



Report in accordance with section 103 of the Garda Síochána Act, 2005 (the “Act”) relating to a referral made under section 102 of the Act in respect of injuries suffered by Anthony Holness on 29 January, 2010, and a related complaint made by Anthony Holness on 8 February, 2010.

On 8 February, 2010, Mr. Anthony Holness, a man in his thirties resident in Waterford, made a complaint in accordance with section 83(2)(b) of the Act at Waterford Garda Station. The complaint was forwarded to the Garda Síochána Ombudsman Commission (“GSOC”) in accordance with the Act.

On 9 February, 2010, a referral was received by GSOC in accordance with section 102 of the Act. The referral, made by a garda superintendent in Waterford, related to the arrest and detention of Anthony Holness. During the course of his arrest Anthony Holness suffered injuries that appeared to the Garda Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in serious harm to Anthony Holness. Section 102 of the Act obliges the Garda Commissioner to refer such matters to GSOC.

Following consideration of the referral and complaint the Ombudsman Commission directed an investigation under section 98 of the Act.

The Director of Public Prosecutions (the “DPP”), having considered a report furnished by the Ombudsman Commission under section 101 of the Act, directed that the following members of the Garda Síochána be charged with the following criminal offences as set out:

- a) Sergeant Alan Kissane, assault causing harm to Anthony Holness contrary to section 3 of the Non Fatal Offences Against the Person Act, 1997;

- b) Sergeant Martha McEnery, assault causing harm to Anthony Holness contrary to section 3 of the Non Fatal Offences Against the Person Act, 1997;
- c) Garda Daniel Hickey, assault causing harm to Anthony Holness contrary to section 3 of the Non Fatal Offences Against the Person Act, 1997; and
- d) Garda John Burke, (a) attempting to pervert the course of justice, contrary to Common Law, (b) attempting to impede the apprehension or prosecution of a person believed to be guilty of an arrestable offence - namely an assault causing harm to Anthony Holness - , contrary to Section 7(2) of the Criminal Law Act, 1997.

The DPP further directed that the charges were to be dealt with in the Circuit Criminal Court.

On 12 July, 2011, the trial of these four gardaí commenced at Waterford Circuit Criminal Court.

On 5 August, 2011 the jury in the trial returned the following verdict:

- a) Garda Daniel Hickey, guilty of assault causing harm to Anthony Holness contrary to section 3 of the Non Fatal Offences Against the Person Act, 1997;
- b) Sergeant Alan Kissane, not guilty; and
- c) Garda John Burke, guilty of (a) attempting to pervert the course of justice, contrary to Common Law, and (b) attempting to impede the apprehension or prosecution of a person believed to be guilty of an arrestable offence - namely an assault causing harm to Anthony Holness - , contrary to Section 7(2) of the Criminal Law Act, 1997.

On 8 August 2011 the jury returned the following verdict in respect of Sergeant Martha McEnery:

- a) not guilty of assault causing harm to Anthony Holness contrary to section 3 of the Non Fatal Offences Against the Person Act, 1997; but
- b) guilty of assault on Anthony Holness contrary to section 2 of the Non Fatal Offences Against the Person Act, 1997.

On the 8th of November 2011, all three gardaí who were found guilty were sentenced at Waterford Circuit Criminal Court by Her Honour Judge Reynolds as follows:

- a) Daniel Hickey, 3 years custodial sentence, 18 months suspended on condition he enter a bond to be of good behavior and did not come to adverse attention of the Garda Síochána for a period of 18 months following release;
- b) Sergeant Martha McEnery, 4 months custodial sentence suspended on condition she entered a bond for €200 to keep the peace and did not come to adverse attention of the Garda Síochána for a period of 6 months. Sergeant McEnery entered the bond and was released by the Court ; and
- c) John Burke, in respect of (a) attempting to pervert the course of justice, contrary to Common Law, 2 years custodial sentence, 12 months suspended on condition he entered a bond to keep the peace and did not to come to adverse attention of the Garda Síochána for a period of 3 years following release and (b) section 7(2) of the Criminal Law Act, 1997; taken into consideration.

Sergeant Martha McEnery and Garda John Burke appealed their conviction to the Court of Criminal Appeal. The appeals were heard on 15th of November 2012 and the Court of Criminal Appeal rejected both appeals.

This was the first prosecution by the DPP following an investigation by GSOC to result in custodial sentences for gardaí. During the course of the investigation and the trial, issues emerged that the Ombudsman Commission believes to be worthy of consideration by interested parties. The cooperation by members of the Garda Síochána who were themselves not on trial was, in some cases, exemplary and, in other cases, slow and less than optimal. An effect on the investigation was that some documentation sought by GSOC from the Garda Síochána was procured at a very late stage in the investigation, some not received at all. This, while not ultimately fatal to the case for the Prosecution, was at the least, inconvenient. It is a cause of concern to the Ombudsman Commission that documentation it sought from the Garda Síochána and which was not supplied, was then produced in the course of the trial by the Defence for certain accused.

It is regrettable that the judge in this case was caused to wonder at what stage of the proceedings the DPP might have to start treating certain garda witnesses (other than the four accused) as hostile witnesses. The Ombudsman Commission understood this to relate to a limited number of garda witnesses and shared the judge's concerns. That notwithstanding, the Ombudsman Commission would wish to acknowledge that the majority of members of the Garda Síochána gave evidence to the court in a professional manner and in accordance with their earlier statements.

At an early stage in the investigation, GSOC investigators noted that a garda whose conduct was a subject matter of the investigation had handled a CCTV download prior to it being handed to designated officers of GSOC. This threatened to pose certain evidential difficulties regarding the continuity chain for evidential purposes. Fortunately, GSOC was in a position to identify this issue in early course and was furnished with a second CCTV download, to the required evidential standard. The management of evidence held by the Garda Síochána, in the context of an investigation by GSOC, is a significant matter in terms of its potential impact on the management of investigations and prosecutions.

During the course of the trial the lawfulness or otherwise of the Garda Síochána at Waterford Garda Station recording incoming and outgoing calls on their public lines, and the admission of the evidence obtained during the use of such practices became the subject of protracted legal argument. On the 29th of January 2010, shortly after the arrest of Mr Holness, there was telephone communication between certain of the accused. These calls were recorded on the Garda Síochána recording system and a recording was provided to GSOC. This recording was offered in evidence by the DPP. Objections were raised by the Defence. The court held that the practice engaged in by the gardaí at Waterford Garda Station of recording all incoming and outgoing calls on a particular phone line was in breach of the relevant statute on the recording of telephone communications, which requires that at least one of the parties to a phone call has consented to its being recorded. This requirement was deemed to have not been met on this occasion. The court ruled that the evidence obtained in those calls was inadmissible. On consideration of the ruling of the court the Garda Commissioner may wish to re-evaluate his practice regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence.

The Ombudsman Commission wishes to express its appreciation of the cooperation of the majority of gardaí at Waterford Garda Station. In making the above observations the Ombudsman Commission is of the view that a failure on its part to draw attention to the matters highlighted would be incompatible with its objectives as set out by the Oireachtas at section 67 of the Act.

The Garda Síochána Ombudsman Commission, June, 2013

End.