IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

No. CO/1523/88

Royal Courts of Justice,

Wednesday, 17th January, 1990.

Before:

MR. JUSTICE HUTCHISON

Crown Office List

THE QUEEN

-v-

THE CRIMINAL INJURIES COMPENSATION BOARD

Ex parte MARY PARSONS

(Tranmscript of the Shorthand Notes of Marten Walsh Cherer Ltd., Pemberton House, East Harding Street, London, EC4A 3AS. Telephone Number: 01-583 7635. Shorthand Writers to the Court.)

MISS BEVERLEY LANG (instructed by Messrs. Bindman & Partners, London, N.W.1) appeared on behalf of the Applicant.

MISS ALISON FOSTER (instructed by The Treasury Solicitor, London, S.W.1) appeared on behalf of the Respondent.

J U D G M E N T
(As approved by Judge)

MR. JUSTICE HUTCHISON: The applicant in this case seeks judicial review of a decision of the Criminal Injuries Compensation Board promulgated, in the sense that this was the date on which they gave their full reasons for their adverse decision, on 22nd June 1988.

I shall give a brief history of the matter in a moment, but it is right that I should say at the outset that whereas the grounds of application contained a number of grounds including the contention that certiorari should go on Wednesbury principles, namely because the decision was one at which no reasonable Board on the evidence before them could arrive, that way of putting the matter has not been pursued by Miss Lang. If I may reiterate what I said when she informed me of that decision, in my judgment it was a wise decision, because on the matter as I see it and on the basis of the evidence that was before the Board, it seems to me that it would be an impossible task to establish that that was the case.

Essentially one point and one point only has been taken, which is, putting it in its simplest terms, that there was important evidence which should have been, but was not, before the Board and which, had it been before the Board, might well have, or could have, led to their reaching a conclusion favourable to the applicant.

The matter arises in this way. On 2nd May 1985 the applicant contends that she was raped and assaulted by a man, a visitor from overseas, in his hotel bedroom in a London hotel.

I do not propose to embark upon a detailed recitation of the relationship that had existed between these two people prior to the dramatic events giving rise to that charge. It suffices to say that the young lady, among other occupations, worked part time for an escort agency; that she had been put in contact with the man concerned by that agency; and that the day before or two days before the events with which I am concerned he had visited her at her flat, money had changed hands and sexual intercourse had taken place with her consent in her bedroom.

She returned to his company the following day, whether at his or her instigation appears to be in dispute, and had dinner with him. In the course of the dinner he passed her £100. She then went to his bedroom not, it would appear on her account to the police, being forced there, which is what she alleged in her application form, but in order to have coffee, so she said; in order to have sexual intercourse, so he said. Whatever encounter took place between them, it ended when she ran naked from the bedroom and sought the aid of an employee of the hotel, as a result of which ultimately the police were called.

The upshot was that she made a statement to the police. The statement is in the papers before me. In so far as it is necessary to cite it, what it involves is that she was saying that she had gone to the bedroom to collect a further £20, which she asserts was due to her either for taxi money or money to be paid as the price of her going to have coffee in the bedroom, but once she got there he double-locked the door, and demanded that she undressed. She complied out of fear. He

then insisted upon having sexual intercourse with her, to which she submitted out of fear and under the influence of threats, that he was rough with her, punched and slapped her, bit her, pulled her necklace off, penetrated her on numerous occasions though without ejaculation, and that ultimately she was able to make her escape in the manner I have described when he went to the bathroom.

On 3rd July there were old style committal proceedings at Marlborough Street Magistrates' Court, and he was committed for trial at the Central Criminal Court charged with rape and assault. He was granted conditional bail on fairly onerous terms: two sureties, one of £20,000 and one of £7,000, and a deposit of a security of £15,000.

On 25th July the applicant made her application to the Criminal Injuries Compensation Board, apparently on advice. In addition to the contents, which I have already in passing cited, which certainly described events in terms which were more dramatic than, and quite different from, those used in her statement, she was asked whether she had previously applied to the Board for compensation for injuries she had received in any other incident, and she completed the answer with the indication "Not applicable", i.e. she had not. That was untrue. She had a short time before made a complaint to the Board about a serious indecent assault by another man in whose company she had been in analogous, but not precisely similar, circumstances, which had not been pursued by her it would seem, and which ultimately was dismissed, or so one infers.

She having made that application matters proceeded. The following year, on 24th March, the criminal case was due for trial. But the man concerned did not surrender to his bail. A warrant was issued but he has never been arrested. He comes, it would seem, from the Middle East, to which no doubt he had returned. He had remained in this country, or at any rate had been present in this country shortly before his trial was due to take place, because the Court was told that he had had a conference with counsel.

The fact of his absconding or failing to surrender to his bail was relied upon on behalf of the applicant before the Board as indicative of guilt on the part of the defendant in the criminal case. It is not material, because no attack is mounted on this basis, but I record it as part of the history that the Board did not think very much of that and it may be that their reasoning was that a wealthy man from the Middle East preferred, even if innocent, to squander what may have been to him relatively trivial sums of money, perhaps reimbursing the sureties, I know not, rather than risk the possibility of being convicted, despite his protestations of innocence. All that is entire speculation. The fact is that when the disappearance of the defendant was mentioned at the hearing before the full Board, they indicated that they were not particularly impressed by that as a point in the applicant's favour.

On 16th December 1986 the matter came before the Single Member on a paper application in accordance with the normal

procedures, and he rejected it. He gave his reasons as follows:

> "The applicant works at least part-time as a highly-paid call girl or prostitute. She has alleged that she was raped on 19th January 1985 by a man named Milston and in this application on 2nd May 1986 by a man named Sultan. Her allegations are uncorroborated and I am satisfied that she has not been frank with either the Board or her psychotherapist. I disallow the application under Paragraphs 4(a) and 6 of the Scheme."

I propose to say nothing more about that dismissal, because I am not concerned with it, the challenge being not to that decision but to the decision on the reference to the full Board.

The applicant entered an appeal on 6th December 1986, and the matter proceeded to a hearing before the full Board, consisting of Sir Michael Ogden, Q.C., Mr.Charles Whitby, Q.C. and Mr. David Owen Thomas, Q.C. Before that hearing a letter was sent to the officer in the case, Detective Inspector Tucker, requesting him to ensure that he brought all documents referred to in earlier correspondence in connection with the hearing, any other documents which might be required for consultation when giving evidence, e.g. the officer's pocket notebook, the original of the statement taken from the applicant, and an updated list of any convictions recorded against the applicant. The documents referred to in earlier correspondence were, it appears from an affidavit of Miss

Fisher Gordon sworn on 10th January 1990, the original statements, if available, and copy lists of convictions of the applicant and her alleged assailant.

The Board heard evidence from the applicant, who was questioned. They had before them statements which Mr. Parsons brought from the applicant herself, from a number of employees in the hotel and from a police officer, Constable Baker, who had been the arresting officer. He recounted a conversation which he had had with the defendant at the scene, in which when asked what happened the defendant had said, "I gave her £150 and told her I wanted to do it, but she said she had to go in five minutes." He was asked, "What did you want to do with her?" He said, "You know, have sex." He was asked "Did you have sex with her?" and he replied, "No I couldn't get an erection." He was then asked abut a broken necklace on the dressing table. He said it was hers. He was asked "How did it get broken?", and he replied "In the struggle." "What struggle?", he was asked, and he said, "She wouldn't do it and started shouting so I struggled with her to make her quiet." "How did you make her quiet?" he was asked, and he replied,"I put my hand over her mouth." The officer said, "It's been alleged you ripped off her clothes?" and he said, "No she took them off." The officer said, "It's been alleged that you raped her." The answer, "No, how can you rape a whore."

Speaking for myself, and for reasons which will become clear, it seems to me that those questions and answers, which might well of course have been the subject of dispute had there

been a trial, since they were not contemporaneously recorded, provide in a sense the high point of the case against the defendant. But it is equally important to emphasise that that statement from Mr. Baker containing that account was before the three-member Board when they made their determination. So that was the material which they had to go on. They did not have, though there existed, the prosecution summary which had been prepared in anticipation of the trial, and which is to be found at page 121 of the bundle, or the interview that had been conducted by Detective Inspector Tucker with the defendant, contemporaneously recorded, as I understand it, which appears at page 142 onwards of the bundle.

The Board rejected the applicant's claim. When asked to give their reasons they did so. Having set out the history, including, I am satisfied, as part of the history and not in any sense being adopted by them, the Single Member's determination which I have cited, they went on to recount the following matters:

> "The applicant's account of the incident was that set out in her statement to the police. In cross-examination by the Board's advocate, the applicant was asked why she had said in her application form that she had not made a previous application to the Board, since she had made an application which had been rejected by the Single Member. She gave no satisfactory explanation for this misstatement.

"The facts of the earlier case were also relevant in that on that occasions she had made a complaint of indecent assault. In her statement to the police she admitted having whipped the alleged offender at a club on an occasion prior to the alleged assault. The applicant told us that this was not serious or violent but was 'just a laugh' at a club where fairly bizarre and outrageous behaviour was commonplace."

Plainly the Board, in the context in which those two matters appear shows, regarded them as having a bearing upon her credit in relation to the instant matter. As to that, having recorded briefly the nature of the complaint and evidence of Detective Inspector Tucker as to the marks on her body and the evidence of photographs, they said this:

"We considered that the applicant was an untruthful witness and we did not believe her account of the incident. In particular, we did not accept that she had been raped. Precisely what happened it is impossible to say. We suspect that either there was a dispute about money or that [the man] became angry when the applicant refused to continue to have intercourse with him, his performance being impaired by his drunken condition. However, we emphasise that it is impossible to say precisely what did happen and it is sufficient to say that, the burden of proof being upon the applicant to

establish that she had been raped, she failed to satisfy us that this was correct."

It is against that decision that relief is sought in this Court, and the relief sought, as I have said, is certiorari remitting the matter to the Board for their reconsideration.

The grounds on which relief is sought are, as I have indicated, that the material evidence in the form of the prosecution summary and the interview were not, but should have been, before the Board. It is suggested that had they been, the Board might well have reached a different conclusion, namely one favourable to the applicant.

In order to understand the basis of the submissions, it is necessary first to have in mind some of the provisions in the Scheme under which the Board was set up. A copy is to be found at page 20, and from the various paragraphs which Miss Lang cited to me, which are paragraphs which establish the competence of the Board to entertain an application of this sort, the fact that they will make an award in cases of rape as being cases of criminal injury, and so on, it is necessary only to quote from paragraph 23. That provides:

> "It will be for the applicant to make out his case at the hearing and where appropriate this will extend to satisfying the Board that compensation should not be withheld or reduced under the terms of paragraph 6 or paragraph 8."

Paragraph 6, in so far as material, is one which in effect gives the Board a discretion to reduce an award which would

otherwise be appropriate, on the basis of the applicant's character, life etc. No question of that sort arises in this case. The Board might have chosen to invoke that provision, but it did not do so. It dismissed the claim simply on the basis that the members did not believe the applicant; she had not established rape. Paragraph 23 continues:

> "The applicant and a member of the Board's staff will be able to call, examine and cross-examine witnesses. The Board will be entitled to take into account any relevant hearsay, opinion or written evidence, whether or not the author gives oral evidence at the hearing. The Board will reach their decision solely in the light of the evidence brought out at the hearing, and all the information and evidence made available to the Board members will be made available to the applicant at, if not before, the hearing.....".

As the case of R. v. The Chief Constable of Cheshire and Another Ex parte John Berry (unreported - 30th July 1985) establishes, there exists a well-tried procedure whereby to facilitate their determination of claims the Board will request (a request which is invariably complied with) the police to provide for them the relevant statements. What happens is -- I am summarising very briefly -- that the officer in the case will attend. The Board members will have been provided with the statements that are material the night before and have had an opportunity to read them. The applicant and her advisers, if she has any, will get those statements when they arrive at

the hearing and have an opportunity to read them. It is clear that if unusual circumstances arise which require an adjournment, then an adjournment may be granted, but in general, since the Board deal with a large number of cases each day, the applicant and her advisers are able to absorb the material and to proceed there and then.

In the case of Berry Mr. Justice Nolan in the course of his judgment, having cited from paragraph 23, said this:

> "The applicant may bring with him a legal adviser to assist him in putting his case, at his own expense. It is, however, the duty of the member of the Board's staff referred to in paragraph 23 -- generally known as the Board's Advocate -- to bring out all relevant evidence in the Board's possession, whether it is for or against the applicant. The proceedings are inquisitorial in nature. They are as informal as is consistent with the proper determination of applications, and are generally held in private."

What in fact happened is that, for reasons which one does not know, although Detective Inspector Tucker attended, he did not bring, or if he brought there were not elicited from him, the prosecution's summary, if he had it, or the notes of interview with the defendant, which certainly would have been available to him. The whole of the hearing proceeded apparently with everyone, the Board members, the representative presenting the case to the Board and the applicant and her

representative, being unaware of the existence of any such document.

No one has suggested that any party was aware and chose not to ask for those documents, but Miss Lang's first point is that the Board, through its representative, should have obtained and placed before the three members those two documents. She places reliance not only on the interview but on the prosecution's summary.

If I can deal with that in a sentence, I have to say, as I made clear in the course of the argument, that it seems to me that the prosecution's summmary is of no import. It does not, as Miss Lang suggests it does, indicate the existence of yet further interview, and since it is only the no doubt careful and, as he would hope, the objective view of counsel summarising the evidence, it is not direct evidence which would have influenced the Board.

But of course on the face of it the interview with the defendant is material which a Board would wish to see in the ordinary way, and I have no doubt had they appreciated its existence would called for it.

Miss Lang's first point is this. She argues that the Board has an investigatory function which extends to gathering the relevant evidence, and that they should have appreciated that probably an interview would have taken place and should, failing Mr. Tucker's production of it, have exerted themselves to obtain it. The failure to obtain that relevant evidence, Miss Lang suggests, imports culpability on the part of the

Board. She says it in various formulae, but in the end put it in two distinct ways. She submitted that it was incumbent upon the Board to request all material information from statements or interviews, and that their letter did not do that. Secondly, on receipt of what was provided, they should have given thought to its adequacy, which would have led to their asking for the interview, because they should have deduced that an interview probably existed. The failure therefore to do so was a material irregularity which vitiated the proceedings. The Board had a duty to inquire in performing its functions fairly and properly and failed in that duty.

She contends, implicitly at any rate, that the statement that I have cited from the judgment of Mr. Justice Nolan is not framed widely enough because the Board's obligation is not merely to put before the members the information and evidence in its possession, but to ensure that there is in its possession all the relevant evidence which it can reasonably deduce exists.

As to that submission Miss Foster, on behalf of the respondent, contends that the Board's duty has been stated much too high. Central to her submission is the contention that it is fairly and squarely stated in the Scheme that it is for the applicant to prove her case. Miss Foster contends that while undoubtedly the Board, as Berry establishes, has a duty to present fairly and impartially the evidence through its representative, that duty does not extend to evidence gathering in the sense that Miss Lang contends for. Provided reasonable

steps are taken to obtain material and place it before the Board, and provided the material that has been obtained is fairly deployed and there is no concealment or unfair advantage taken, then, she submits, the Board has fulfilled its proper function.

It seems to me that, in the light of the provisions as to the burden of proof and in the light of the passage in the judgment of Mr. Justice Nolan, Miss Foster's submissions are to be preferred. Nowhere can I find any indication that the obligations of the Board extend to the making of full inquiries on its own initiative or the gathering of evidence, in the sense to which Miss Lang contends. Accordingly I reject her first submission.

Miss Lang's second submission is along the following lines. She contends that even assuming that the conduct of the Board cannot be impugned because of the failure to ferret out and place before the three Members the interview (and I have held it cannot) nevertheless the fact that, for whatever reason, that information was not placed before the Board entitled her to the remedy of certiorari.

I propose to say very little about that difficult question at this juncture. She cited in support of it four authorities: East Hampshire District Council v. Secretary of State for the Environment, (1978) Volume 248 Estate Gazette Law Reports, 243; Prest v. Secretary of State for Wales 81 L.G.R. 193; and to two somewhat different cases: R. v. Leyland Justices Ex parte Hawthorn (1979) Q.B. 283 and R. v. Blundeston

Prison Board of Visitors Ex parte Fox-Taylor (1982) 1 All E.R. 646.

The first two cases are cases involving public inquiries and compulsory purchase. Relying on passages there Miss Lang submitted that where there is a public interest in the resolution of particular questions, then, albeit that there is no fault on anyone's part, the Court has the power to interfere by certiorari where it appears that there has been a failure on the part of the deciding authority to consider relevant evidence which, had it been before it, might have affected the result.

As to those two cases Miss Foster seeks to distinguish them from the present by arguing that their context is entirely different. In relation to the East Hampshire case, she contends that there the failure was on the part of the Inspector and there is no difficulty, given the relationship between the Inspector and the Minister who makes the decision on a planning matter, in interfering by way of certiorari in the Minister's decision where there has been a culpable failure on the part of the Inspector.

As to the case of Prest, she contends that it is not really in point in the present case, relying in particular on passages in the judgments of Lord Justice Watkins and Lord Justice Fox. I do not propose to cite, but I have well in mind, either the passages on which Miss Lang relied or those on which Miss Foster relied.

The Leyland Justices Ex parte Hawthorn case and the Blundeston Prison Board of Visitors case are, it seems to me, much more obviously in point. Those cases, read at face value, do appear to support the proposition that even where the Tribunal whose decision is impugned has not been guilty of any culpable act or omission, it may be open to the person who complains of the decision to obtain certiorari where the result of the failure to consider the evidence may have been that there has not been a fair or proper decision.

In Ex parte Hawthorn Lord Widgery, Lord Chief Justice, adverted to the difficulty that prima facie existed where the Tribunal itself could not be criticised. He cited a classic passage from Halsbury's Laws of England as to the nature of the rules of natural justice and the circumstances in which certiorari would go against Justices, and he continued:

> "Nothing is there said about breach of the rules of natural justice. There is no doubt that an application can be made by certiorari to set aside an order on the basis that the tribunal failed to observe the rules of natural justice. Certainly if it were the fault of the justices that this additional evidentiary information was not passed on, no difficulty would arise. But the problem -- and one can put it in a sentence -- is that certiorari in respect of breach of the rules of natural justice is primarily a remedy sought on account of an error of the tribunal, and here, of course, we are not concerned with an error of the tribunal; we are concerned with an error

of the police prosecutors. Consequently, amongst the arguments to which we have listened an argument has been that this is not a certiorari case at all on any of the accepted grounds.

"We have given this careful thought over the short adjournment because it is a difficult case in that the consequences of the decision either way have their unattractive features. However, if fraud, collusion, perjury and such like matters not affecting the tribunal themselves justify an application for certiorari to quash the conviction, if all those matters are to have that effect, then we cannot say that the failure of the prosecution which in this case has prevented the tribunal from giving the defendant a fair trial should not rank in the same category."

So, says Miss Lang, on the authority of that case and the Blundeston case, it is open to this Court, if it concludes that even though without fault the Criminal Injuries Compensation Board was deprived of material evidence which might have had a decisive effect on the outcome, to grant certiorari.

In answer to that Miss Foster relies on the recent decision of the House of Lords in the case of Al-Mehdawi v. Secretary of Sate for the Home Department (1989) 3 W.L.R. 1294. There it is stated in the clearest terms that where through the fault of the party's legal advisers material evidence is not placed before the court or indeed, as was the case there, the hearing takes place in the absence of the affected party

because he was not, through the fault of his advisers, notified of it, that is not a ground for certiorari. The case does not in terms, and indeed Lord Bridge expressly refrains from deciding this, reach any conclusion as to what the position is where the omission is not one which can be laid at anyone's door: where there has been no fault on the legal advisers or anyone else, just an unfortunate omission which has nevertheless led to the absence of the party or the failure to place before the tribunal relevant evidence.

I am asked by Miss Foster to conclude that by implication Lord Bridge is really saying in that case too, absent any fault on the part of the tribunal whose decision is impugned, certiorari will not lie. On the other hand Miss Lang points to the fact that Lord Bridge expressly refrains from over-ruling the cases of Hawthorn and Blundeston, though he points out that the justification for the decision in Hawthorn and by implication in Blundeston is somewhat different from that expressed in the headnote. He says this:

> "Though I do not question the correctness of the decision in Ex parte Hawthorn.... I do question whether it is correctly classified as a case depending on either procedural impropriety or a breach of the rules of natural justice. Certainly there was unfairness in the conduct of the proceedings, but this was because of a failure by the prosecutor, in breach of a duty owed to the court and to the defence, to disclose the existence of witnesses who could have given evidence favourable to the defence.

A

Although no dishonesty was suggested, it was this suppresio veri which had the same effect as a suggestio falsi in distorting and vitiating the process leading to conviction, and it was, in my opinion, the analogy which Lord Widgery C.J. drew between the case before him and the cases of fraud, collusion and perjury, which had been relied on in counsel's argument, which identified the true principle on which the decision could be justified."

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Miss Lang suggests that even re-interpreted in that way the case of Ex parte Hawthorn provides support for her contention that in circumstances such as the present it is open to the Court to grant certiorari even though the Tribunal is not at fault. She relies, I think, on the necessary close identity that there is between the person presenting the case before the Members of the Tribunal and on the existence of the well tried procedure whereby the Board's advocate obtains or should ordinarily obtain information from the police.

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It seems to me that these rival submissions give rise to very difficult questions and they are questions which, I should be reluctant to determine in the course of an extempore judgment. However for reasons which I am about to explain, it is, in my judgment, unnecessary to reach a final conclusion as to the correctness of Miss Lang's submissions in that regard.

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The reason is this. It is accepted that, assuming for purposes of argument that this is a case in which it would be open to this Court to grant the remedy of certiorari, it would only do so if the evidence which was not before the Board was

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evidence which on a sensible appreciation of the case, and viewing it in the context of the material that was before the Board, was such that had they heard that evidence there is a realistic possibility that they would have reached a conclusion different from that at which they did reach. I have unhesitatingly concluded that there is no realistic possibility that they would have reached a different conclusion had they had before them the interview, or the interview supplemented by the prosecution summary.

It must be remembered that they had evidence from the complainant. They had all the material documentation, apart from the prosecution summary and the interview. They had her application. They had the somewhat contradictory statement which she had made to the police when she described the matter in much more detail. They had the point about her failure to disclose her previous application to the Board, and the somewhat bizarre circumstances of that application. But above all they had had the advantage of seeing her and forming a view of her credibility as a witness. They also had, though as I have indicated they were not impressed by it, the point that the defendant had failed to surrender to his bail and they were invited to draw such inferences as they thought proper from that.

What did the interview amount to? I do not propose to cite from it in order to prolong this already overlong judgment. But it is fair to say this (and I have considered the interview carefully, read it and re-read it) that it begins

with the defendant being asked to give his account of what happened, and over the space of some four or five pages in an uninterrupted answer he gives a detailed account of the relationship between the two of them, of the passing of the money, of the events of the previous day, and so on. He describes finally how on the occasion in question they went to the bedroom. He says that they both undressed. She was in a hurry. He could not get an erection because of alcohol. She tried to put a contraceptive on him, but it was no use (there is support for that attempt in her account). She told him to hurry up or she was going. He got a little angry and told her either to repay the money or there was nothing.

He was then asked detailed questions in which he repeatedly asserted that although there had been some disagreement and quarreling between them, at no stage had he ever had sexual intercourse with her on that evening. Again and again, when asked if he had, he repeated that he had not. He asserted, as undoubtedly was the fact on all of the evidence, that he was very drunk. When asked if he had forced sex upon her, he said that he did not.

The high point of the interview is to be found at page 155 at the end:

> "Q. Did you struggle with her at all? A. A little bit in the beginning when I couldn't get an erection and she was angry, and I asked her for five minutes more and then I went to the loo. There she ran out of the room.

A .....

"Q. What type of struggle was this? A. She was pushing me off her and kept on telling me I had no erection to forget about it.

B "Q. Did you keep trying? A. I kept trying for a couple of minutes but it was no use.

"Q. So you carried on when she told you to stop? A. Yes that's right.

C "Q. Did your penis go into her at this time? A. No, not at all...".

Pausing there, that passage is relied on by Miss Lang as being an admission by the defendant that he had continued to

D attempt to have sexual intercourse when the complainant, impatient at his failure to get an erection, had told him to forget about it. But Miss Foster has pointed out a construction, which I confess on first reading had not occurred

E to me, that that passage may well be consistent with his saying that he continued to try not to have sexual intercourse but to obtain an erection. Perhaps the distinction is not very important. It is at any rate a serious possibility that that

F is the construction it bears, though some passages I am about to cite cast some doubt upon it.

The officer continued:

"Q. Did you try to push it wth your hand? A. No.

G "Q. Did you get frustrated by not being able to have sex with her? A. Yes, a little. After she left and I started drinking and then Police arrived.

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A .....

"Q. Did you try and have sex with her when she was not willing? A. No.

"Q. You said that you struggled and she told you to stop, but you carried on when she didn't want to. That is doing it without her consent. Is that not right? A. It never went in.

"Q. Did it go in a little way? A. No. There was no erection. "

There is the high point of the interview.

It seems to me (and I appreciate that I have to ask the question in the context of the formula which I have enunciated, namely, if that had been before the Tribunal, is there any realistic chance that they would have reached a different conclusion) that so far from that supporting the applicant's case, it would, if anything, have reinforced the view that the Tribunal arrived at. Certainly there was nothing there to undermine the jaundiced view that they took of her credibility. She was someone who asserted in the plainest terms, putting it in the terms which she used in her statement rather than her application where she used more extravagant language, that she had been penetrated by this man again and again, numerous times. The interview contained a succession of categorical denials from a man who apparently made no bones about answering the questions that were put to him and being perfectly willing to do so.

It is suggested by Miss Lang that while it was no part of the applicant's case that all that had happened was an attempted rape, the Board could at any rate have treated the statement as being support for the proposition that the crime of violence that had occurred was the crime of attempted rape.

As to that I have to say that reading it in its context it does not seem to me that it does support that view. But even if it does, given the nature of the complainant's statement and her account of what happened, I cannot conceive that the Board could have regarded that statement as providing any support for a case of attempted rape.

The reality of the matter here is that the contest was, had there been sexual intercourse or not? The interview provided cogent support for the fact that there had not. In saying all that I do not overlook the question of the injuries which the applicant had sustained and the degree of violence which the man admitted. But all of those matters were before the Board and their decision based upon the evidence that was before them has not been, and could not be, impugned.

Accordingly even if, which I have not decided, Miss Lang is correct when she submits that absent any fault on the part of the Board it would nevertheless be open to this Court to grant certiorari because of the failure to obtain the interview, I would refuse in my discretion the remedy of certiorari on the grounds that I cannot conceive that it could realistically have made any difference to the outcome of the Board's determination.

There was a final point taken by Miss Lang that there was a factual inaccuracy on the part of the Board in holding, as part of the reasoning in support of their rejection of the claimant's claim, that there was no corroboration of her allegations.

As I read the decision I do not think that that is what they held. The submission is based upon their recitation of the Single Member's reasoning. As I have already indicated, they did that, in my judgment, as part of the history and not by way of adopting it as their own reasoning. In the circumstances there is no substance in that submission.

For those reasons therefore I have concluded that this is a case in which the application must be rejected.

MISS FOSTER: I am grateful my Lord. I understand that my friend's client is legally aided. I make no application for costs.

MR. JUSTICE HUTCHISON: Yes, very well. You ask for an order for legal taxation do you?

MISS LANG: Yes.

MR. JUSTICE HUTCHISON: Yes, very well. Thank you both very much.
