JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/89

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	CLIFTON MORGAN	APPELLANT
AND	JAMAICA RACING COMMISSION	RESPONDENT

Pamela Benka-Coker for appellant
instructed by Robinson, Phillips & Whitehorne

Dr. Lloyd Barnett & Richard Ashenheim for
respondent, instructed by Hilholland, Ashenheim
and Stone

September 27 & October 11, 1989

WRIGHT, J.A.:

On September 27 we dismissed this appeal with costs to the Respondent to be taxed if not agreed and promised to put our reasons for so doing in writing. We now fulfil that promise.

The appeal is against the refusal of the Full Court (Bingham, Panton, Clarke, JJ) to grant a motion for an order of certiorari to quash the decision of a Tribunal appointed under the Jamaica Racing Commission Act which on August 5, 1988 found the appellant in breach of Rule 161 of the Jamaica Racing Commission Rules 1977. By way of

punishment the appellant was warned of all courses and other places where the said Rules are in full force for a period of 18 months and ordered to pay a fine of $4,000.00.

The appellant is a licensed trainer and among the horses in his care was "Ankaar Moore" which won a race at the Caymanas Race Track on December 5, 1987 and so became subject to a mandatory test for prohibited substances. The test proved positive for oxyphenbutazone, a synthetic substance normally used as an anti-inflamatory. It is a prohibited substance and the problem was to ascertain how this substance came to be in the body of the horse. That was the assigned task of the afore-mentioned tribunal.

Worthy of note is the fact that the finding of a prohibited substance in the body of the horse gives rise to a rebuttable presumption of negligence on the part of the trainer and the groom (the persons having the care and custody of the horse). Rule 207(2) of the Jamaica Racing Commission Rules 1977 makes this provision - the rule reads as follows:

> "207(2) A finding by the Racing Chemist that a Prohibited Substance or a substance other than a substance which can be traced to a normal nutrient is present in the sample taken from a horse or that a normal nutrient in abnormal quantities or administered or applied in an abnormal manner was present in the sample taken from a horse shall unless the contrary be proved by the owner, trainer, groom or any person having the charge and custody or care of the horse, be proof that the horse was administered such substance or normal nutrient, that in the case of a sample taken on the day in which the horse has participated, the horse carried the said substance or normal nutrient in or on its body while participating in the race and that, in the case of a sample taken on the day of a race in which the horse was declared to start but in which the horse did not start, the intention of the person having the charge, custody or care of the horse was that the horse

> "should carry the said substance or normal nutrient in or on its body while participating in the race. Any such a finding as aforesaid shall unless the contrary be proved by any of the persons aforesaid, also be proof that the said substance or normal nutrient was one which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse, and that the trainer, groom and any other person having the charge, custody or care of such horse has been negligent in the charge, custody or care of such horse."

Rule 161 of the aforesaid Rules prescribes the parameters within which such a person may rebut the presumption under Rule 207. The provisions of Rule 161 are as follows:

> "161. The trainer, groom and any other person having charge, custody or care of a horse are obliged properly to protect the horse and guard it against the administration or attempted administration, whether internally or externally, of any Prohibited Substance or of any substance other than a substance which can be traced to a normal nutrient being a substance which by its nature could affect the speed, stamina, courage or racing performance of a horse or of a normal nutrient in such abnormal quantities or in such an abnormal manner that it could affect the speed, stamina, courage, conduct or racing performance of a horse, and if the Commission shall find that any such person has failed to show proper protection and guarding of the horse, it shall impose such penalty and take such other action as it may deem proper."

The evidence before the Tribunal was that the appellant was a licensed racehorse trainer since 1986 and that Phillip Brown, whom he had known for about 10 years, was his head groom. Phillip Brown was an experienced groom having been so engaged since 1972.

The appellant had the first indication of trouble when, sometime after the race on December 5, 1987, he went to collect his purse and was told it was with-held. It was not until sometime in January 1988 that he was told that "Ankaar Moore" had tested positive for the race. That is quite understandable because the certificate of the Racing Chemist is dated January 14, 1988 and the result of the confirmatory test

bears date January 27, 1988. The appellant was thrown into a dither because he had not administered any prohibited substance to the horse nor was he privy to any such administration. He failed to elicit any information from any of his grooms and so he called in the police - Detective Sergeant Barnes. On his first visit the officer fared no better than the appellant but on his return visit Phillip Brown admitted in a written statement, which he maintained before the Tribunal, that after "Ankaar Moore" had competed in a race on Wednesday, December 2, 1987 and had been returned to his stall, he observed that the horse appeared to be lame. By then the appellant had left. In an effort, therefore, to render the horse fit for a race on December 5 for which it had been nominated, he procured two pain-killer tablets which he administered to the horse with such beneficial results that by the next day when the appellant arrived, he did not advise him of what he had done. In his statement and before the Tribunal, Brown said he had given the horse the pain-killers but that he had not given the horse any drugs. He was saying so because he did not regard pain-killers as drugs, and he was encouraged in such ignorance because neither the appellant nor any of the other trainers with whom he had worked had ever told him not to administer pain-killers to the horses although drugs had been forbidden. The truthfulness of his contention, at least so far as the appellant is concerned, was put beyond any doubt when the appellant admitted to the tribunal that he had indeed warned Brown against the administration of drugs but not against pain-killers specifically.

The Tribunal on that evidence found that the appellant was in breach of Rule 161 (supra). In dismissing the appellant's motion for an order of certiorari to quash this

finding of the Tribunal the Full Court held, correctly, in my opinion, that the appellant had failed to discharge the evidential burden of showing that all reasonable care had been taken to protect and guard the horse against the administration of a prohibited substance.

Before us, Mrs. Benka-Coker had proposed to challenge this decision of the Full Court on the basis of the following two grounds, which I must say in all fairness to her, were not settled by her. Ground 1 is as follows:

> "That the Full Court was wrong in law in concluding that the applicant/appellant had a duty under Rule 161 of the Jamaica Racing Commission Racing Rules to instruct the groom not to give a painkiller to the horse."

Ground 2 -

> "That the Full Court was wrong in law in concluding that there was evidence to support a finding that the applicant/appellant was in breach of Rule 161 of the Jamaica Racing Commission Racing Rules 1977."

Ground 1 flies directly in the face of Rule 161 (supra) and having regard to the evidence of Phillip Brown and the applicant himself agreeing that he had not warned Brown against the administration of pain-killer, Ground 2 is a clear non-starter. Recognising that the essence of the appeal was whether there was any onus on the trainer to tell the groom not to administer pain-killers, Mrs. Benka-Coker capitulated to the weight of the evidence and did not advance any submissions on behalf of the appellant.

We wholeheartedly endorsed her decision as it is well-nigh impossible to think of any plausible submisisons which could be made on behalf of the appellant. His was a hopeless case.