

OPENING STATEMENT ON THE BARRON INVESTIGATION

Sir, the circumstances known to the Tribunal legal team as of November of last year were outlined in our Preliminary Opening Statement beginning on the 4th day of that month. As and from March of this year, a list of the witnesses whom we propose to call in relation to this paragraph of the Terms of Reference has been posted on our website at www.morristribunal.ie. In the intervening time, many of the witnesses who are crucial to this matter have been spoken to and transcripts of the taped interviews have been circulated in the twelve lever arch files of materials which the Tribunal has furnished to persons who have been granted the right of representation before the Tribunal. Sir, we reiterate that we feel that it is our function to ask all relevant questions in relation to the issues that might reasonably arise on the statements gathered to date. The witnesses to be called here in Donegal are, for the most part, brought to testify not as witnesses of controversy, but as witnesses as to fact. In the vast majority of instances, there is no need for anything beyond an examination as to the facts which they are in a position to prove by reason of being aware of them at first hand. In relation to some witnesses, elements of contradiction can exist between their statements and that of other witnesses and it is therefore legitimate to pursue cross examination. We mention this because at virtually every juncture in what should have been a simple chain of facts uncovered as a result of a competent investigation in the death of the Late Richard Barron, side avenues of complication have been opened.

Any one of these can be pursued in circumstances which are wasteful of the Tribunal's time and resources. It is essential, therefore, for the next short while, to outline what we, as the Tribunal's legal team, regard as the main issues. This is done with a view to crystallising any change in the circumstances which has occurred since the delivery of the Preliminary Opening Statement and to clarify the areas of investigation which we intend to pursue. In doing so, one matter needs to be made absolutely clear. We are not here dealing with the arrest and detention of the twelve persons arrested for murder, or as accessories after the fact to murder, on the 4th, 5th, 8th and 17th of December or, in respect of the Edward Moss matter, on the 4th of February, 1997. This module is not about how Mr. McBrearty senior and junior, Mr. and Mrs. McConnell, Mrs. Brolly, Sean Crossan, Mr. and Mrs. Peoples, Mr. and Mrs. Quinn, Martin McCallion and Damien McDaid were treated in custody. That is entirely separate. All issues concerning the status and credibility of the statements allegedly made by Mr. Frank McBrearty, Jnr. in respect of the death of the late Mr. Richard Barron whilst in custody fall to be determined at a later stage during the module concerning arrest and detention. The lawfulness of the arrest of these parties is not primarily an issue in this module either. Insofar, however, as facts found on the ground were used as the foundation of an apparently reasonable suspicion then the existence or non-existence of those facts, the acceptance or non-acceptance of those facts and the checking through of those facts against collateral and related facts, or the non-checking of facts, are issues to be established here.

It will not be, Sir, until you have resumed and disposed of the explosives module that we will be in a position to call any of the persons who indicated the apparent guilt of Mr. Frank McBrearty junior and Mr. Mark McConnell in relation to the death of the Late Richard Barron. Equally, some of those persons attempted also to implicate Mr. Frank McBrearty senior. All of these implications are withdrawn and, if the written statements, which are the apparent foundations of the testimony of the witnesses whom we will be calling, are to be believed, never had any basis in fact in the first instance. No new information has been submitted by any party seeking to implicate any member of the

McConnell or McBrearty family in the death of the Late Mr. Barron.

We feel that we need to return to some of the facts with a view to indicating what we believe are the issues. Unless issues are focused on in the course of the hearing of this section of this module the amount of time spent on it will spiral out of control. Equally, unless people come to this Tribunal with a view to giving evidence which accords with ordinary sense and forego the temptation to say things which deny the truth, it will be necessary to cross examine them at particular length. The following, Sir, seem to us to be the issues which are going to arise in the course of this module and in each case they are related to some extra facts drawn to the attention of the Tribunal principally as a result of its own work since the time of the Opening Statement:

- (1) The first issue is where Garda John O'Dowd and Garda Padraig Mulligan were prior to attending late at the scene of Mr. Barron's death in Raphoe in the early hours of Monday, the 14th of October, 1996. The truth of the matter appears to be that Padraig Mulligan, the Garda on duty in Raphoe, left the sub-district together with his off-duty colleague John O'Dowd and travelled first of all to Garda O'Dowd's house where they stayed for ten or fifteen minutes and then went on to a pub which is alternatively known as Brannigan's or Daly's in Lifford; volume 12 page 3643/3714. This piece of information was eventually extracted from both of these serving members of An Garda Síochána as a result of interviews conducted by Chief Superintendent Brian Garvey of the Royal Canadian Mounted Police, one of your investigators, earlier on this year. We draw to your attention the extraordinary efforts made by the Carty investigation team to require members of An Garda Síochána to give an account of the time which they spent, supposedly in the service of the people of Ireland. Under the Tribunals of Enquiry Act, 2002 a failure to answer the investigators' questions is a criminal offence. We merely comment that it does not seem right for a force which can only function on the basis of discipline to be left without immediate answers. A Tribunal of Enquiry founded upon statutory powers requiring co-operation on pain of imprisonment can eventually get answers which any sensible person would expect their employees to give them immediately. It may seem cumbersome, Sir, for you to have to recommend that Gardaí should be immediately required to account for their duties truthfully and unambiguously and in full, but one of the factors which seems to us to be inescapable in relation to the necessity to have this Tribunal at all has been the determination of serving members of the Gardaí not to account for themselves.
- (2) The second issue is as to how the Late Richard Barron died. We have circulated reports from Professor Marie Cassidy, Dr. D.T. Barry, Professor John Harbison and a joint report by Professor Whitwell and Dr. Philip Lumb. These all indicate the very, very strong probability that Mr. Barron died, not as a result of an assault, but as a result of an impact with the hard road surface caused as a result of a collision with a motor vehicle. Professor Whitwell is Professor and Head of Department at the University of Sheffield, Department of Forensic Pathology. She is also a consultant to the Home Office in Great Britain, as is Dr. Lumb. Their opinion, following a detailed analysis of the partial remains of Mr. Barron, is as follows:

In my opinion, I think the most likely cause of these injuries was a broad impact at the back of this male's head followed by a forced thrust of the forehead by this blow into the ground. It is not possible to ascertain whether this male was stood upright or crawling at the time of the first impact. I note the alcohol level was 283 mg per decilitre and it is possible that this male was in fact stumbling around on the floor. The most likely causes of the initial impact to the back of the head are either a bumper of a car or an extended wing mirror of a vehicle such as a lorry. Both of these have broad flat surfaces capable of inflicting such an injury when the vehicle is travelling at speed. Following this initial impact, this male has been projected forwards and downwards and has most likely had an accelerated fall with his forehead into the ground such as road or pavement. This would account for the y shaped laceration on the front of the scalp and the scratch marks seen on the skull. The impact would have been accelerated and would have caused the extensive fracturing to the front of the face. The neck injuries described are consistent with a rotational force applied to the skull such as that which may have been produced by the initial impact at the back of the head. There were injuries noted to the hands in this male. It is not possible to determine whether these are defensive type injuries which occurred just prior to impact or as a result of the accelerated fall caused by the original impact. It is also important to consider the possibility of an assault upon this male. I would consider it extremely difficult for an assailant to cause the injury to the back of the skull by a blow with an object and to be able to force this male into an accelerated fall onto the floor. One might expect other injuries with an assault such as facial lacerations and bruises. However, these were not noted. However, it is not entirely possible to entirely exclude a violent attack, though I think this is highly unlikely. One should also consider the possibility that this could be a simple fall. There was no evidence that this male had fallen from a height such as from a building...occasionally falls in these individuals who are intoxicated can produce fractures. However, they are usually not as extensive as those seen in this case. When falls in those intoxicated do produce fractures, there is usually unconsciousness and no second fracture is identified. I would consider the possibility that this is a simple fall as extremely unlikely. (Page 3785).

- (3) The third issue concerns the competence of the investigation into the death of the Late Mr. Barron. The reality of this matter is that the Gardaí arrived late on the scene. There seems to be no plausible excuse as to why this happened. Furthermore, the original note of the phone call to the Garda Communications Centre at Letterkenny distinctly notes the place of the incident as being at Townparks in Raphoe. How this could be translated into a request to go to Convoy, or to anywhere else, is extremely hard to fathom. However, it is possible that people will wish not to tell the truth about this matter, be that at their own peril. The scene was not preserved and various excuses have been put forward

for this. Some of these have been reiterated and expanded upon in interview with our investigators. Again, whether people wish to attempt to justify practices which are completely contrary to the instructions issued in the Garda manual is entirely a matter for them.

If one wishes to build a house one first of all lays foundations. These have to be laid with particular care because otherwise the superstructure will be subject to the same infirmities as the level upon which everything rests. To use an ancestral adage : ní hea lá na gaoithe lá na scailpe. Similarly, if one wishes to build a case the first duty, it seems to us, of a member of An Garda Síochána is to investigate on a reasonable basis the possibilities which arise by reference to the facts as they are known. It is a matter for you, Sir, as to whether you take the view that it could ever have been reasonable to regard the death of Richard Barron as being a murder case. Experience tells us, however, that no murder case has ever been presented within the memory of your legal team which has not had the benefit of an investigation on the remains of the victim, where available, which show a violent insult brought about, by apparent human intention, to the body of the deceased. Why, therefore, was a forensic pathologist not brought in to this matter? On this issue, in a statement to the Tribunal, Professor Harbison states:

At the time of being called upon to carry out this post mortem examination, I do not recall being told that this was a murder case. I would have considered it unusual that had I been told it was a murder case, that I would have delegated the task of the post mortem examination to a hospital pathologist. As far as I recall it, it was intimated to me that it was a "hit and run" road fatality, initially at any rate. With hindsight, had I been told that this case was one of murder, I am sure, within the constraints of my examination commitment at the Royal College of Surgeons, I would have responded by going to County Donegal, even with some initial delay, to do the initial post mortem examination, or even a second post mortem examination. I regret to say that I cannot remember nor did I record these discussions in writing. This absence of any written record of communications between myself and the Gardaí is indicated by the fact that there is no file with a case number in my office on the case, because I did not carry out a post mortem examination other than that after the exhumation. Hence, there was therefore no contemporaneous post mortem report to file such messages, if ever set down in writing. If counsel for the Tribunal asks whether I was aware at the time of the request for my services, that the death of Mr. Barron was indeed being treated as a murder, I cannot recall that either, but can only surmise that if the death was indeed being treated as a case of suspected murder, at the beginning, I should have felt contractually bound to travel to Donegal to carry out a post mortem examination, if no other post mortem examination had been made by then. (Page 3776).

In answer to the circular letters which were sent by this Tribunal to all the current

and past serving members of the Gardaí within the Donegal Division, a response was received from Superintendent John J FitzGerald. In it he refers to the several statements which were already made by him to the Carty, Lennon and FitzPatrick/FitzGerald investigation teams. He adds:

On Tuesday, 15/10/96 I had conversation with Dr. Barry, Pathologist. He had an open mind on how Richie Barron was injured, this being after the post mortem. He indicated to me that the head injury would be consistent with having been struck with/by a blunt instrument, that it was the head injuries that killed him. I then received the word that night from Chief Superintendent FitzPatrick that Richie Barron was murdered, etc. as referred to in my statement. I considered it vital that Professor Harbison would examine the body and on Wednesday morning, 16/10/96 I contacted Dr. Barry again and told him that we had information that he may have been killed other than a hit and run accident. During our conversation, when I mentioned Professor Harbison, he stated he would welcome Professor Harbison to examine the body as Professor Harbison was a forensic pathologist. We agreed on this. I then rang to find Professor Harbison on that morning 16/10/96 to get him down to examine the body of Richie Barron. I traced the Professor to a court sitting in the Four Courts. I got him out from the court and had a conversation with him. I explained the case and during our conversation that it was initially reported as a hit and run accident, but that we had information that he was killed otherwise than a hit and run. I requested him to come down and examine the body. He explained he was tied up in a case at the Four Courts...Professor Harbison then requested me to organise the faxing of Dr. Barry's report and on receipt he would examine same, have a conversation with Dr. Barry and then he would come back to me, I organised this and Dr. Barry's report was faxed to him, I was again in touch with Professor Harbison and he explained to me that he had a detailed discussion with Dr. Barry, that Dr. Barry was an eminent pathologist, that his examination was in great detail and he stated it would be duplication for him to examine the body (of Richard Barron) and his considered opinion was to bury the body. There is reference by the Tribunal that I had thought that Garda O'Dowd's source of information was William Doherty. It states "as to the supposedly reliable source this was thought at the time by both Chief Superintendent FitzPatrick and Superintendent FitzGerald to be William Doherty". This is not correct. I never knew a William Doherty either before or after the death of Richard Barron...I understood at all times during the course of the early investigation and for a long time afterwards that Garda O'Dowd was dealing directly with Mr. X later to be Noel McBride, a witness who was in the car park and saw something. The name Doherty was never mentioned to me.

(4) Sir, it seems to be beyond doubt that a murder investigation may be defined as

an attempt to find and sift relevant facts in order to determine whether one person was intentionally killed by another and if facts are found to warrant that suspicion to build a case based upon truth. Garda John O' Dowd, who had previously been unforthcoming, made a statement to Chief Superintendent Garvey in which he elucidates what he says is the entire basis of the suspicion against the Frank McBrearty and Mark McConnell (page 365 - 365):

On the Tuesday night this William Doherty rang me up around a quarter to ten...spoke about the death of Richie Barron and he said the talk about it up in the Wake-House is that it was supposed to be a murder and that Mark McConnell and one of the McBreartys were supposed to be involved and he went on to say that he was in the town that night and he seen Andy McBreary and he had a leather jacket and a white pair of trousers. Due to the gravity of the information, I immediately sought to contact my superiors. I tried to contact Superintendent FitzGerald, but I couldn't. I rang Chief Superintendent FitzPatrick and I told him the story. He asked me where did I get it and I told him who I got it from. I also rang Joe Hannigan and I told him the information...the Chief told me to be in in the morning at a quarter past nine in the conference room, that was Wednesday morning. I arrived in at a quarter past nine. I met John McGinley there, Inspector McGinley. There was a crowd gathered. There was the Chief, Superintendent FitzGerald, John McGinley. As far as I remember Brendan Roache was there and I think Tina Fowley might have been there. I am not sure about Marty Moylan. There was a meeting convened and I gave the same details of the information to John McGinley and he wrote it down on a piece of paper. The discussion went on about what should be done. I suggested at the meeting at the time, "I think seeing that we have a conflicting story now, we have a story of a hit and run and now we have information that it is supposed to be a murder, we need to call Professor Harbison in relation to this". The conversation was geared in that direction and I was of the opinion when the meeting finished up that Professor Harbison was going to be called down because it was being discussed how they would deal with the family and ask them not to bury the remains and things like that until Professor Harbison had seen the body. I went out to Raphoe around 1 o'clock that day and I couldn't believe that he was buried.

Garda John O'Dowd also said that nothing was done to establish the veracity of the information and that the information was never presented by him as being anything other than a rumour overheard by a third party. This does not reach the standard of suspicion, never mind reasonable suspicion. It is completely at variance with the commonsense ruling of the Canadian Supreme Court in R v Debot.

The scene of the fatality that was being investigated as a murder from the evening of the day following Mr. Barron's death, was committed on a public road where a lane way was available. In the investigation, even the scene itself was

not reported correctly with an apparent piece of scalp being left aside as an irrelevancy. There is nothing in the Garda manual or in the prospectus for studies at Templemore Garda College which brings this scene within the remit of proper police procedures. We still await hearing from any member of the Garda Síochána as to whether they wish to assert that the manner in which the pathology, the scene and the informers/witnesses were treated could possibly be regarded as any basis for an apparent reasonable suspicion.

If the entire foundation of the case subsequently built against Mr. Frank McBrearty junior and Mr. Mark McConnell was the word of Mr. X, what steps were taken to verify the potential availability and trustworthiness of someone who must at that stage have been a potentially vital witness in the prosecution which is the ultimate aim of a murder investigation? The manner in which alleged witnesses were dealt with also looms large, therefore, in relation to this module. From an international perspective Chief Superintendent Garvey will be supplying a statement which may be of assistance to you, Sir.

- (5) A fifth issue which might arise is in relation to the question as to what steps were taken by the McBrearty family in order to ward off the suspicions that were, increasingly obviously, becoming focused upon them. In an interview with the Tribunal, Mr. Frank McBrearty senior had indicated clearly that he never sought to obstruct any Garda investigation into the death of the Late Mr. Barron. If any issue were to arise as to him debriefing members of his staff or family as to what questions were asked of them by the Gardaí, his clear view is that there was no such process. It might be thought to be reasonable for a person who knows that unfounded suspicions are focused in his direction to take steps to discover the nature of those suspicions. Whereas there are some incidents in the materials contained in the book of evidence circulated to interested parties which tend to indicate a Garda view that Mr. McBrearty followed them to a number of places where they intended to conduct interviews with members of the public, we must again urge practitioners, if Sir this meets with your approval, to focus on real issues.

If, on a hypothetical basis, a person makes efforts to conceal the commission of a crime, then that may be a strand of circumstantial evidence that can be used against that person in a later prosecution. However, we caution that even at its best it can be no more than a strand. We also caution that before any such inference can be drawn against a person the traditional concept of balance within our criminal justice system must be brought to bear on the interpretation of any such evidence. Where two views are possible it is only correct to take the view which does not favour an accused person where the interpretation of that view can be arrived at beyond reasonable doubt. Attempts to fend off unwarranted suspicions are not evidence of criminal activity. It therefore seems appropriate that people should focus first on the issue of what the foundational level of suspicion was, if any, before moving onto a process which may not ever reasonably be open to any interpretation based on guilt. Furthermore, we caution that the arrests in this case took place during the month of December, 1996 at a time when there would seem to be very little material, if any, to support this hypothesis.

A further complicating factor could be the involvement of the private detectives firm of William Flynn. Mr. McBrearty senior has told us that as a result of the pressure which he felt was coming to bear on him, he thought he needed professional assistance. He first checked with the detective from the West, who had investigated an insurance claim at his premises. This detective recommended Mr. Flynn, though Mr. McBrearty did not get directly in touch. Instead, perhaps through a third party, Mr. Flynn's card was later presented to Mr. McBrearty in his premises. This led to contact with Mr. Flynn. That involvement occurred as and from February of 1997. This is at a time when arrests, apparently founded upon reasonable suspicion, for that is the only basis upon which arrests can be justified in law, were already made. The involvement of Mr. Flynn cannot add to something which had occurred previously, nor can it confirm it. One of the side turnings which certain individuals might like this Tribunal to take is an enquiry into the activities of Mr. William Flynn. If anybody were to allege any discreditable conduct against Mr. Flynn, and if that were to reasonably arise on a state of the papers distributed by the Tribunal, then we would need to say that this module of this Tribunal is not about Mr. Flynn and his activities, but is about the Garda conduct during the course of the investigation into the death of the Late Mr. Barron. Mr. McBrearty senior has told us that the basis of the engagement of Mr. Flynn was on terms of his trusting Mr. Flynn to pursue such lines of enquiry as might uncover the truth, but on the basis of professional conduct and standards. If people wish to challenge this scenario then, Sir, with your permission, it might be reasonable for them to do so. There is no principle of vicarious responsibility, however, whereby any action of Mr. Flynn, or any of his operatives, can be laid at the door of Mr. McBrearty, or any member of his family, unless it is first shown that this group of independent contractors were instructed, to use the classical legal phrase, not simply as to the work to be done, but were explicitly told how that work was to be carried out. While we have placed the relevant material in the books of evidence we, Sir, would hope that people would think before pursuing this matter as to whether it is within the terms of the mandate given by the Houses of the Oireachtas to the Tribunal. They may be required, at your request, Sir, to make submissions as to relevance.

- (6) The sixth issue is as to how a case was built against Mr. McBrearty and Mr. McConnell. That case also involved building a case of extortion and conspiracy to pervert the course of justice against Mr. Frank McBrearty senior. We want to know how it came to be that witnesses claimed to have seen things incriminating these parties, and to have been subjected to bribery attempts by them, if this did not happen. These serious allegations have been disavowed. If there was no basis for these allegations in the first instance then how was it that these witnesses' statements were made. Each of these witnesses are making the case that they were set up. We want to know who set them up. What happened, if it happened, following upon the death of Mr. Barron was extraordinarily serious. The foundation of any police force has to be the investigation of facts. Facts reflect the truth. If there was a poor or non-existent investigation, if appropriate steps were not taken and if apparent witnesses to crime were accepted at their word without any cross-checking being done then a case of

serious negligence seems to emerge. It is also reasonably possible to take a view which is even more shocking. If witnesses were primed to give evidence against the McBreartys on the basis of saying things which they could not possibly know, of giving details in their statements to which they could not be privy because they were not in the relevant places at the relevant time, then persons who knew about these matters, and who therefore knew how facts might be manipulated for lying purposes, could reasonably be inferred to be involved.

- (7) The seventh and final major issue which can therefore emerge is as to the motivation for targeting the McConnell/McBrearty families. This may in part be revealed by the methodology used in applying the instruments of the law in pursuit of persons whom it may be the case could not even reasonably be described as suspects in respect of a crime that may never have been committed.

Peter Charleton SC
Paul McDermott SC
Anthony Barr BL