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C0-2883-92

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE)

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 16 June 1994

B e f o r e

MR JUSTICE LATHAM

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R E G I N A

-v-

THE CRIMINAL INJURIES COMPENSATION Board
EX PARTE LESLIE ASTON

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Computer Aided Transcript by
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(Official Shorthand Writers to the Court)

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MR T PRICE (Instructed by Kennards of Leytonstone, London, E11) appeared on behalf of the Applicant.

MR M KENT (Instructed by the Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Respondent.

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JUDGMENT
(As approved by the Court)

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MR JUSTICE LATHAM: This Applicant seeks to challenge two decisions taken by or on behalf of the Criminal Injuries Compensation Board in relation to an application that he made under the Criminal Injuries Compensation Scheme in October 1991. The first decision is a decision of 8 January 1992 by Miss Riddle, the Board's advocate, who concluded that the Applicant was not eligible for an award on the basis that under paragraph 6 of the Scheme the Board was required to consider whether the Applicant assisted the police in bringing offenders to justice; that compensation was not usually paid where the Applicant failed to report the circumstances to the police; that the Applicant had not reported the matter to the police at any time and that as a result there could be no effective police enquiry. Under those circumstances she applied this Scheme so as to withhold compensation from this Applicant.

The Applicant then made application for an oral hearing which was determined by two members of the Board. Notification of their decision was given to the Applicant on 4 September 1992 when it was stated that the application for an oral hearing was refused under the terms of paragraph 24(a) of the Scheme. It is agreed that that was a mistake and should have read, as could be readily appreciated from the history of the matter, to "paragraph 24(c) of the Scheme".

Before I deal with the details of the Scheme itself, I should deal with the facts of the matter as they were available, and made known, to the Criminal Injuries Compensation Board at

the time of those two decisions. At the time of Miss Riddle's decision, the information before her was contained in the application form. Attached to that form was a statement in which the Applicant described what had happened.

He said that on 13 September 1991 between midnight and 1 a.m. he had been returning to his flat at Hollydown Way on the housing estate in which he resided, when he was jumped on from behind. He did not see his attackers; he believed there was more than one; he could not remember very many details of the event; he believed that he may have been cut with a knife or at least kicked; he was kicked to the floor, punched and he was knocked unconscious. He regained consciousness sometime later and found that he had been robbed. His lighter, glasses, money and other effects had been stolen. He had £8 in cash. He managed to return to his flat whereupon an ambulance was called. He was taken to Whipps Cross Hospital and received treatment as indicated on the form. He was detained for observation for some days afterwards. The matter was not reported to the police.

It can be seen that the incident was a serious street robbery in circumstances in which, it is surprising to say the least, that there was no report to the police. According to him the position was that he had not merely been injured, but that items had been stolen from him.

There is a part of the form in which the Applicant is able to set out why it was that the matter was not reported to the police. He explained it in the following terms:

> "The claimant attended hospital immediately after the attack. He could not identify his attacker and there

was no identification evidence. He was knocked unconscious immediately following the attack and a report to the police would have only have served administrative purposes."

In the form he also set out the details of his injuries which included a broken jaw; stitches to the right side of his neck; stitches to the side of his skull; bruising and shock. He asserted he was still suffering pain. There was no other explanation given for his failure to report the matter to the police.

After Miss Riddle refused his application, those acting on his behalf submitted a further document to the Criminal Injuries Compensation Board in support of the application for an oral hearing. It was said that it was within the Applicant's knowledge that, where there was no identification of an assailant, the police would not make any efforts to secure evidence with regard to the crime or to pursue the attackers. He asserted that any evidence that might have been recovered by the police had he reported the matter would have been dissipated by the time he was able to report it, and that would not have given the police sufficient evidence on which to base an investigation. He asserted it was not the case that he did not wish to cooperate with the police or other authorities. It was added on his behalf that he had difficulty with reading and writing, that the hospital authorities did not call the police and he was not advised in this regard.

That was the material which both Miss Riddle, in the first instance, and then the two Board members who dealt with the application for an oral hearing, had before them when they

considered the respective applications. The provisions of the Scheme to which they had to give effect, were the provisions of the Criminal Injuries Compensation Scheme, promulgated in February 1990, known as the 1990 Scheme.

There is no doubt that prima facie on the statement made in his application, this Applicant was a person who had sustained personal injury, directly attributable to a crime of violence, which would be an application which the Board should entertain. By paragraph 6 of the Scheme however, it is provided as follows:

> "The Board may withhold or reduce compensation if they consider that:-
>
> > (a) The applicant has not taken, without delay, all reasonable steps to inform the police, or any other authority considered by the Board to be appropriate for the purpose, of the circumstances of the injury and to cooperate with the police or other authority in bringing the offender to justice:"

It was that provision which was the provision which Miss Riddle considered when she determined that compensation should be withheld from this Applicant. Paragraph 22 of the Scheme makes provision for the application for an oral hearing. It provides that in circumstances where an ihitial decision refusing compensation has been made, if he is not satisfied with that decision, the Applicant may apply for an oral hearing which, if granted will be held before at least two members of the Board excluding any member who made the original decision.

By paragraph 23:

> "Applications for hearings must be made in writing on a form supplied by the Board and should be supported by reasons together with any additional evidence which may assist the Board to decide whether a hearing should be granted."

Paragraph 24 reads:

"An Applicant will be entitled to an oral hearing only if-

> (c) no award, or a reduced award was made and there is a dispute as to the material facts or conclusions upon which the initial or reconsidered decision was based, or it appears that the decision may have been wrong in law or principle."

It then goes on:

> "If it considered on review that if any facts or conclusions which are disputed were resolved in the Applicant's favour, it would have made no difference to the initial or reconsidered decision, or that for any other reason an oral hearing would serve no useful purpose, the application for a hearing will be refused. A decision to refuse an application for a hearing will be final."

I turn to the decision of Miss Riddle, which is the first one challenged. There is no dispute but that she had power to make the decision. There is also no dispute but that paragraph 6 of the Scheme provides for a discretion which has to be exercised by her, in the particular circumstances of this case, to withhold or reduce compensation. There is no doubt that the primary fact was available entitling her to exercise that discretion if she considered it appropriate, because there is no dispute but that this Applicant did not report the matter to the police.

Her decision is challenged on the basis that, in effect, she was applying a blanket policy objection to the grant of compensation and was not properly applying her mind to the fact that she had, whatever policies there may be, a discretion to exercise. In other words, if and insofar as she was applying the policy, she had allowed it to fetter her discretion.

The policy which is said to be the one which was being applied by her without proper consideration was the general policy to refuse wherever there has not been any report to the police. That cannot stand as a ground of attack in the light of the sentence in her decision letter where she asserts that compensation is not usually paid where the Applicant failed to report the circumstances to the police. It follows that she was well aware of the fact that there were circumstances which could justify a departure from the normal practice.

The Applicant has referred me to the document which goes to Applicants called "A guide to the Criminal Injuries Compensation Scheme". It is a document which is intended to help those seeking to make application for compensation to know how the Scheme will be applied in general terms.

Paragraphs 18 - 24 of that guide set out the general practices of the Board in relation to cases where there has not been any report to the police. The Respondents have made it plain that this document should not be treated as a policy document. That is in accordance with the stance that was taken by the Board before Sedley J in the case of The Queen v Criminal Injuries Compensation Board, ex parte Andrew Gambles decided on 3 December 1993 of which I have a transcript. Nonetheless, it is a helpful piece of background information against which, without doubt, Applicants are able to gauge the general approach of the Board and in the light of which one would expect the Board generally to approach cases. In that particular part of the guide it is made plain that the condition that the incident

should have been reported is particularly important because it is, as stated in the guide, the Board's main safeguard against fraud. The guide makes it plain that the question of reporting is not simply for the purposes of ensuring the police should be given information in order to seek to obtain a conviction by way of identifying the assailant or whatever, although that is a material matter, the fact remains that it is one of the few ways in which the Board are able to obtain the sort of information, by way of investigation from the police, which will assist in determining the value of any particular claimant's case.

In paragraph 23 examples are given of cases where the failure to report will not necessarily result in the claim being withheld. It says:

> "Every case is treated on its merits and the Board will take a more sympathetic view where the delay or complete failure to report the incident to the police is clearly attributable to youth, old age, or some other physical or mental incapacity which rendered it difficult or impossible for the victim to appreciate what to do."

Whilst that is not, and cannot be, an exclusive list of the sort of circumstances in which the Board could properly exercise its discretion in favour of permitting compensation to be granted even if there has been a failure to report, nonetheless, it gives a sensible, common sense guide to the sort of circumstances which are likely to affect the Board, and can properly affect the Board, in the light of the overall purposes of the Scheme.

There was nothing in the application which Miss Riddle had to assess which gave her any reason to believe that this Applicant was disabled in any way from making his report to the

police. The only excuse given in that application was that he felt that no useful purpose would have been done by his reporting the matter, because he could not identify the assailant or assailants.

In the light of what was before Miss Riddle, there is no conclusion that she could properly have come to other than the conclusion to which she came, namely, that there was nothing in the material before her which could justify the exercise of discretion other than in the way that she did. It is said that there was, however, a deficiency in her reasoning, or certainly a deficiency in the reasons she gave, because she did not appear to have considered that the discretion she had was not merely in relation to withholding compensation, but also reducing compensation. It is plain from the judgment of Sedley J in the case of Gambles, to which I have already referred, that there is undoubtedly a three stage process to be gone through in every case. Firstly, does the Applicant's conduct make a full award inappropriate? Secondly, if so, to what extent does the Applicant's conduct impact on the appropriateness of an award? Thirdly, what award, if any, should the Applicant consequently receive?

It may well be that in some cases, particularly those cases which one might call cases of "contributory fault" towards the receipt or suffering of the injury, that it will be necessary for those stages to be expressly set out in any decision so to as show that there has been proper consideration of those matters because, clearly, each of those three stages is critically

important. The extent to which in any case a decision document has to set out each of those stages, will depend upon the subject matter of the application and the particular part of paragraph 6 which is being considered.

As it was presented to Miss Riddle, there seems to be no scope for any argument as to there being some sort of reduction in compensation. It was a classic example where an alleged serious assault was simply not reported. The Criminal Injuries Compensation Board had been deprived of any opportunity to assess its validity.

In those circumstances there was no requirement on Miss Riddle to set out expressly the fact that she had gone through the process of asking each separate question and setting out the answer that she came to in respect of thereof. There was, sensibly, no other answer that could or should have been given on the material that was before her.

The conclusion that I have reached is that her decision is not challengeable. The only remaining question is whether or not the material which then went before the two Board members was sufficient to justify an entitlement to an oral hearing in accordance with paragraph 24. The letter of 4 September 1992 gives no reason for the refusal of the application, apart from asserting that section 24(c), when properly read, is the relevant part of that paragraph. In effect, it was being said that this application did not fall within 24(c) because there was no dispute as to the material facts or conclusions upon which the decision was based and the decision was not wrong in law or in

principle. The minutes of the Board's deliberations in relation to the application record the following:

> "There was no dispute as to the fact that the Applicant had not reported the matter to the police in accordance with paragraph 6(a) of the Scheme and no basis for saying the decision may have been wrong in law or principle. Accordingly, the application for a hearing was refused."

Whilst there was no dispute as to a material fact, there was undoubtedly a dispute as to the conclusion reached by Miss Riddle. Miss Riddle had essentially determined that, in her view, the fact that the Applicant did not report the matter to the police, meant that there could not be an effective police inquiry. In the application for the oral hearing, the Applicant's advisers made it plain that they were challenging that conclusion in this sense: they were saying that there could not have been an effective police inquiry in any event. In other words, it was not the failure to report which would have resulted in an ineffective police inquiry, it was the circumstances of the offence itself and the fact that the Applicant would have been able to give no information to the police which could have helped them.

In my view, it follows that the two members of the Board did come to a wrong conclusion in the sense that they failed to appreciate that there was a dispute as to the conclusions reached by Miss Riddle. They did not go on to consider the extent to which that dispute would nonetheless have resulted in an identical result which is how paragraph 4 effectively requires them to deal with the matter if they do come to a conclusion that there is a dispute as to fact or conclusions. In other words,

they are asked to consider that even if there is a disputed fact, or a disputed conclusion, would the matter nonetheless have been dealt with in precisely the same way if the Applicant's version of facts, or submission as to the conclusions which should have been reached, been one upon which the decision was based.

In the context of this case there could have been no other conclusion that this Board could have reached on the material before it at that time, namely that even if the Applicant's version was correct, the only sensible and proper result must have been to withhold compensation. I would therefore refuse this application in respect of the challenge to the decision of the Board for that reason, despite the fact that I consider that there was a deficiency in the way the matter was approached.

I have had put before me a substantial body of material in addition to that which was before the Board. I have looked with anxiety at that in order to determine the extent to which I am justified, in the exercise of my discretion in declining to grant relief.

The new material tends in two separate directions. The first aspect of the evidence which has been put before me establishes that this particular Applicant was not merely a person who could not read or write, which was the only handicap which was asserted by him or on his behalf to the Board at any relevant time, but also that he was subject to considerable disabilities. I have a psychologist's report which makes it plain that he is within the area of the border line mentally handicapped. There is no doubt that that was a matter which

could have formed the basis for the exercise of discretion in his favour, in the light of what is set out in the guide, because that would equate him to somebody who is a child. As a result, I have been even more concerned to look at such material as there is about what actually happened on that particular night, and to see the extent to which, nonetheless, I am exercising my discretion against him correctly.

But the second aspect is that it becomes quite plain from all the material that is now before me that the circumstances in which he received his injuries are obsure and will always remain obscure to those other than him, if and insofar as he has any memory of the matter. It is therefore classically the sort of situation where those seeking to administer the Criminal Injuries Compensation Board would have been left without any proper basis upon which they could have concluded that this was a man whose claim was one which should be met out of public funds.

The reasons that I say that are as follows: it will be remembered from what I have already stated about his application, that he was saying that the incident had happened between midnight and 1 a.m. on 13 September 1991 as he was returning to his flat. He then gave a quite detailed account of having been jumped on from behind and so forth. That account was given on 10 October 1991. He did not arrive at the Accident and Emergency department until 20.38 on 14 September 1991. I suspect that in the Applicant's statement it may well be that he had intended to say it was between the hours of midnight and 1 a.m. on 14 September 1991. I propose to approach it on that basis.

He was first seen, as one would expect, by the nurses. The account that he gave on that occasion was as follows:

> "Friends called to see him at 1 p.m. and found him on the floor. His nose was swollen and there was injury to the right side of his face and his eye. He could not remember anything."

What was put by the nurses as the cause of the injuries he sustained was "? Assaulted last night." When he was seen later that evening by the doctor, the history which was obtained at that time was as follows:

> "Last night Mr Aston had 'lots to drink'. Went out at about 1 a.m. Returned today in the early hours of this morning, with facial injury. Found at about 1 p.m. by a friend."

He was then asked whether he remembered anything about the matter and he said:

> "Does not remember anything about last night."

The next day it was again recorded in the notes that the cause of the injuries was "? assaulted, early a.m. 14.9.91." He was finally discharged from hospital on 18 September, the consultant surgeon who had repaired his broken jaw, said as follows in the first paragraph of his discharge letter to the general practitioner:

> "This patient attended the A & E Dept. on 14.9.1991 at 20.38 hours. He was complaining of pain over his right mandible but denies any knowledge as to how an injury could have occurred."

That material does not support the detailed assertions which were set out on 10 October 1991 in his statement. As I have already indicated, those wanting to investigate will never be able to find out what really happened because the Applicant never reported the matter to the police. They, at least, would have

been able to confirm, or otherwise, what his condition was; when he was found by his friends; where it was likely to have been that he suffered his injury; whether there was evidence there to show how he had suffered his injury; whether there may have been people there who saw what happened to him; precisely what his movements had been and his condition during the previous night and whether there was any evidence to support his claim to have been robbed. Those are all matters which would have been critical to a proper assessment of his claim. All of that was material which was denied to the Criminal Injuries Compensation Board by reason of the fact that he did not report the matter.

For those reasons I am confident that I am correct in concluding that, despite the deficiency I have identified, it would be wrong in the exercise of my discretion to grant relief. The conclusion that was reached by the two members of the Board was one which in my view was inevitable if they had considered the matter in the right way, and was inevitable had they considered the matter in the light of all the facts that are known to me today.

For those reasons this is one of those cases in which it is proper for this court to exercise its discretion against an Applicant even though there is a technical deficiency in the way in which the application that he made was dealt with.

MR PRICE: May I ask for legal aid taxation?

MR JUSTICE LATHAM: Certainly.