J A M A I C A

IN THE COURT OF APPEAL

R. M. COURTS CRIMINAL APPEAL NO. 173/66

BEFORE: The Hon. Mr. Justice Lewis,
The Hon. Mr. Justice Moody
The Hon. Mr. Justice Shelley (Acting)

R. vs. R O G E L I O M A L E K
&
O'H A I N E Y R E Y E S

Messrs. D. Coore, Q.C., and E. George for Malek

Messrs. I. Ramsay, Q.C., and H. Hamilton for Reyes

Messrs. F. Phipps and W. K. ChinSee for the Crown.

October 17, 18, 19, 20, 21, 24, & 25
November 30, 1966.

LEWIS, J.A.

The judgment I am about to read is the judgment of the Court.

The appellants were convicted on the 29th of April, 1966, after a trial which lasted some seventeen days, on two counts of an indictment which read as follows :-

" STATEMENT OF OFFENCE - FIRST COUNT: Conspiracy to defraud (Contrary to Common Law). PARTICULARS OF OFFENCE: O'Hainey Reyes and Rogelio A. Malek on divers dates during the period 3rd. to 5th June, 1965, in the parish of Kingston conspired together and with other persons unknown to defraud such persons as should be induced to accept bets made by/or on behalf of Rogelio A. Malek on certain horses in the Dewar Handicap Race on the 5th of June, 1965, by

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" agreeing to ensure that the horses "Great Surprise" and "Serenade" lose the said race. O'Hainey Reyes and Rogelio A. Malek are further charged with the following offence: STATEMENT OF OFFENCE - SECOND COUNT: Conspiracy to effect a Public Mischief. PARTICULARS OF OFFENCE: O'Hainey Reyes and Rogelio A. Malek on divers dates during the period 3rd. to 5th June, 1965, in the parish of Kingston, conspired together and with other persons unknown to effect a Public Mischief by agreeing to ensure that the horses "Great Surprise" and "Serenade" lose the Dewar Handicap Race on the 5th of June, 1965. "

The appellant Malek was sentenced to six months' imprisonment with hard labour on count 1 and twelve months' imprisonment with hard labour on count 2 to run concurrently. The appellant Reyes was sentenced to three months' imprisonment with hard labour on count 1 and six months' imprisonment with hard labour on count 2 to run concurrently. They now appeal against their convictions and sentences.

In four of his eight grounds of appeal the appellant Malek refers to "the judgment of the learned Resident Magistrate" and in ground seven he refers to "the judgment of the learned Resident Magistrate attached hereto." No judgment was attached to the grounds of appeal. It appears that the learned Resident Magistrate delivered an oral judgment or summation of which no official note was made. He did not record in his notebook his reasons or any findings of fact.

At the commencement of the appeal, learned Counsel for the appellant Malek referred the Court to an affidavit by one Donaldene Cooke, a certified Stenotypy Writer, to which is attached a document which she says is a copy of the typescript of the judgment delivered by the Resident Magistrate and taken down verbatim by her, and asked this Court to accept it as part of the record in the appeal.

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This was objected to by Mr. Phipps, Deputy Director of Public Prosecutions, on the ground that the document contains so many errors and omissions that he could not agree to it as being a correct record of the learned Resident Magistrate's judgment. The grounds of appeal were filed on the 17th of May, 1966, and this document was evidently then in the hands of learned Counsel for the appellant who settled them, and in fact, he so stated to the Court. The Court was also informed that the document was not sent to the Learned Resident Magistrate for his perusal and comments until the 3rd of October. The learned Resident Magistrate stated in a letter of the 11th of October - also attached to the affidavit - that he had no copy of the judgment he delivered, and was therefore unable to say whether the document correctly records his judgment. This Court was informed that the delay of some five months in sending the document to the learned Resident Magistrate was occasioned by the fact that he was on leave. The Court has made enquiries of the Chief Justice's Office, which is responsible for the administration of the Resident Magistrates' Courts, and has been informed that during the relevant period the Resident Magistrate went on fourteen days' departmental leave from the 22nd of August, 1966, so that this explanation is quite unsatisfactory.

Mr. Phipps eventually withdrew his objection to the document being received by the Court and all parties agreed that the Court should admit it subject to the errors and omissions. During the course of his argument on the appeal, however, Mr. Phipps invited the Court's attention to the various gaps in the document and to the fact that the word "inaudible" appears five times on the last three pages. He submitted that at a critical stage of the document there were significant omissions which counsel had agreed they were unable to fill in. He had earlier stated that although he had no recollection of the learned Magistrate having referred to corroboration he was not in a position to agree that he had not done so.

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The Court has considered the document with care and some anxiety and has reached the conclusion that it can only treat it as what on its face it purports to be, namely, an incomplete record of the Magistrate's summing-up, and not as establishing that the Magistrate did not in fact refer to any matter not mentioned therein. In particular the Court is unable to hold, on the basis of the document, that the learned Magistrate did not warn himself of the danger of convicting on the uncorroborated evidence of an accomplice.

The Court has stated that the learned Magistrate did not record in his notebook his findings of fact or his reasons for his decision. It must be observed, however, that the law does not require him to do so, nor does it require him on an appeal being taken to furnish this Court with any reasons for his decision. No provision is made for an official note to be taken of an oral judgment, or for the inclusion of any note of the Magistrate's comments or reasons as part of the appeal record. In this connection, reference may be made to the Judicature (Resident Magistrates) Law, Cap. 179, ss. 280, 282, 291 and 299. Resident Magistrates have a jurisdiction to try serious offences both summary and indictable and this case highlights the view which the Court has on previous occasions expressed that the law ought to be amended to require them to file reasons for their decisions when appeals are taken.

The case for the prosecution, put shortly, was as follows. The Dewar Handicap Race was to be run on June 5, 1965, and four horses, namely, Great Surprise, Bally Rose, Collette and Serenade were entered for it. Great Surprise had won a race in the previous week and had placed second in another race. The appellant Malek planned to bet heavily on the quinella Bally Rose-Collette and wished to make sure that he would win. He therefore conspired with his trainer, the appellant Reyes, and with others, to defraud the persons with whom he would bet on the basis of a fairly run race, by ensuring that the other two horses ran third and fourth. In order to do this he, with Reyes' assistance, got control of Great Surprise

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by purchasing it at a price much above its market value, bribed or attempted to bribe the jockeys of Great Surprise and Serenade to hold back the horses, and with Reyes and others had Great Surprise doped. This dishonest interference with the fair conduct of the race would cause great inconvenience and detriment to the public and the agreement was therefore also a conspiracy to effect a public mischief.

The evidence clearly established that the horse Serenade, which ran third, was "pulled" by the jockey, and that Great Surprise, which ran fourth, was doped. It was also proved that the appellant Malek, introduced by the appellant Reyes, purchased Great Surprise from an owner-trainer named Godwin Bucknor on the morning of the 4th of June and that it was delivered to them early on the morning of the 5th June. It was also proved or admitted that the appellant Malek bet sums totalling £2,335 on the quinella Collette-Bally Rose on the 5th June with book-making establishments in Kingston and Montego Bay, the largest individual bet of a £1,000 being placed within the final ten minutes before the race started.

Serenade was ridden by an apprentice jockey named Gilford Searchwell, upon whose evidence the prosecution placed great reliance. His evidence was that on the night of June 4, his master, the appellant Reyes, at whose home he lived, awakened him during the night and said to him:- "You going to ride horse named Serenade and he must run third and Great Surprise is going to run last." Searchwell replied, "Great Surprise run first last week how it to run last this week?" To which Reyes answered, "You are a ginnal", (meaning you are trying to be a wise man) and added either that he had bought Great Surprise or was about to buy it, and that they were going to gamble a lot of money, and if they lost they would have to go away; that either Collette or Bally Rose would win first or second. Searchwell said that the following morning Reyes took him to the Race Course at Caymanas and reminded him of what he had told him the previous night, and later called him into his

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office where he met Malek; that Malek then told him that he was going to give him the same thing that he had given the other one, and handed Reyes £15 which Reyes handed to him. Reyes told him that he must not let the horse "jump good" that is, take a lead, and that he must "try and go wide". Searchwell admitted that during the race he pulled the horse on the straight.

On the following day, according to Searchwell, Malek called at Reyes' home. Reyes was out. Malek spoke with Searchwell and handed him £35 saying, "sorry the quinella so small, next time is there."

In cross-examination Searchwell admitted that at an enquiry into the race held by the Jockey Club of Jamaica on the 7th June, he did not say that he had pulled the horse as a result of anything that Reyes had told him, but had said that he had held up the horse's head on instructions from one Campbell, Serenade's trainer, because the horse had recently had lampas. He maintained, however, that it was true that he had held back the horse in accordance with Campbell's instructions but that his evidence with respect to Malek and Reyes was also true. He admitted that having lost his licence he wanted to go to Venezuela and that his mother had gone with him to see Reyes about this, but he denied hearing his mother ask Reyes for £75.

Great Surprise was ridden by a jockey named Gaussen who had in the previous week ridden it successfully. He had been "declared" its jockey by Bucknor on the 4th. He testified that on the morning of the 5th June Reyes took him to his stables and showed him Great Surprise and told him: "They bought Great Surprise" and "The 'man them' would like to run a quinella race between Collette and Bally Rose, so you must come back around ten o'clock to see the owners." He left the stables and spoke to his trainer master Mr. Skelton. He returned to the stables between 10 and 10.30 a.m. and after a while Reyes called him into his office where Malek was and left them together. Malek then told him that he had bought Great Surprise, that he would like to win a quinella race and that he would give him £25. (Gaussen's percentage if he won the race would be about £19.) In the afternoon shortly before /the....

the race Reyes told him that he knows the horse so he must ride him. He rode to win but the horse did not run as it usually did and in fact ran last.

As we have said, it was proved that Great Surprise was doped. The chemist Ledley Mowatt expressed the opinion that the drug promazine, a tranquiliser, had been administered about four hours before the specimen was taken - it was taken about 2.15 p.m. - but admitted in cross-examination that it was possible that traces of the drug might be found in the urine up to twelve hours after it was administered.

Bucknor gave evidence that he was first approached by Reyes about selling Great Surprise on the evening of June 3. Reyes offered £600 on behalf of a prospective purchaser and he said he would sell for £800. On the Friday Reyes raised his offer to £700 but Bucknor declined as he regarded Great Surprise as a winner and it had two engagements in the Saturday meeting. Reyes agreed to Bucknor's price and said he would bring the purchaser. Bucknor told him to bring cash. Later that morning Malek and Reyes came to his (Bucknor's) premises in Malek's car, called Bucknor out to the car and Malek paid him £800 in cash. Bucknor offered to write a receipt but Malek said he would write one and wrote something which Bucknor signed without reading. The receipt was incomplete when he signed it. This receipt (Exhibit 1) was put in evidence by the defence and stated the price as £500. Bucknor said he also signed an incomplete transfer (Exhibit 33) addressed to the Jockey Club. Malek and Reyes left and Reyes later returned and asked for commission. Bucknor got £20 from his wife, to whom he had handed the £800, and gave it to Reyes. We should mention here that Reyes in his evidence admitted this second visit to Bucknor for commission and that Bucknor told him that he had handed the money to his wife, but denied that Bucknor gave him the £20 or any amount.

Mrs. Bucknor gave evidence that her husband did hand her £800 that morning, which she checked, and that she did give him £20 to give Reyes.

To continue with Bucknor. He said that on this occasion he also gave Reyes a letter to his groom to deliver Great Surprise.

Early next morning he went to his stables and finding Great Surprise still there had it taken to Reyes' stables where Reyes took delivery from him. Both Bucknor and his groom testified that at the time of delivery Great Surprise was in perfect racing condition: the groom had kept watch over it during the night, and no one had administered any drug to it.

In cross-examination Bucknor denied having agreed with Reyes to deliver the horse to him after the race meeting. He said that on delivering the horse he did at Reyes' request give him a letter to the Stewards and that he may have said in that letter that he was sick and could not attend the races. (Evidence was called by the defence to prove that this letter had been delivered to the Stewards of the Jockey Club on the 5th and subsequently passed by the Jockey Club to their solicitors, who had mislaid it.) Bucknor said that he was not in fact sick and did go to see the horse run and bet £10 on it at the track, but was so disappointed at its performance that he left immediately. On this point a defence witness, Mrs. Sharp, secretary to the Jockey Club, said that in a private conversation with Bucknor on the occasion of the enquiry into the race he told her that he was sick and had not attended the race meeting, but this conversation was not put to Bucknor in cross-examination.

Oswald Steele, President of the Jockey Club, said that on 7th June Malek came to his office and told him that there was a rumour that he had bought Great Surprise for £800 but that he had only paid £450 for it. He heard Malek say at the enquiry that he had bought Great Surprise for £500 and another horse Gold Dust for £450, but he was sure that Malek told him that he had paid £450 for Great Surprise. He (Steele) thought the market value of Great Surprise was £450. He gave evidence that Searchwell's licence had been cancelled, and Reyes and Malek " warned off" as a result of the enquiry; and that Malek had sued the Jockey Club. Subsequently he had told Searchwell that if he told the truth about the Dewar Handicap the Stewards might reconsider his position. He agreed

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that Great Surprise was entered in two races on the 5th and had it won both, Malek would have been entitled to the purses of about £200 each.

The evidence as to bets placed by Malek either personally or by his agents was not disputed. With Merrick Watson's betting establishment at Kingston he placed £160, and at Montego Bay £550 on the quinella Bally Rose - Collette. Merrick Watson's reaction to this was to telephone his father Frank Watson and to arrange for him to place a lay off bet on the track. With Frank Watson's establishment at Kingston he first placed bets of £125 each on the quinellas Collette-Serenade and Bally Rose-Serenade, and of £625 on the quinella Collette-Bally Rose. Then immediately before the race was run he placed another bet of £1,000 on the quinella Collette-Bally Rose. Frank Watson's reaction was also to lay off at the track. With respect to this bet of £1,000 Malek said that he did this because he overheard the telephone conversation between Frank Watson and Merrick Watson and realised that Frank Watson was going to place lay off bets on the track. With the Jamaica Turf Club, the licensed promoters of the race meeting of June 5, Malek placed bets totalling £1150 on the five possible quinella combinations other than Bally Rose-Collette. As the Watson's establishments pay dividends as declared on the track, the effect of the bets on the track was to increase the dividend on the winning combination Bally Rose-Collette.

The evidence of Mr. Armond, Managing Director of the Jamaica Turf Club is of importance and the appellants rightly placed great reliance upon it. It established that the pattern of betting on the track showed that Bally Rose and Collette were the favourites in that order, followed by Great Surprise and Serenade. This, the appellants urged, must be considered in the light of the evidence of Ivan Barrow, a Race Steward, that as a result of the previous week's win by Great Surprise its weight had been increased and that of Collette reduced, so that Collette was better off in the Dewar Handicap by 22 lbs. a large amount in such a race, and shows

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that anyone who followed racing closely, as Malek did, would have realised that Great Surprise was unlikely to win the Dewar Handicap.

Both appellants gave evidence. The appellant Reyes said that he had no interest in the race and made no bets on it, and knew nothing of the quinella. He denied entirely Searchwell's allegations and said that Searchwell did not sleep at his house on the night of the 4th of June but slept in a lodge in the compound of his stables. He himself slept in his office, nearby. Searchwell, he said, had lived with him for three years and had proved to be an ungrateful and undisciplined person whom he had had to punish from time to time. At the time of the race they were not on good terms. He considered Searchwell the type of person to do dishonest things in a race and if asked to pull a horse would do so. He denied that he gave Searchwell any instructions as to how to ride Serenade. He admitted that on the morning of the 5th June both Searchwell and Gaussen were at his stables when Malek was there and that he saw Malek speak to Gaussen. He said that he did not see Malek speak to Searchwell. He had no conversation with Gaussen about a quinella. With regard to the purchase of the horse, he said that it was Bucknor who approached him with a request that he should find a purchaser for Great Surprise. Bucknor did ask £800 but he told him, in effect, that this was a ridiculous figure. He did eventually arrange for Malek to buy the horse and took Malek to Bucknor's premises on the 4th. He did not see the price paid but Malek showed him the receipt. Later he returned to Bucknor to claim his commission, but Bucknor told him that he had handed the money to his wife who could not then be disturbed, and he said that he never did receive any commission.

With regard to the delivery of the horse at his stables on the 5th, he denied that Bucknor had given him a letter to the groom, and said that he had arranged with Bucknor to take delivery of the horse after the race. He was therefore surprised to learn that Bucknor had brought the horse. He spoke with Bucknor, not at his stables but on the road, and only agreed to keep it because Bucknor said that he was sick and could not attend the races, and agreed to give him a letter to the Stewards to that effect.

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He said that the stables in which he placed Great Surprise contained a number of other horses, some of which had engagements that day, and that a fairly large number of persons would have access to them. Although he was responsible for the safe keeping of the horse, and to the best of his ability took precautions to see that no one doped it, yet it was possible for someone to dope it without his knowledge. He received no report from any of his grooms, or from the groom in charge of Great Surprise, of any suspicious movements. He said that shortly after mid-day on the 5th he visited Great Surprise at the stables. It did not look right to him, so he drove it around and the horse "bucked" its head on the feed pan. This made him think that the horse might be shy-blind, but by waving his hand in front of it he discovered that it was not. He made a report to the veterinary surgeon, Mr. Bent. when the horse was in the saddling. Bent ran it up and down and it pitched once as though it would fall but Bent said that he saw nothing wrong with it and that he should let it race.

Bent was called as a witness on his behalf, but denied that Reyes had made any report to him. He said that he observed that the horse's legs were bandaged and after enquiry called Reyes who removed the bandages. He made a routine examination of the legs and found the horse to be sound. He did not observe anything to suggest that the horse had been doped.

Malek denied any conversations with or payment to Searchwell. He admitted going to Reyes' house on the 6th, but said that on learning that Reyes was out he left without coming out of his car. In this he was supported by his witness Catherine Mahfood. He did not see Searchwell on that day. He agreed that the dividend paid on the quinella was very small, but denied having said so to Searchwell. With respect to Gaussen, he said that Gaussen approached him on the morning of the 5th by his motor car at Reyes' stables and enquired whether he was going to start "Great Surprise", as he, Gaussen, was the declared jockey, and he told him "yes" and promised him £25, a little more than his percentage, if he won.

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They had no conversation about a quinella. He said - and this was admitted by one witness for the prosecution - that owners sometimes offered their jockeys something above the jockeys' percentage to encourage them to win the race. He confirmed Reyes' account of the purchase of Great Surprise, and said that after discussion Bucknor had agreed to sell for £500, and this was what he paid. He wrote the receipt (Exhibit 1) and transfer (Exhibit 33) and Bucknor signed them. He denied that either was in blank or only partly complete when Bucknor signed. He did not hand in the transfer to the Stewards until the day of the enquiry because he had arranged with Bucknor not to deliver the horse to him until after the race.

Great Surprise was not his first race horse. He had owned one between 1957 and 1959 and had started to buy again in May, 1965. He purchased "Gold Dust" for £450, and gave it to Reyes to train. He also purchased "Boxing Day". He considered £800 for "Great Surprise" a ridiculous figure and would never have paid it. He denied telling Steele he had paid £450 for it: he had said £500.

Reyes told him on the morning of the 5th that Great Surprise had been delivered, and he did look at it along with Reyes, but he was not interested in its condition. He knew nothing about its doping. With regard to the heavy betting, he agreed that £2,335 was the highest sum that he had ever bet on one combination, but said that he was a man earning a large income, and had for many years bet fairly heavily on horses. He used a system which he had learnt of in the United States of America, and which he had previously discussed with Mr. Frank Watson. (Mr. Frank Watson had admitted this.) He had used this system on the 5th. He had not intended to place the final bet of a £1,000, but had done so in order to off-set Frank Watson's lay off bet. He did not expect Great Surprise to win the race but would have been pleased if it had. He himself did not attend the race meeting.

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The grounds of appeal may be summarised as follows :

(1) The facts alleged by the prosecution, even if established, would not amount to any criminal offence because -

(a) as regards Count 1, the betting transactions with the Watsons were illegal ;

(b) as regards Count 2, the categories of public mischief are closed.

(2) (a) The learned Resident Magistrate failed to warn himself of the danger of convicting on the uncorroborated evidence of Searchwell who was an accomplice ;

(b) the learned Resident Magistrate wrongly relied upon Searchwell's uncorroborated evidence.

(3) The evidence with respect to the doping of the horse Great Surprise was inadmissible there being no evidence connecting either of the appellants therewith.

(4) The prosecution failed to establish a vital ingredient of each charge, namely, an agreement to ensure that each of two horses would lose the race, since the evidence did not establish any unlawful act done by either appellant designed to ensure that the horse Great Surprise would run neither first nor second.

(5) If the learned Resident Magistrate found that the appellants were responsible for the doping of Great Surprise, such finding was unreasonable and a misdirection.

(6) The convictions were unreasonable having regard to the evidence.

(7) The sentence of imprisonment passed on the appellant Malek was manifestly excessive.

Under Ground 1(a) it was submitted, and this was conceded by the Crown, that the bets with the Watsons were illegal transactions prohibited by the Gambling Law, Cap. 137 (since repealed) because they were made in their betting shops. It was contended that as a matter of public policy the law will not lend its aid to protect illegal transactions, and that to hold that it is possible to defraud

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a person engaged in an illegal transaction is legalising illegality. It was necessary to show that the person defrauded had a lawful right or interest; the evidence established no such right or interest and accordingly the count could not be maintained. Reference was made to R v. Orbell (1704) 6 Mod. 42, R v. Peach 1 Burr. 548, and R v. Stratton 1 Camp. 549. The prosecution, it was submitted, must prove that at least one person was induced to take a lawful bet on the winning quinella.

Counsel for the prosecution submitted that the illegality of the bets was immaterial. He adopted the proposition favoured by Glanville Williams, Criminal Law 2nd. ed. para. 222 at p. 695 and cited from the American case of Gilmore v. People (1899) 97 Ill. App. 128:- "The people are entitled to have the criminal punished on public grounds, for the suppression of crime and for the protection of the public against other like crimes, no matter how unworthy the source from which the proof may come. "

He referred to R v. Hudson (1860) Bell 263, R. v. Dodd (1868) 18 L.T. 89, and R v. Caslin (1961) 45 Cr. App. R. 47.

We are unable to accept the submission of learned counsel for the appellants either upon authority or in principle. The case of R v. Orbell (supra) shows that a conspiracy to obtain money by fraud or cheating in a public race is a matter affecting the public and an indictment will not be quashed. No case involving fraud was cited in which the fault or unworthy conduct of the prosecutor was held to be a defence. The weight of authority seems rather to be in the contrary direction. In R v. Peach (supra) the court, while refusing its aid to infamous cheats on a motion for an information for conspiracy to cheat them out of £900 by fraud at a foot race, referred them to their ordinary remedy of action or indictment. In Hudson's case (supra) the defendants were convicted of conspiracy to defraud although the prosecutor had himself intended to defraud one of them - a case, as Blackburn J. pointed out, of "the biter bitten." In Dodd (supra)

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Lush J. overruled an objection to an indictment for forgery with intent to defraud based on the fact that the society defrauded was unregistered and had illegal objects. In R v. Browne and others (1899) 63 L.T. 790, Darling J. expressed the opinion that an indictment for false pretences would lie against a person who, pretending to sell to a woman drugs in order that she might attempt to procure an abortion, supplied her instead with an innocuous substance: and in the more recent case of R v. Caslin (supra) the illegality of the transaction in which the soldier paid over his money to the prostitute did not prevent the Court of Criminal Appeal from substituting a verdict of obtaining money by false pretences.

Nor does there appear to be any reason in principle why the illegality of the betting transactions should be a bar to the indictment for conspiracy to defraud. The gist of the offence is the agreement to induce some person or persons by means of fraud to act in some way to their detriment or prejudice or contrary to what would otherwise be their duty. It is the purpose which the conspirators plan to achieve by their dishonest devices which must be looked at and not the transaction or overt act by means of which they may gain an economic advantage for themselves. Payment of money on a losing bet is a detriment or prejudice whether it is paid under a legal or an illegal contract. Thus the legality or otherwise of this transaction is irrelevant to proof of the offence. Indeed the offence would be complete even if the bookmaker when approached, declined the bet, or having taken it, cancelled it before the race: for it is immaterial that the conspirators did not succeed in their purpose. (In the instant case, Frank Watson having heard of the race, cancelled the bets and declined to pay.)

Finally, betting per se was not illegal, and indeed, under the Gambling Act, 1965, bookmakers may now lawfully operate under a licence. Public policy would indeed be an 'unruly horse' which would require proof of the offence of conspiracy to defraud to depend upon whether the bookmaker had or had not a licence in force.

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There is however a further ground on which we think count 1 can be sustained. The bets taken with the Jamaica Turf Club, the promoters of the race meeting, were admittedly legal. It was contended by counsel for the appellants that these bets were irrelevant for the purpose of sustaining the count because they were taken on losing combinations and the Turf Club therefore won. We do not agree. The effect of these bets - and the appellant Malek admitted that this was in part their purpose - was to increase the dividend which the Turf Club would declare on the winning combination and on the basis of which the Watsons would pay. The declaration of this increased dividend was part of the purpose of the conspiracy and, if induced by fraudulent devices of the appellants, was in our view a sufficient detriment or prejudice to the Turf Club to sustain the count. Further, as promoters of the race meeting, under the Jockey Club of Jamaica recognised by statute as the governing body of racing in Jamaica, the Turf Club would be under a duty not to accept any bets upon a race if it were brought to their knowledge that the conduct of such race had been improperly interfered with. The count is in our opinion sustainable by proof that they were induced by fraud to act contrary to their duty.

COUNT 2 - PUBLIC MISCHIEF:

With respect to this count, it was submitted that the categories of public mischief are closed, and that in order to sustain a count for conspiracy to effect a public mischief, it was first necessary to show that some act had been done, which, if performed by an individual, would fall within a category which had previously been recognised as a crime. This proposition, it was said, was based upon the decision in R v. Newland (1953) 37 Cr. App. R. 154. It was contended that the facts of this case did not fall into any such category. In our opinion Newland's case does not support this proposition. Newland's case decided, as stated in the head note at page 155 (as corrected), that "The right approach to cases of public mischief is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed

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in combination with others as indictable only if they constitute what has been held in the past to be a common law or a statutory offence." Thus the alleged closure of the categories of public mischief is relevant only when the charge concerns the acts of an individual "not committed in combination with others." The Court in Newland's case declined to decide whether the facts there alleged were such as to create a new offence if done by an individual, holding that this was unnecessary on two grounds. First, because "it is well known that there may be many acts which, if done by an individual would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of persons as the result of a conspiracy" and secondly, citing from Hawkins' Pleas of the Crown, Vol. 1, p. 446: "There can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person are highly criminal at common law." The instant case is concerned with the acts of a combination of persons.

It is well recognised that the State has an overriding interest in promoting the health and welfare of the community through public recreational facilities. Horse-racing is a sport in which the public as a whole take a keen interest in one form or another. Some may attend the meetings, others may bet on the results of the races, yet others may merely follow on radio or television. Moreover, the law provides for part of the revenues collected from the sale of sweepstakes drawn on these races to be allocated to the maintenance of public hospitals. Thus the State and the public have an interest both cultural and economic in ensuring that the sport of horse-racing is conducted on principles of honesty and fair dealing. We have no doubt that attempts to interfere with the fair running of a race by bribing a jockey and doping a horse operate to the prejudice of the community and that a conspiracy for this purpose is a conspiracy to create a public mischief and a criminal offence. In thus holding we do not attempt to legislate or to create a new offence, but merely declare that certain facts, if proved, fall within a well recognised criminal offence. A similar approach was taken by the

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House of Lords in Shaw v. D.P.P. (1961) 45 Cr. App. R. 113, where the House disclaimed any intention to legislate and held that conspiracy to corrupt public morals was a crime well known to the common law and that it was open to the jury to find that the facts proved, though novel, constituted that offence. Lord Simonds pointed out, at pp. 148, 149, that the label given to the offending act mattered little, and that it might by some be aptly described as the creation of a public mischief.

We hold that the counts were properly charged and that this ground of appeal fails.

GROUND 2 -Corroboration: Searchwell was admittedly an accomplice. It was submitted on behalf of the appellants that there was no corroboration of his evidence and that the learned Resident Magistrate had failed to indicate in his judgment that he had addressed his mind to the danger of convicting the appellants upon his uncorroborated evidence. The magistrate, it was contended, had not stated whether he thought there was corroboration or not. If he thought there was corroboration, he was wrong. If he held that there was no corroboration, then the conviction could not be sustained because of his failure to state that he had given himself the necessary warning. In support of these submissions learned counsel referred to Chiu Nang Hong v. Public Prosecutor (1964) 1 W.L.R. 1279, a Privy Council Appeal from Malaya against a conviction for rape, in which it was held that in such a case where a judge, sitting alone, decides to convict in the absence of corroboration because he is convinced of the truth of the complainant's evidence, he must make it clear in his judgment that he has in mind the risk of convicting upon her uncorroborated evidence but is nevertheless convinced by the evidence, though uncorroborated, that the case against the accused is established beyond any reasonable doubt.

We have already stated that we are unable to hold that in this case the Resident Magistrate did not give himself the required warning. We have also pointed out that the law of Jamaica does not require the Magistrate to make any note or record of the

/considerations....

considerations which led to his decision to convict. We do not find it necessary to decide whether the decision in Chiu Nang Hong's case is applicable in circumstances where there is no statutory obligation imposed upon the Magistrate to record, either before or after conviction, the reasons for his decision. It may be that while the duty of a judge sitting alone to warn himself is a judicial duty, an obligation to record that he has in fact done so can only be based upon some statutory requirement, but we express no opinion on this question.

We would however, mention that the Resident Magistrate's notes show that he was addressed on the danger of convicting on Searchwell's uncorroborated evidence, the issue left to him to decide being whether there was evidence which in law was capable of affording corroboration and which he accepted, and he could not have failed to have these matters very much in mind when he was summing up.

In our opinion, the questions that we must ask ourselves in the circumstances of this case are: "Did the learned Magistrate accept the evidence of Searchwell as true?" and secondly, "was there evidence capable of affording corroboration which the Resident Magistrate accepted as true?" If either of these questions can be answered in the affirmative, then this ground of appeal must fail.

We are satisfied that the learned Magistrate accepted the evidence of Searchwell as true, and that he did so after a very careful examination of his evidence and of the submissions made by counsel about it. He commented that cross-examination was unable to move Searchwell's evidence on any of the material points, and that "one has to listen to the evidence of Searchwell very carefully as to what he has said about this conversation and bribe and what Reyes said to him, Malek said to him; one has to consider what he says about this Sunday episode of the £35." The learned Magistrate accepted the evidence of the witnesses for the prosecution and found the case proved as charged in the two counts, and it is clear to us that in so doing he placed reliance upon Searchwell's evidence. Even if we considered that there was no corroboration of his evidence we would not find it possible to quash the conviction upon this ground. However,

/we are....

we are of opinion that there was corroboration of Searchwell's evidence.

It was contended on behalf of the appellants that the evidence relating to the betting, the purchase of Great Surprise, and its subsequent doping amounted to no more than suspicion against the appellants, while Gaussen's evidence was at the best equivocal. Counsel for the Crown contended that Gaussen was not an accomplice and that his evidence was corroborative of Searchwell's. He further relied upon the heavy betting and the fact that Great Surprise ran last, as corroborative of Searchwell's evidence that Reyes told him "Great Surprise is going to run last" and as showing that Reyes knew that there was going to be heavy betting. He submitted that the independent evidence that Great Surprise was in fact doped corroborated Searchwell's evidence that Reyes had told him that Great Surprise is going to run last; while Bucknor's evidence that the appellants bought the horse corroborated Searchwell's evidence that Reyes had told him that he was either going to buy it or had bought it.

We do not find it necessary to decide whether or not Gaussen was an accomplice, or even whether his evidence raised the question "accomplice vel non," for we are clearly of opinion that he was at least a person who had an interest of his own to serve. On his own evidence he must have been aware that something improper was going to take place in connection with the race and involving Great Surprise which he was to ride. Against that background, the fact that Great Surprise was found to be doped after he had ridden it and it had come last would place him in a very difficult situation. He would at least be concerned to protect his licence. We do not regard his evidence as capable of affording corroboration and must therefore look elsewhere.

Corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. (See R. v. Baskerville (1916) 2 K.B. 658 at p. 667. The purchase of Great

/Surprise....

Surprise at an extravagant price, the falsification of the receipt indicative of a dishonest purpose; the pattern of unusually heavy betting on the quinella - a substantial bet being placed at Montego Bay in the hope that the attention of the bookmakers would not be attracted to the overall size of the amount being staked on the quinella, the bets on all but the winning quinella at the track, and the last minute bet of £1,000 at Frank Watson's - these matters, in our opinion, amounted to circumstantial evidence capable of affording corroboration of Searchwell's evidence as to his conversations with the two appellants, and accepted by the learned magistrate as proved.

GROUND 3 - Admissibility of evidence that Great Surprise doped.

This was not pressed in argument, it being conceded that this evidence was admissible as being relevant to the Crown's case that Great Surprise was doped in pursuance of the alleged conspiracy by or in complicity with the appellants.

GROUNDS 4 and 5 - Failure to establish a vital ingredient of the charges, to wit: an unlawful act by either appellant with respect to Great Surprise.

These grounds may be taken together as there was no evidence of any unlawful act with respect to Great Surprise other than the fact that it was doped. Gaussen's evidence tends to confirm that the appellants intended that he should not win the race and that the purchase of Great Surprise was linked up with this intention, but it does not establish that the appellants proposed that he should take any positive action towards this end. The evidence may suggest, but does not clearly establish, even acquiescence as his part in the conspiracy. As learned counsel for the appellants submitted, Gaussen's evidence did not fully support the Crown's opening.

Learned counsel further submitted that in order to establish either charge of conspiracy, the agreement as alleged in the particulars must be proved by evidence establishing an unlawful act done in respect of each horse, to ensure that that horse would

/run.....

run neither first nor second: even assuming that the evidence established the complicity of the appellants in the pulling of Great Surprise, that was not sufficient, and the evidence did not establish that the appellants or either of them were responsible for the doping of Great Surprise.

In view of the conclusion we have reached with respect to the appellants' complicity in the doping of Great Surprise, it is unnecessary for us to decide whether the counts or either of them would be established by proof of an unlawful act affecting one horse only. We proceed therefore to consider the evidence with respect to the doping.

It is true that there is no direct evidence that the appellants, or either of them doped the horse or had it doped. But we consider that there is ample circumstantial evidence to support a finding by the learned Magistrate that it was doped in pursuance of the conspiracy and that the appellants were party to the doping. According to Searchwell, Reyes in effect told him that in order that the appellants might win a quinella on Bally Rose-Collette on which they were going to bet heavily he was to hold back Serenade, and that Great Surprise was being or had been bought and in some way or other would be made to run last although it had won in the previous week. Gaussen's evidence as to his conversation with Reyes also suggests that the purchase of Great Surprise was linked with the winning of the quinella.

Counsel for the appellants submitted that even if these conversations do point to some proposed interference with the running of Great Surprise, they do not point conclusively to doping: other methods may have been intended, and there is no evidence as to what was intended. Moreover, it was argued, the evidence does not establish that Great Surprise was not doped before it was delivered to the appellants; and even if it did establish this fact, there was opportunity for several other persons who had access to the stables, and motive in all who had bet against Great Surprise, to dope the horse.

/Once.....

Once the learned Resident Magistrate accepted the evidence of Bucknor and his groom, as he did, there was evidence on which he could find that Great Surprise had not been doped at the time of its delivery to Reyes. We have already referred to the circumstances of its purchase as disclosing a dishonest purpose. The evidence of Searchwell and Gaussen shows that both Reyes and Malek had a strong motive to tamper with the horse, that its purchase was in their minds linked with the control of its running and their betting on the quinella, and that Reyes had in effect indicated that it would be interfered with. After its delivery to Reyes it remained under his responsibility and control until the race. He says that he assigned a special groom to it and that he received no report from his groom of any suspicious occurrence. It is clear that he visited it several times during the interval and himself bandaged its legs. This was a winning horse, the purchase of which he had just negotiated. It would be strange if he took no interest in its condition at this time or failed to notice the effect of the tranquiliser upon it. Indeed, he says that he observed at midday that all was not well with the horse and that he reported this to the veterinary surgeon Bent at inspection time before the race. Had he done so, undoubtedly Bent's mind would have been alerted, and he probably would, in accordance with his duty, have made appropriate tests. But Bent gives Reyes the lie on this. He says Reyes made no report to him, though he expressly sent for him to remove the bandages from the horse's legs.

In our opinion, this circumstantial evidence, satisfying fully the tests of opportunity, motive and conduct, points inevitably to the conclusion that Great Surprise was doped by or at the instance of the appellants in pursuance of the conspiracy charged.

/Ground 6.....

GROUND 6 - Convictions unreasonable.

Under this head, reference was made to alleged discrepancies and improbabilities in the evidence of Searchwell and Bucknor. Having carefully examined the evidence and the learned Magistrate's summing-up, and considered the submissions of learned counsel for the appellants, we are satisfied that the verdicts are not unreasonable.

GROUND 7 - Sentence.

Although Malek alone complained in his Grounds of Appeal about his sentence we allowed counsel for both appellants to address us on this subject. We were urged by learned counsel to set aside altogether the terms of imprisonment but we are unable to accede to this request.

On the second count, Malek was sentenced to twelve months imprisonment, the maximum sentence which a magistrate can by law impose for this offence. As he is thirty-two years of age and has no previous conviction we consider that the maximum sentence is manifestly excessive. We order that this sentence be set aside and a sentence of six months imprisonment with hard labour be substituted. The other sentences imposed on the appellants are confirmed.

In the result, except for the variation of Malek's sentence on the second count, the appeals are dismissed.

JUDGE OF APPEAL

JUDGE OF APPEAL

JUDGE OF APPEAL (Ag.)