A statement allegedly made by Frank McBrearty, Jnr. at Raphoe Station in respect of the Stephen Barron issue has not, to date, been made available to us. A further enquiry will be carried out in relation to this matter. Sergeant White's account of the investigation leading up to the arrest of Frank McBrearty, Jnr. can be found in a statement made by him on the 2nd of June, 1998. He contends that, following his arrival in Raphoe on transfer on the 10th January, 1997 as a uniform Sergeant, he was briefed by Superintendent John Fitzgerald on his duties and the general situation in Raphoe in regard to crime. In particular, he states that he was made aware of the alleged serious assault on Edward Moss. He gives the history of the attendance of Mr. Moss on the 21st January, 1997 at Raphoe Station which has already been referred to and he gives his views as to why Mr. Moss wished initially to withdraw his complaint and these are presently the subject of continuing enquiry by us.

An initial approach appears to have been made by Garda John O'Dowd to Frank McBrearty, Jnr. at The Diamond, Raphoe on the 6th January, 1997 when Garda O'Dowd contends he encountered Frank McBrearty, Jnr. and questioned him in relation to the alleged assault on Mr. Moss. Apparently, Mr. McBrearty denied any knowledge of the assault and refused to speak further on the matter. This is described in the White Report and he concludes the paragraph by saying that "he was most unhelpful and warned Garda O'Dowd to stay away from his doormen".

Sergeant White's next statement in relation to how the investigation proceeded, and why the arrest took place, states that he discussed the matter with his district officer, Superintendent John Fitzgerald, who agreed with him that the case should be fully investigated in the interests of justice and a file sent to the Director of Public Prosecutions for his directions. Following the suggested discussion, he states that Garda John O'Dowd arrested Frank McBrearty, Jnr. on the 4th February, 1997 outside Raphoe Garda Station on suspicion of being involved in the serious assault. There is no mention of Mr. McBrearty having attended Raphoe Station for the purpose of making his complaint in respect of Stephen Barron.

It may be, Sir, that Mr. McBrearty, Jnr.'s attendance at the station for the purpose of the making of his complaint afforded a convenient opportunity to further the investigation by making the arrest. It may perhaps be thought unsurprising that such an arrest would be made where civilian witnesses have identified an individual as an alleged assailant and a suspicion is then formed by an investigating Garda that this person committed the alleged assault and ought to be arrested and detained for the purposes of furthering the investigation of the offence whether by questioning or otherwise. A question may arise in relation to the timing of the arrest in the light of the rather fraught relationship between the McBrearty Family and the members of An Garda Síochána in Raphoe in the light of the description given by Mr. Frank McBrearty, Jnr. of the way in which he was arrested. That question is whether the arrest itself was a reaction to his attendance to make a complaint at the Garda Station which was, possibly, in some way seen as being cheeky or a provocation. This question perhaps bears some more serious consideration than it might otherwise because at the conclusion of the detention Mr. McBrearty, Jnr. was allegedly served with two summonses in relation to road traffic matters which will be considered under Term of Reference (c) in relation to harassment. It may be that the service of those summonses casts some light on the state of mind of the investigating officers and Gardaí in Raphoe suggesting perhaps an agenda beyond the straightforward investigation of the allegations of Mr. Moss or it may simply indicate a further coincidence of convenient opportunity.

It should be noted that allegations of misconduct are made by Frank McBrearty, Jnr. against Garda John O'Dowd and Sergeant John White which range from allegations of verbal abuse to assault, all of which are denied by both members in statements which they have made in the course of investigations carried out in relation to this detention. The allegations span the entire period from the time of his arrest in Raphoe to his ultimate release from detention at Letterkenny Garda Station at 10.18 p.m.

It is recorded in the custody record that on arrival at Letterkenny Garda Station, Garda Healy, the member-in-charge, authorised the detention of Frank McBrearty, Jnr., apparently on the basis of material outlined by Garda John O'Dowd who informed him about the arrest, the injuries sustained by Mr. Moss and the fact that a number of statements had to be obtained from witnesses to the incident. Garda Healy was relieved as a member-in-charge by Garda Martin Leonard at 2.02 p.m.

Mr. James Sweeney, Solicitor arrived at Letterkenny Station at 2.33 p.m. and asked Garda Healy to attach a note with his objection to his client's detention to the custody record. Between 2.05 p.m. and 2.40 p.m., apparently, Frank McBrearty, Jnr. was interviewed by Sergeant White and Garda O'Dowd. The note of this interview appears as Exhibit 6 in the Book of Evidence and contains reference to questions put to Mr. McBrearty, Jnr. concerning the alleged assault upon Mr. Moss and relating to the payment of £15,000 Sterling to Mr. Moss. Frank McBrearty, Jnr. makes the allegation that he was questioned primarily about the death of Richard Barron. Indeed, following a consultation at 2.40 p.m., ending at 3.10 p.m., with his solicitor, his solicitor, Mr. James Sweeney went to the member-in-charge, Garda Leonard requesting that his client be released immediately and alleging that his client had been questioned about matters other than the matter for which he had been arrested. His solicitor also asked to see the Superintendent.

At 3.15 p.m. Garda John O'Dowd alleges that he went to the interview room and sat down across from Frank McBrearty. He did not question him in relation to the alleged assault at this stage and all of a sudden Mr. McBrearty, Jnr. said "I am going to bang my head off that wall and I am going to blame you". Garda O'Dowd immediately took Frank McBrearty out of the interview room and put him in a cell. He reported the incident immediately, he says, to the member-in-charge, Garda Leonard, and also brought it to the attention of Mr. James Sweeney, the solicitor. He asked him to make a note of it. This incident is recorded in the custody record, as is the fact that at 3.30 p.m. Mr. McBrearty, Jnr. was taken from the cell to the interview room by Garda O'Dowd and Sergeant White. Sergeant White is then said to have gone to the toilet. This left Garda O'Dowd alone in the room with Mr. Frank McBrearty, Jnr. which, Sir, may be regarded as an odd development in the light of the allegation made about Frank McBrearty, Jnr.'s comments at 3.15 p.m. and his immediate removal from the room by Garda O'Dowd, presumably so that Garda O'Dowd would not be alone with him at that stage. Yet, within seconds of being returned to the room, Garda O'Dowd is left alone with him again.

Garda O'Dowd, in his statement made the 5th February, 1997, describes the incident in the following terms:

I again returned along with Sergeant John White and I took Frank McBrearty from the cell to the interview room. After entering the interview room I administered the usual legal caution. Sergeant John White informed the prisoner that we would continue our questioning in relation to the assault on Eddie Moss. Frank McBrearty seemed to get agitated and excited and said "If you ask me about Eddie Moss again I'll bang myself" putting his two fists up by the side of his head. Sergeant John White left the interview room. Frank McBrearty asked when was his doctor coming. I told him Dr. McFeely had been contacted and would be here as soon as he could. Frank McBrearty then said to me "I'm going to bang my head off that wall". He immediately jumped up from the chair and hit the wall with his forehead. As soon as he

did that he began to punch himself with his fists around the eyes and the side of his head. I could see from the way he punched himself it was a boxer style. I immediately alerted a member, Garda John Rouse, who was in the corridor, to come into the interview room and witness what Frank McBrearty was doing to himself. Garda John Rouse was standing alongside me at the doorway while Frank McBrearty was busy hammering away at his own head. As soon as he became aware that there was another Garda standing watching him beat himself he stopped and sat down. I informed Garda J. Rouse to bring the member-in-charge to the interview room. I pointed out to Garda Martin Leonard redness on Frank McBrearty's forehead and around his eyes. I informed him Frank McBrearty was after inflicting these injuries on himself in the previous minute, firstly by banging his head off the wall and then systematically punching himself with both his fists around the eyes and head. Frank McBrearty made no response to this.

Sergeant John White's statement supports Garda O'Dowd's version of events.

Frank McBrearty, Jnr. gives a totally different account of what happened. He states:

After the solicitor left I was alone in the room with Garda O'Dowd. I was sitting with my head in my hands. Garda O'Dowd punched me in the face two or three times. I shouted for help. A number of the Gardaí and my solicitor came into the room. ...

He then goes on to describe the exchanges which took place between the Gardaí present and his solicitor in respect of which further enquiry will be made. In his video taped interview with Mr. Flynn (transcript pg. 87) he states in respect of this incident:

O'Dowd just done that with my head on the ... desk with the two punches in the face like ... this was in the room on his own like

and demonstrates what was done to him. He says his head was shoved into the desk and he was punched. He stated that he shouted for help and also shouted that O'Dowd had been beating him up. He had two black eyes and a bump on his head:

You know he turned around and he says he ... beat himself up, he banged his head off the wall, he is just after punching himself and all. I says I didn't and the lawyer he was out in the hallway and the lawyer came in and I says to the lawyer if you don't get me out of here I'm going to ... kill myself because these ... are going to kill me.

Garda John Rouse states the following in relation to the incident:

The prisoner was again taken to interview room by Garda O'Dowd and Sergeant White. A few minutes later Sergeant White left interview room. I was at this stage in the corridor beside the interview room. At 3.31 p.m. Garda O'Dowd called me and I observed the following. Frank McBrearty was standing in the room and he had his two fists clenched. He was punching himself on both sides of his face and around his eyes. Around his eyes and both sides of his face were red as he was punching himself with some force. As he looked around and saw me standing at the doorway he stopped beating himself. I immediately informed Garda Leonard, member-in-charge, and his solicitor, James Sweeney, who was in the day room of what the prisoner was after doing.

The custody record indicates that Garda Rouse apparently told Garda Leonard to go to the interview room where Garda O'Dowd pointed out the redness on the prisoner's cheeks and forehead and indicated that the marks were self-inflicted. The member-in-charge had apparently brought the threat of such behaviour to the notice of James Sweeney, Solicitor, and after it was alleged to have happened Garda Leonard called Mr. Sweeney to the interview room and pointed out the marks and previous threats made by the prisoner. Garda O'Dowd states that he informed Garda Leonard that the injuries had been self-inflicted by Frank McBrearty, Jnr. by banging his head off the wall and then systematically punching himself with both fists around the eyes and head. He suggested that Mr. Sweeney was asked to make a written note of the threat to inflict self-injury made by Frank McBrearty. Mr. McBrearty's recollection is that Mr. Sweeney was rushed out of the interview room and treated very rudely. This is a matter which will require further enquiry.

There is no statement available from Mr. James Sweeney in respect of this matter, perhaps because of difficulties which arise in respect of legal professional privilege; though there is a letter dated the 12th February, 1998 indicating that he had no comment or statement to make regarding complaints made against An Garda Síochána by the McBrearty Family. However, at 3.45 p.m. the custody record records that Frank McBrearty, Jnr. was placed in a cell following a consultation with his solicitor after which Mr. Sweeney requested that questioning cease immediately pending the arrival of a doctor and required a meeting with a Superintendent. On behalf of his client he made an allegation that Garda O'Dowd had assaulted his client at 3.31 p.m. At 3.50 p.m. Mr. Sweeney met with Superintendent John Fitzgerald and it is not clear what transpired at this meeting because of the absence of a statement from Chief Superintendent Fitzgerald and Mr. Sweeney in this regard.

Dr. McFeely arrived at the station and examined Mr. McBrearty, Jnr. at 4.16 p.m. and left the station at 4.31 p.m. In a statement to Chief Superintendent Carey on the 17th February, 1998 he states that:

Frankie alleged his forehead was banged off a desk and that he had been punched on the face. I cannot recall if he said who

punched him. He was in a rather distressed state and I said “I cannot take much more of this”. I examined him. He had a raised red area about the size of a pound coin on his forehead. This would be consistent with early bruising. The areas around both eyes were red similar to his forehead. This was also consistent with early bruising. I was with him for approximately ten minutes as I recall. I did not find any other evidence of bruising on his body.

Garda O’Dowd left the station at 3.45 p.m. but returned a while later. At approximately 3.45 p.m. Mr. McBrearty, Jnr. was placed in a cell but was taken from the cell at 4.17 p.m. for the purposes of medical examination. Garda Rouse remained outside. Apparently, Frank McBrearty, Jnr. was kept in the interview room until 4.37 p.m. when Sergeant White entered the room but Garda Rouse remained in the hallway. This left Sergeant White on his own with Frank McBrearty, Jnr. We now come to a period in which somewhat unusual events took place in the course of Frank McBrearty, Jnr.’s detention. At 4.38 p.m. it is recorded by Garda Leonard in the custody record that:

Prisoner walked out of interview room. Garda Rouse shouted to me. I went to interview room and saw Mr. McBrearty and he was refusing to answer or sit on a chair. Alleged he was going to kill himself. He then lay down on the floor. D/Sergeant Smith entered the room.

Sergeant White states that when he entered the room at 4.37 p.m. Mr. McBrearty was there and immediately left it. “Garda Rouse was in the interview room at this stage”. Garda Leonard walked down the hallway and the prisoner again entered the interview room. He refused to sit on a chair and then lay face down on the ground. Detective Sergeant Hugh Smith apparently entered the room at this stage. Gardaí Smith and White attempted to interview the prisoner who was still lying on the floor with his face down. It is recorded at 4.55 p.m. that D/Sergeant Smith left the room and Sergeant White operated a video camera. Indeed, a video recording exists in relation to what appears to be a period or a part of the period between 4.40 p.m. and 5.25 p.m. Sergeant White contends that when Mr. McBrearty, Jnr. returned to the room after Garda Leonard was called, Detective Sergeant Hugh Smith entered the room. After administering the usual legal caution to the prisoner he goes on the state:

I placed a video camera on a chair in the interview room and turned on same as I suspected that the prisoner would injure himself upon the departure of the member-in-charge. Both Detective Sergeant Smith and myself put several questions to the prisoner regarding the assault on Edward Moss. The prisoner lay face down on the floor of the interview room and did not answer any of the questions. At 4.55 p.m. D/Sergeant Smith left the interview room. I continued to put questions to the prisoner without ever receiving an answer. At 5.25 p.m. Garda Leonard entered the interview room and informed the prisoner that he was

taking him to the cell. He did not answer and Gardaí Leonard and Rouse took him to the cell by dragging him along the ground.

In the statement of evidence of D/Sergeant Hugh Smith (contained at pg. 33 of the Book of Evidence) he confirms, for the most part, Sergeant White's account but does not suggest that he knew anything of a camcorder being used. He states that both D/Sergeant White and himself questioned Mr. McBrearty, Jnr. in relation to the crime for which he had been arrested but that he didn't reply to any of their questions and did not speak at all. He lay on his face on the floor during the entire interview. He felt that Frank McBrearty, Jnr. was doing everything in his power to restrict the interview. Detective Sergeant Smith states that his attendance at this interview was procured at about 4.45 p.m. when D/Sergeant White asked him to go to the interview room. He was told by D/Sergeant White that Mr. McBrearty, Jnr. had assaulted himself by banging himself off the wall and hitting himself round the face with his fists. He also stated that this happened whilst Mr. McBrearty, Jnr. was in the room with Garda O'Dowd. D/Sergeant White requested him to accompany him to the interview room and remain there with him until Garda O'Dowd returned. When he arrived at the interview room he saw Frank McBrearty, Jnr. lying face downwards on the floor with his head in his hands. His feet were preventing the door from being fully closed. D/Sergeant Smith asked him to get off the floor and he made no reply. Apparently, he thought that D/Sergeant Smith was in fact D/Inspector McGinley and said he didn't want to speak to him. When he realised it was D/Sergeant Smith he said he didn't want to speak to him either. An attempt was made to physically lift him on to a chair but since he made no effort to get up he left him on the floor. He was asked by Sergeant White about the assault on Edward Moss and didn't make any reply. Garda Rouse was outside as was Garda Martin Leonard.

Apparently, Garda Leonard knew of the use of the camcorder or its proposed use, because it is recorded at 4.55 p.m. that "Sergeant White operates video camera". This is acknowledged by Sergeant White as a "most unusual step". He placed the camcorder on the windowsill of the interview room he said "in order to protect Garda O'Dowd and myself during future interviews with Mr. McBrearty". He goes on to state that neither Garda O'Dowd nor he ever requested Frank McBrearty, Jnr. to withdraw any statement of complaint which he had made against Garda O'Dowd.

A viewing of this video recording indicates that is not the case. There is also some reference on this video recording to the death of Richard Barron.

Frank McBrearty, Jnr. complains that during this period when D/Sergeant Smith was present he wasn't interrogated by D/Sergeant Smith but was verbally abused by him which is denied by D/Sergeant Smith. After Detective Sergeant Smith left the room at 4.55 p.m. he complains that Sergeant John White kept poking him with a pen. He alleges that D/Sergeant White was smoking and down on his hands and knees and blowing smoke in his eyes and flicking the hot ash on the back of his neck. He was walking over him and standing with two feet on his back. He gives this description in his statement to Chief Superintendent Carey:

He kept poking me with a pen, a writing pen. He was smoking and down on his hands and knees and blowing smoke in my eyes. He was flicking the hot ash on the back of my neck. Somebody came into the room. White wiped the back of my neck. This person left again and I was alone with White. I was praying away to God, please get me away from this hell. He continued to mentally abuse me. I was still lying on the floor. He would walk over me. The last time he stood with his two feet on my back. He told me he would set me up and that I wasn't the first person he fitted up. I wouldn't speak or answer him. Two or three Gardaí came into the room. I just lay there as if I was dead. They turned me over and said "Maybe he is hurt". They then threw a glass of water on my face. They then dragged me out of the room and down the corridor to the cell. White was videoing me. I was then put into the cell.

All the Gardaí who have been mentioned to date have denied all of the allegations made by Frank McBrearty, Jnr.

In particular. Sergeant White denies the allegation that Frank McBrearty, Jnr. was questioned for most of the time about the death of Richard Barron and not Edward Moss. He emphasises that this will be borne out by the video recording.

It should be noted in respect of the allegation that Sergeant White walked or stood on Frank McBrearty's back, that he was examined the following day by Dr. McFeely, following his release from custody, who describes his attendance as follows:

On the next day Frankie called to see me at my surgery ... He complained of a pain in his back. He said he had been stood on while in Garda custody. I examined him but I could find no marks or other evidence on his back. He had an old history of back pain. On examining him I noted more florid bruising around his eyes and his forehead. I advised him to go and see his solicitor, James Sweeney.

In addition, later that evening, at 8.40 p.m., Dr. McColgan arrived and examined Frank McBrearty, Jnr. on behalf of the Gardaí. He made a statement to Chief Superintendent John Carey on the 17th February. 1998 and stated that when examined, Frank McBrearty, Jnr. told him that:

He had headaches and back pain and that he had been assaulted by a Garda. I don't recall that he named the Garda. I am not quite sure if there was a Garda present when I spoke to him. He had bruising around the right eye and a bump on the left forehead. He also told me that he had back pain and that he had it for some time. I examined him just in relation to the complaints he pointed out to me. I gave him some tablets for pain relief ...

The video, Sir, is available and can be viewed and may be regarded as peculiar. It could be regarded as showing Frank McBrearty, Jnr. in a distressed condition lying on the floor. Derogatory remarks are made to Mr. McBrearty, Jnr. in the course of the recording. Apart from its contents, the atmosphere which prevailed in this interview room may, perhaps, be regarded as its most noteworthy aspect.

At 5.25 p.m. Gardaí Leonard and Rouse took Frank McBrearty to the cell “by dragging his legs and sliding him on the floor to the cell” according to Garda Leonard. Frank McBrearty, Jnr. states that they took his shoes and belt from him and that while he was in the cell they kept opening and closing the door and banging the door and that he was in the cell for nearly three hours.

An extension order was made in respect of his detention on the application of Garda Martin J. Leonard (the member-in-charge). In his application he set out the following:

I explained to the Superintendent that the prisoner was making no effort to answer any questions and was continually looking for doctors and making false allegations against Gardaí conducting the interview. He was acting stupid and lying on the floor and totally uncooperative. I required detention for a further period of six hours to continue to try and conduct an interview with the prisoner. I explained the allegations in a statement by the injured party to the Superintendent and he was satisfied to issue the detention and I immediately relayed this authority to the prisoner at 6.47 p.m. but he did not acknowledge my presence.

In this regard, Sir, attention is once again drawn to Regulation 4(3) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 which provides that “as far as practicable the member-in-charge shall not be a member who was involved in the arrest of the person for the offence in respect of which he is in custody in the station or in the investigation of that offence”. It may be regarded as inappropriate in the controversial circumstances which had occurred in the station that Garda Leonard would be the person making an application for an extension of his detention. During his duties as member-in-charge, Garda Leonard may perhaps be viewed in these circumstances as involving himself in the investigation. It is not clear from the documentation to what extent Superintendent Fitzgerald was informed of the occurrences in the station such as the video taping of interviews and the extremely fraught situation which appeared to have developed with Frank McBrearty, Jnr.

At 8.28 p.m. Mr. McBrearty’s solicitor complained to Garda Leonard that his client had been assaulted by Sergeant White and that he had kicked and slapped him on the floor and asked him to withdraw his complaint against Garda O’Dowd. He further indicated to Garda Leonard that his client would cooperate with Gardaí and need not be forced to do so.

From the custody record, it can be seen that the doctor's visit took place between 8.40 p.m. and 9.10 p.m. Mr. McBrearty's mother and wife visited the interview room at 9.20 p.m. and he was returned to his cell at 9.58 p.m. He was then taken to an interview room at 9.40 p.m. by Sergeant White and Garda O'Dowd. This interview continued until approximately 10.13 p.m. when he was placed in the cell again. Frank McBrearty's account of this interview is that he was questioned again about the death of Richard Barron. After about fifteen minutes he was questioned about Eddie Moss. He said Sergeant White was very angry and Garda O'Dowd was shaking when they took him back down to the cell. He says that they got fed up questioning him and Sergeant White told him that he'd wasted his day. Garda O'Dowd apparently asked him whether Martin McCallion or Liam O'Donnell had assaulted Mr. Moss if he hadn't. He then goes on to describe a menacing posture which he suggests was adopted by Sergeant White as he was returned to the cell and his response to this and some five minutes later at 10.18 p.m. he was taken to the day room and given his property and released from custody. As he was leaving Garda O'Dowd approached him and is alleged to have said "There's a wee present for you" and handed him two summonses in respect of road traffic offences. He insists that at the end of his time in the interview room he was asked to withdraw the complaint against Gardaí White and O'Dowd.

The material gleaned by the Gardaí from the interviews with Frank McBrearty, Jnr., together with the statements of those involved in the arrest and detention and interviewing of Frank McBrearty, Jnr., were included as part of the Garda file prepared by Sergeant White for onward transmission, ultimately to the Director of Public Prosecutions with the covering report to which reference has already been made.

Insofar as any reason is given for the video taping of portion of the interviews with Frank McBrearty, Jnr., this is justified by Sergeant White on the basis that he felt unwarranted allegations were being made by Frank McBrearty, Jnr. against interviewing members of An Garda Síochána and that this threat of baseless allegations could best be met by the use of a video recording machine or camcorder, in order to have a record of the interview should any issue arise or further allegation be made such as the allegation of assault made against Garda O'Dowd.

Therefore, from either perspective in relation to these events, use of the video recorder was highly unusual.

There is no statutory provision for using a video recorder in this way. However, Regulations which came into operation on the 1st March, 1997 under the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 (S.I. No. 74 of 1997), provided for the electronic taping of interviews.

Though no such facilities were available at Letterkenny Garda Station at the time of these events it is understood that in more recent times full facilities for

the video taping of interviews have been installed at Letterkenny Garda Station.

The Regulations provide the basis upon which interviews may be electronically taped and set out detailed procedures to be followed in that event. No Regulations existed on the 4th of February, 1997 in respect of this matter. It is not clear whether authorisation from a higher ranking officer was sought by Sergeant White for using his camcorder. Mr. Sweeney, the solicitor, does not appear to have been informed of its intended use nor was the consent of the interviewee sought or obtained. Sir, it will be necessary to carry out further enquiries in relation to the use of the camcorder on this occasion both in the general sense and by having it technically assessed.

Two other relevant developments in the investigation relate to the other co-accused Liam O'Donnell and Martin McCallion. Liam O'Donnell was arrested at 6.20 p.m. on the 4th of February, 1997 by Garda Matt Tolan at Liskea, Ballindrait, Lifford, Co. Donegal on suspicion of being involved in an assault occasioning grievous bodily harm to Edward Moss. He was brought to Letterkenny Garda Station and there detained. Garda John O'Dowd was in the arresting party and accompanied it back to Letterkenny. Essentially, he had nothing to say in relation to the allegations of his involvement in the assault on Edward Moss other than to confirm that Frank McBrearty, Jnr. was present in the nightclub when Mr. Moss was put out. Martin McCallion was interviewed by Sergeant White on the 9th of February, 1997. This interview, unusually perhaps, took place following the administration of a caution to Mr. McCallion at 3.22 a.m. at Drumucklagh, Raphoe. Sergeant White states that he took notes of this interview in the form of a memo. in his "official notebook". Apparently, D/Garda Thomas Kilcoyne was with Sergeant White at the time. The notes of this interview are set out in the White Report and yielded nothing of evidential value to the investigating Gardaí.

In a letter stamped 4th December, 1997, received at Garda Headquarters on the 5th December, 1997 from the Chief Superintendent of the area, the office file (the White Report) was sent to the Assistant Commissioner for Crime and Security. This letter notes that Frank McBrearty, Jnr. was "the main suspect for the murder of Richard Barron". It goes on to state that:

It is interesting to note that due to the conduct of Mr. McBrearty while being detained the Gardaí decided to record the activities on video. It will ultimately be for the courts to decide whether this was a breach of the Custody Regulations. This decision is awaited with interest. The matter of his consent has not been adverted to in attached reports and will be queried on return of file.

This was noted by the Deputy Commissioner, Operations, who wished to be advised of further developments in a memo. to the Assistant Commissioner, "C" Branch from the Office of the Deputy Commissioner (Operations).

Meanwhile, a letter had been sent to the Director of Public Prosecutions by C.F. MacLochlainn, Esq., State Solicitor, Buncrana together with the Garda file in the case.

The response from the Director of Public Prosecutions came from Mr. Niall Lombard (Legal Assistant) dated the 19th November, 1997. Mr. Lombard directed that the matter should be prosecuted on indictment in respect of offences contrary to Section 18 of the Criminal Justice (Public Order) Act, 1994: that is that the three suspects should be charged that on the 30th day of December, 1996 at Frankie's Night Club, Meeting House Street, Raphoe, Co. Donegal, a public place, they assaulted Edward Moss with intent to cause bodily harm and that they committed an indictable offence on Edward Moss by punching and beating him continuously and assaulting and injuring Edward Moss to the extent that his ankle was fractured.

In respect of that aspect of the White Report, concerning whether there should be any prosecution for an attempt or conspiracy to pervert the course of justice by the payment of the £15,000 Sterling, Mr. Lombard stated as follows:

It seems to be an undoubted fact .. that £15,000 Sterling was paid to the injured party but there is some confusion as to whether this was a settlement of a civil type, an attempt to get the injured party to withdraw his complaint to the Gardaí or indeed a compilation of both. It does not seem to me that the circumstances are sufficiently clear so as to warrant prosecution for attempt or conspiracy to pervert the course of justice. Such a prosecution will normally only take place in the most clear cut of circumstances and this is certainly not the case in this instance. Such a prosecution would in this particular case only serve to muddy the waters with regard to the main prosecution but such a background is not too surprising giving this ongoing saga.

These directions were forwarded to the Superintendent at Letterkenny Garda Station on the 24th November, 1997 by the State Solicitor for Donegal and subsequently forwarded to the Assistant Commissioner, Crime Branch in or about 19th December, 1997.

Following a request for further information on the 9th January, 1998 from the Commissioner, Crime Branch, Garda Headquarters, a report was prepared by Sergeant White, dated 20th January, 1998, in which he gave an explanation as to why the camcorder was used and why no consent was sought or obtained from Frank McBrearty, Jnr. to use this camcorder while he was being interviewed. He confirmed that he had the original cassette tape used on the date in his possession and it could be produced if required. In a covering letter, again dated 20th January, 1998 and received at Crime Branch, Garda Headquarters on 22nd January, 1998, Superintendent Kevin Lennon stated:

While the recording was done in the view of the prisoner it could be interpreted to be a technical breach of the Custody

Regulations as permission had not been obtained to photograph him at that time. However, I am of the view that this is a mere technical breach of the Custody Regulations which was carried out for the purpose of safeguarding the integrity of the members concerned, bearing in mind the volume of complaints resulting from any contact with the McBrearty Family.

He noted that this matter had been raised in the report to the D.P.P. He noted that the Director had not addressed the matter in his response or commented on same. He thought that the issue in respect of the tape recording was likely to arise in the defence of the proceedings. It is hoped to present a more complete account of how the senior Garda authorities reacted to the unusual events in the interview room in Letterkenny Garda Station after further enquiry.

A prosecution was initiated upon the direction of the Director of Public Prosecutions in respect of Edward Moss. The case was returned for trial to the Circuit Criminal Court. It came before Letterkenny Circuit Court on the 28th April, 1999. The injured party, Edward Moss, failed to appear and a warrant was issued for his arrest. After contact was made with Mr. Moss he appeared on the 29th April, 1999 and the trial proceeded. All three defendants were arraigned and pleaded not guilty. According to a report to the Assistant Commissioner, Crime Branch from Inspector Eugene McGovern:

During the trial the charges against Liam O'Donnell and Martin McCallion were struck out on the instructions of the judge due to discrepancies in the evidence of two of the State witnesses. Mr. McBrearty's case was heard and the jury returned a verdict of not guilty after forty minutes deliberation.

Notification of the result was forwarded to the Assistant Commissioner, Crime, Security and Traffic on the 5th August, 1999 and to the Deputy Commissioner, Operations, "C" Branch, Garda Headquarters by Assistant Commissioner Patrick O'Toole on a date in August, 1999.

Some further enquiries have now to be carried out by us in relation to events which we have outlined. Following the receipt of further documentation, including a transcript of the trial, it is hoped that we will be able to proceed to a hearing which will ultimately allow you, Sir, to conduct the enquiry to the fullest extent into this Term of Reference as envisaged in your explanation of the 15th July, 2002.