



REPORT OF THE TRIBUNAL OF INQUIRY

Set up Pursuant to the Tribunal of Inquiry
(Evidence) Acts 1921-2002
into Certain Gardaí in the Donegal Division

CHAIRMAN:
The Honourable Mr. Justice Frederick R. Morris

**REPORT ON THE
GARDA INVESTIGATION OF AN ARSON ATTACK
ON PROPERTY SITUATED ON THE SITE OF THE
TELECOMMUNICATIONS MAST AT ARDARA, COUNTY DONEGAL
IN OCTOBER AND NOVEMBER OF 1996**

Term of Reference (g)

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Registrar to the Tribunal: Brendan O'Donnell

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Mr. Justice Frederick Morris

28th March, 2006

Re: Tribunal of Inquiry set up pursuant to the Tribunal of Inquiry (Evidence) Act 1921-2002 into certain Gardai in the Donegal Division.

Dear Minister,

I enclose herewith my Report in respect of Term of Reference (g), namely

(g) – Allegations relating to the Garda Investigation of an Arson attack on property situate on the site of the Telecommunications Mast at Ardara, Co. Donegal in October/November 1996.

In this Report, there are findings which are critical of Detective Sergeant John White. You will be aware that Detective Sergeant White is, at the moment, awaiting trial in respect of an alleged offence concerning the discovery of a firearm in a Travellers Encampment on the 23rd May, 1998. You may perhaps consider that the publication of this Report and its criticisms of D/Sergeant White might prejudice these criminal proceedings and accordingly you may wish to invoke Section Three of the Tribunal of Inquiry (Evidence) (Amendment) Act 2002.

On the 13th February, 2006, the Tribunal wrote to Inspector Declan P. Downey at the Garda Liaison Office with a view to ascertaining whether it was reasonably possible or reasonably probable that criminal proceedings might be brought arising out of the circumstances which are the subject matter of this Module. I enclose a copy of the reply received from Chief Superintendent Terry McGinn. It is my opinion that the investigation to which Chief Superintendent McGinn refers has no relevance to Term of Reference (g).

Yours faithfully,

Frederick Morris

Frederick Morris.

Michael McDowell, Esq.,
Minister for Justice Equality and Law Reform
Dept. of Justice Equality and Law Reform
94, St. Stephen's Green
Dublin, 2.

An Garda Síochána

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24th March 2006

**Mr Hugh Dockry,
Solicitor to the Tribunal of Inquiry,
Belfield Office Park,
Beaver Row,
Clonskeagh,
Dublin 4.**

**Re: Tribunal of Inquiry into complaints concerning some Gardaí in Donegal.
Silver Bullet Module - Term of Reference (d)
Ardara Module - Term of Reference (g)
Actual or Potential Criminal Proceedings.**

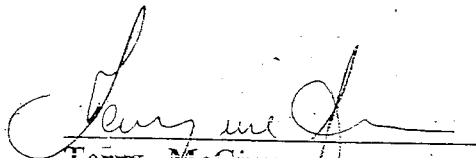
I refer to your correspondence dated the 17th January and 13th February 2006 in respect of the above caption.

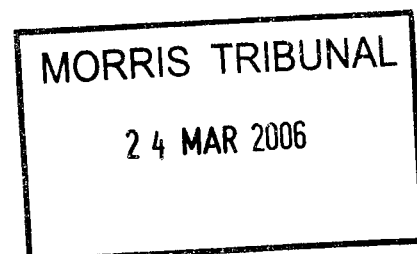
The following matter pertaining to the relevant Modules have been investigated, and the current position with the investigation is as set out below:

No.	Investigation	Current Position:
1.	Allegation of Perjury against Bernard Conlon as contained in Statement of John White dated 21 st February 2005.	File with DPP - Under Consideration.

Should there be any developments in the above investigation, I will inform you without delay.

Is mise le meas,


Terry McGinn
Chief Superintendent



- Is é Misean An Gharda Síochána

An leibhéal insroichte is aired a bhaint amach maidir le Cosaint Phearsanta, Tiomantas don Phobal agus Slándáil Stáit

Mission Statement

To achieve the highest attainable level of Personal Protection, Community Commitment and State Security

Tribunal of Inquiry into complaints concerning some Gardaí of the Donegal Division

Established by the Minister
for Justice Equality and Law Reform
by the Tribunals of Inquiry
(Evidence) Act 1921
(Establishment of Tribunal)
Instrument 2002



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Sole Member
The Honourable Mr. Justice Frederick Morris

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PLEASE QUOTE OUR REFERENCE ON ALL CORRESPONDENCE

Monday, 13 February 2006

**PRIVATE AND CONFIDENTIAL
STRICTLY ADDRESSEE ONLY**

Inspector Declan P. Downey
Garda Liaison Office
C/o Morris Tribunal
Belfield Office Park
Beaver Row
Clonskeagh
Dublin 4

**Re: Paragraph (d) – Silver Bullet module
Paragraph (g) – Ardara module
Request for information in relation to outstanding criminal proceedings**

Dear Inspector Downey,

We refer to paragraph (d) of the Tribunal's Terms of Reference, which obliged the Tribunal to inquire urgently into:

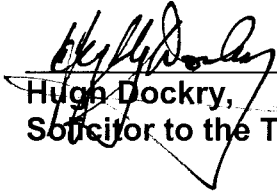
[t]he circumstances surrounding the arrest and detention of Mark McConnell on 1st October, 1998 and Michael Peoples on 6th May, 1999.

We also refer to paragraph (g) of the Tribunal's Terms of Reference, which obliged the Tribunal to inquire urgently into:

[a]llegations relating to the Garda investigation of an arson attack on property situated on the site of the telecommunications mast at Ardara, County Donegal in October/November 1996.

The Tribunal is mindful of its obligations as to possibly damaging pre-trial publicity in reference to the aforementioned modules in relation to which hearings have already concluded. Could you please indicate whether any charges have arisen from the issues covered by these hearings of the Tribunal, or whether any charges are likely to arise.

Yours sincerely,



Hugh Dockry,
Solicitor to the Tribunal

**PARAGRAPH (g) of the
TERMS of REFERENCE**

Set up Pursuant to the Tribunal of Inquiry
(Evidence) Acts 1921-2002
into Certain Gardaí in the Donegal Division

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

***Allegations relating to the Garda investigation of
an arson attack on property situated on the site
of the telecommunications mast at Ardara,
County Donegal in October/November, 1996.***

NOTE TO THE READER

The reader will please note the following:

1. Quotations from the transcript are designated by a bold indented italic.
2. Quotations from documents are boxed.
3. Particularly important conclusions of the Tribunal are printed in a different colour.
4. Transcript quotes may have been slightly corrected as to punctuation.
5. In the Report, members of An Garda Síochána are referred to by the rank that they held when giving evidence where their testimony is quoted or referred to, and by the rank they held at the time of events referred to.

Overview and Introduction

- 1.01. This is the fourth report of the Tribunal of Inquiry set up by Dáil and Seanad Éireann pursuant to the resolution of the 28th of May 2002. The first report of the Tribunal, concerning hoax explosives finds in Donegal in the years 1993 and 1994 was published in July of 2004. Of necessity that report also dealt with related issues of fact which broadened the scope of the period to be inquired into from 1988 up to February of 1999. The second report of the Tribunal dealt with the investigation into the death of the Late Richard Barron, which occurred in the early hours of the 14th of October 1996, and also dealt with the related matter of extortion calls received by Michael and Charlotte Peoples on the 9th of November of the same year. The third report deals with allegations made by Bernard Conlon that he was acting as an agent of An Garda Síochána in respect of his being found on the nightclub/public house premises of Frank McBrearty Senior in Raphoe on the 31st of August 1997, and further that in making a complaint that two men had arrived at his door late on the evening of the 20th of June 1998, he was acting as an agent of An Garda Síochána. This report deals with an arson attack on a telecommunications mast in County Donegal and a later explosive device in the same location during November 1996.

Preliminaries

- 1.02. The Tribunal is now reporting on paragraph (g) of the Terms of Reference. This requires the Tribunal to urgently enquire into:

Allegations relating to the Garda investigation of an arson attack on property situated on the site of the telecommunications mast at Ardara, County Donegal in October/November, 1996.

In explaining the Terms of Reference, I, as Tribunal Chairman, indicated that this particular paragraph was largely self-explanatory. Insofar as any expansion of that explanation was necessary I indicated that the principles applied to the Burnfoot investigation, which is dealt with in paragraph (i) of the Terms of Reference, would apply, with appropriate changes, to paragraph (g). Both are, in essence, very similar.

- 1.03. This inquiry was, in essence, a fact-finding mission. I was not tasked with finding out the author of the arson attack on the telecommunications mast at Ardara, Co. Donegal. Instead, I was to enquire into the Garda investigation in relation to that matter. It resulted in three persons being arrested and, as I understand from the evidence, High Court proceedings have been issued in respect of those arrests. Because this matter is simpler than any of the other reports into matters

with which the Tribunal has been concerned, it is possible to proceed largely on the basis of a chronological narrative. This is what I propose to do.

Background

1.04. The background to this matter was not in any way disputed during the course of the hearing of this matter over twelve days of October and November of 2005. As the Tribunal understands it, particularly from the helpful evidence of Mr. Thomas Gildea, a former T.D., up to 1997 radio and television signal on the national channels was received in south western Donegal through the broadcasting network of Radio Telefís Éireann. Donegal is proximate to Northern Ireland. Because the authorities there were broadcasting their own radio and television signals, these could be received quite readily in many areas of Donegal, depending on the situation and the geography of the area. Ardara is in the west of the county and quite distant from the border. But, because of the broadcasting facility at Enniskillen, across the border, the residents were able to tune into stations broadcast from there fairly easily. The signal, however, was not always good. One of the things which the residents did was to establish community based networks whereby one individual, or neighbourhood, receiving the signal, would pass it on by means of wires to other residents and neighbourhoods. Mr. Gildea, in giving evidence, said the following:

My involvement was community [based], where it was a voluntary community system of television transmission from the deflector system and this was a system that we could avail of the British television by transmitting it from a hill top down into the valley. And in April, I think it was, in April 1988, we became aware that there was going to be legislation passed in the Dáil which would prohibit that type of voluntary TV transmission. We made many submissions up until the time the picket started in Ardara, which was around the end of November, '95. We also objected to planning permission to have the MMDS service provider's equipment put on the mast in Ardara. But that planning permission was granted. At a meeting in Ardara, towards the end of November, it was decided to mount a picket. Personally, at first I was cautious because in my opinion a picket is, you know, ... volatile ... But, as it turned out, the picketers were all local, law-abiding people. The picket was always very peaceful and was carried out with the utmost dignity and decorum. At most times the picketers remained totally silent when the Gardaí came with the MMDS service providers and at no time was there any, you know, sort of animosity towards the Gardaí. Because the people who were on that picket would not anyhow, including myself,

would not tolerate that type of behaviour. And if there were to be any of that behaviour the picket would be discontinued. Because none of the people would come back again ... Sometime around mid-December the equipment was taken to the mast on the mountain at Mulmasog mountain at night with the support of a team of Gardaí. And the picket was then continued again. There was nobody there that night when the equipment was delivered and when, while there was a lot of disappointment, I suppose, would be the word, that the equipment was taken up, nevertheless, I think many of us were relieved in a way that there was nobody present and that there was no confrontation. Gardaí did arrive on a number of occasions to gain access, but the picket was placed on the entrance to – on the road to the mast and the idea was to block the entrance. Eventually, the MMDS service provider secured a High Court injunction preventing the picketers, named people, including myself, from attending at the site or congregating there and it was a bit wider in its application because it also prohibited us, I think from going anywhere near that vicinity.¹

- 1.05. The use of neighbourhood deflector schemes was not in accordance with the legislation of the State as it stood in 1995 and 1996. Because of the disquiet that arose, Mr. Gildea was later elected to Dáil Éireann where he conducted a successful campaign to have neighbourhood deflector systems brought within the ambit of the law. This change was, however, later than the events which were described in this report.
- 1.06. In the mid-1980s, Telecom Éireann purchased a site in the Ardara region on a hill called Ált na gCappaill. A special road was completed over a distance of approximately one kilometre from the nearest public road. This road went through the land of Bernard Shovlin and Geraldine Diver Shovlin, his wife. In fact, to access the site one has to pass directly through his farmyard and past his residence and farm sheds. The site in question, together with the right of way, was, the Tribunal understands, bought from the Late Mary Bridget Diver, who is the mother of Hugh Diver, the Late Anthony Diver, and Geraldine Shovlin. It is highly probable that in selling the land, the Late Mary Bridget Diver thought that she was selling a site for the purpose of building a mast for telecommunications purposes. She probably did not anticipate that in passing the fee simple to a portion of the property, Telecom Éireann would be entitled to engage in whatever use of the site they felt was appropriate, subject to the appropriate planning permissions and licensing regulations.

¹ Transcript, Day 377(4), pages 10-14.

- 1.07. In the mid-1990s, the availability of an elevated site, together with a mast, was attractive to Cable Management Ireland Limited (which I shall hereafter refer to as CMI). This company specialised in the development of local transmission systems for radio and television. The service offered by the company gave subscribers in the south west Donegal area access to enhanced reception of various television stations, including those already received, apparently free, from across the border. In 1995, CMI entered into an agreement with Telecom Éireann to place some of its equipment on the existing mast and to service same through buildings that were to be located in the fenced-in yard that surrounds the telecommunications mast. The radio and television transmission was to be by way of multi-point microwave distribution. The Tribunal was not asked to attempt to sort out the rights and wrongs of this situation. It suffices to record that many local people felt there was a risk to health from the means of transmission, whether this be right or wrong. It was also strongly felt, in many quarters, that if a signal was already available from Enniskillen this development was unnecessary. The result of it would have been to take away the system of television transmission already informally entered into by local communities and to replace it by a system that had to be paid for.
- 1.08. The Tribunal should emphasise, at this point, that there is no evidence that Telecom Éireann engaged in a subterfuge with a view to buying the site. Further, in entering into an agreement with CMI for the purpose of radio and television broadcasts, they acted within the law.

The Situation Develops

- 1.09. When it was realised that CMI were going to place their equipment at Ált na gCappaill and to use the mast there for the purpose of cable network, radio and television transmission, the local community were irate. The Tribunal accepts the evidence of Mr. Thomas Gildea that all lawful means of protesting were pursued by the local community. This included objecting to the application for planning permission and seeking legal advice as to any other avenue that might be open. A picket had been set up in 1995. The Tribunal infers that the purpose of this picket was to discourage CMI from ever placing their transmission equipment on the Telecom mast at Ált na gCappaill.

The Equipment Enters Ált na gCappaill

- 1.10. The District Officer for south west Donegal at this time was Superintendent Denis Cullinane. He was worried that a confrontation might occur were the container of telecommunications equipment to be brought in past the protestors. He therefore decided to use a sleight of hand to avoid that situation. The Superintendent asked Detective Garda John Dooley to go to Mr. John McLoone

in Glenties and to arrange for a meeting to be set up with the protestors on the morning of the 14th of December 1995. The Superintendent knew that in the early hours of the 13th of December the radio and television broadcasting equipment, housed in a container, was to be delivered to the site. The net result of seeking to arrange a meeting with Mr. McLoone was to catch the protestors off guard. They felt that negotiations of some kind were afoot and that, therefore, it was highly unlikely that any equipment for CMI would be moved onto the Telecom site before the meeting with the Superintendent took place. In fact, exactly the opposite was the case. Superintendent Cullinane gave the following evidence:

Well, then in the early hours of 13th December, I decided that the best time to get the CMI onto the premises would be late at night when there would be nobody around, up to that time there was a picket placed on the gate and it operated during the hours of daylight. So, I decided to avoid any confrontation. We would get them in late at night. On the 13th of December 1995, a large force of Gardaí, we assisted the CMI, we escorted them onto the site and we left their property there. Then when the locals became aware of this they became very upset altogether about it and they placed pickets on the site on a 24-hour basis ... I got a letter from Mr. Gildea condemning the actions of the Gardaí and my behaviour in it also and subsequent to that I did meet Mr. Gildea at another protest on the site ... I never met Mr. McLoone. The only time I saw Mr. McLoone was on one occasion at a protest. He was there and I spoke to him and he seemed to be in charge and I asked him were they going to allow these people access to the site and he said no, that they weren't. I said "What are you going to do?" He said "I'm going to sit down on the road with everybody else." Other than that, I never spoke to him ... I didn't want a confrontation with local people over it.²

The Situation Escalates

- 1.11. In the aftermath of the entry of the CMI equipment, the protestors' mood became somewhat more emotional. On the evidence of the Gardaí who have testified before the Tribunal, nails were placed on the road leading to the site and the tyres of patrol cars were punctured. On another occasion, some barbed wire was laid on the side of the road to prevent Garda cars from turning around. A strong light was shone into the face of a Garda driver visiting the site late at night. It is also fair to say that all of these matters, Superintendent Cullinane

² Transcript, Day 370(4), pages 10-13.

indicated, were sorted out on a community policing basis. There appeared to be goodwill on all sides. The situation was, nonetheless, subject to flux. Superintendent Cullinane related how on the 20th of March 1996 he accompanied a party of Gardaí and CMI personnel to Ált na gCappaill. Because of his earlier sleight of hand, the nature of the protests had changed from a daylight hours to a 24-hour a day basis. On this particular occasion, a large number of protestors were sitting on the access road to the site and one of them was actually chained to a cattle grid. One of the protestors indicated that he would not allow the CMI personnel to enter the site. A file was then prepared and forwarded to the DPP. In the months following this incident, the locks leading to the site were injected with a glue-like substance. This rendered them ineffectual. This was discovered by the Gardaí when they attempted to inspect the area. They found it was necessary to cut the locks. The company fitted new ones.

- 1.12. Because the site was an isolated piece of ground in the beautiful west Donegal area, and was surrounded by the Shovlin-Diver lands, the one kilometre access road was blocked by a number of gates. One was there for the purpose of keeping in cattle, another was there for the purpose of isolating Mr. Shovlin's farmyard and a third gate led into the compound itself. Of these three gates, two were locked.
- 1.13. The Tribunal understands that the Gardaí had access to the relevant keys. Sergeant John White, who was stationed in An Charraig Garda Station in west Donegal at this time, also had access to Ardara Garda Station. This station was not open on a 24-hour basis and Sergeant White could have legitimate business in entering the Garda station to consult occurrence books and other documents. Keys to all Garda stations would be held in the District Headquarters in Glenties. A number of copies of keys to the lower gate at the Shovlin's land were available to the Gardaí. However, only one copy of the compound key was available to the Gardaí. The Tribunal is satisfied that this was kept in Ardara Garda Station at all times. Confusion could arise on the evidence in relation to another key, which is in fact one of the keys to the Shovlin gate, which was kept in the patrol car from Glenties station and in respect of which there were a number of other copies in various other persons' possession. The Tribunal, with regard to the compound key, accepts the evidence of Sergeant Seán McKenna in the following passage:

Generally it was a Telecom person that left the new set of keys in. It was generally left in Glenties Station, and I would collect them. I was updated with keys ... the set in Ardara Station was always kept in the station and still are. And they're in a self-seal kind of evidence bag, which is fairly unique to scenes of crime. It is kept in this and was see-through, transparent ... that was just hanging on

a nail and still is hanging on a nail in the station ... there was a second set in the patrol car but I understand there was only one key. That was the key to Bernard Shovlin's gate. Myself and Garda Pat O'Donnell, and towards the end Sergeant White, had access to the station [at Ardara].³

The Arson Attack

- 1.14. Because of ongoing concerns related to the safety of the site, Superintendent Cullinane set up patrols to Ált na gCappaill on a periodic basis. As the Tribunal understands it, these patrols would take place on a perhaps twice daily basis with a further check during the night time. Gardaí operating the Glenties patrol car would be required to drive along the road from which the new spur road leading to the mast exits, and to go up the spur road to the actual mast on a periodic basis. The Tribunal is satisfied that this was done. The Tribunal is also satisfied that it was rare for the Gardaí to actually enter the compound and to check same. A visual inspection of the perimeter fence would be enough to indicate whether there was any trouble or not. It would appear to the Tribunal that as and from the summer of 1996, visits to the perimeter fence around the compound of the mast became more rare. Incidents concerning gluing of locks and replacement of same took place in October of 1996. It appears to be definite that on the 30th of October 1996 some new locks were fitted to the Shovlin gate and, because it was his land and he obviously had a right of way across it, the relevant key was dropped in to him. Mr. Shovlin never had a key to the compound.
- 1.15. When CMI installed their equipment the wires were run up the mast to their broadcasting equipment and then down across a gantry into a small container which served as the nerve centre for radio and television transmission. On the 7th of November 1996 Telecom Éireann employees noticed that a fire had occurred at the site. Telecom Éireann had a brick building within the compound for the purpose of holding telecommunications equipment. Telecom Éireann employees arriving on the 7th of November discovered that this container had been the subject of an arson attack and was burned out. The reports available satisfy the Tribunal that someone had gained access to the container by prising a portion of the roof open and by pouring in diesel, or some form of hydrocarbon, and then setting it alight. The blaze was extremely effective. Photographs were taken in the aftermath by the local scenes of crime examiner, Sergeant Seán McKenna, who was also the Sergeant of Ardara Station. These show that the cables in the interior of the container were melted and that CMI's equipment, to a value of approximately £50,000, was destroyed.

³ Transcript, Day 374(4), pages 181-182.

- 1.16. The Tribunal does not know whether the events are related, or are a coincidence, but on the 4th of November 1996 Mr. Justice McCracken granted an injunction in the High Court restraining certain protestors from attending at or near the site of the mast. It is possible that the burning of the container was an act of revenge. Equally, however, it is possible, since the last detailed inspection of the site was on the 30th of October, that the arson attack predated the granting of the injunction.

Responsibility for the Arson Attack

- 1.17. The Tribunal was not tasked with discovering who burned the equipment of CMI at Ált na gCappaill. It might be inappropriate to give such a task to a Tribunal since it is the function of An Garda Síochána, as the national police force, to investigate crime and to make recommendations to the Director of Public Prosecutions as to the prosecution of potential accused. A number of thoughts are possible on the basis of the evidence heard by the Tribunal. It is highly unlikely that the person or persons who burned the container did so as an act of random violence isolated from the background of protests against the television relay proposed. If a person were minded to engage in an act of wanton vandalism, they could just as easily have smashed up, or burned, equipment at another location. To engage in this act of vandalism, they would have had to traverse the lands of Mr. Shovlin and to climb into the compound. It follows, therefore, that the person who committed this act was highly motivated.
- 1.18. The Tribunal is not prepared to conclude that any particular protestor carried out the arson attack on the mast. The Tribunal is satisfied from the evidence of Mr. Thomas Gildea that the people in the area are both well meaning and law-abiding. The protest involving an act of criminal damage would not have suited the ethos of the protests that had been engaged in heretofore. Further, the Tribunal is satisfied that even taking into account the incidents involving barbed wire being laid to prevent Garda cars turning, nails on the access roadway, the shining of a torch and the gluing of locks, it is not necessarily the case that the same person or persons were involved. It seems most probable to the Tribunal that whoever perpetrated the arson attack was a maverick personality within the group of protestors who suddenly decided, and without warning to anybody, to take the law into his or her own hands.
- 1.19. Finally, the Tribunal is satisfied that Mr. Bernard Shovlin and his wife and family knew nothing of the attack by fire on the CMI equipment. Their farmyard was traversed so often by Telecom, CMI and Garda personnel that they would have paid little or no attention as to who was going up and down to the mast. Further, the presence of protestors would have been a huge distraction to their ordinary family life, as would the necessary attention of the Gardaí to those protests.

The Local Stations

1.20. The Tribunal understands that of the stations in the area, only the District Headquarters at Glenties was a 24-hour station. In addition, there were a number of other smaller outlying Garda stations in An Charraig, in Ardara and in Glencolmcille. The station in Ardara itself was very small. It consisted of the station party of one sergeant, namely Sergeant Seán McKenna, and one Garda, namely Garda Patrick O'Donnell. These were men who had given long service to An Garda Síochána. They lived in the area and were heavily involved in community life. Sergeant McKenna, for instance, told the Tribunal that he had attended some of the early protest meetings in relation to the television mast, but had decided, because of his position as the local sergeant, that a conflict of interest might arise in due course with the protestors, and he therefore decided to quietly withdraw. Garda O'Donnell lived in the area and had friendly relations, as was entirely appropriate, with members of the community. It would be rightly perceived by their Superintendent that these men were superb community policemen. In terms of the investigation of crime, however, their background had not led them to confront serious criminal charges on a regular basis.

Sergeant John White

1.21. At the time of these events, Sergeant John White was serving in An Charraig Garda Station. He had a distinguished career within An Garda Síochána, serving in Dublin in the Murder Squad, and being promoted to Sergeant and transferred to An Charraig Garda Station in March of 1995. In August of 1997 he returned to the Detective Branch as Detective Sergeant but, by that stage, he was serving in Letterkenny.⁴

1.22. The Tribunal has asked itself the question as to why Sergeant White was brought from An Charraig to Ardara in the aftermath of the arson attack on the mast at Ált na gCappail. Sergeant White arrived in Ardara around the 8th of November 1996. Superintendent Cullinane put him there in order to investigate the arson attack because he was considered to have an expertise in crime investigation. The view of the local Gardaí was not sought prior to his involvement. The Tribunal is satisfied that during the year and more prior to these events, Sergeant White had been given a roving brief by Superintendent Cullinane to pursue the investigation of crime in various sub-districts other than An Charraig. He had, for example, been to Ált an Chorráin to investigate some crimes of burglary in that location and to other areas throughout south west Donegal. On the night when the container was put in place at the mast he was one of the party of Gardaí accompanying it. His roving brief was authorised, and indeed encouraged, by Superintendent Cullinane. The Tribunal would comment, however, that it was a

⁴ Transcript, Day 374(4), pages 15-16.

roving brief without sufficient supervision and without sufficient duties of reporting and control to his superior officers. Superintendent Cullinane had this to say as to why he felt that Sergeant White ought to be drafted into the investigation at Ardara:

Well, they were dealing with it as best they could, I suppose. But, Sergeant White, who was, he was stationed in Carrick at the time, he had been a good crime investigator and I had appointed him as well as looking after Carrick, so it was a quiet sub-district where he was and I had him assist the detectives in crime investigations in the area and he would have been there to assist them in the investigations also ... They were progressing as well as they could in the circumstances...Sergeant McKenna would be in charge of the investigation, it was his sub-district ... but he had the assistance of Sergeant White and he had his own guard, Garda O'Donnell ... I didn't call him in for this. Prior to that I had, I became aware, that he was a very good investigator and that he was in a quiet sub-district. Our crime detection rate was, I suppose, average, but I thought Sergeant White would be better employed helping out at the crime investigation. There had been two detectives, one of them asked to be reverted to uniformed duty and Garda Dooley, Detective Garda Dooley was the only remaining Detective. He had a lot on his plate so I asked Sergeant White to help out.⁵

- 1.23. The impression of Garda Patrick O'Donnell and Sergeant Seán McKenna would be that when Sergeant White came to the sub-district he was in charge of the arson investigation. Sergeant McKenna and Garda O'Donnell instance the fact that he brought a new methodology to the investigation which involved opening a jobs book and giving out jobs to various members. Whereas in ordinary or normal circumstances the person keeping the book in a major investigation, such as a rape or a murder, might be seen as having a clerical function, in this instance Sergeant White's function could easily have been perceived as one of command. The following exchange took place between the Tribunal and Mr. Patrick O'Donnell:

Q. Chairman: I want to clarify something that has been, if you like, canvassed before me and it is this: when you have a meeting and everyone is putting their heads together to find out in what direction we go, it can be a very minor person who actually fills up the jobs book. It can

⁵ Transcript, Day 374(4), pages 18-19.

be, if you like, somebody who is acting as secretary, I believe, it doesn't necessarily have to be the head man?

A. *No.*

Q. *Chairman: Who fills up the jobs book?*

A. *You're right there.*

Q. *Chairman: So when you say that Sergeant McKenna – well first of all am I right about that?*

A. *Yes, but the only difference would be in this case was that Sergeant White was actually telling us what to do rather than writing out anything directly from Sergeant McKenna.*

Q. *Chairman: Do you mean he was acting as boss?*

A. *Well, he was actually telling us what jobs we would be doing, what enquiries to carry out.*

Q. *Chairman: Is that different to merely filling up the jobs book?*

A. *Well I would think he was giving the instructions.*

Q. *Chairman: Right because I don't know if you had heard the cross examination that was directed towards the suggestion that fair enough, he was filling up the jobs book?*

A. *Yes, that's right, yeah.*

Q. *Chairman: But he was only doing it as, if you like, the secretary, do you know what I mean?*

A. *Yes. Well.*

Q. *Chairman: You wouldn't accept that?*

A. *I can only go by the impression I got. The impression I got is that he was detailing Sergeant McKenna on whatever enquiry, I can't remember, he was to carry out.⁶*

To the Tribunal, it does not really matter as to whether Sergeant White or Sergeant McKenna was in charge of this investigation. The Tribunal is satisfied

⁶ Transcript, Day 378(4), pages 60-62.

that Sergeant White was in charge and that he was appointed to head up the investigation by Superintendent Cullinane. The only issue of importance that this fact gives rise to is as to whether his presence in the Garda station created a kind of hotbed of resentment which had the result of Sergeant White being hated by Sergeant McKenna and Garda O'Donnell to the extent that they would be prepared to fabricate evidence against him. The Tribunal is satisfied that whereas there were some tensions between the three members principally involved in the investigation of the arson at Ardara, this, judging by the evidence and demeanour of Sergeant McKenna and Mr. O'Donnell, has not had the result of their fabricating evidence against him.

A New Approach

- 1.24. Sergeant White was less involved in the community than Sergeant McKenna or Garda O'Donnell. It is understandable that his approach would differ from theirs, he being an experienced crime investigator and they being, in the main, community policemen. Sergeant Seán McKenna and Garda O'Donnell, however, found themselves at odds with his approach. Sergeant McKenna gave this evidence:

My attitude to the protestors, I suppose, I had some sympathy with them, but I felt we shouldn't aggravate them. And, I suppose, Sergeant White had a different attitude, where, if he felt like confronting them or putting an issue to them, he was more forthright about making that comment or to approaching them ... there was one particular night, I think it was the 18th of December 1995, when the placards were on the gate, it was at about 10.30 p.m. We went up and we had to turn and come back down. On the way back down there was a barrel, I think its called a brazier or something like that, it was lighting and there were three protestors standing around it. I believe that two of them were the Divers, Hugh Diver and the Late Anthony Diver, and I think there was another man from Meenybradden in it. They were standing around it and as we came down they were standing with their backs to us. So Sergeant White got out and he approached the three guys standing at it. Now I didn't get out of the car, but I felt from what was going on, anyway, that there was – it ended up in a heated exchange between them. So, after a minute or two, whatever passed between them, Sergeant White got back into the car. At that stage, I was just writing down numbers and I have that noted in my notebook ... the protestors turned their back on us on the way down ... they had their backs deliberately turned to us on the way down. They were quite aware that we were there ... from

their demeanour and their body language that they were quite well aware that we were there. I don't recall saying much [to Sergeant White] I don't recall saying anything to him. I felt myself that I wouldn't do it in my case. But Sergeant White made the approach ... it was a different approach to me ... I don't think I expressed my problem that night.⁷

The Glue

- 1.25. Both Sergeant Seán McKenna and Patrick O'Donnell claimed that they had a certain unease as to the potential approach of Sergeant White to solving this crime. That unease was heightened by an incident which they claim occurred on Friday, the 8th of November 1996. The least certain evidence on this issue was that given by Patrick O'Donnell. This is how he described to the Tribunal what he alleged happened on that day:

I was just writing a report, or doing something in the station, an action report or something. It's just a conversation I overheard. John White had come in with some glue, I didn't even see what container it was in, but I heard him asking, Sergeant White [that is], "would that be the glue that was put in the locks?" and Sergeant McKenna said it wasn't. But, he said it would be no good anyhow without a warrant, or something to that effect ... I might have sort of glanced, but I didn't take any heed. I didn't take much heed at the time. I just overheard the conversation because I left then immediately and I didn't - I finished whatever I was doing and I left, the two of them were still there ... [Sergeant McKenna] sort of mentioned it, I'd say, a day or two after, made some reference to it, alright, about the glue and it wasn't glue, you know. But I had more or less forgotten about it and then about - I was chatting to Sergeant McKenna about maybe five or six weeks ago and he asked me was I in the barracks that day, did I remember, and I said I was ... it had more or less gone to the back of my mind and he asked me did I remember it, yeah.⁸

- 1.26. The evidence given by Sergeant Seán McKenna on this issue was much more definite. He stated:

I recall it was late at night. Then again, darkness at that time in November would come, would start at six o'clock in the evening, half past five. So it was darkness anyway at the time and myself and Garda O'Donnell were inside in the station and I don't know

⁷ Transcript, Day 373(4), pages 189-192.

⁸ Transcript, Day 378(4) pages 68-70.

exactly what I was at, I think I was at some kind of books anyway. Sergeant White came into the station and he had a jam jar with him and it was kind of a sloshy kind of liquid in it. It was a grey liquid. He says "what do you think this is?" He also said "have you seen this before?" and "is this something you would put on a lock to glue it?". I wondered what, well obviously it was a liquid to see and I began to think of the legal situation and I recall asking him how did he get it and that the like of that wouldn't be much good in evidence now, that you'd need to have a warrant. He seemed to dismiss that. So, I asked him then where did he get it, and oh he says he got it in sheds. So I got the impression then, and I still hold the impression, that it was in Bernard Shovlin's sheds that he got it from. So, I asked him then how did he go into the sheds and agh, he says, "I went in for a leak and seen this sitting up on the bench and I took it with me" ... if it was glue it would be solidified at that stage. There is no way it would be sloshy. It was just like a liquid, any ordinary liquid. It looked like an oil, actually in a jam jar. From what I can recall, it was an oil, kind of grey oil, and that when you shook it it actually moved from side to side and up and down the jar, you know...there was no top at all on the jar. Well, I don't recall a top being on the jar ... I don't recall smelling it. I recall having a discussion about it and how legal it was and how did he get it ... I tried to recall was it ever around the station afterwards and I don't recall it being around the station, so I believe he took it back with him that night ... because I don't recall it being around the station immediately afterwards.⁹

- 1.27. It is appropriate to quote a section of the cross examination by Mr. John Whelan SC, counsel for Detective Sergeant White, of Sergeant McKenna on this issue. In answer to a question as to whether he would repeat his allegation as to the so-called pot of glue, Sergeant McKenna substantially repeated what he had said. However, he indicated that he didn't know whether it was "my questioning or Garda O'Donnell's questioning then confirmed to me that he had obtained the liquid in Bernard Shovlin's sheds".¹⁰ Mr. Whelan continued with his cross examination as follows:

Q. *Garda O'Donnell now in his evidence says that he didn't ask any questions or say anything...which is it?*

A. *That's what he said, yeah.*

Q. *So now you are contradicting Garda O'Donnell's evidence?*

⁹ Transcript, Day 374(4) page 195.

¹⁰ Transcript, Day 379(4) page 74.

- A. *Well I believe there was a question asked as to what sheds, once he said sheds, what sheds was it obtained from and I am not too sure whether I asked the question or Garda O'Donnell asked the question. But, in any event, the question was asked and whatever reply he gave, it indicated to me that he had obtained it in Barney Shovlin's sheds.*
- Q. *And you are also alleging that he said why he went into the shed in the first place?*
- A. *Oh, that's correct. That was further down the line. Why did he go in? He said he was going in to relieve himself.*
- Q. *Now that is a complete fabrication, I put to you, Sergeant McKenna?*
- A. *Not in this world it is.*
- Q. *It never came up before, it was never mentioned to the Carty team, it was never mentioned to the Disciplinary Enquiry when you made statements to them. It has come up for the first time on the 12th of October [2005], less than two weeks back. How does your memory suddenly become so enlightened with this extraordinary story and, coincidentally, Garda O'Donnell's as well? ...*
- A. *It was just an incident that happened during the week, that week, that I recall and I only recalled it lately and that was at the beginning of October.*
- Q. *When it was convenient to recall it, to make matters appear worse for Sergeant White?*
- A. *Well it was just one of those issues that I want to be forthright with this Tribunal [about] and that's what I am.*
- Q. *Well you have an extraordinarily graphic description, so graphic that I cannot possibly imagine how you could have forgotten it for nine years and you suddenly recall it literally on the eve of giving evidence to the Tribunal?*
- A. *I don't think at any stage in the past I have researched my memory as I have in these last six weeks and that and other issues have been brought forward and I have elicited them.*
- Q. *You commence your statement on the 12th of October with a very interesting comment. You said: "While making this*

statement, I found myself unsure as to whether my memory is now influenced by other people's statements and/or what other people have said to me since then concerning these events". Isn't that so?

A. *That's what I said.*

Q. *So in other words, the statement is put together clearly on your own admission under the influence of what other people have said and everything that has been talked about over the past nine years: isn't that true?*

A. *Sorry.*

Q. *Without distinguishing between fact and fiction?*

A. *Well this particular incident that you are referring to is fact. It actually happened.*

Q. *Well John White has said already in evidence that it is the most disgusting and disgraceful statement, that he would have done such a thing. I would have said – that you would suggest that he did that, go into a shed to relieve himself and then take out a jar of glue?*

A. *Going into the shed to relieve himself is his excuse.*

Q. *Excuse?*

A. *But on the night ... in question he appeared in the station with his jam jar of grey liquid. He was very concerned that it would be glue and that it could be put in a lock and I knew of my experience with glues that you can't take the top off them, because once you take the top off, it solidifies from the top downwards, and this was a sloshy liquid.¹¹*

1.28. It is now appropriate to quote Detective Sergeant White's denial of this matter. During cross-examination by counsel for the Tribunal he said the following:

I can tell you, Mr. Chairman, that that is the most ridiculous, dirty, disgusting allegation that has been made against me, that I went behind some shed to go to the toilet, that's a fact. That is a disgusting rotten allegation made by Garda O'Donnell ... it's aggravating, Mr. Charleton, coming from that man. Let me explain to you: there was no jar of glue of any kind. I have only heard of

¹¹ Transcript, Day 379(4), pages75-79.

this recently, it's quite upsetting, to be honest with you, very upsetting. There was no jar of glue. If I went in there, Chairman, I committed a crime, the crime of burglary. If that was the case Sergeant McKenna or Garda O'Donnell should have notified the Superintendent and reported the crime of burglary. I certainly did not go into Mr. Shovlin's sheds and take any jar of glue of any kind. This is dirt being pulled out at a late stage by these two men, the two men who nominated the suspects and got the warrants, Chairman. It's very aggravating ... There is nothing to tell, because I most certainly, Chairman, did not go behind any sheds for a pee or anything else and if Garda O'Donnell is used to doing that business I am not. It's as simple as that.¹²

1.29. In addition to the foregoing, as Chairman for the Tribunal, I asked Detective Sergeant White certain questions. This is necessary for the purpose of closely examining his demeanour. These questions are recorded in the transcript as follows:

Q. Chairman: Leave out going to the shed: did you bring back a pot of glue?

A. No, Chairman, I didn't. I don't even remember where the Shovlin sheds are. I presume they're behind the house.

Q. Chairman: Forget about the sheds for a moment. They're saying you brought it back to the Garda station afterwards?

A. Yes.

Q. Chairman: Did you bring back something to the Garda station?

A. No, I didn't, Chairman. I had no pot of glue of any kind. If I had I would have got it tested, in some way, or whatever.

Q. Chairman: Are they mixing it up with something else?

A. They're not, Chairman. There is no pot of glue. There is no bottle of glue, there is no jar of any substance of any kind. It's only in the last couple of weeks I've seen this thing. Why didn't they tell the Carty team this, the internal investigation team? This is a new allegation that has been concocted in the recent weeks. To the best of my knowledge anyway.¹³

¹² Transcript, Day 374(4), pages 45-46.

¹³ Transcript, Day 374(4), pages 46-47.

- 1.30. This issue might be regarded as being of little importance. However, the matter turns into a question of credibility. As has already been stated, the Tribunal does not believe that Mr. O'Donnell or Sergeant McKenna are suffused with bitterness against Detective Sergeant White. **The Tribunal has examined carefully the demeanour of all witnesses in giving evidence on this matter. The Tribunal is satisfied that on or about the 8th of November 1996, Sergeant John White went exploring the Shovlin lands and sheds for the purpose of investigating the arson attack. He was tempted, on seeing an open door, or an unlocked door, to go into a shed and take away a jar of a substance. Probably this was not glue; because the jar was open it would have solidified. The Tribunal is satisfied Sergeant White took it thinking that it was some kind of combustible liquid. A notion that this might be connected to the gluing of the locks was also on his mind. Later that evening he brought it back to the Garda station and had a conversation with Sergeant McKenna as to this substance. In the course of this, mention was made as to whether this substance might have been used to glue the padlocks on the gates. The Tribunal is satisfied that Sergeant McKenna made some comment in reply as to the usefulness or not of the seizure by virtue of the absence of a warrant. It is highly probable that Sergeant White then took the substance away and possibly replaced it on his next visit in or around the Shovlin premises.**

The Criminal Damage Warrants

- 1.31. The Tribunal has no indication that the work organised between Sergeant John White, Sergeant Seán McKenna and Garda Patrick O'Donnell, in investigating the arson attack, was anything other than competent. This joint work was pursued in good faith. The jobs book was opened, which the Tribunal has seen. This indicates real determination to attempt to get to a solution to the problem as to who had committed the attack on the mast. The Tribunal understands that in or around the 9th of November, Sergeant John White went to Dublin with exhibits taken from the burned container. The Tribunal also understands that work detained him in Dublin until the 13th of November. While there is now some uncertainty as to these dates, all the witnesses are agreed that he was absent on the 12th of November. This is significant for a number of reasons.
- 1.32. Between the 7th and the 12th of November, the Gardaí investigating the arson attack enquired of their sources as to whether there was any indication as to who may have been involved. It was in consequence of these enquiries that the Tribunal is satisfied that the Gardaí felt it appropriate to investigate Hugh Diver, the Late Anthony Diver and Bernard Shovlin. The Tribunal makes no finding as to whether there were sufficient grounds for seeking to arrest any of the foregoing, or to search their premises, on the basis of the information that the Gardaí had

in their possession. The Tribunal makes no finding of fact against any of the persons arrested in respect of the later attack on the mast. The fact that suspicion may, or may not, have existed in respect of these individuals is not in any way indicative of their guilt. The Tribunal did not seek to penetrate into the confidential information given to the Gardaí and would have been forbidden from doing so, in any event, because of informer privilege. It would seem, however, that the primary focus of suspicion, and that is all that it was, was on Hugh Diver and the Late Anthony Diver. Any issue that there might be in relation to Bernard Shovlin related to the fact that the sheds at the rear of his premises could possibly have been used for hiding or storing equipment, or borrowing something for the purpose of the arson attack on the mast. No confidential informant of the Gardaí ever nominated Bernard Shovlin as a person who may have been involved in that crime.

- 1.33. In the absence of Sergeant White, on the 12th of November Sergeant Seán McKenna, accompanied by Garda Patrick O'Donnell, went to Bunbeg District Court and obtained search warrants in respect of the premises of Hugh Diver, the Late Anthony Diver and Bernard Shovlin. These were issued by Judge Liam McMenamín and it is appropriate now to quote same. As all the warrants are in identical form, only that issued in respect of Bernard Shovlin is reproduced here:

Rule 8(2)	Form 15
CRIMINAL DAMAGE ACT, 1991.	
Section 13(2).	
SEARCH WARRANT	
BEING SATISFIED from the application made, by information on oath and in writing sworn before me on this date, by the under-named member of the Garda Síochána for the issue of a search warrant under section 13 (2) of the above-mentioned Act, that there is reasonable cause to believe that a person has in his custody or under his control or on his (under-mentioned) premises a certain thing, namely jemmy bar, crowbar, inflatable liquid, or glue containers and that it has been used, or is intended for use, without lawful excuse,	
*(to damage property (other than data), namely locks, property of CMI and Telecom Éireann, Ált na gCappaill, Ardara belonging to another),	
*(to damage property (other than data), namely....in a way likely to endanger the life of another or with intent to defraud),	
*Delete clause which does not apply.	

I HEREBY AUTHORISE YOU Sergeant S McKenna, a member of Ardara, Co. Donegal, accompanied by such other members of the Garda Síochána as may be necessary, at any time or times within one month of the date hereof, TO ENTER if need be by force the premises situated at Ált na gCappaill, Ardara in the said court district, property of Bernard Shovlin TO SEARCH the premises and any persons found therein, TO SEIZE AND DETAIN anything which you believe to have been used or to be intended for use as aforesaid.

Dated this 12th day of November 1996.

Signed: Judge McMenamin
Judge of the District Court

To the above-named member of the Garda Síochána.¹⁴

- 1.34. The Gardaí were proposing to search for jemmy bars, crowbars, inflammable liquid or glue containers. Similar items were mentioned as a justification for the search on the warrants issued in respect of Hugh Diver and the Late Anthony Diver.

Unexecuted Warrants

- 1.35. It is common case to all the parties before the Tribunal that the warrants issued in Bunbeg District Court on Tuesday, the 12th of November 1996, under the Criminal Damage Act, 1991 were never executed. It is now appropriate for this Report to enter a slight legal diversion. The Criminal Damage Act of 1991 was implemented by the Oireachtas to codify and simplify the law in relation to vandalism to property. It includes new sections relating to the unauthorised accessing of data held on computers. It replaced the Malicious Damage Act, 1861. Certain sections of this, however, were left in force. Basically, these are section 35 (which deals with placing wood and other objects on railways with intent to obstruct or overthrow a train), section 36 (involving obstruction of engines or carriages on railways), section 37 (which deals with injuries to electric telegraphs), section 38 (which deals with attempts), and certain other sections involving the killing or maiming of cattle and other animals, exhibiting false signals in order to destroy a ship, destroying markings and lighthouses on the sea and also dealing with admiralty offences. When the Offences Against the State Act was enacted in 1939, the Malicious Damage Act was included in the schedule. In consequence, although those intent on destroying the constitutional order of the State might normally be thought of as using firearms and explosives, because many offences of criminal damage might be committed by subversives,

¹⁴ Tribunal Documents, page 495. Italics indicate the non-standard portions of the warrants, which are filled in.

as well as ordinary criminals, a power of arrest arose under section 30 of the Offences Against the State Act, 1939 where any malicious damage offence had been committed. Up to 1984, with the enactment of the Criminal Justice Act of that year, there was no power to detain persons for the purpose of questioning. There was, however, a confused power to use the time lawfully available between arrest and charge for the purpose of questioning prisoners. Under the Offences Against the State Act, 1939, section 30 allowed, and still allows, a person suspected of a scheduled offence to be arrested and detained for questioning for up to 48 hours, with the authorisation of a chief superintendent. That period of detention may now be extended by a judge. Section 29 of that Act allows a superintendent to issue a search order in respect of premises. In summary, with the passing of the Criminal Damage Act of 1991, the vast majority of powers under the Offences Against the State Act in relation to search and detention disappeared in respect of acts of criminal damage. Normally, these sections are only available if crimes related to firearms or explosives are suspected.

- 1.36. It is common case between all the parties that on Sergeant White's return from Dublin, probably on Wednesday, the 13th of November 1996, he discovered that warrants had been issued under the Criminal Damage Act, 1991. In consequence, he rang Garda O'Donnell. There is no conflict, on this issue, between Garda O'Donnell and Sergeant White. Garda O'Donnell indicated that he received a telephone call at his house on the evening of Tuesday, the 12th of November, after the warrants had been issued, and that Sergeant White had said to him that it would be "bad law" getting the warrants made out three days before a search was planned. Some conversation probably took place as to the absence of Geraldine Diver Shovlin and therefore the probable absence of Bernard Shovlin during the hours of daylight from his house, while his wife was away. Sergeant White denies using the phrase "bad law", in this conversation or otherwise. Both are agreed, however, that in consequence of that telephone call Sergeant McKenna was contacted.
- 1.37. There is confusion in Sergeant McKenna's mind as to whether he received a telephone call on the evening of the 12th or the 13th of November, in the aftermath of the issue of the criminal damage warrants. He does, however, recall that Sergeant White had indicated to him, whether in person or on the telephone is unclear, that he disagreed with getting the warrants because he felt that "the warrants were inadequate".¹⁵ Sergeant McKenna's account of the matter puts a conversation with Sergeant White occurring some time around Saturday, the 9th of November 1996, and in different terms. This is what he told the Tribunal:

¹⁵ Transcript, Day 378(4), page 119.

We had a discussion about the criminal damage and he was more or less clarifying with me what or where can we go from here. I was of the opinion we had only criminal damage and I recall him saying to me, criminal damage is not good enough, we need section 30 here. I think it was in the light of that, whatever conversation I had with Sergeant White about the warrants, after getting them, that I married the two together, that is the inadequacy of it...when [the Criminal Damage Act] came in [1991] our powers of detention were subjected to section 4 of the Criminal ... Justice Act which was 1984, and we would, could, keep somebody for six hours in detention for criminal damage, with a six hour extension. In contrast to that, under section 30, you can keep somebody for 24 hours and have it extended then later to 48 hours. I gathered from the conversation that he felt that the criminal damage warrants weren't sufficient in that respect ... that they were inadequate...this comment that section 4 is not good enough. You need section 30 here ... that when he said it was bad law, whatever way he said it, I felt that this is what he was hinting at, that it's bad law in that respect. That they weren't adequate.¹⁶

Sergeant McKenna was closely queried on this matter, both by counsel for the Tribunal and counsel for Detective Sergeant White. When Detective Sergeant White gave evidence, for the purposes of cross examination by counsel for the Tribunal, at the end of this module, he having given evidence in chief at the very beginning, a somewhat new version of the possible conversation he had with Sergeant McKenna emerged. Detective Sergeant White had consistently indicated that he probably had a conversation with Sergeant McKenna in relation to obtaining warrants prematurely. He emphasised in his evidence that his training, in the murder squad and elsewhere, was to prepare everything in relation to the investigation of an offence prior to executing a search warrant and prior to arresting and interviewing a suspect. He also emphasised that in the event that a warrant had been issued for some days, he would be concerned that a query could be raised by defence counsel, or by the judge, as to why a warrant had not been earlier executed. That, he said, was the nature of his conversation with Sergeant McKenna.¹⁷ Detective Sergeant White gave evidence, at the end of the module, that he probably had a conversation with Sergeant McKenna on the 9th or 10th of November concerning section 30 warrants. This was his evidence:

I see in one of the job sheets there that it says "N.B. section 30 warrants", or something about that. But, at that stage, I had it in the back of my mind, Chairman, that even though the Malicious Damage Act came in, I think ... in 1991, to the best of my

¹⁶ Transcript, Day 378(4), pages 118-120.

¹⁷ Transcript, Day 374(4), pages 56-60.

recollection there was at least one or two exceptions ... and one of them was interference with railways or State installations, I'm not so sure about the State installations but I think it may be it still is the case that interference with railways is one of the things...one of the persons named on the C56 was a listed Provisional IRA at the time, the third suspect. And while there was no suspicion that actually the PIRA was involved, there was a discussion between Sergeant McKenna and myself that the men responsible may have enlisted help from someone with know-how. I am not talking about explosives, just that they may have elicited help from somebody who would have knowledge of these kind of matters ... but after a few days that man's name, we came to believe that he wasn't involved ... I didn't know this man at all, but obviously Sergeant McKenna did.¹⁸

The Tribunal would wish to emphasise that any suspicion as to the involvement of any member of the self-styled 'Provisional IRA' was not related to any of the suspects later arrested. This is a completely different person in respect of whom suspicions soon evaporated.

- 1.38. The Tribunal has concluded that it is highly probable that Sergeant White had a desire to use the powers available to the Gardaí under section 30 of the Offences Against the State Act and that he expressed this view to Sergeant McKenna in the context of his frustration that, in his absence in Dublin, the Criminal Damage Act of 1991, which did not carry such powers, had been evoked. This was, in effect, thought of by Sergeant White as the Gardaí pinning their colours to the mast and limiting their options in terms of the credibility of later using the extensive powers under the Offences Against the State Act in the face of Sergeant McKenna and Garda O'Donnell having chosen to get a warrant under the more limited powers available by virtue of the Criminal Damage Act of 1991.

The Explosive Device on the Mast

- 1.39. The radio and television transmission equipment burned out in the arson attack that was discovered on Thursday, the 7th of November 1996 needed to be replaced. By this stage, in the dispute between CMI and the local community, pickets were no longer in place at the entrance to the mast beside Bernard Shovlin's home. It appears that CMI did not tell anybody as to when the container with fresh equipment, to replace that burned out, was to be delivered. Sergeant Seán McKenna told the Tribunal that on the morning of the 19th of November he was somewhere near the mast in circumstances where he had a view of Ált

¹⁸ Transcript, Day 382(4), pages 59-63.

na gCappaill. He saw a lorry trailing a container snaking up the access road from Shovlin's. He was not expecting this and he felt he should make enquiries about it. In consequence, he returned to Ardara Garda Station at what he believes was approximately midday. From there he telephoned Sergeant White to find out if he knew anything about the container arriving. Apparently Sergeant White did not.¹⁹ Sergeant White's account as to how he went to the mast that morning involves a message being received, possibly the message from Sergeant McKenna, that there was a problem at the mast. He asked Garda George McNeill to accompany him. Together they drove up towards the mast. The Tribunal is satisfied that the device later found on the mast was already in place before the personnel accompanying the container arrived at the mast compound, and before Garda McNeill and Sergeant White drove up there. Paul Browne worked for Cable Management Ireland Limited at the time. On Tuesday, the 19th of November 1996 he arranged for the delivery of the new equipment to replace that which had been vandalised. Thomas Murray and he met in Donegal town with the driver of the lorry that was transporting in the new container. They then travelled up together to the mast. His account to the Tribunal continued:

We estimate that we were there for between an hour and two hours on site. The truck arrived behind us, we drove in advance of it. The truck driver was required to remove the new container and temporarily locate it in order to remove the old one. He would then have removed the old container and replaced the new one in its position ... Around the time we were just about finished carrying out the work, my colleague, Tom Murray, noticed an object taped – it appeared to be taped to the gantry, which is the overhead routing for cables ... Well we didn't know what it was. But it certainly looked as if it was out of place. It had tape, insulating tape, wrapped around it: clumsily I would say. It looked like it had hydrodare, which is a rubber, a plastic pipe used in plumbing ... well, we surmised that it may have been [an explosive]. We didn't know what it was, but we brought it to the attention of the Eircom employee who was on site...and we presumed that he was – we advised him, you know, he should report this. We reported it as something that shouldn't be there. It didn't look like it should be there. I think Tom said it could be a fuse hanging out of it but we weren't sure what it was when we were looking at it ... We just informed him that it was there, we showed it to him and we didn't know what it was, he didn't know what it was either. We just said, you know, you should report this.²⁰

¹⁹ For the account of Paul Browne, CMI employee, as to the delivery of the container see Day 375(4), pages 79-88.

²⁰ Transcript, Day 375(4), pages 83-86.

- 1.40. The Tribunal has had the benefit of the evidence of Detective Sergeant William Brennan and the written report of Commandant Larry Devaney.²¹ From their evidence the Tribunal is satisfied as to the following. The device on the mast was not a bomb. It was, in fact, a hoax. It consisted of a length of plastic piping, similar to down-pipes that might be used for the guttering of domestic houses, roughly bunged at one end with a crude piece of wood and stopped up at the other end with a number of ordinary Halloween bangers. From these Halloween bangers, a fuse had been extracted which was hanging out of the device. The interior of the device consisted of a few dozen Halloween bangers that had been split apart so that their powder was loosely contained within the pipe. It is possible that if someone had lit the fuse, it would have ignited some of the bangers and caused the powder from the other split bangers to produce a pyrotechnic effect. In other words, it would seem that what might have happened would have been a bang, or a whoosh, accompanied by a mild flash of light. The device was not one which was designed to explode. In particular, it did not have the capability of blowing the well insulated cables on the gantry from their mooring. In terms of law, it would be right to treat it as an explosive device since it consisted of powder, which under the 1875 Explosive Substances Act is listed as an explosive.
- 1.41. That, however, is not the real issue before the Tribunal. The real issue is who put the device there, and for what purpose. There are two main possibilities that arise on the evidence. The first is that the crude device had been put there by protestors in escalation of their campaign. It might be argued, in that regard, that these matters follow an escalating pattern. First of all, you have the protests. Then, you have nails on the road and barbed wire on the ditch where the Garda car turned. After that, you have the gluing of locks. You then have a substantial escalation with the burning of the radio and television equipment. Finally, you have an attempt to blow up the mast. The Tribunal does not accept this. The protestors had shown that they were well capable of engaging in peaceful protests through lawful and democratic means. Some small number of protestors, without the approval of the vast bulk of the law-abiding community of west Donegal, decided to escalate the dispute with nails, the gluing of locks and barbed wire. One or two mavericks then went further and burned the container. These mavericks, however, had shown they were well capable of causing damage. It is difficult to know why they would have chosen to put together such a crude device when, perhaps, stuffing a block of firelighters between the cables and lighting it on a calm night might have caused much more damage.

²¹ Tribunal Documents, page 130.

- 1.42. The other possibility is that the crude explosive device was an excuse invented by a member of An Garda Síochána for the purpose of invoking the powers of search and detention under sections 29 and 30 of the Offences Against the State Act, 1939, as amended.

Garda Activity at the Mast

- 1.43. Detective Sergeant John White's account of how he came to go to the mast and discover the device strapped to it was as follows:

I started at 12 o'clock, at noon ... and somebody, some Garda in the station, must have told me that there was a problem with the mast because I asked the nearest person, the only available person to go with me, which was Garda McNeill ... usually it would be Garda Dooley I would ask to go up with me ... but he wasn't around ... Certainly there wasn't a message passed to me: there is a suspect explosive device on the mast. That certainly wasn't the case. But there was some problem with the mast or some problem at the mast. But this had been the way for the previous couple of weeks between stones being thrown, locks being glued, the container being burned. It would seem to be happening on a fairly continual basis ... To the best of my recollection, Chairman, we got up to the mast, there was a Telecom man there; at least, he had the door of the Telecom hut open. I presume he was Telecom; he had to be. He informed me of the device on the mast, or something on the mast. He pointed vaguely over to that direction and I went over to look at it straight away and I called Garda McNeill over then to look at it and we didn't get any more than, I suppose, six feet from it, because there was something sticking out the bottom of it which looked like a fuse and there was burning on it ... well I thought there was some kind of an – certainly an explosive device, yeah, because of the fuse type of a thing sticking out of it and there was burning on the end of it. Certainly the way – obviously somebody had put it on – it was strapped on with tape and it was there intentionally for some reason.²²

- 1.44. There is a slight divergence between the evidence of Detective Sergeant White and that of George McNeill, who accompanied him. It seems to the Tribunal, however, that this divergence is explicable on the basis of recollection and does not undermine the credibility of either of the witnesses. Mr. McNeill's account is of being inside the hut belonging to Telecom, and talking to a Telecom Éireann employee for some time, between five and ten minutes, before Sergeant White

²² Transcript, Day 374(4), pages 73-78.

called him over to the mast and drew his attention to the device on it. It seems probable that against the background of what the CMI employees had discovered, someone, be it a CMI or a Telecom Éireann employee, drew the attention of the Gardaí either directly to what was on the gantry leading to the mast, or to the general area of where the explosive device was strapped.²³ It is probable, from the note in Sergeant Seán McKenna's diary, that he had seen the container going in the direction of the mast at or around 12.15. He believes that after seeing this, he went back to Ardara Garda Station and made a telephone call to the District Headquarters at Glenties. As to how long he waited, he could not say. He claims that he was collected by Sergeant White in an unmarked car and that the two of them drove to the mast. He claims to have gone to the mast in ignorance as to what was up there. If anything had been said he would have brought his scenes of crime equipment and a camera. On arriving at the mast, he has a vague recollection of Garda McNeill being somewhere there at the time. His recollection is that his attention was drawn to the object on the mast while he was walking away from it and that it was Sergeant White who pointed it out to him. On briefly examining it, he thought it was an incendiary device.²⁴

1.45. At some stage, Superintendent Cullinane was called. He also came to the mast. At some stage, also, Commandant Devaney came to the mast. What is deeply peculiar is the lack of activity of an appropriate kind around the mast. Sergeant McKenna had to return to get his scenes of crime kit. What he did with it is more than uncertain. No fingerprints appear to have been taken. No sketch was drawn up. No photographs were taken. Indeed, Sergeant McKenna did not have a camera. After the discovery of the device, he took his meal break, possibly in his own house, an event lasting upwards of an hour. He then returned to the mast without a film in his camera, film being readily obtainable, it is fair to suppose, in any supermarket or large shop in the area. Sergeant White used his video camera and made a video recording of the mast and its environs.

1.46. Garda Martin Cullen took up duty preserving the scene of the mast at Ált na gCappail at 15.00. His notebook is an invaluable source of information for the Tribunal. It is also a model of how brief notes are essential to structured police investigations. He records that at 15.00 Sergeant Gallagher and Superintendent Cullinane were present and that both left with Telecom Éireann personnel. At 16.00, Sergeant White arrived. Present at that time was Mr. Michael Dineen of Telecom Éireann. At 16.20, Sergeant White took numerous photographs of the installation. At 16.30, an army team arrived from Finner Army Camp. Garda Cullen spoke with Commandant Devaney and Sergeant Barry, of the Third Garrison in Cork, and EOD of Finner Camp. He also took a note of their

²³ Transcript, Day 374(4), pages 156-159.

²⁴ Transcript, Day 378(4), pages 122-129.

telephone numbers and extensions. He saw nothing as to what the army did to the device to render it safe. If he did, as he said, he would have recorded it in his notebook. Curious details emerge from his evidence, which the Tribunal accepts as being entirely truthful and disinterested. He was not warned that there was any danger. He was not told that it was a bomb site or that he should take care and stand back. The gate to the compound was closed but only, it would appear, to stop unauthorised persons from gaining access as a result of the diligence of Garda Cullen. Sergeant White stood with his video camera at a distance of four to five metres from the device and filmed it. It would appear that as darkness was falling, at around 17.00, the device was taken off the gantry and that some kind of a very small controlled explosion was carried out by Commandant Devaney. Then, the device was put in the charge of Sergeant McKenna. As darkness closed in, the Gardaí left the site.²⁵

The Reaction of Superintendent Cullinane

1.47. Superintendent Cullinane was convinced that what had occurred at the mast was a major escalation of the protest campaign by maverick protestors. A flavour of this comes through from his evidence:

I got a report from Sergeant White that there was a suspicious object tied to the power cable on the communications mast at Ált na gCappail. Now I went to the site and I met Sergeants White and McKenna there. They showed me a black plastic piece of piping, about twelve inches in length, attached to the power cable and there was a partly-burned fuse protruding from the pipe. I was of the opinion that it was an explosive device and I had an army EOD team summoned to the site ... I was convinced it was [an explosive device] because when I was examining the – it was maybe seven, I forget, seven or eight feet up from the ground, and I was looking at it, when I saw the pipe it was a – oh there was a timber bung at one end of it and at the other end there was a partly burned fuse and when I saw the fuse, I became alarmed. I was convinced it was some type of a bomb and I ordered the men back from it and I called for the army team ... in the situation I was in there, I was convinced it was some type of bomb ... I was concerned there would be further bombs planted there and somebody would be injured or even worse ... this is a very sinister development in it ... I felt it was the same people who had committed the malicious damage there.²⁶

²⁵ Transcript, Day 377(4), pages 39-45.

²⁶ Transcript, Day 370(4), pages 37-38.

- 1.48. If the objective of the putting of the device on the mast was to enflame senior members of An Garda Síochána with the idea that a bombing campaign had begun, it succeeded. The Tribunal finds the entire circumstance relating to the Garda handling of the suspected crime to be deeply suspicious. Even though a Telecom Éireann worker had apparently discovered the device on the mast, which had all the appearances of a pipe bomb, according to the evidence of Detective Sergeant William Brennan, he remained quietly working in his hut, a matter of some metres away from the bomb. The Tribunal regards this as unlikely. Sergeant White had, on his own evidence, gone up to the mast because he had been “told there was a problem with the mast”. In these circumstances, the Tribunal would have expected that he would have carried out some enquiries. However, he did not. Given that it was definite that it was Sergeant White who discovered the device, as opposed to Sergeant McKenna, and on this point there was some confusion prior to the hearings, it would be reasonable to expect Sergeant White to behave as a Garda Sergeant. This would have involved him noting the matter in his notebook and carrying out appropriate investigations. This did not happen. As Sergeant White had just discovered a device, and suspecting that it was an explosive, one would have expected that he, the Telecom Éireann employees on the site, the CMI employees on the site, and Garda McNeill, would all have either made statements or had statements taken from them. Instead, these statements are absent. Further, there is an absence of notes in Detective Sergeant White’s notebook in relation to this matter.

The Device at the Station

- 1.49. The device on the mast was brought by Sergeant McKenna and Sergeant White back to Ardara Garda Station. This is a small station. The Tribunal has examined it. It has basic, but good, accommodation for the purpose of police work. Downstairs, there is a conference room with a table and chairs and a corridor leading to the stairs and the back yard of the Garda station. Upstairs there is an office for the sergeant and other offices which can be used by, for example, a visiting superintendent. On duty in the station were Sergeant John White, Sergeant Seán McKenna and Garda John Kilbane. Later on in the evening, Superintendent Denis Cullinane also comes into the picture. Very late in the evening, Garda Patrick O’Donnell arrived for duties which included a briefing as to arrests which were to take place the following morning.
- 1.50. The Tribunal is satisfied that Sergeant Seán McKenna intended to deal with this device in a way that was consistent with a proper exploration as to its exact chemical make-up and purpose. He brought the device into the conference room.

Regrettably, he left the door open. He began packaging the various elements of the device into various plastic bags which would all have been consigned into one large marked evidence bag for the purpose of transmission to the Forensic Science Laboratory and the ballistics section at Garda Headquarters.

The ‘Test’

1.51. A stark conflict of evidence then arose as to what happened as Sergeant McKenna was packaging the device. It is important to record this in detail. The Tribunal has read in full all of the statements gathered by its own investigators, and by members of the Carty investigation team, as to rumours which began circulating in Donegal County that the device found on the mast had been made up in the rear yard of Ardara Garda Station, or some other Garda station in the area, and planted on the mast by a Garda for corrupt purposes. It seems to the Tribunal that this rumour had its origin in the evidence which the Tribunal now proposes to record. Like all rumours, in the telling and in the re-telling of it, whatever truth there may have been in terms of inspiring it became lost in a mushroom-like expansion of fantasy. It is important to allay public disquiet as to whether the device on the mast was made up in a Garda station. If it were, then it might seem a matter of routine that evidence could be manufactured by Gardai prior to an arrest or search operation. This did not happen. The Tribunal is certain that the device on the mast was made up secretly. The Tribunal is equally certain that rumours of a test of the device in the yard of Ardara Garda Station became rumours that this device was manufactured there. These rumours were, and are, wrong.

1.52. Sergeant Seán McKenna told the Tribunal that, when dealing with the device on the table of the conference room, he had gloves on and a set of forensic over-clothing. This is what he told the Tribunal of what happened next:

I recall Sergeant White coming in. And, he made some comment “is this the device”, or I think he made some comment, anyway. And then he produced a spoon and he took a sample from the device, from the powder. It was a greyish powder. And he left the room. And I believe that Garda Kilbane left the room immediately after him. And, needless to say, I was shocked and it was the first time this ever happened to me. And I made very sure that it never happened to me again, either, afterwards. The two left the room and I believe I continued on to package the device. I have some recollection of either, during this time or shortly afterwards, of meeting Sergeant White halfway down that hallway, but I don’t know what I talked about. I know it was at the bottom of the stairs. And I could be mixing this up, with a few minutes later on,

I am not that sure. But I recollect talking to Sergeant White down that stairway. But, in any event, I continued on to package the device and then label it. And then secure it...I don't recollect him coming back into the room ... I believe he said, and I am not too sure whether he said it from outside in the hallway, or whether he came into the room to me, but I believe that he said that he believed it was an explosive device, by whatever test that he carried out ... and I cannot recall whether I said anything or not. But, I was so stunned I am sure I did say something. But I don't know. I don't remember what I said. In fact, this changed my complete thoughts on packaging samples thereafter. I never went into anywhere where there was anybody else. I always had a locked room and I always did it in Ardara Station afterwards. It was to change my complete method of packaging samples and the fear of cross-contamination was evident.²⁷

Sergeant McKenna said nothing to the Forensic Science Laboratory as to the possible contamination by, presumably, a teaspoon of this sample, and he did not mention this incident to any superior officer.

- 1.53. Garda John Kilbane was in the conference room casually observing, it appears, Sergeant McKenna going about his work. He gave the following account of what happened:

Sergeant White came in the door from the hall of the Garda station into the conference room and he took a bag that contained the grey powder and he took a spoonful from it and he took it out the back and I followed him. He may have said that he wanted to check to see if there was an explosive substance ... yes. Teaspoon. An ordinary teaspoon. He walked in, you know, and just caught the bag...and took a sample out of it...went out the back on the step and tried to light it ... I wanted to see what it was too ... He actually tried to light it ... He wanted to test it to see if it was an explosive substance or words to that effect ... He went outside and tried to light it on the step ... I have a vague recollection of my giving him the matches, because I smoked at that time ... but he attempted to light the powder ... no reaction. I stepped back, actually, just in case it did go off ... sorry, he also tried to light the ticker tape, that you get in, say, in a [Christmas] cracker or something similar to that ... I walked in the hall in front of him and he turned left and as he did so he said he was satisfied it was an

²⁷ Transcript, Day 378, pages 131-135.

*explosive substance ... I would have been gob smacked. I was gob smacked.*²⁸

- 1.54. The Tribunal has added the weight of this evidence to the slight support that is available from the testimony of Superintendent Denis Cullinane. He gave no indication of knowing about a test of this kind until he actually came to give evidence before the Tribunal. That night, Superintendent Cullinane issued three warrants under section 29 of the Offences Against the State Act, 1939 to search the premises of Hugh Diver, the Late Anthony Diver and Bernard Shovlin. In that regard, there must have been some conversation between Sergeant White and Superintendent Cullinane. One aspect of Superintendent Cullinane's account of it is that he had a vague recollection of Sergeant White saying that he had tested the powder and "either ignited it or attempted to ignite it".²⁹ In the net result, the Superintendent recalls that Sergeant White "was satisfied it was kind of an explosive".³⁰ The Tribunal would now like to say something of its own procedures.
- 1.55. The procedure of the Tribunal is not to identify allegations and to attempt to prove them against various persons who might, in criminal proceedings, be regarded as suspects. There is more than one model as to how to do an investigation properly. The purpose of a criminal trial is to allow the trier of fact, the jury, the judges in the Special Criminal Court, or the judge in the District Court, determine as to whether the prosecution have fulfilled their burden of proving their case beyond all reasonable doubt. The State is not entitled, in a criminal prosecution, to call the accused. The accused is entitled, it would seem, not to make a positive case. In other words, if it is alleged against a person that he was identified as being on O'Connell Street and stabbing the victim dead at a particular time of a particular day, the accused can remain silent and not put any positive case to a witness who identifies him as the assailant of the victim. Instead, the cross examination can meander around whether or not there was good lighting and whether the witness has a good recollection of events. If the accused is to give evidence, his case must be put to the prosecution witnesses. A tribunal is different.
- 1.56. The purpose of a tribunal is to discover the truth. The Tribunal is entitled to adopt any fair procedure which aids that. The Tribunal has made it clear to parties appearing before it that where a case is made adverse to the reputation of any party represented before it, it is incumbent on that party to cross examine by directly putting their case to the witness. In this case, Detective Sergeant White was required to put his case to witnesses who said things about him with which he disagreed. In other words, during the course of the testimony of a given

²⁸ Transcript, Day 377(4), pages 69-71.

²⁹ Transcript, Day 370(4), page 43.

³⁰ Transcript, Day 370(4), page 43.

witness, the Tribunal had the benefit of hearing not only the witnesses' case, but the contrary case of any party whose credit or reputation was touched by that testimony.

- 1.57. Detective Sergeant White's case, in cross examining Superintendent Cullinane, Sergeant McKenna and Garda Kilbane, was that the spoon test incident never happened. In addition, he gave the following testimony:

I have no recollection, and that is the truth before God, Chairman, of touching the device in any way. Initially, it was a question of me opening bags and that certainly didn't happen. I am too long in this game of police work to open or unseal bags in any way and that certainly didn't happen. Genuinely, I have no recollection of taking a spoon of powder and testing it outside the back door. Because, personally myself, I wouldn't know how the powder lights. I have seen it several times, 30, 40 times prior to that and I knew they were firecrackers because the Commandant showed them to me and told me and his opinion was it was an explosive ... I am as sure as personally I can be, Chairman, in my memory. I cannot see how I could do it and not remember it. Believe me, at this stage, Chairman, I would tell you if I did ... I deny it, yes. I would remember if it happened, Chairman. I hate going into conflict with both of these men ... yes, I deny it.³¹

- 1.58. The Tribunal is satisfied that Sergeant John White did take a teaspoon and go into the conference room, took up a spoonful of powder in the presence of Sergeant McKenna and Garda Kilbane, moved with it down the corridor to the backyard of the Garda station and then, using either his own match or borrowing a match from Garda Kilbane, played a flame on it and attempted to light a taper of some kind. He then returned with Garda Kilbane trailing after him, back down the corridor of the Garda station where he voiced a loud opinion, so that these two members of An Garda Síochána could hear it, to the effect that he was now satisfied from testing the powder that it was an explosive.

Issuing the Warrants

- 1.59. The sequence of events in relation to the issuing of warrants under section 29 of the Offences Against the State Act, 1939 by Superintendent Denis Cullinane, the Tribunal is satisfied, was as follows. Superintendent Cullinane was upstairs in Ardara Garda Station. After the test by Sergeant White was carried out, he came up and spoke to the Superintendent. Sergeant McKenna then came up and the

³¹ Transcript, Day 374(4), pages 98-100.

conversation continued. The reason why Sergeant McKenna came up is that he was brought up. At some stage during the conversation between Superintendent Cullinane and Sergeant White, Superintendent Cullinane asked where Sergeant McKenna was. Sergeant White then left to get him. Superintendent Cullinane claims that, at this stage, he had blank section 29 warrant forms in front of him. Sergeant McKenna claims that by the time he came upstairs one warrant appeared to have been almost fully filled out, while the other warrant was about half way filled out. Sergeant McKenna limits his involvement in relation to issuing the warrants to indicating to the Superintendent what the relevant townlands were for the various subjects of the proposed warrants. Sergeant McKenna also claims that he said to the Superintendent that he was concerned as to whether this device was an explosive substance. He backed up this evidence by claiming that, on the issue of the warrants, he was deeply concerned as to whether the Forensic Science Laboratory would find an explosive substance within the powder, and other pieces from the device, which he had sent up to Garda Headquarters. In the event, when word arrived from the Forensic Science Laboratory, weeks later, that an explosive substance had been found, he claims to have been relieved.

1.60. Detective Sergeant White makes the case that Sergeant McKenna was pushing for the issue of these warrants and that, in this regard, Superintendent Cullinane was acquiescent. The Tribunal is satisfied that Superintendent Cullinane had reacted, when he saw the device at the site of the mast, in such a way that it made it highly likely that he was going to issue search orders, at some stage, under section 29 of the Offences Against the State Act, 1939. Sergeant McKenna, on the other hand, gives the impression, both at the site and later at the Garda station, of holding back from engaging in the kind of vigorous investigation of the matter which the Tribunal is satisfied he was well capable of. The Tribunal contrasts, for example, the very full sets of photographs that were taken in relation to the arson incident with a complete absence of notes by him, or photographs taken by him of the device found on Tuesday, the 19th of November 1996. The Tribunal is further satisfied that Sergeant White engaged in the teaspoon test of the powder from the explosive in order to have at least a pretence of proof that an explosive device was involved before visiting Superintendent Cullinane. The Tribunal does not feel it necessary to resolve any issue as to whether warrants were partially written out prior to Sergeant McKenna coming into the room, having been fetched by Sergeant White.

1.61. It suffices to record that Sergeant White was pushing for the issue of the warrants immediately. The Tribunal finds this additional fact highly suspicious. When recalled to give evidence, for the purpose of cross examination, on day 382 of the Tribunal's hearings, Detective Sergeant John White firmly told the Tribunal that his

entire experience and training in relation to investigations left him in a position where important steps, such as arrests or searches, should never be rushed into. The Tribunal contrasts his reaction to the issue of warrants under the Criminal Damage Act, in respect of the arson attack on the mast, and the fact that almost two weeks had elapsed without any arrest taking place since the discovery of the arson attack on the mast on Thursday, the 7th of November 1996, with the rush in respect of this discovery of the device on Tuesday, the 19th of November 1996.

- 1.62. The Tribunal is satisfied, from Detective Sergeant White's evidence, that his entire methodology, in genuine circumstances, would have been to carefully check, record and note all pertinent aspects in relation to the commission of a crime. Further, the Tribunal is satisfied that he would have done all investigations that seemed to logically arise out of the necessity to investigate the background to a crime prior to effecting a search and an arrest. Sergeant White was, in respect of the arson investigation, pleased by the availability of confidential information tending to point in a particular direction. It is inconceivable to the Tribunal that he would not have asked the members of An Garda Síochána who had obtained that information, to return to their confidential informants and to find out what was now being said in relation to this apparent attack with an explosive device on the mast. In fact, the entire thrust of this investigation, which the Tribunal is satisfied was substantially led by Sergeant White, was to react immediately on the discovery of the explosive device, in contrast to the painstaking methodology employed in investigating the arson attack.

Is This Explicable?

- 1.63. About a year previous to these events, on the 12th of September 1995, at the annual Harvest Fair in Glenties, a large number of counterfeit video tapes and other items, including fireworks, had been seized by the Gardaí. The Tribunal is satisfied, from the evidence of Sergeant Conal Sharkey, that this seizure of fireworks was well known to the Gardaí in the Donegal area. There was no real need to regard these fireworks as exhibits in a future criminal trial as, on the evidence of Sergeant Sharkey, it was impossible to attribute possession of them to anyone. They were therefore stored together with traffic cones, spare tyres and items of damaged furniture, and the like, in an unsecured room in Glenties Garda Station. The fireworks, or the bulk of them, remained there until the 9th of December 1997 when they were destroyed in a quarry.
- 1.64. The Tribunal is satisfied that on the evening of the discovery of the device on the mast, Sergeant McKenna and Garda O'Donnell began to draw conclusions from everything they had seen. It seems to the Tribunal that

Sergeant McKenna was drawing back in relation to the duties he was forced into by virtue of the discovery of the device on the mast. He was reluctant. Probably his state of mind stemmed from suspicions that were invading on his desire to do his duty. When the test had occurred at Ardara Garda Station, his suspicions were heightened. That was the point at which he should have laid his suspicions before Superintendent Denis Cullinane. Garda O'Donnell, on arriving at the station, and hearing about the test, began to suspect that the discovery of the device on the mast was not the discovery of a crime, as that word is usually thought of. He, too, should have spoken to Superintendent Cullinane.

1.65. The failure of both of these men to lay their suspicions before their Superintendent was explained to the Tribunal on two bases. Firstly, it was obvious that the Superintendent regarded Sergeant White as his man and had every confidence in him. An attack on his integrity, at that point, would have had serious consequences. Furthermore, as policemen used to dealing in proof, they were very well aware of the fact that they merely had suspicion without proof. Secondly, the Superintendent had the power to transfer them out of the district where they were comfortable and respected members of the local community. They therefore decided to remain silent about the suspicions which, the Tribunal is satisfied, they held at that time. The Tribunal might be minded to criticise them for their silence but for the fact that structures of An Garda Síochána did not then allow for confidential communications to be made to a superior officer, or to Garda Headquarters, in order that a serious and deeply suspicious state of affairs might be investigated without serious consequences for anyone who might be regarded as "making an allegation". The Tribunal understands from the evidence given in relation to the Barron death investigation by Deputy Commissioner Peter FitzGerald, that a structure is at the planning stage in Garda Headquarters in order to allow legitimate concerns to be expressed, and investigated, without those who have genuine concerns being penalised. The Tribunal regards this as essential for the proper future functioning of An Garda Síochána. The members involved, Garda O'Donnell and Sergeant McKenna are not therefore to be blamed for being put into, and forced into, a situation where they were required to apparently carry out a duty which they found repulsive. The potential reaction of the Superintendent, in any event, is to be gauged by what occurred on the following afternoon when a controversy arose as to the release from Garda custody of Bernard Shovlin.

1.66. How these suspicions began to emerge is well captured in the examination by counsel for the Tribunal of Mr. O'Donnell:

Q. *So there was a much more laid back view being taken of this thing?*

A. *Yeah...well, on account of the powder that was in the yard and that, that would be the reason for the lighter view being taken of it...well nobody had proof. Sergeant White had powder in the yard and John Kilbane had come in and told some of them that it was the powder out of the bangers that were in the station and assumptions were being raised then that?*

Q. *Are you saying that it didn't look like a serious terrorist event?*

A. *Yeah, with the powder that was there, from that on, Gardaí didn't take it that it was a serious terrorist event.*

Q. *So whatever the Superintendent thought, the local members on the ground didn't think that this was some kind of a terrorist device?*

A. *Yes.*

Q. *I understand. Now, you were not working on the day when the actual device was found, but you did come in later?*

A. *I wasn't working early on in the morning time, I was away.*

Q. *In the evening time you were working?*

A. *I would have got a call earlier from Detective Garda Dooley, John Dooley in Glenties...telling me that a device had been found on the mast. At that stage I thought it was one of the suspects that might have – it's the first thing that came out of my mouth.*

Q. *Did you have some suspicion in relation to bangers in this device? I mean, were you putting any fact together with any other fact?*

A. *Well going by the story I heard that night in the barracks, it looked like as if the bangers were used to plant the device on the mast.*

Q. *What bangers are you referring to?*

A. *The bangers that would have been seized in Glenties.*

Q. *Did other people have that view?*

A. *Well, there was general talk about it. Nobody had any proof, but we were assuming that something might have happened.*

Q. *I suppose, policemen being suspicious individuals, by profession. Was it a case of you trawling through every possible possibility that might arise out of this thing and trying to think it through, or was there a definite view?*

A. *Well there was a view that what was involved and, you know, it transpired that it was possibly a set-up job.*

Q. *Did that make you unhappy, vis-à-vis any question of arrests then?*

A. *It did, yes.³²*

Telephone Calls to the Divers

1.67. Approaching midnight on the 19th of November 1996, or early in the hours of the 20th of November 1996, Hugh Diver and the Late Anthony Diver both received telephone calls at their respective residences. Since Anthony Diver is now deceased, the Tribunal cannot rely on any account attributed to him as to the nature, or origin, of these phone calls. Hugh Diver's account of the telephone calls was that he received an anonymous telephone call to his home. The caller said "what the hell is going on on the hill?" He replied that he would not know what was going on on the hill, because he was not on the hill. Then there was a pause and the male caller said "could you meet me in Dungloe tomorrow?" Mr. Diver asked why would he want to meet this person in Dungloe tomorrow, because he had enough to do without travelling to Dungloe. The caller then said "I'll leave it, I'll give you a shout tomorrow."³³ In evidence, Mr. Diver identified the accent as a Cavan accent. He claims that the voice on the telephone was Sergeant Seán McKenna. The Tribunal notes, however, that Mr. Diver had previously claimed that two different members of An Garda Síochána had been the author of this call. In the circumstances, it seems very highly probable that Mr. Diver, while attempting to do his best in a difficult situation, was wrong. **The Tribunal does not believe that Sergeant Seán McKenna would engage in such a subterfuge.**

1.68. There are two other pieces of evidence to add to the account of Mr. Diver. On the evening of Thursday, the 21st of November 1996, Garda Patrick O'Donnell and Sergeant John White visited Bernard Shovlin. The ostensible reason was to

³² Transcript, Day 378(4), pages 89-90.

³³ Transcript, Day 381(4) pages 12-13.

recover a key which fitted one of the original glued locks which, it might be supposed, could come under forensic scrutiny. Present in the house were Bernard Shovlin, the Late Anthony Diver and Geraldine Diver Shovlin. It is possible that Bernard Shovlin did not witness a row which broke out. During the course of the visit by the Gardaí, Anthony Diver became emotional and said something to the effect that Sergeant White was no more interested in a key than he was, but that he was "here for a second bite of the cherry".³⁴ He then threw an allegation against Sergeant White that he had planted the device on the mast for the purpose of the arrest. Sergeant White accepts that this occurred. He does not accept the evidence given by Mr. O'Donnell and by Geraldine Diver Shovlin as to what happened next. Anthony Diver, according to Mr. O'Donnell and Geraldine Diver Shovlin, then accused Sergeant White of making a telephone call to his house.³⁵ According to Geraldine Diver Shovlin's account the Late Anthony Diver confronted Sergeant White with a claim that he had identified his voice because "he recognised it that day when we were leaving Glenties".³⁶ The Tribunal accepts the account given by Geraldine Diver Shovlin and Mr. Patrick O'Donnell in their testimony. It does not accept the account of Detective Sergeant John White.

- 1.69. The second piece of evidence that bears on this matter relates to an event that was alleged to have happened within about half an hour of the telephone calls being received by the Divers, but in Ardara Garda Station. Garda John Kilbane gave the following evidence to the Tribunal:

*When I was leaving, I have a recollection of meeting Mr. White on the way coming into the day room; there is a wee corridor there. I was out, on my way out home, because I had to get up in the morning. I think John White said to me that he would give them a sleepless night – they would have a sleepless night tonight, that's all.*³⁷

Mr. Patrick O'Donnell's evidence on this matter was as follows:

Sometime during the search, and this is before I arrested Anthony Diver, I recall Anthony Diver over on my right hand side and I feel it was from this shoulder of him saying something that he received phone calls the night before, or that night – in fact it was that morning he said that he had received phone calls and he said something about that one of the phone calls referred to him doing a good job on the hill. It was at this stage that I recalled a

³⁴ Transcript, Day 378(4), page 108.

³⁵ Transcript, Day 378(4), page 108.

³⁶ Transcript, Day 376(4), page 92.

³⁷ Transcript, Day 377(4), pages 76-77.

conversation that I had with Sergeant White the night before where I met Sergeant White in the hallway and I have a recollection of meeting Sergeant White in some kind of a dim area: it wasn't a fully lit area, so I gather it was a hallway, where Sergeant White made some reference to phone calls. Now at that stage I didn't seem too worried about it, but when Anthony Diver made the allegation about phone calls, I married that, or I associated that, with what Sergeant White had said the night before. I just made a link in my mind between the two of them ... the only recollection I have is that he made some reference to telephone calls. Whether that related to the earlier conversation I had with him, where he said he was obtaining telephone records or not, but the following day I made the link. I thought is this what he was talking about last night? But it was only a suspicion on my behalf.³⁸

- 1.70. The Tribunal takes into account the fact that Sergeant White was, on the night/morning of the 19th/20th of November 1996, staying with Superintendent Cullinane. The Tribunal also takes account of the fact that telephone records obtained from Telecom Éireann show no telephone calls from Ardara Garda Station, or indeed any Garda Station, to the homes of Hugh Diver and the Late Anthony Diver on that night. The Tribunal is well aware of the fact, however, that a mobile telephone, or a landline telephone could be used from any other location. The evidence on this matter is too uncertain to be relied on in terms of any overall conclusion that the Tribunal feels it must reach.

The Arrests

- 1.71. On the evening of the 19th of November 1996, Sergeant John White, with some assistance from Sergeant McKenna, drew up an arrest chart. This indicated what member of An Garda Síochána was to arrest which suspect. It is probable that the arrest chart was approved by Superintendent Denis Cullinane. He, however, did not have full possession of the facts. The Tribunal accepts the evidence of Mr. Patrick O'Donnell and Sergeant Seán McKenna that the ordinary warrants under the Criminal Damage Act, issued in Bunbeg District Court on the 12th of November 1996, were intended to be used to arrest Hugh and Anthony Diver in respect of the earlier incident of arson. There was no intention, however, to arrest Bernard Shovlin unless something incriminating had been found in his sheds. He was not a prime suspect. Because it was thought that Hugh and Anthony Diver had access to Bernard Shovlin's shed, situated on the private access road to the

³⁸ Transcript, Day 378(4), pages 143-144.

mast, it was felt that a search of those sheds might yield something possibly used in the arson attack, but innocently stored with Mr. Shovlin.

- 1.72. Garda Patrick O'Donnell knew Bernard Shovlin well. They were on friendly terms. The Tribunal is satisfied that at some stage after Sergeant White had returned from Dublin, a discussion took place between him, Sergeant McKenna and Garda O'Donnell. A question was asked as to Bernard Shovlin and who he was married to. When it emerged that he was married to the sister of Hugh and Anthony Diver, Sergeant White became determined to arrest him. No logical reason was given for this. Garda O'Donnell was tasked with drawing up antecedent history forms in relation to possible suspects. He could not accept, rightly, that Bernard Shovlin could be the subject of any possible suspicion in relation to the arson attack on the mast. In filling in the form, therefore, under various headings requiring Bernard Shovlin's antecedent history related to the likelihood of his being involved in the crime, he wrote the following:

Never appeared at any picket or protest at Altnagapple. Was very depressed over events which took place at Altnagapple. Did not agree with any hassle given to Gardaí. Is a very hard working and law-abiding person. It is very unlikely that culprits who committed arson at Altnagapple would have confided in Bernard Shovlin...it would be very unlikely if culprits confided with Shovlin as he would not agree with this action.³⁹

The Tribunal is satisfied that the foregoing document was drawn up by Garda O'Donnell in a legitimate attempt by him to protect the rights of Bernard Shovlin. It is right that a member of An Garda Síochána, who feels that no suspicion should fall on any nominated suspect, should make his views known. He or she may be right or wrong, but it is only by pooling information honestly, and debating it, that correct decisions are generally arrived at.

- 1.73. The Tribunal has listened carefully to the testimony of Hugh Diver in relation to his arrest and detention in Glenties Garda Station. The Tribunal accepts that the experience was unpleasant for Mr. Diver. The Tribunal accepts his account of his interviews with members of An Garda Síochána. I note his honesty in respect of these accounts, that he did not make allegations of improper treatment against members of An Garda Síochána and that he had the fortitude to bear the experience. Sergeant Seán McKenna has given evidence that, immediately prior to the arrest, and during the search of Hugh Diver's home, he and Sergeant White were in the Diver kitchen. Sergeant McKenna has given evidence that he hesitated

³⁹ Tribunal Documents, pages 434-436.

in arresting Hugh Diver, whereupon he received a nudge from Sergeant White who said to him "do your duty". The Tribunal is not so satisfied as to accept this evidence.

- 1.74. Mr. Patrick O'Donnell has given evidence to the Tribunal that he was more than surprised, on reading the schedule for arrests on Wednesday, the 20th of November 1996, to see that he had been scheduled to arrest Bernard Shovlin. He suspected that this was a form of revenge being taken by Sergeant White in respect of his attitude towards the searches and arrests. Detective Sergeant White, on the other hand, has given evidence that in deciding that Garda O'Donnell should arrest Bernard Shovlin, he felt that it would be a humane consideration that the member of An Garda Síochána who dealt with him would be someone whom he knew and trusted. Mr. O'Donnell's evidence, in this regard, is only of a suspicion which he held. Detective Sergeant White, on the other hand, was speaking as to his motivations for his own actions and the Tribunal is prepared to accept that evidence.
- 1.75. Bernard Shovlin gave clear and coherent evidence to the Tribunal as to his treatment at the hands of members of An Garda Síochána while in custody in Donegal town Garda Station on Wednesday, the 20th of November 1996. Like Hugh Diver, the experience was an unpleasant one for him. The Tribunal also accepts that the search of his house, coupled with his arrest, was unpleasant and worrying for Geraldine Diver Shovlin, his wife. The Tribunal accepts fully all of their evidence. Bernard Shovlin does not make any allegation of ill treatment at the hands of members of An Garda Síochána. Nonetheless, the experience of being arrested and questioned is, necessarily, a very unpleasant one.
- 1.76. Hugh Diver has also given evidence that he felt that the reason for his arrest had nothing to do with the explosive device on the mast, but was related to an incident which happened some years earlier. In summary, Mr. Diver's wife, out of a sense of commitment to another couple who had begun running a chip shop, worked there for some time. An unfortunate incident broke out when an impoverished woman from the locality, who was possibly the worse for drink, came into the chip shop and caused a fracas. Mr. Diver's account refers in very complimentary terms to the behaviour of Bernadette Diver, his wife. Part of the account was as follows:

There was a wee gateway leading into the kitchen, so Bernie stood there and she stopped yer one getting into the kitchen because the kitchen would be full of knives and this particular one would knife you as quick as she would look at you. So, anyway, Bernie got a chance anyway, and she rang up to [AB's] house to see if [A] or [B] was about or if anybody that was about would come down and

chase them away. They were somewhere outside and the wee ones were in the house then, they ran outside to see if they could see one of the neighbours and tell them to go down and chase them away. So they went outside. Sergeant Seán McKenna was coming out of the barracks, so they told Seán McKenna the story. He came down to the chip shop. Now yer one was still inside the chip shop at this stage, and Seán McKenna came down and he tried to arrest her ... and she beat him up and she kicked him and she had his nose bleeding...Now, yer one threw an ashtray at Bernie all right and it hit her under the eye, but the eye wasn't damaged, or nothing. Like you wouldn't even notice it. So, anyway, the only thing that was bothering her was that we would be going to a wedding the next morning and the eye would all be black. As it happened, anyway, it wasn't. So, she was good enough. But I went up to the barracks then on the following Tuesday morning. Sergeant Seán McKenna was in the barracks and myself and Seán got on very well ... I would be standing with him maybe for 20 minutes talking about football, or some kind of silliness anyway. So, I mentioned to Seán about the disturbance in the chip shop and I says, Seán, I says, there's no way, I says, that we can go to court with them people. I says, I know the family all my life and, I says, I never had any problem with them and, I says, to be honest, and I think I told him this, I says, to be honest with you, I says, I would have no problem, I says with any of the [relevant people] coming to babysit for me.⁴⁰

- 1.77. The Tribunal is grateful to Mr. Diver for this account, which it accepts as honest. His inference, however, that because a prosecution could not take place against the authors of the row in the chip shop, Sergeant Seán McKenna bore a grudge against him is incorrect. The Tribunal is satisfied that Sergeant McKenna does not bear, and did not bear, any grudge against Mr. Diver but respected him as a member of the local community. Furthermore, the Tribunal feels that the real issue before it is as to whether the device on the mast was planted for the purpose of using a section 30 arrest. No power of arrest would have been available in relation to the humane attitude which Mr. Diver had adopted in respect of the unfortunate woman who, his wife had recounted to him, had attacked members of An Garda Síochána. Of course, if a summons had been issued in respect of Mr. Diver, and if he had failed to appear in court, an arrest would follow possibly, together with a conviction for obstructing

⁴⁰ Transcript, Day 381(4), pages 17-19.

justice, or some other statutory offence. The Tribunal is, however, satisfied that Mr. Diver is a law-abiding person as evidenced by his determination to co-operate with the Tribunal as best he could.

Poitín

1.78. A slight digression is appropriate at this time. During the spring and summer of 2000, TV3 broadcast a number of programmes, under the 20/20 title, dealing with the situation in Donegal. The Tribunal understands that during the course of one of these programmes an allegation was made that Sergeant Seán McKenna had planted poitín in the house of Hugh Diver. Mr. Diver gave evidence before the Tribunal. The Tribunal has also reviewed his statements relative to this matter. The Tribunal did not feel it appropriate to spend time dealing with an allegation which was outside its Terms of Reference. The matter did, however, come up in hearings: in a mercifully brief way. Hugh Diver never had any evidence that either Sergeant Seán McKenna or any other individual planted poitín in his house. He told the Tribunal that he kept some poitín, for medicinal rub-in purposes related to arthritis, in his house. In mysterious circumstances a crate of poitín appeared in the porch area of his front door some time prior to the Garda searches and arrests of the 20th of November relating to the explosive device found on the mast. In previous statements, Hugh Diver nominated a number of people whom he suspected could have put the poitín there. The Tribunal regards Mr. Diver as a fair-minded man. The Tribunal therefore notes that in his evidence Mr. Diver indicated that he had absolutely no proof as to how this quantity of poitín, additional to the bottles of poitín he already kept in his house, had come to be in the vicinity of his door. Those he nominated as suspects were named merely on the basis of his belief. In other words, it was speculation. That, however, did not stop sections of the media reporting it as fact.

1.79. **The Tribunal is absolutely satisfied that Sergeant Seán McKenna never delivered any poitín to Hugh Diver's door, or planted poitín on him or did anything other than fulfil his duty as a member of An Garda Síochána in an honest way.**

The Release of Bernard Shovlin

1.80. A serious conflict of evidence arose as to the release of Bernard Shovlin from Garda custody. This controversy throws light on the reasons why Bernard Shovlin was arrested in the first place. Was it for the purpose of pressurising the other detainees, or was it, as has been claimed by Detective Sergeant White, a genuine part of the investigation?

1.81. Having been brought to Donegal town Garda Station Mr. Shovlin was detained until around 14.00. Detective Garda Dooley and Garda Patrick O'Donnell decided

that any further questioning of him would be futile. Everything indicated that he was completely innocent of any wrongdoing in terms of criminal damage to the mast, by arson or an explosive. They were determined to release him. This was right. The sequence of events needs to be set out in more detail. Briefly, those detaining him sought the approval of Superintendent Cullinane for his release. This was granted. Sergeant White then rang and when the conversation turned to the release of Bernard Shovlin, he disputed that this should be done at that time. He claimed that he wanted to wait until later: perhaps as late as midnight. A row occurred between Garda O'Donnell and Sergeant White. The nature of this row is in dispute. Sergeant White then rang Superintendent Cullinane. He then rang Detective Garda Dooley and Garda O'Donnell and told them to continue the detention of Bernard Shovlin until 18.00 approximately. This was, in fact, when Mr. Shovlin was released.

- 1.82. Detective Garda Dooley's account as to the crucial portion of this conflict was as follows:

A few minutes later, Sergeant White telephoned me at Donegal Garda Station and he stated that there may be matters to be clarified and that Bernard Shovlin should not be released at that time. Garda O'Donnell was standing beside me, with his hand out for the phone, so I said to Sergeant White "I'll put you on to the man who arrested him". There were certainly loud words on the phone from between – well from Garda O'Donnell's side, I could hear anyway that there were loud words on the phone. The phone call seemed to end abruptly. Superintendent Cullinane rang back within a few minutes and he said to me, "on reflection, I think he shouldn't be released for a while, there may be things to be clarified". He said, he can be released around 6.30 p.m.⁴¹

- 1.83. The Tribunal is satisfied that the first telephone call was made between Detective Garda Dooley and Superintendent Cullinane. The Tribunal is also satisfied that, coincidentally, Sergeant White telephoned Donegal town Garda Station and spoke to Detective Garda Dooley, at that time, simply to find out how the investigation was progressing. Garda Dooley then passed the phone to Garda O'Donnell. The conversation between the members of An Garda Síochána became heated. When that call was terminated, Sergeant White telephoned Superintendent Cullinane and complained. Superintendent Cullinane then changed his mind as to the release of Bernard Shovlin and directed that he should be held until 18.00. As to what was the cause of the controversy that gave rise to the heated words between Garda O'Donnell and Sergeant White, Detective

⁴¹ Transcript, Day 379(4), pages 17-19.

Garda Dooley said the following:

Well I could only hear what Garda O'Donnell was saying. Garda O'Donnell said to him – two of the things he said, and this is all I can remember. He said "you should know well, [passage redacted], that he should be released". The other thing that I can recall Garda O'Donnell saying was "I have a conscience, John, whatever about you."⁴²

- 1.84. The evidence of Mr. O'Donnell was somewhat different. It was to the effect that the telephone call from Sergeant White directly followed on the telephone call from the Superintendent, and made reference to it. In effect, Sergeant White was ringing up to tell Detective Garda Dooley and Garda O'Donnell that the Superintendent wished to have Mr. Shovlin detained until midnight. His account was that Detective Garda Dooley tried to point out to Sergeant White that the Superintendent had already authorised the release of Mr. Shovlin. In consequence of the emerging controversy, Garda O'Donnell beckoned to his colleague to give him the phone. Mr. O'Donnell gave this account of what the row was about:

That this man shouldn't be here, it was ridiculous. That I would know the man, in his private life, that it wasn't suiting him either and that he should understand that. And, I was trying to get him to – and I don't know when he wasn't agreeing with me, I lit into him. I just can't remember exactly. I think he hung up on me eventually.⁴³

- 1.85. In evidence to the Tribunal, Detective Sergeant White denied that anyone, at any stage in his career, ever had an argument with him about holding a prisoner despite him being innocent. Detective Sergeant White, in effect, denies there was any reference to an issue as to conscience in the course of the telephone call. Instead, his evidence was that a reference to a personal matter between Garda O'Donnell and himself had caused the heated words between them.⁴⁴

- 1.86. **The Tribunal is satisfied that there were heated words between Garda O'Donnell and Sergeant White over the release of Bernard Shovlin. The Tribunal is further satisfied that Garda O'Donnell had raised the detention of Mr. Shovlin in a specific way as an issue of conscience. The Tribunal is satisfied that the telephone call was terminated because of the heat generated by virtue of this reference to the professional pride that members of An Garda Síochána hold while carrying out their work. The Tribunal is satisfied that Sergeant White then complained in severe terms**

⁴² Transcript, Day 379(4), page 19.

⁴³ Transcript, Day 378(4), page 103.

⁴⁴ Transcript, Day 382(4), pages 140-150.

to Superintendent Cullinane who, in consequence, felt there was a challenge by Garda O'Donnell to his authority. Since he had put Sergeant White in place for the purpose of directing the investigation of the arson, and the later explosive device discovery, he reasserted his authority at the prompting of Sergeant White. The decision to detain Bernard Shovlin for another four to five hours was made by Superintendent Cullinane at the prompting of Sergeant White.

- 1.87. In fairness to Superintendent Cullinane, he had reposed great trust in the ability of Sergeant White. When he had been insulted, as the matter had been perceived by Sergeant White, and when rude words had been used on the telephone, he felt that the investigation was being interfered with by Garda O'Donnell.
- 1.88. The Tribunal is satisfied that Garda O'Donnell acted in good conscience. The Tribunal is further satisfied that Superintendent Cullinane was manipulated by Sergeant White into giving an order to keep Mr. Shovlin in custody for a further time period.

Subsequent Events

- 1.89. On Thursday evening, the 21st of November 1996, Sergeant White and Garda O'Donnell visited Bernard Shovlin's house. The Tribunal is satisfied that Garda O'Donnell felt that there was a genuine reason, related to recovering a key legitimately held by the Shovlins, for visiting their home. The Tribunal is further satisfied that Garda O'Donnell, after Mr. Shovlin had been released, had done his best to ensure that he was reassured as to his position. He had visited his home, on returning home from Garda custody, on Wednesday evening, the 20th of November 1996 and had taken tea with Mr. Shovlin and his wife. The visit, on the next evening, had, as far as Garda O'Donnell is concerned had a legitimate context. The Tribunal has already recounted the exchange between the Late Anthony Diver and Sergeant White on that occasion and has made findings of fact in that regard.
- 1.90. On Friday, the 22nd of November 1996, Garda O'Donnell again visited the Shovlins. He had a quite lengthy conversation with Geraldine Diver Shovlin. The Tribunal has considered their accounts of this conversation. Whereas there may be some slight differences of emphasis, in that regard, the Tribunal is satisfied that both of them were doing their best to tell the truth to the Tribunal on this matter, and in their testimony generally. It is highly probable that Garda O'Donnell sympathised with Mrs. Shovlin in relation to what had occurred over the previous days.

- 1.91. The Tribunal is satisfied that Mrs. Shovlin told Garda O'Donnell that there were already rumours flying around that the device had been planted on the mast by a member of An Garda Síochána for the purposes of effecting the arrest of her brothers and her husband. The Tribunal regards it as probable that either Superintendent Cullinane, Garda Kilbane or Sergeant McKenna had mentioned to persons in the locality that Sergeant White had conducted a test with a spoon of explosive powder in the backyard of Ardara Garda Station. These rumours gave rise by distortion to the later, and much more widespread, rumour that the device on the mast had been constructed in the backyard of Ardara Garda Station, or some other Garda station in Donegal. Garda O'Donnell, on hearing of the suspicion from Mrs. Shovlin that the device on the mast had been planted, urged her to make a complaint, in the event that she had any evidence.

Sergeant White Leaves the Investigation

- 1.92. On the evening of Thursday, the 21st of November 1996, in the aftermath of the row in Shovlin's house with the Late Anthony Diver, Sergeant White and Garda O'Donnell drove back towards Ardara Garda Station. The Tribunal is satisfied that, in the course of this journey, Sergeant White told Garda O'Donnell that he was leaving the investigation and that the file could be completed by Sergeant McKenna. It was a deeply curious event that Sergeant White, having apparently worked so hard on this investigation, should suddenly, as it were, throw up his hands and leave. Sergeant White has explained this on the basis of his having commitments of a personal kind and work elsewhere. The Tribunal does not accept that explanation. He did have personal commitments. However, when they were over, he could have returned to complete this crime file. He did not.

Conclusion

- 1.93. The evidence that Sergeant John White, while sergeant stationed in An Charraig, planted the explosive device on the mast at Ált na gCappail, for the purpose of arresting the suspects under section 30 of the Offences Against the State Act, 1939, is circumstantial. The Tribunal is mindful of the definition of circumstantial evidence. It takes into account the following statement of the law on the use of circumstantial evidence by Robert Lindsay Sandes, in his book 'Criminal Law and Procedure in the Republic of Ireland' as to the nature of that evidence and as to its use in proof of crime:

The testimony of a witness who actually saw the accused person kill the deceased is direct evidence, but if the prisoner had died of poisoning the pecuniary embarrassment of the prisoner, his buying poison and attempting to avoid an inquest and other such facts would be relevant as circumstantial or indirect evidence. See *R v Palmer (1856)*, Stephen's

History of the Criminal Law, P 389. Circumstantial evidence is very often the best evidence that the nature of the case permits of. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial, R –v- Taylor, 21 CAR 21. A jury may convict on purely circumstantial evidence, but to do this they must be satisfied, not only that the circumstances were consistent with the prisoner having committed the act, but also that the facts were such as to be inconsistent with any other rational conclusion than that he was the guilty person. AG –v- O’Brien CCA 11-7-32; R –v- Hodge, 2 Lew 227, Halsbury, First Ed, Vol IX, Art 1190; page 588.⁴⁵

- 1.94. In addition to that, two other principles emerge. Firstly, a lie told for the purpose of evading responsibility in respect of a wrongful act can be corroboration if (i) it is a deliberate falsehood; (ii) it relates to a material issue; (iii) the lie is attributable to a consciousness of, and an attempt to, conceal guilt; and (iv) where the issue is the credibility of an accomplice, the statement at issue is clearly shown to be a lie by evidence independent of the accomplice to be corroborated.⁴⁶
- 1.95. The second principle relates to the burden and standard of proof before a tribunal of inquiry. Counsel appearing on behalf of the Tribunal are not tasked with proving anything. The inquiry is not a criminal trial. Its purpose is to uncover the truth, wherever the truth may lie, by sifting through evidence while attempting to allow people a fair opportunity to challenge such evidence as seems to raise an inference against them, or directly alleges wrongdoing by them. The Tribunal is entitled to conclude a matter by giving its opinion as a probability.
- 1.96. The Tribunal is satisfied with the following:
1. While Sergeant McKenna continued to hold the position as sergeant for the sub-district of Ardara, Sergeant White was, in effect, in charge of the investigation into the arson attack at Ált na gCappail mast which was discovered on the 7th of November, 1996.
 2. Sergeant White was not satisfied that warrants under the Criminal Damage Act, 1991 had been obtained by Sergeant McKenna in respect of that arson attack. The Tribunal is satisfied that Sergeant White felt that the use of sections 29 and 30 of the Offences Against the State Act, 1939 were necessary in order to uncover evidence as to the guilt of those who would be arrested for that criminal act. These powers, he was determined, would be used to hold the suspects for a

⁴⁵ Sandes, 'Criminal Law and Procedure in the Republic of Ireland' (3rd ed, 1951), page 177.

⁴⁶ R –v Lucas [1981] Q.B. 720 at 723; [1981] 2 All E.R. 1008 at 1010 (per Lord Lane C.J.) cited in McGrath, 'Evidence' (Dublin, 2005) at pages 150-152.

sufficient length of time to enable a full investigation of the arson attack.

3. Sergeant White failed to act as the Tribunal would expect an investigating officer to act at the scene of the apparent bomb find on the mast on Tuesday, the 19th of November 1996. He should have taken notes, preserved the scene and, if he genuinely believed that the device was a bomb, should have cleared the area. He would have sought out witnesses and taken witness statements.
4. Late in the evening of the 19th of November 1996, Sergeant White took a spoonful of powder from the device on the mast and brought it back to the yard of Ardara Garda Station and played a flame over it. He did this because he expected that the powder would ignite and, as a result, enable him to report to Superintendent Cullinane that the powder was an explosive substance as the basis for issuing section 29 warrants. The fact that the powder did not ignite, however, did not stop him from so reporting.
5. Sergeant John White then told Superintendent Denis Cullinane that he had carried out this test.
6. Sergeant White also told Garda Kilbane and Sergeant McKenna that he had carried out a test on the device and his opinion was that it was, on this test, an explosive device.
7. In carrying out this test Sergeant White displayed a determination to ensure that warrants were issued in respect of the searches which he had planned to effect under the Offences Against the State Act against the Late Anthony Diver, Hugh Diver and Bernard Shovlin. He was determined that they should be arrested and questioned with a view to uncovering their supposed guilt in respect of the arson attack.
8. Sergeant White had shown an ability to pursue extra-legal measures in respect of those whom he regarded as suspects when, in and around Friday, the 8th of November 1996, he had taken a pot of glue-like substance from Bernard Shovlin's sheds and brought it back to Ardara Garda Station.
9. The Tribunal would suggest that if this explosive device was properly investigated then it should have been dealt with as a separate issue from the burning of the container. A separate report should have been sent up in connection with it and it should have been investigated on its own merits. The Tribunal cannot think of any good

reason why this was not done. The device is merely referred to as an offshoot of the burning of the container. It deserved separate mention. Sergeant White was the man in charge from a practical point of view at the time. He should have commenced the investigation independent of the arson.

10. The Tribunal does not find that it has been proved that Sergeant White made telephone calls to Hugh or Anthony Diver at or around 00.00 on Wednesday, the 20th of November, 1996.
11. Sergeant John White was confronted at around 14.00 on Wednesday, the 20th of November 1996 with an allegation of wrongdoing by Garda O'Donnell, on the telephone, that Bernard Shovlin was being held in contravention of the requirement that innocent persons should be released from Garda custody. The Tribunal accepts the evidence of Mr. O'Donnell, in that regard, and rejects the evidence of Detective Sergeant White.
12. The Tribunal rejects the evidence of Detective Sergeant White, and prefers the evidence of Geraldine Diver Shovlin, and Mr. O'Donnell, that on the evening of the 21st of November 1996, Sergeant White had been confronted by the Late Anthony Diver not only with an allegation that he had planted the device on the mast, but that he had made telephone calls to his home on the previous evening.
13. The Tribunal accepts the evidence of Garda Kilbane and Mr. O'Donnell that, at around 00.00 on Wednesday, the 20th of November, 1996, Sergeant White had indicated something to them in relation to making telephone calls to the suspects. The Tribunal finds, however, that this fact is not proved.
14. Sergeant White rushed the arrest of the suspects, following the discovery of the device on the 19th of November 1996. This is in marked contrast to the careful investigation which he initiated, and wished to control, following the discovery of the arson on the 7th of November 1996.
15. On the balance of probabilities, the account from Detective Sergeant White as to his involvement in the investigation that arose out of the arson attack on the mast is so riddled with inconsistencies that the Tribunal cannot accept his version of events. The Tribunal cannot accept that he was telling the truth as to how he found the object on the mast. The Tribunal is convinced that he was aware, before anyone

had officially discovered it, that it was there. The Tribunal is satisfied that when he went to 'find' it, it came as no surprise to him that it was there. Sergeant White did not act in any way consistent with a Garda making a discovery. Sergeant White manipulated the investigation, and in particular Superintendent Cullinane, who trusted him, in order to ensure that the powers of arrest under section 30 of the Offences Against the State Act, 1939 were used against Hugh Diver, the Late Anthony Diver and Bernard Shovlin.

16. The device was caused to be put on the mast by Sergeant White for the purpose of effecting arrests under section 30 of the Offences Against the State Act, 1939 in respect of the earlier arson attack. Either this was done by him or on his behalf.
17. The Tribunal is satisfied that all of the arrests for the explosive device on the mast were based upon a false premise. In particular, they were founded on the wrongdoing of Sergeant White.
18. The Tribunal emphasises it cannot find any evidence that in purporting to discover the device on the mast, Sergeant White had any accomplice within An Garda Síochána. In particular, the Tribunal is satisfied that none of the members of An Garda Síochána, or former members, who gave evidence to the Tribunal acted in collusion with Sergeant White in respect of this scheme.
19. In the aftermath of the departure of Sergeant White from the investigation, Garda Patrick O'Donnell photocopied two documents tending to show that the arrest of Bernard Shovlin was wrong. He kept these in case Mr. Shovlin ever needed them in a civil claim. The Tribunal might criticise this but for the extraordinary situation in Donegal at the time. The Tribunal also notes that Garda O'Donnell had no one in Garda Headquarters to whom he might turn with his very serious concerns. The Tribunal excuses this on the basis of the absence of appropriate structures.

Recommendations

1. Subject to safeguards, it should be possible for any serving member of An Garda Síochána to ring Headquarters, and to speak in confidence with a designated officer, or group of officers, as to real concerns they may have as to misconduct within the organisation. Those complaints should be investigated on a basis which, insofar as it is possible, is confidential as regards the source of the information. Such complaints should be regarded as a matter of urgency. Steps should be taken to ensure that mischief-makers are weeded out of such a process early on.
2. The Tribunal appreciates that weeding out mischievous and malicious interventions by disaffected members of An Garda Síochána may be difficult. The structures of this matter have already, as we understand, occupied the time of the committee that was set up to consider the first two reports of this Tribunal into misconduct by members of An Garda Síochána in County Donegal. The structures should, however, be advanced as a matter of urgency in the light of what is contained in this report. Such a structure is essential to the well-being of the force.
3. The Tribunal notes, with dismay, that many of the serving members of An Garda Síochána in County Donegal were overawed by the apparent achievements and connections of Detective Sergeant White. It also notes, with grave concern, that he was given a roving brief between Dublin and Donegal, in terms of the investigation of crime. He was subject to no supervision of any meaningful kind concerning this investigation. The Tribunal makes no comment as to any supervision he may have had in relation to confidential matters in Dublin, or elsewhere in the country.
4. As this Tribunal has commented in its previous reports, the facts of this matter speak highly enough in themselves without the necessity for the Tribunal to attempt to perform a management function within An Garda Síochána, or to advise the Department of Justice, Equality and Law Reform as to what structures are needed to reform An Garda Síochána.
5. At a minimum, however, the Tribunal feels that it is necessary to point out that no one should serve as a superintendent without having the training, the expertise, the commitment to duty and the front line experience that will enable them to make real judgments on matters

relating to criminal investigation. Men and women who are chosen for the rank of superintendent should, under no circumstances, be overawed by the experience or connections of any detective, sergeant or inspector serving under them.

6. The Tribunal notes the very low number of members of minority religious communities serving in the Donegal Gardaí, which is a marked contrast to the actual make up of the County Donegal population. This should be addressed in future recruitment, not only in Donegal but in An Garda Síochána generally.
7. The Tribunal also appreciates the valuable work done by community police officers, such as Garda O'Donnell and Sergeant McKenna. The Tribunal feels, however, that just as there is an ongoing obligation on judges, on lawyers and on doctors, among other professions, to keep themselves up to date and to continue to pursue their studies while practising, the same obligation should devolve on members of An Garda Síochána. Being a police man or a police woman is a profession and, in our society, is rightly a respected one. It is for Garda Headquarters, in consultation with the Department of Justice, Equality and Law Reform, to consider whether an obligation should be imposed on members to continue to study particular learned works as to police investigation and management, to study new scholarly, but practical, works or to take particular courses that could be made available through the Garda College at Templemore, or elsewhere. Another real possibility, in terms of ensuring that members of An Garda Síochána are not overawed by those who are perceived to have experience and connections, is to ensure that there is a periodic transfer, for reasonable periods of time, perhaps a month or more every five years, of members of An Garda Síochána to units which are pursuing particular work of a specialist variety. The necessity for further education impacts on everyone in our increasingly complex society. The Garda Síochána provides that, but only, insofar as the Tribunal is aware, in the context of promotions and those chosen for specialist training. The ordinary members of An Garda Síochána, at garda, sergeant and inspector rank are highly important personnel for the future well-being and cohesive running of Irish society. They are already a valuable resource. The Tribunal recommends that, on reading this report, the Commissioner of An Garda Síochána, and the Department of Justice, Equality and Law Reform, should do everything possible to see what steps can be taken

with a view to fostering their existing abilities and promoting them through ongoing education.

8. Finally, the Tribunal notes the recent resignation of members of An Garda Síochána in County Donegal. It would be highly undesirable to continue a situation where inexperienced members could be staffing Garda stations. Having only four Gardaí of inspector rank in Donegal county might be reviewed in relation to potential policing problems that could arise in that division. The Commissioner should strive at all times for experience and education in the leadership of the force. The Tribunal is certain from his evidence in a previous module that he has the best interests of the Gardaí and the community it serves as his fundamental principle.

THE MORRIS TRIBUNAL
Report on the Ardara Mast Criminal Investigation