In the Supreme Court

The Full Court

Before: Smith, C.J., Malcolm and Gordon, JJ.

Suit No. E. 182 of 1983.

R. v. The Jamaica Racing Commission

Ex parte Anthony Subratie

R. Carl Rattray, Q.C. and Brenda Warren for Applicant

Dr. Lloyd Barnett and Richard Ashenheim for Respondent.

2 and 13 April, 1984.

Smith, C.J, :

The respondent, the Jamaica Racing Commission (the Commission), held an investigation on 18 and 22 August 1983 under the provisions of s. 25 of the Jamaica Racing Commission Act (the Act) into the performance of the horse Lamplighter during races on 23 March, 16 April, 9 July and 13 July 1983. The applicant, a licensed racehorse trainer, was the trainer and part-owner of Lamplighter. After viewing films of the races and hearing sworn evidence from the three jockeys, Messrs. A. Ramjeet, A. Maragh and H. Henry, who rode the horse, and from the applicant, the three members of the Commission (Messrs. D.H. Lalor, Chairman, N.D. Levy and C.C.A. Randle) constituting the tribunal which held the investigation found that on 23 March, 16 April and 9 July 1983 Lamplighter was not allowed to run on its merits as required by rule 200 of the Jamaica Racing Commission Racing Rules, 1977. The tribunal found that the applicant "conspired at least with H. Henry to breach Rule 200 of the Rules of Racing." Pursuant to rule 247(xi), the applicant was warned "off all courses and other places where the Rules of Racing are in force" for seven years and was fined $10,000.00. Pursuant to rule 104, Lamplighter was disqualified for 18 months. Each of the jockeys was warned off for 12 months and fined $5,000.00.

On 18 October 1983, Patterson, J. granted leave to the applicant to apply for an order of certiorari to quash the orders of the Commission penalising the applicant and the horse. The seven lengthily stated grounds upon which leave was granted were compendiously argued before us as a breach of the rules of natural justice in that the applicant was found guilty and penalised without being charged beforehand with a specific offence or being given notice of a charge which he was required to answer.

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Mr. Rattray, for the applicant, submitted that if an investigation under s. 25 is going to terminate in a penalty against someone that person has to be told that he is charged with a specific offence, he must have notice of the charge and must be allowed to make representations in answer to the charge.

The applicant was represented throughout the investigation by an attorney-at-law, Mr. Trevor Robinson. At the commencement of the investigation, on the first day, the Chairman of the tribunal stated the procedure which would be followed. He said that the tribunal proposed to commence by showing the films. There would then be a short break, after which they wanted to hear from the riders of the horses (sic) in turn, "for which purpose (they) will ask those who are not giving evidence at the time to remain outside"; and then they would hear from the trainer. After the films of the four races had been shown there was an adjournment. On the resumption, the following exchanges occurred (pp. 11 and 12 of record) :

"Chairman: We are going to take evidence to start with from Mr. H. Henry and I would ask all other persons who are here to give evidence if they would please retire for a short while and we will call you within a few minutes.

Mr. Robinson: Mr. Chairman, what about Mr. Subratie ?

Chairman: We don't propose to have Mr. Subratie remain in the room because he is one of the persons who will be a part of this investigation. What will happen, we are now merely investigating a matter. There is no charge laid against anybody, so that Mr. Subratie's position can in no way be affected. If, based on the evidence that we have before us, we feel that it is likely that Mr. Subratie could face a penalty under the Rules of Racing, then at that time we will advise him of what has been said and give him an opportunity, if he wishes, to make any cross-examination he may wish.

Mr. Robinson: That is at another hearing, not this hearing ?

Chairman: Yes, this one.

Mr. Levy: Yes.

Mr. Robinson: Of course, I would naturally want to ask questions of the witnesses.

Chairman: At what stage ?

Mr. Robinson: When they are called.

Chairman: We have no objection to that. That is why I make the point that only those persons who are likely to be giving evidence we would like them to retire. "

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observe the rules of natural justice but submitted that it was clear that a person may become subject to the possibility of incurring a penalty in the course of an investigation under s. 25 of the Act though when the investigation commenced the evidence which made this possible had not yet been disclosed.

Russell v. Duke of Norfolk & ors. (1949) 1 All E.R. 109 was concerned with the applicability of the principles of natural justice to inquiries held under the Rules of Racing of the Jockey Club (of England). In this connection, Tucker, L.J. said this, at p. 118 :

> " ...... I should unhesitatingly hold that there was nothing here which was contrary to the principles of natural justice as laid down in the various authorities which have been brought to our notice. There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. "

These observations of Tucker, L.J. were quoted with approval by the Privy Council in University of Ceylon v. Fernando (1960) 1 W.L.R. 223, 231. Similar views were expressed by Barwick, C.J. in Stollery v. Greyhound Racing Control Board (1972) 128 C.L.R. 509 when he said, at p. 517 :

> "In my opinion, it is of the utmost importance that tribunals such as the Greyhound Racing Control Board should conduct their proceedings with scrupulous adherence to the requirements of natural justice. What is required to satisfy these principles no doubt depends very largely on the nature of the matter in hand and the circumstances in which the hearing takes place. "

The relevant provisions of s. 25 of the Act are as follows :

> "The Commission may, where it considers it expedient so to do, hold or cause to be held an investigation -
>
> (a) to determine whether any licence granted under Part III should be suspended or revoked ;
>
> (b) in respect of the breach of any of the regulations or of the Racing Rules made under this Act or of any terms or conditions of any licence or provisional licence; or
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> (c) as respects any matter related to or connected with its functions so as to determine whether any of such functions should be exercised,

and with respect to any such investigation the following provisions shall have effect -

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(i) the person or persons holding the investigation (hereinafter in this section referred to as "the tribunal") shall do so in such manner and under such conditions as the tribunal may think most effectual for ascertaining the facts of the matter under investigation ;

(ii) ....

(iii) ....

(iv) .... "

Paragraphs (ii), (iii) and (iv), respectively, give to the tribunal the powers of a Resident Magistrate to summon witnesses, call for the production of books and documents and to examine witnesses and parties on oath; make any person summoned liable to a penalty for refusing to answer questions or refusing or neglecting to produce books or documents; give to a witness the same privileges from answering questions etc. to which he would be entitled if giving evidence before a court of justice; and entitle a witness to allowances for expenses payable in a Resident Magistrate's Court.

It was not contended before us, as it was during the investigation, that the investigation should be conducted like proceedings in a court. That contention was, correctly, dismissed by the Chairman as "utter rubbish." In my opinion, it is plain that the Commission's powers under the section are not limited to, or even primarily concerned with, the investigation of charges which have been preferred beforehand. The wide and general powers of investigation granted by the section permit the Commission, in my judgment, to commence an investigation without prior charge into a suspected or alleged breach of the regulations or the Racing Rules with a view to deciding whether a breach was in fact committed and, if it was, whether any, and if so what, person is liable for the breach. Section 30 empowers the Commission to impose penalties "for any breach which has been found to be committed" upon an investigation under s. 25. Where a charge is not laid, or notice of a charge given, before the investigation commences, there is, in my judgment, a sufficient compliance with the rules of natural justice if a person upon whom a penalty is subsequently imposed either knew or was made aware, or it became clear, during the investigation that he was being accused in respect of a particular breach and he was given adequate opportunity to meet the accusation.

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The applicant had prior notice of the intention of the Commission to hold the investigation. He was served a summons requiring him to appear before the Commission for the purpose of an investigation which it proposed to conduct under s. 25 into the performance of the horse Lamplighter in the races on the four dates stated above. The summons stated that the jockeys had been summoned and told the applicant that, if he wished, he may be represented by an attorney-at-law and he should bring any witnesses he may have. From the outset, therefore, it must have been clear to the applicant that his conduct as trainer of the horse was, at least, likely to be called into question during the investigation. He certainly could not think that he was being summoned merely as a witness.

Rule 200 of the Racing Rules provides that "every horse in a race shall be run on its merits whether the owner and/or trainer runs another horse in the race or not." Mr. Rattray submitted that this rule does not create an offence "or assumption on the part of anyone", so any allegation being made must be adequately stated. An express allegation or charge, if made, could only state that the horse was run in breach of the rule or was not run on its merits. Apart from an allegation of doping, this is the only rule appropriate to an inquiry into the performance of a horse during a race; so the applicant had due notice that the investigation was concerned with whether or not there had been a breach of this rule. He could not have thought that it had anything to do with doping.

Mr. Rattray referred, in support of his submission on want of jurisdiction, to the fact that the applicant was sent out of the room while the jockeys gave evidence so that he could not instruct his counsel. This is neither a defect nor an irregularity in procedure as it is expressly authorised by s. 25(1). Applicant's counsel was present and could ask to be allowed to take instructions from his client in the event that this became necessary because of evidence given while the applicant was out of the room.

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In my opinion, reference to the record of the investigation will show that, without doubt, the applicant and his counsel well knew that the investigation being conducted was one in which the applicant was exposed to a penalty for a breach of the rules and, as I have indicated, it could only have been rule 200. Apart from the contents of the summons, to which reference has been made, before the applicant left the room on the first day of the hearing, the chairman stated that he (applicant) "is one of the persons who will be a part of this investigation." He went on to say (see extract from the record set out above): "If based on the evidence that we have before us, we feel that it is likely that Mr. Subratie could face a penalty under the Rules of Racing .... " The Chairman then made it clear that he was speaking of "facing a penalty" in that investigation and not a future one. Counsel stated his desire to "ask question of the witnesses" when they were called. He could only have wanted to do so in the interest of his client. At the end of the evidence of each of the three jockeys he was given the opportunity to ask questions. He did not question Henry or Maragh and his questions to Ramjeet were with a view to eliciting evidence which was consistent with explanations given by the jockeys, and subsequently by the applicant, for the performance of the horse.

During examination of the applicant the following exchanges between the chairman and counsel occurred (p. 59 of record) :

"Chairman: Do you know the extent of Ramgeet's injuries when he got hospitalised ?

A: **No, sir, but he** was on the track working horse.

Mr. Robinson: Could you ask him whether he is a doctor if he can determine a man's fitness? That is the best question to ask.

Chairman: The difference between yourself and myself, I am not here to engage in hostilities.

Mr. Robinson: That is not helping the situation.

Chairman: Please allow me to finish. Whether you feel it is helping the situation or not, it is your affair. Mr. Robinson, I have already expressed, if you do not like the way the investigation is being held, you have access to another arena.

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"Mr. Robinson: According to the rules the hearing ought to be conducted along the lines of the Court.

Chairman: That is utter rubbish.

Mr. Robinson: Even if it is not so, a hearing of this nature in which a person's livelihood is at stake there are certain rules called the rules of natural justice.

Chairman: We have heard it from far more experienced counsel.

Mr. Robinson: You shouldn't be hearing it again. You are hearing it from one more counsel.

Chairman: You will not come here and tell me how to conduct the hearing.

Mr. Robinson: Just conduct the hearing properly, that is all. "

The reference by counsel to the rules of natural justice and the livelihood of a person being at stake is significant. Counsel intervened constantly and made objections while his client was being examined by members of the tribunal and was given the opportunity to ask him questions. At the end he was invited to make submissions (as were the jockeys) and did so (see p. 96 of record).

The evidence during the investigation, including the record of the races on film, established that the horse Lamplighter ran badly unplaced in the races in March and April and on 9 July but won the race on 13 July. The tribunal sought to have this apparent inconsistency in form explained by the jockeys and the applicant. The inconsistency was, of course, most pronounced when the forms on 9 and 13 July were compared. The purpose of the investigation was stated by the chairman to applicant's counsel during the examination of the applicant this way (at p. 75) :

> " Let me explain to you what we are trying to do .... We are trying to ascertain why a racehorse ran in a particular manner on one day and in another manner on a day (sic). The only way by which we know ...... the only way we know how to get that information is to ask of the person who holds a licence under our Rules as to what training he did to bring the horse to race. "

Typical of the questions which were on the minds of the members of the tribunal were the following, which Mr. Levy asked the applicant (at pp. 88 and 89) :

" .... In your experience at Caymanas Park have you ever seen a horse come last by as far as Lamplighter did on the 9th and come back and win four days later ? "

" From physical appearances, did you see anything that would lead you to believe that it would run as badly as it did on the 9th of July and as well as it did on the 13th ? "

The answer was in the negative in each case.

In a general way, the explanation given by the jockeys and the applicant for the poor performance of the horse on the occasions on which it ran badly was that it was lame in the left front leg and could not be forced and it "ran wide" in those races. The applicant said that because it was lame he exercised it by swimming it in the sea. It is clear from the record that even as this explanation was being given the tribunal was receiving it with scepticism. Typical of this is the following statement by the chairman during the examination of the applicant. He was addressing the applicant's counsel (at p. 55) :

" If you think we are beating around the bush, we happen to be the Tribunal trying to ascertain what happened and we have still not ascertained from your client how is it a magical process of salt water has managed to heal a horse in a period of less than forty-eight hours, and that, Mr. Robinson, is really the crux of the matter. "

The films did not, apparently, support the explanation of the horse running wide and out of control.

In my judgment, the applicant was given ample opportunity to explain and, so, meet the accusation which the whole tenor of the proceedings made clear was being made against him and the jockeys. His evidence is spread over 40 pages of the record and he was time and again asked to explain the inconsistency of the form of the horse. An example of this is at pp. 56 and 57 of the record :

"Mr. Levy: Mr. Subratie, can you give this Tribunal any explanation in your mind as to how a horse can run a distance second to the last horse and come back four days later and run a very good race and win if the Jockey rode a satisfactory race on that horse when it ran a distance second to the last horse ?

A: Could you explain to me when you said 'satisfactory race' ?

"Mr. Levy: Your explanation is that it went to the sea after the race, that race brought it on so that it could improve by what would be the equivalent of about forty lengths.

A: The Jockey came and told me the horse was going wide, and what could I say about that ?

Chairman: You better find something to say about it.

A: I know it is a horse that have a history of lameness and all I could do with the horse is swim him.

Mr. Levy: Swimming did not work in the past, but it works now. "

The chairman did not advise the applicant, as he said he would, of any evidence given at the investigation which it was felt was likely to make him face a penalty so as to give him an opportunity to cross-examine if he wished. In my opinion, the applicant could not have been prejudiced by not being told. As has been stated, the only evidence at the investigation was from the three jockeys and the applicant himself. There was no evidence given by any of the jockeys which could, by itself, incriminate the applicant. This accounts for the fact that the first two were not cross-examined by applicant's counsel and the third was merely asked questions to support the explanation for the apparent inconsistency in the horse's form which had so far been given. Without doubt, it is the evidence which the applicant gave, looked at by itself and when compared with the evidence of the jockeys, that caused the tribunal to make a finding adverse to him. The occasion for advising him of evidence prejudicial to him which could be cross-examined did not, therefore, arise. I mention, in passing, that a bit of evidence which must have affected him prejudicially is his statement that he regarded Henry, who he employed to ride Lamplighter on 9 July, "as being an incompetent jockey. " Henry himself admitted that he had not won a race for twenty months and added: "It come in like it is using them is using me .....-". By contrast, Ramjeet, who rode the horse on 13 July, described himself as "one of the top jockeys" when being questioned by applicant's counsel.

The tribunal rejected "the explanation offered" by the three jockeys "in respect of the performance of Lamplighter in the races in question." They also rejected the explanation of the applicant "as to the sudden reversal of form on July 13." It has not been suggested that

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there was any other evidence which could have been given which was not given, or any witness not called who would have been called, had a formal charge been preferred against the applicant. Miss Emma Chen, part-owner of Lamplighter, attended the first day's hearing. When the chairman asked in what capacity she was there, applicant's counsel replied : "As a witness, if needed" and said he was responsible for her being there. She did not attend the adjourned hearing. At the end of the applicant's evidence, the chairman said that they did not propose to call "the other part-owner of the horse." Applicant's counsel then said: "I don't know whether you plan to call Miss Chen? I don't think she is here." The clerk confirmed that she was not present but counsel's question was not answered. Miss Chen was the only witness who the applicant took to the investigation in response to the intimation in the summons and, as I have said, it is not suggested that she or any other witness could throw any further light on the matter under investigation. Reading the record, it seemed to me that the question of the performance of the horse was exhaustively ventilated. The "crux of the matter", as the chairman called it, insofar as the applicant was concerned, was the remarkable change in the form of the horse between 9 and 13 July. All that could possibly be said about this had obviously been said. When invited to ask questions of his client after he had been examined by members of the tribunal, the applicant's counsel asked two questions only and he must have realised what was the "crux of the matter" because his entire closing submission was directed to the change in the horse's form between 9 and 13 July.

As I have stated, the argument before us in support of the application was limited to the contention that the tribunal did not comply with the requirements of the rules of natural justice. In my judgment, for

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the reasons I have endeavoured to state, there was a sufficient compliance with those rules. I would, therefore, have dismissed the application and so, respectfully, dissented from the judgment of my learned brethren granting it.

Malcolm, J:

Anthony Subratie, the applicant in these proceedings, seeks an order of certiorari to quash an order of the Jamaica Racing Commission made on the 22nd day of August 1983, warning him off all courses and other places where the Jamaica Racing Commission Rules of Racing are in force for seven (7) years, fining him the sum of $10,000 and disqualifying his horse "Lamplighter" from racing for eighteen (18) months. This order was made on Subratie being found guilty of contravening Rule 200 of the Jamaica Racing Commission Racing Rules, 1977 which recites:

> " Every horse in a race shall be run on its merits whether the owner and/or trainer runs another horse in the race or not".

To put it more precisely the chairman of the tribunal after "investigation" into the running of Lamplighter on the 23rd March 1983, the 16th April 1983 and the 9th July 1983 said that the tribunal based on the evidence finds that he (Subratie) "conspired at least with H. Henry to breach Rule 200 of the Rules of Racing" to which Rule I have already referred.

The applicant is a licensed race horse trainer and the trainer/owner of the horse "Lamplighter". By a letter dated the 20th July 1983 signed by one Mavelyn Clarke - Secretary, Mr. Subratie was informed that the Commission proposed to conduct an investigation under Section 25 of the Jamaica Racing Commission Act into the performance of the above-mentioned horse in certain stipulated races. The letter further went on to state that he the applicant was summoned to appear at the Commission's office at a stated date and time. In due course the

investigation was held on the following dates: 18th August 1983 and 22nd August 1983 and I will in due course make reference to what transpired at the hearings.

The gravamen of the applicant's complaint as disclosed in his statement dated 14th September 1983 were, inter alia, as follows:-

(1) " Errors of law on the face of the record which shows a denial of justice on the face of the record in that on page 3 of the transcript the chairman stated that they were hereby investigating the matter and there was no charge against anyone, and that Mr. Subratie's position would be in no way affected and that if it is likely that the applicant could face a penalty under the rules of Racing, then at that time they would advise him of what had been said and give him an opportunity to cross-examine. That the Commission at the end of questioning the three (3) jockeys and the applicant pronounced a verdict in the matter and proceeded to impose penalties without a proper hearing as required by law. At no time was the applicant charged with the offence on which he was found guilty or any other offence or told he was on trial, neither was the applicant advised that he could face any penalty, neither was he given an opportunity to cross-examine as declared to by the chairman at the start of the proceedings.

(2) The face of the record disclose no evidence of conspiracy as found or any whatsoever so that the Commission's finding is not possible in law on the facts and amounts to a breach of the law and of the applicant's right to work and as such of natural justice in that it misdirected itself on the facts".

Mr. Rattray in his usual forceful and persuasive manner submitted before us that in any matter which can result in a penalty, the Jamaica Racing Commission, the body which hears the matter and imposes the sentence, is bound to follow the principles of natural justice.

He elaborated by submitting that the person exposed to the penalty is entitled to know with what offence he is charged so that he can prepare to meet this charge, to call his witnesses if necessary and to make such representation as are necessary in relation to the specific charge.

He cited <u>Stollery v. Greyhound Racing Control Board (1972) C.L.R. 509</u> when Barwick C.J. said at 517:

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> " In my opinion it is of the utmost importance that tribunals such as the Greyhound Racing Control Board should conduct their proceedings with scrupulous adherence to the requirements of natural justice. What is required to satisfy these principles no doubt depends very largely on the nature of the matter in hand and the circumstances in which the hearing takes place".

I might add that in all cases the tribunal should act in good faith.

DeSmith's Judicial Review of Administrative Action was referred to by Mr. Rattray and it is of interest to note what Campbell J, delivering the leading judgment in Zaidie vs. The Jamaica Racing Commission, Miscellaneous Suit No. 40/80 (a case not dissimilar to the instant case) had to say:-

> " Both learned attorneys cited passages from DeSmith's Judicial Review of Administrative Action............ under the rubric 'Content of the audi alteram partem rule'. One attorney referred to this to substantiate the need for prior notice of formulated charges; the other attorney referred to it to show that there is no such rigid and inflexible rule. It would appear that both learned attorneys can find support in the authoritative exposition of the learned author, because while he postulated that 'prima facie, failure even to attempt to give prior notice to a person against whom pre-judicial allegations are to be made or whose interest will suffer detriment by what is proposed will vitate the subsequent proceedings, he cited exceptions derived from statute, and also exceptions founded on case law. One such exception founded on case law is formulated thus, 'where the person claiming to be aggrieved must be assumed to have known or did in fact know what was being alleged or what was likely to happen to him'. In the latter circumstances the requirement of a notice does not arise. This latter exception appears to have been secreted from cases among which is Russell v. Duke of Norfolk /1949/ 1 All. E.R. 109 at pp. 117-118".

In the instant case the investigation was held under Section 25 of the Jamaica Racing Commission Act. The section provided at (i) as follows:

> " The person or persons holding the investigation (hereinafter in this section referred to as 'the tribunal') shall do so in such manner and under such conditions as the tribunal may think most effectual for ascertaining the facts of the matter under investigation".

Mr. Trevor Robinson, attorney-at-law, represented the applicant Subratie during an investigation that can best be described as the "curate's egg" - good in parts, decidedly bad in others.

From the opening gambit which took place after the resumption and appears at pp. 11 & 12 of the verbatim report one sensed an impending uncertainty that eventually manifested itself in a decision which cannot in my opinion withstand the glare of logic. I quote:

" Chairman : We are going to take evidence to start with from Mr. H. Henry and I would ask all other persons who are here to give evidence if they would please retire for a short while and we will call you within a few minutes.

Mr. Robinson: Mr. Chairman what about Mr. Subratie?

Chairman : We don't propose to have Mr. Subratie remain in the room because he is one of the persons who will be a part of this investigation. What will happen, we are now merely investigating a matter. There is no charge laid against anybody, so that Mr. Subratie's position can in no way be affected (quote broken here merely to comment that fortunately Mr. Robinson did not as many might have done lose interest in what followed) - If based on the evidence that we have before us, we feel that it is likely that Mr. Subratie could face a penalty under the Rules of Racing then at that time we will advise him of what has been said and give him an opportunity, if he wishes to make any cross-examination he may wish.

Mr. Robinson: That is at another hearing, not this hearing?

Chairman : Yes, this one.

Mr. Levy : Yes.

Mr. Robinson: Of course, I would naturally want to ask questions of this witness.

Chairman : At what stage.

Mr. Robinson: When they are called.

Chairman : We have no objection to that. That is why I made the point that only those persons who are likely to be giving evidence we would like them to retire".

So one asks the inevitable question, was the investigation conducted fairly? True Mr. Robinson was allowed to cross-examine the witnesses, true although the applicant was at times outside the area of the hearing his attorney was present, but who can say had he envisaged the dread "decision" handed down at page 98 what his endeavours and actions would have been. It must be bourne in mind that the finding of conspiracy against Subratie involved an agreement with Henry and it is questionable whether procedures which excluded the applicant at this stage could be described as fair.

Natural justice is fair play in action. A man's livelihood is at stake - The tribunal through its chairman intimates - "there is no charge laid against anybody, so that Mr. Subratie's position can in no way be affected" then at the end a pronouncement of conspiracy.

When the decision was given Mr. Robinson, to my mind not unnaturally, remarked to the chairman:-

> " What I would like to know is whether there is going to be a charge and another hearing.
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> Chairman : No.
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> Mr. Robinson: Because there has been no charge so far".

Some might at this stage remark "how naive can an attorney get?" others on the other hand may (and I must confess I belong to the latter group) well say surely the chairman's assurance must mean exactly what it says and that the chairman ought to be aware that reliance would have been placed on his unequivocal assurance.

Dr. Barnett for the respondent in his submission stated, inter alia, that the applicant "was given a fair opportunity to explain his conduct in relation to the horse in question and there was no breach of the rule of natural justice". This to my mind was reducing the matter to a degree of simplicity with which I cannot agree.

Paul Jackson in his terse but excellent book "Natural Justice" 1973 at p. 11 had this to say:

> " It would be hard to find a more striking example of failure to observe natural justice arising from not informing a party who was before a tribunal of the charge he is to meet than Sheldon v. Bromfield JJ ([1964] 2 Q.B. 573). Justices dismissed a charge of assault against M but bound over M and two prosecution witnesses to keep the peace. The witnesses had been unaware of the possibility of being bound over. The Divisional Court held that the Justices had acted contrary to natural justice".

Lord Parker said at page 578:

> " It has been argued here on behalf of the justices that provided, as in this case, the persons whom it is proposed to bind over have had, in effect, their say by being examined, cross-examined and re-examined, there is no need at all that they should know what is passing through the court's mind, and indeed that the justices can bind them over without giving them any advance notice or any opportunity of dealing with it. I must say

> that I shudder at any idea that that can be done, although it is said that it is done quite generally. It seems to me to be elementary justice that, in particular a mere witness before justices should, at any rate, be told what is passing through the justices' minds, and should have an opportunity of dealing with it".

I turn my attention to that part of the applicant's statement which deals with the evidence of conspiracy. He contends that "the face of the record discloses no evidence of conspiracy as found or any whatsoever etc". Let us briefly look at the evidence of jockey H. Henry and in particular at page 14 of the record:-

" Chairman: We are concerned with the sixth race, the one on the film. So anything I ask you about the horse Lamplighter is to do with that race unless I ask you if you had ridden him since or before. So, can you tell us, did you get any instructions from anybody how to ride the horse"

Answer : Only on the race-day the trainer give me instructions in the saddling ring.

Chairman: What were his instructions?

Answer : When I come in the saddling ring I ask him what I must do and him say if I can win I must win, but if I find him scrambling on the foot don't fight him because he is not a much sound horse".

At page 28 Mr. Levy had his innings -

" Mr. Levy: And what did he say?

Answer : Him say must ride a good race.

Mr. Levy: You must ride a good race?

Answer : And if I can win I must win.

Mr. Levy: If you can win, you must win.

Anything else?

Answer : Nothing more and I go upon the horse".

Then at page 30 again the indefatigable Mr. Levy:-

" Mr. Levy: Did you ride out that horse on its merits?

Answer : Yes sir.

Mr. Levy: You rode it as hard as you could, you rode it to the best of your ability?

Answer : I ride him good but I wasn't getting the best out of him".

Then page 32 - a change in the cast.

> " Chairman: I am going to put a question to you, and think about it.
> Did anybody tell you not to ride the horse to win?
> Be careful how you answer this.
> Did anybody tell you not to ride the horse to win?
>
> Answer : Nobody never tell me that etc"
>
> Mr. Howard Henry stands down

Subratie given the early assurance that he would not be adversely affected could never have imagined that this evidence would have affected him and would have resulted in a finding prejudicial to him.

Turning now to the "Decision" on p. 98, let us look at the material portion of the verbatim report:-

> " Chairman............ The tribunal also rejects the explanation of trainer A. Subratie as to the sudden reversal of form on July 13 and based on the evidence finds that he conspired at least with H. Henry to breach Rule 200 of the Rules of Racing".

On such a finding of conspiracy which involved not only the applicant but another party to the conspiracy it was imperative, if the principles of natural justice were to be followed, that the applicant be alerted at the very inception of the investigation or at the earliest possible moment of the nature of the charge.

May I make this passing comment that when persons are clothed with quasi-judicial functions it is not in the least helpful or necessary as the chairman did in the instant case to cry "utter rubbish" to objections and comments made by participating attorneys - it is far more desirable to bring a balanced and fair approach to bear on the proceedings.
A tribunal on reading Section 25(i) of the Jamaica Racing Commission Act may pardonably experience a "heady" feeling of limitless power. They should always remember however that they must act within the limits of natural justice.

In my view the tribunal failed to apply the rules of natural justice and in addition made a finding of conspiracy which was totally unwarranted.

It is for the foregoing reasons that I agreed that the application be granted and that certiorari should go to quash the order of the Jamaica Racing Commission.

Gordon J.

The Jamaica Racing Commission was established by Act of Parliament to regulate and control the sport of horse racing in Jamaica. This sport was, until recently when the Racing Pools were introduced, the only form of legalised gambling in Jamaica. The Jamaica Racing Commission, hereafter referred to as the Commission, was given wide powers under the Act and in the purported exercise of those powers a tribunal met in the words of the Chairman -

> "to conduct an investigation under Section 25 of the Jamaica Racing Commission Act into the performance of the race horse, LAMPLIGHTER, in the following races; Race 2 on 23rd March, 1983, Race 6 on 16th April, 1983, Race 6 on 9th July, 1983, Race 2 on 13th July, 1983".

The jockeys who rode the horse on each occasion and the trainer of the horse, the applicant, were summoned to attend and they attended the inquiry. Summons served on the applicant invited him to attend with his witnesses, if any, and informed him of his right to be represented by an Attorney-at-Law.

On August 4, 1983, the day appointed in the Summons Mr. Subratie, his Attorney-at-Law Mr. Gordon Robinson and Jeffrey Mordecai, Mr. Frederick Cooke a part-owner of Lamplighter and the jockeys summoned appeared before the tribunal. The Acting Chairman Mr. Noel Levy stated -

> "Unfortunately, for a number of reasons we will be unable to carry through the investigations in toto this afternoon, we do not wish to start it and have it as a part-heard matter, so we are proposing to hear it on Monday 8th starting at 5:00 o'clock and we would wish you all to be present here on Monday."

Mr. Robinson indicated that he had come prepared to commence and was ready to proceed; he informed the tribunal he could not be available until after the 29th August. The Acting Chairman was unwilling to grant a request for so long an adjournment and it was agreed that the hearing be adjourned to the 15th August on the understanding that the applicant would have to instruct a different Attorney-at-Law.

On the 15th August, 1983 the applicant was not in attendance, a medical certificate was tendered on his behalf. The hearing was adjourned to the 18th August, 1983; on this date the enquiry commenced, was part-heard and adjourned to the 22nd idem when it was concluded. After deliberating the Chairman announced -

> "Having considered the evidence the tribunal finds that on
> 23rd March, 1983
> 16th April, 1983
> 9th July, 1983
> the horse Lamplighter was not allowed to run on its merits in the races it ran in on the above dates as is required by Rule 200 of the Rules of Racing."

The tribunal found the applicant "conspired at least with H. Henry to breach Rule 200 of the Rules of Racing". The tribunal then proceeded to impose its penalty thus "Pursuant to Rule 247(ix) the tribunal warns trainer A. Subratie off all courses and other places where the Rules of Racing are in force for a period of seven (7) years and fines him $10,000.00".

"Pursuant to Rule 104 the tribunal disqualifies the horse LAMPLIGHTER for a period of eighteen (18) months with immediate effect." Each jockey was fined $5,000.00 and

warned off for twelve (12) months.

The applicant now applies to this Court for an Order of Certiorari to remove into this Court and to quash the order of the Commission relative to the applicant and to the horse Lamplighter.

The Jamaica Racing Commission is a "creature of Statute". It was created by Act 3 of 1972 and its functions are circumscribed by the Act. Section 25 of the Act reads:

> "The Commission may, where it considers it expedient so to do, hold or cause to be held an investigation -
>
> (b) In respect of the breach of any of the regulations or of the Racing Rules made under this Act or of any terms of conditions, of any licence or provisional licence; or
>
> (c) as respects any matter related to or connected with its functions so as to determine whether any of such functions should be exercised,
>
> and with respect of any such investigation the following provisions shall have effect -
>
> (i) the persons holding the investigation (hereafter) in this section referred to as "the tribunal") shall do so in such manner and under such conditions as the tribunal may think most effectual for ascertaining the facts of the matter under investigation;
>
> (ii) the tribunal shall have for the purpose of the investigation all the powers of a Resident Magistrate to summon witnesses, call for the production of books and documents and to examine witnesses and the parties concerned on oath;
>
> (iii) any person summoned to attend or produce books or documents under this section, and refusing to answer any question put to him by or with the concurrence of the tribunal shall be guilty of an offence against this Act and be liable

on summary conviction before a Resident Magistrate to a fine not exceeding five hundred dollars and in default of payment to imprisonment for a term not exceeding three months;

Provided that no person shall be bound to incriminate himself and every witness shall, in respect of any evidence given by him at such an investigation be entitled to the same privileges to which he would be entitled if giving evidence before a court of justice; ...."

I pause here to make two observations: Under section 25(c)(ii)-

> "The tribunal has the powers of a Resident Magistrate to summon witnesses, call for the production of documents and to examine witnesses and the parties concerned on oath",

but if the person so summoned fails to comply with that which he is required to do the tribunal has no power to deal with him, he has to be referred to the Resident Magistrate's Court to be dealt with by a Resident Magistrate, see section 25(c)(iii). By virtue of section 25(c)(i) the tribunal is self regulatory. In this respect the powers of the tribunal as to the procedure it adopts in holding the investigations are not confined within the practice and procedure which obtains in the Resident Magistrate's Court or in any other Court of this Island.

Section 30 of the Act provides -

> "(1) The Commission shall have the power to impose penalties for any breach which has been found to be committed, pursuant to investigations under section 25, so, however, that the penalty in respect of any such breach shall not exceed ten thousand dollars.
>
> (2) Any such penalty shall -
>
> (a) be paid into the funds of the Commission;

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(b) be recoverable by the Commission as a debt in a Resident Magistrate's Court.

The penalty of $10,000.00 which the Commission can impose exceeds by far that which a Resident Magistrate can impose in the ordinary exercise of his jurisdiction. The Statutory limit to the Resident Magistrate is $1,000.00 <u>except</u> where he is empowered by a particular statute to exceed that limit. One such exception is found in this the Jamaica Racing Commission Act section 31.

Section 26 of the Act empowers the Commission to delegate its functions subject to the right of appeal to the Commission (section 27) by any person aggrieved by a decision given by a person acting in pursuance of any function delegated under section 26.

In section 28 we find that -

> "All decisions of the Commission given in respect of any matter which falls within its function shall be final."

When acting under section 25 in its original function and under section 27, in its appellate function the Commission arrives at a decision, that decision is not subject to judicial review by way of appeal, but by a prerogative writ. The court therefore has to take particular care in reviewing the functions of the Racing Commission to ensure that in exercising its right to regulate its own proceedings the Commission does not violate the rights of those that are subject to its control.

Denning L.J. in <u>Russell vs Duke of Norfolk and others (1949) 1 All E.R. page 109 at paragraph 119</u> said:

> "This penalty of disqualification is the most severe penalty that the Stewards can inflict. It is the same penalty as that which is imposed on persons guilty of corrupt practices. It disqualifies the trainer from taking any part in racing and thus takes away his livelihood. Common justice requires that before any

> "man is found guilty of an offence carrying such consequences, there should be an enquiry at which he has the opportunity of being heard. ...... The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding responsibilities."

When the inquiry commenced the Chairman pronounced: -

> "We don't propose to have Mr. Subratie remain in the room because he is one of the persons who will be a part of this investigation. What will happen, we are now merely investigating a matter. <u>There is no charge laid against anybody, so that Mr. Subratie's position can in no way be affected.</u> If, based on the evidence that we have before us we feel that it is likely that Mr. Subratie could face a penalty under the Rules of Racing, then at that time we will advise him of what has been said and give him an opportunity, if he wishes to make any cross-examination he may wish."

Mr. Rattray submitted that the rules of natural justice had been breached in that the person exposed to the penalty (Mr. Subratie) is entitled to know with what offence he is charged so that he can prepare to meet it.

He referred to <u>Stollery vs Greyhound Race Control Board (1978) 128 C.L.R. page 509</u> and the judgment of Bonnick C.J. at page 517 where the Learned Chief Justice said that the person accused should -

(1) Know the nature of the accusations made,

(2) be given an opportunity to state his case,

and, the tribunal should act in good faith.

This is an expulsion case, Mr. Rattray submitted, and the rules of natural justice require that in such cases the person affected has the right to know the charge and meet it at the hearing.

He referred to McInnis vs Onslow et al 1978, W.L.R. 1520 and Mosque Trustees vs Mahmud 1967 1 A.C. 13; 1966 1 All E.R. 545 in support of this submission. He contended that Mr. Subratie was told there was no charge against him, he was not allowed to hear the evidence given by the jockeys so he was not able to instruct his counsel, he gave evidence without being informed of the charge, then the tribunal announced its finding. This he said was in clear breach of natural justice.

Dr. Barnett agreed that the Jamaica Racing Commission had a duty to observe the rules of natural justice. The question was whether in conduct of these proceedings Mr. Subratie did not have a fair opportunity to meet the allegations against him. It was clear he further submitted, that under the provisions of the Act in the course of investigations a person may become subject to the possibility of incurring a penalty although when the investigations commenced the evidence which made this possible had not yet been given. Each jockey called to testify before the tribunal was advised of his rights by the Chairman. Mr. Subratie was not so advised when he was called, presumably this course was adopted because he was represented by counsel. This counsel, was not one of those who appeared for Mr. Subratie on the first day the hearing was set. It is obvious from the records he was not versed in the proceedings. He thought they should follow the format that obtained in the courts and so indicated - (page 50 of bundle) -

"Mr. Robinson:	According to the rules the hearing ought to be conducted along the lines of the court.
Chairman :	That is utter rubbish.
Mr. Robinson:	Even if it is not so a hearing of this nature in which a person's livelihood is at stake there are certain rules called the rules of natural justice.
Chairman :	We have heard it from far more experienced counsel."

This exchange came near the end of the first day's hearing, and during the evidence of the applicant. Up to this point no reference had been made to any breach of the racing rules and the Chairman had not indicated anything adverse to the applicant in the terms of the tribunal's undertaking given at the commencement of the proceedings. It is not strange that the significance of the Chairman's remarks shortly thereafter "in the interest of your client I am taking an adjournment" escaped Mr. Robinson.

On the preferment of a formal charge Dr. Barnett referred to James Zadie vs Jamaica Racing Commission M40/1980 (unreported) and Russell vs Duke of Norfolk (supra). Both cases were also relied on as authorities for the procedure adopted by the tribunal. In Zadie's case the racehorse trained by the applicant was declared to run in exercise plates but it was presented to the Stewards before the race in racing plates. The Stewards declared the horse a late non-starter and reported the breach to the Jockey Club for investigation. At the hearing the plaintiff was asked by the Chairman - "why your horse was wearing racing plates when it was declared to race in exercise plates?" On complaint made before the full court on terms similar to those in this case; the court per Campbell J. held that there was no need for a formulated charge in the circumstances as the case fell in the category "where the person claiming to be aggrieved must be assumed to have known or did in fact know what was being alleged or what was likely to happen to him." At the hearing the applicant Zadie testified -

> "I dont want you to think that I was trying to mislead the public or anybody."

He also tendered a letter written by Dr. Bradford. He knew the nature of the allegations made and he was prepared to meet them.

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Russell's case was one which involved doping of the race horse. The appellant Russell attended the hearing with a prepared statement which he tendered. It was clear that he knew what was being alleged and he sought to meet it with his prepared statement.

In this case now under review, at the end of the first day's hearing there was no indication of the breach that was under investigation. No specific racing rule had been mentioned and the applicant had not been warned. It is fair to say none of the jockeys already interviewed had been advised of any breach of the Racing Rules. Counsel's observation on the effect of the proceedings on his client's livelihood must be based on the possibility of the tribunal indicating at a later stage that a breach had been committed which called for an answer from his client.

When the hearing resumed the Chairman concluded his examination and Mr. Levy commenced his interrogation of the applicant. At page 64 there is this passage:

"Mr. Levy: Do you consider Henry to be an incompetent jockey?

Answer : Well, according to ..... yes, sir.

Mr. Levy: You consider him to be incompetent?

Answer : Yes, sir, he is not the best of jockeys, sir."

The question was repeated twice. (Page 65):-

"Mr. Robinson: Mr. Levy, with respect.......

Mr. Levy : I wish him to answer the question.

Mr. Robinson: He has answered already.

Mr. Levy : I wish him to answer again.

Mr. Robinson: Why?

Mr. Levy : I don't have to give any reasons. I am not satisfied with the qualification."

There followed a two and a half (2½) pages of argument, then the Chairman ruled the question must be answered.

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On page 70 we find:

"Mr. Levy: Do you think he was allowed to run on his merit?

Answer : Yes sir.

Mr. Levy: You thought that performance on the 9th, he was allowed to run on his merit?

Answer : Yes, sir."

Despite the objection of Mr. Robinson the question was repeated six times then the witness answered -

> "After viewing the film, I think the horse could have run better if the jockey had more control of the horse."

At page 86 Mr. Robinson observed -

> "but the way this thing is being run as if it is some sort of inquisition......."

On the procedure applicable at the enquiry I quote from the judgment of Tucker L.J. in Russell vs Duke of Norfolk et al at page 118, B:

> "A layman at an enquiry of this kind is, of course at a grave disadvantage compared with a trained advocate but that is a necessary result of these domestic tribunals which proceed in a somewhat informal manner ....
> This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law ....
> The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth, Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportuntiy of presenting his case."

In Russell's case the evidence of doping was before the tribunal in the form of the analyst's report which was known to the appellant. The appellant presented an answer to what he knew was the charge in the form of a prepared statement. In this case it was known at the commencement of the proceedings that there was no charge, The Chairman indicated this. He further indicated the procedure he would follow. It must always be remembered that the tribunal had the right to regulate its proceedings. Once it indicated the rules it would follow it should not depart from them without giving proper notice to the applicant. Per Tucker L.J. (supra)

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting."

The tribunal should act in good faith, it must maintain its integrity.

Unlike Zadie's case and Russell's case (supra) where the inquiry commenced with a report of a breach of the Rules of Racing on which a charge could be based, this case began with no charge being preferred. The jockeys were called, questioned and made to stand down. They were not informed of the likelihood of their facing a penalty. The applicant was likewise dealt with. He was asked if he thought the requirements of Rule 200 were complied with but he was never informed he was likely to face a penalty. He was not informed of the evidence that had been given in his absence nor was he offered an opportunity to have witnesses recalled for cross-examination. He was not invited to call witnesses in his defence. The Chairman had indicated the rules the tribunal would apply at the hearing. The applicant relied on the integrity of the tribunal to observe the rules.

When the applicant was called to testify he was informed by the Chairman -

> "Mr. Subratie, you are aware that we are enquiring into the performance of LAMPLIGHTER on the 23rd of March, 1983, 13th of July, 1983."

The tribunal is comprised of honourable men. Its integrity should not be questioned. Having summoned the applicant to an enquiry re the running of the horse on four dates, having heard evidence in his absence before calling him in, what should the applicant think this announcement meant?

Certainly the tribunal should not have arrived at a decision adverse to him in respect of either or both of the dates 16th April, 1983 and 9th July, 1983 without hearing from him, that would breach the natural justice rules, so the reasonable inference to be drawn is that the tribunal had been satisfied with what it had already received and only wished to hear of the applicant in the area limited by the Chairman's remarks, namely 23rd March and 13th July, 1983. Despite this statement the tribunal asked questions of the applicant pertaining to the running of Lamplighter on 16th April, 1983 and 9th July, 1983. There was no statement by the tribunal that the remark of the Chairman indicating two dates was in error. Can it be assumed that the statement was made in error and the subsequent proceedings indicated that this was so, so the applicant was not dealt with unfairly?

At the conclusion of the hearing the Chairman asked Mr. Robinson if he wished to make submissions. Mr. Robinson's submission related to the running of the horse on the 9th July, 1983. This indicates he attached no significance to the Chairman's statement made to the applicant just before the applicant commenced his testimony. One has no way of determining how this statement affected the testimony of the applicant.

After the tribunal gave its findings, Mr. Robinson asked that the evidence of the conspiracy be indicated. He was told it would be available in the transcript. He expressed surprise that there had been no charge. His surprise is understandable having regard to what the Chairman had said at the commencement of the proceedings. The word "conspiracy" was used for the first time when the Chairman made his pronouncement. No examination or cross-examination of witnesses was directed at proving or disproving a "conspiracy".

In Calvin vs Carr (1979) 2 All E.R. 444 at pages 451-452 Lord Wilberforce said:

> "Those concerned know that they are entitled to a full hearing with opportunities to bring evidence and have it heard. But they know also that this appeal hearing is governed by the Rules of Racing and that it remains an essentially domestic proceeding, in which experience and opinions as to what is in the interest of racing as a whole play a large part, and in which the standards are those which have come to be accepted over the history of this sporting activity. All those who partake in it have accepted the Rules of Racing, and the standards which lie behind them; they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as, when the process of reaching those decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits."

(underlining mine).

The above statement I quote with approval. I find that in arriving at the conclusion that the applicant conspired at least with H. Henry to breach Rule 200 of the Rules of Racing, the tribunal fell in error. The tribunal failed to observe the procedure it indicated would apply at the commencement of the inquiry. It cannot be said that the applicant had fair treatment and consideration of his case on its merits. I hold that certiorari should go to quash the order of the Jamaica Racing Commission.

Evidence was then given by the jockeys in turn followed by the applicant. His evidence was not completed on the first day and was continued on the second day, 22 August. On the conclusion of the applicant's evidence, submissions were invited from his counsel and from the jockeys, who were not represented. The tribunal then deliberated and announced their findings. The Chairman thereafter addressed Mr. Robinson, applicant's counsel, thus :

> " Having regard to those findings, Mr. Robinson, I don't know whether you wish to address us on possible repercussions. "

The following exchanges then took place (pp. 98 and 99 of record) :

"Mr. Robinson: Well, first of all, sir, perhaps you could indicate to us the evidence of the conspiracy.

Chairman: Well, we will make available to you the transcript.

Mr. Robinson: I have not heard any such evidence. There must be evidence of this conspiracy.

Chairman: This evidence will be available to you in the transcript. We are now delivering to you our findings, and what I am asking you to do is, having regard to the findings of the Tribunal, we are asking you now if you wish to address us on the possible repercussions of the findings.

Mr. Robinson: What I would like to know is whether there is going to be a charge and another hearing.

Chairman: No.

Mr. Robinson: Because there has been no charge so far.

Chairman: No. We have conducted an investigation designed to ascertain certain information. Based on the evidence that we have before us, we have arrived at certain conclusions which we are perfectly entitled to do.

Mr. Robinson: In the absence of a charge ?

Chairman: Yes.

Mr. Robinson: Surprising! I have made my submissions already. "

The Chairman then announced the penalties set out above.

Mr. Rattray submitted that the applicant having been told that there was no charge against him, been sent out of the room so that he could not instruct his counsel and having given evidence in what he was told was an investigation without a charge, the Commission had no jurisdiction to find the applicant guilty and impose a penalty depriving him of his livelihood for seven years without preferring a charge and giving the applicant notice of it. Dr. Barnett, for the Commission, conceded that the Commission had a duty to

/ ....