

Judgment Book.

In the Supreme Court

The Full Court

Before: Smith, C.J., Parnell and Patterson, JJ.

Suits Nos. M83, 84, 85 and 86 of 1982.

R. v. The Jamaica Racing Commission

Ex parte Lynford Hue, Claud Thompson,
Lincoln Ellis and Glen Simms.

R. Carl Rattray, Q.C., and W.K. Chin See for Applicants

Dr. Lloyd Barnett for Respondent.

21, 22 and 23 March, 1983

Smith, C.J. :

The applicant Lynford Hue is a licensed racehorse trainer and the other applicants are licensed racehorse grooms. They were each granted leave by Orr, J. on 4 November 1982 to apply for orders of certiorari to quash orders of the respondent, the Jamaica Racing Commission (the Commission), made on 23 September, 1982 whereby the applicants were warned off all racecourses and other places to which the Jamaica Racing Commission Racing Rules, 1977 apply. The orders were made at the conclusion of an investigation held by the Commission, pursuant to s. 25 of the Jamaica Racing Commission Act, following findings by the Racing Chemist that a prohibited substance, namely polyoxyethelene glycol, was present in samples taken from horses Don Corleone, Royal Star and Royal Chree on 29 May, 1982, when they participated in races.

The applications were heard together, as they were based on identical grounds, and were dismissed. I state below the reasons for my decision agreeing with the judgment of the Court.

Of the five grounds relied on in support of the applications for leave, two were struck out in limine at the hearing as it was held that the complaints made in them did not amount to errors of law on the face of the record; one ground was not pursued and another was abandoned during the argument. The remaining ground and a new ground, which was added by leave at the hearing, were the two grounds argued before us.

The surviving original ground complained of the finding of the Commission that the substance polyoxyethelene glycol was a prohibited substance within the meaning of the Racing Rules of 1977 "although the said substance is inert and innocuous to a racehorse and does not affect the speed stamina courage or racing performance of any racehorse."

Section 25 of the Act empowers the Commission to hold an investigation "in respect of the breach of any of the regulations or of the Racing Rules made under (the) Act." Rule 161 is the rule of which the applicants were found to have been in breach and it provides as follows :

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

Rule 2 defines "Prohibited Substance" as meaning "any substance originating externally whether or not it is endogenous to a horse which falls in any of the categories contained in the First Schedule to these Rules." The first schedule lists eighteen categories of substances lettered from (a) to (r) consecutively. Polyoxyethelene glycol (PEG) was found to fall within category "(o) - Any synthetic substance." The undisputed expert evidence before the Commission was that PEG was not a drug, while the substances named in all the categories, except category (o), are standard drugs. It was also not disputed that whereas the substances in categories (a) to (n), if administered, could affect the speed, stamina, courage or racing performance of a horse, PEG would not. The evidence, also, was that the substances in categories (a) to (n) can be produced synthetically while those in categories (p) and (q) "relate to matters created by the animal self, from within, as

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opposed to the first category, from without." (Evidence of the Racing Chemist, Dr. David Lee - Vol. III p. 13 of record). PEG was said by Dr. Lee to be a carrier, which can be used as a carrier for different pharmaceutical substances. Dr. Alton Ellington, the Government Chemist, described it as "part of a drug delivery system." Dr. Lee said that in testing the samples taken from the three horses for the presence of pharmaceutical substances "signs of polyoxyethelene glycol turned up." He said that the tests carried out by him for any co-administered pharmaceutical substance did not result in a positive finding.

Resulting from the finding that PEG was a prohibited substance, the three horses were disqualified by the Commission, under powers contained in rule 207, in respect of the races in which they participated on 29 May 1992. As reliance was placed on the provisions of this rule to support the applicants' contention on the original ground, those provisions are quoted hereunder in full :

207. (1) A horse which has been entered or declared to run in a race which on examination shows the presence in its tissues, body fluids or excreta any quantity
- (a) of a Prohibited Substance ; or
 - (b) of any substance (other than a substance which can be traced to a normal nutrient) being a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of a horse ; or
 - (c) of a normal nutrient in such abnormal quantities or administered or applied in such an abnormal manner that it could affect the speed, stamina, courage, conduct or racing performance of a horse
- shall be disqualified by the Commission for the race in question and may, at the discretion of the Commission, be disqualified for such time and for such races as it shall determine.
- (2) A finding by the Racing Chemist that a Prohibited Substance or a substance other than a substance which can be traced to a normal nutrient is present in the sample taken from a horse or that a normal nutrient in abnormal quantities or administered or applied in an abnormal manner was present in the sample taken from a horse shall unless the contrary be proved by the owner, trainer, groom or any person having the charge and custody or care of the horse, be proof that the horse was administered such substance or normal nutrient, that in the case of a sample taken on the day in which the horse has participated, the horse carried the said substance or normal nutrient in or on its body while

participating in the race and that, in the case of a sample taken on the day of a race in which the horse was declared to start but in which the horse did not start, the intention of the person having the charge, custody or care of the horse was that the horse should carry the said substance or normal nutrient in or on its body while participating in the race. Any such a finding as aforesaid shall unless the contrary be proved by any of the persons aforesaid, also be proof that the said substance or normal nutrient was one which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse and that the trainer, groom and any other person having the charge, custody or care of such horse has been negligent in the charge, custody or care of such horse."

Mr. Rattray, for the applicants, submitted that this rule is to be interpreted as a whole and that the mischief sought to be dealt with by the rule is in the last sentence of para. (2), namely, to prevent the administering to a horse of a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of the horse. It was said that the purpose for the creation of the presumption in para. (2) "must be to indicate that this is the mischief being sought to be prevented and, therefore, highlights the purpose of the enquiry." So, the argument continued, when one finds among a list of prohibited substances a substance such as at category (o) of the first schedule one has to interpret that substance to mean a substance falling within the mischief sought to be dealt with by the rule and belonging to that genus. It was submitted that it would be contrary to the scope and purpose of the Act and lead to an absurdity to interpret synthetic substance at category (o) in the way the Commission has done and would expose trainers and grooms to a finding that a normal dietary substance which is synthetic is a prohibited substance with dire consequences. It was pointed out that the evidence shows that vitamin E, which is beneficial to a horse, would be caught by a strict interpretation of the provisions.

In my opinion, this contention of the applicants was clearly without merit. Paragraph (2) of rule 207 merely serves to shift the burden of proof and raise presumptions of fact in order to facilitate proof of breaches of the rules, particularly rules 161 and 207(i).

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Acceptance of this contention of the applicants would allow the provisions of that paragraph to alter the structure and govern the construction and plain meaning of para. (1) of rule 207. It is plain that the qualification in sub-paras. (b) and (c) of para. (1), that the substance or nutrient, respectively, must be such as affects the speed, stamina, courage, conduct or racing performance of a horse, does not apply to a prohibited substance in sub-para. (a). The last sentence of para. (2) must, obviously, be interpreted consistently with the provisions of para. (1); so, "substance" and "normal nutrient" referred to in the sentence are those in sub-paras. (b) and (c) of para. (1); and "substance" there does not include "prohibited substance" in sub-para. (a). The provisions of sub-paras. (a), (b), and (c) of rule 207(1) are repeated verbatim in rule 161, or vice-versa, and are indentically structured. Both sets of provisions must, therefore, have the same meaning.

As an alternative contention, Mr. Rattray submitted that the eiusdem generis doctrine should be applied to the interpretation of the First Schedule. It was submitted that as all the substances listed in categories (a) to (n) are drugs and are such as by their nature can affect the speed, stamina, etc. of a horse, they form themselves into a class, and "any synthetic substance" at category (o) must be interpreted as referring to a substance belonging to that class. In my opinion, it is clear from the list of substances in the schedule itself as well as from the scope of the rules, when considered as a whole, that the general words at category (o) ought to be construed generally. The application of the eiusdem generis doctrine is thus excluded.

The conclusion at which I have arrived is supported by the background against which the provisions contained in rules 161 and 207 were prescribed in June, 1977. These provisions replaced provisions in the former rules (rules 175 and 237, respectively) in which the prohibition was against the administration of any drug or other substance for the purpose of affecting the speed, stamina, courage or conduct of a horse in a race. For example, the provisions which the present provisions

in rule 207 replaced were as follows :

A horse shall have nothing administered to it other than normal nutrients within 72 hours prior to running in a race and shall be disqualified in any race in which it has been administered or applied to it for the purpose of affecting its speed, stamina, courage or conduct in said race any substance whatsoever by any method whatsoever.

If the applicants' contention is right, it would have been quite unnecessary to alter the rule in the manner prescribed in subparas.

(a) and (b) of rule 207(1).

It is plain, in my judgment, that in prescribing rules 161 and 207 in their present terms the Commission intended to widen the prohibition which previously existed, as Dr. Barnett submitted.

I also agree with his further submission that against the background of the scientific problems and real probabilities it was reasonable for a rule to be made which prohibits the administration of "any synthetic substance" near the time of the racing of a horse. The evidence before the Commission in this case demonstrates the wisdom of such a provision. As stated earlier, PEG is a synthetic substance which is used as a carrier for the administration of drugs. The evidence shows that, when so used, the drug co-administered is quickly absorbed in the system and is difficult or impossible of detection, while the PEG, being inert, passes through the system and can be detected (see evidence of the Government Chemist, Dr. Ellington, at Vol. IV p. 30, 31 of record). Dr. Ellington said he formed the opinion that the presence of PEG in the samples of urine could be interpreted to mean that "it represented an indicator or a marker for a pharmaceutical formulation being administered", most likely by injection (Vol. IV p. 12 of record). It was not demonstrated at the enquiry that the PEG was administered to the horses for any nutritional or other innocent purpose. I would expect that in including an item in the First Schedule as general as "any synthetic substance" the Commission acted on expert scientific advice.

The additional ground argued was directed at the penalty imposed, the complaint being that the Commission acted without and/or in excess of jurisdiction in imposing sanctions not permitted by the Act further and/or alternatively, that the provisions of the Rules relating to penalties are ultra vires.

The orders by the Commission warning the applicants off all racecourses and other places were made pursuant to rule 247(xi), which provides that any person who commits an offence under the Rules will be liable to be warned off all courses and other places where (the) Rules are in force and/or to be fined a sum not exceeding ten thousand dollars.... by the Commission. It is not disputed that 'warning off' is a penalty.

Section 30(1) of the Act empowers the Commission 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. Mr. Rattray referred to these provisions and submitted that the only penalty which the Commission could lawfully impose for breach of the Rules was a pecuniary penalty, up to the maximum fixed by the section; that 'warning off' was not a permissible penalty and that, therefore, the provisions in the Rules purporting to authorise the imposition of that penalty were ultra vires.

These submissions were conclusively answered by Dr. Barnett by reference to provisions of the Act, to which reference will now be made. Section 22(1) gives the Commission the power to prescribe 'the Racing Rules' and to vary them. Section 32(1) provides as follows :

" The rules relating to horse racing made by the Jockey Club of Jamaica and in force immediately before the commencement of this Act shall continue in force after the commencement of this Act as if those rules were prescribed by the Commission under section 22 so, however, that references therein to the Jockey Club of Jamaica shall be construed as references to the Jamaica Racing Commission.

The rules made by the Jockey Club contained provisions for 'warning off' in terms identical to those in rule 247 of the Rules of 1977 as well as provisions for pecuniary penalties (see Jockey Club Rules

281 and 283). In enacting s. 32(1) in the terms that it did, Parliament expressly approved of 'warning off' as a penalty for breaches of the rules. That penalty cannot, therefore, be ultra vires the provisions of s. 30. That section must be taken to be restricting the limit of the pecuniary penalty but not the type of penalty that may be imposed.

Mr. Rattray submitted in reply that the rules preserved by s. 32(1) were revoked in 1977 and replaced by the existing rules and it is the latter which must now be interpreted to determine whether or not they are ultra vires. In my opinion, revocation of the old rules did not affect the power of the Commission to prescribe in the new rules the types of penalties which could be imposed under the old rules. The comprehensive revision of the rules which was done in 1977 was merely a variation of the rules as they then existed and if the penalties in those rules, which were expressly approved by Parliament, were retained in the revised rules, those penalties are, in my judgment, clearly intra vires. Rule 247, under which the Commission imposed the penalties in this case, is a reenactment of rule 281 of the old rules, with variations. Except for the maximum pecuniary penalty, the penal provisions in rule 281 were repeated verbatim in rule 247. For these reasons, the additional ground of complaint also failed.

PARNELL, J.

On the third day of the hearing, the Court was unanimous in dismissing the move by the applicants seeking to have certiorari to run so that their punishment imposed by the Racing Commission may be quashed.

I have had an opportunity to read in draft, the reasons propounded by my brothers the Chief Justice and Patterson, J. why each of them concurred in the result. Out of deference to the forceful exertions of Mr. Rattray and on account of the importance of the issues raised, I shall take the opportunity to add a few comments of my own. But for these matters I would have adopted as my own reasoning what my brethren have outlined.

Brief outline

In 1972, Parliament enacted the Jamaica Racing Commission Act and created a body known as the Jamaica Racing Commission. The Commission supplanted the former Jockey Club of Jamaica. Section 3(1) of the Act has charged the Commission:

"to regulate and control horse racing and the operation of race courses in the Island and to carry out such other functions as are assigned to it by or in pursuance of the provisions of this Act or any other enactment."

Operating as a voluntary club, the former Jockey Club regulated and controlled horse racing in Jamaica before the advent of the Commission. Every voluntary club, society or body which seeks to pursue certain objects for certain ends, operates under a set of rules or regulations which every member thereof is deemed to have adopted either at the formation of the club or at the time the member seeks entry.

Parliament in recognizing the principle that every member of a voluntary club and every person who resorts to the activities under the umbrella of the club is deemed to have agreed to the rules of the said club governing the operation of the aims thereof, specifically enacted sec. 32 of the Act for the purpose of preserving the rules of the Jockey Club until such time as the Commission prescribed its own rules under the Act.

Section 32 (1) of the Act states as follows:

"The rules relating to horse racing made by the Jockey Club of Jamaica and in force immediately before the commencement of this Act shall continue in force after the commencement

of this Act as if those rules were prescribed by the Commission under section 22 so, however, that references therein to the Jockey Club of Jamaica shall be construed as references to the Jamaica Racing Commission."

If this was not done in the way it was done, the "change over" of control would have been far from being smooth, cordial and effective. Confusion would have immediately set in where certainty formerly held sway. The elements of irregularity and rascality would have reared their tentacles with impunity. The punishment of "warning off" which the Jockey Club under its rules used to impose on recalcitrant jockeys and trainers before the Act came into force was not swept away from Caymanas Race Track as if a severe hurricane lashed the track - and no where else - when the Act came into force. The new Act came on the scene to put on a statutory basis what was taking place in an area where several persons earned a living and in an industry which shows signs of sustaining and supporting the economy of Jamaica. The Act did not put in an appearance in order to destroy. It came to satisfy aspirations and to nurture and preserve a popular sport.

A certain submission

It is in the light of these observations why I must confess that I was surprised when Mr. Rattray submitted that today there is no power in the Racing Commission to award a "warning-off" on a jockey who is found guilty of a breach of the Racing Rules. According to him, the only punishment which the Commission may impose is that of a fine. Pushed to its logical conclusion his argument involves a self-defeating proposition. A breach found proved may not deserve more than a "reprimand" or a "severe reprimand". But according to him, the Commission, in its compassion, may not award a sentence lighter than a fine on the over zealous and hot tempered groom. Apparently, in considering sentence, the part is not included in the whole nor is the whole greater than the less. But as I have already indicated, this part of the submission has its genesis in a fallacy, namely, that the well known form of punishment, namely, warning off, mysteriously disappeared as soon as the Act came into force. Although the

Act preserved the Jockey Club Rules which authorised such a penalty. In a robust reply, Dr. Barnett pointed out that the argument of Mr. Rattray to the effect that punishment by the Racing Commission is confined to a fine was rejected by the Full Court in October 1980 in the unreported case of M26/1980 re Brenton Chin. An oral judgment was delivered by the Court comprising of Wright, Vanderpump and Theobalds, JJ.

The real issue

There was a race meeting at Caymanas Park race course on Saturday, May 29, 1982. Among the horses that were prepared to participate in the races were Don Carleone, Royal Star and Royal Chree. In the 8th race in particular, Royal Chree came first. After samples of urine taken from the three horses on the said race day, were tested, the Racing Chemist found that a substance known as "Polyoxyethelene Glycol" otherwise known as "PEG" was present.

Under the wide statutory power conferred on the Racing Commission by sec. 25 of the Act, a full investigation was held and the result was as follows:

Conclusion at end of investigation.

| No. | Name | Punishment |
|-----|--|--|
| 1 | Lynford Hue (Trainer) | Warned off all courses and other places where the Rules of Racing are in force until the 31st August, 1987, and with effect from September 29, 1982. |
| 2 | Claude Thompson Lincoln Ellis & Glen Simms (Grooms) | Warned off all courses and other places where the Rules of Racing are in force until February 28, 1984 and with effect from September 29, 1982. |

Racing Rules

The present Rules prescribed by the Commission under sec. 22 of the Act were gazetted on December 22, 1977. They became effective subsequent to all race meetings held on December 31, 1977.

Rule 175 of the Jockey Club of Jamaica which was preserved by the Act until such time as the Racing Commission otherwise prescribed, was in these terms:

"The trainer, groom, and any other person, having charge, custody or care of a horse, are obliged properly to protect the horse and guard it against the administration or attempted administration, whether internally or externally, of any drug, stimulant, narcotic, or any substance other than a normal nutrient for the purpose of affecting its speed, stamina, courage or conduct in a race, and if the stewards of the Jockey Club of Jamaica shall find that any such person has failed to show proper protection and guarding of the horse, they shall impose such penalty and take such action as they may deem proper."

See page 42, rule 175 of the 1966 publication (Rules of Racing).

The object of the rule above is made abundantly clear by Rule 237. See page 52 of the Jockey Club Rules of Racing.

"A horse shall have nothing administered to it other than normal nutrients within 72 hours prior to running in a race and shall be disqualified in any race in which it has been administered or applied to it for the purpose of affecting its speed, stamina, courage or conduct in said race any substance whatsoever by any method whatsoever."

Rule 175 above mentioned has been revoked and replaced by the Racing Commission. In its place, Rule 161 of the 1977 Rules now operates and it is in the terms as outlined by the Chief Justice. And Rule 237 of the "old rules" has been replaced by Rule 207 (1) of the 1977 Rules. I need not outline its provisions. My brother the Chief Justice has done so in his judgment.

Certain principles enshrined

From a careful examination of the above rules together with its historical setting, I extract the following principles.

- (1) In a race, breeding, grooming and training of a horse alone must speak. Doping is absolutely prohibited. And the administering or finding of any prohibited substance in the tissues, fluids or excreta of any horse which has been entered in a race or declared a runner, makes the horse liable to be disqualified.
- (2) Normal nutrient administered to a horse in a normal manner is permitted.

- (3) Corrupt practices by persons having the care or charge of a horse are prohibited under the pain of punishment. Horse racing in Jamaica must be kept clean and acceptable as far as the Racing Commission can make it.
- (4) The trainer and those who have the immediate care and control of a horse are prima facie responsible for its health and safety. And at any investigation the burden of showing that proper care and skill had been exercised in the preparation of a horse to enter a race is on the person who is charged with neglect. The mere finding by the Racing Chemist of a "prohibited substance" in the horse is enough to shift the burden of proof.

Prohibited Substance

The term "prohibited substance" is given a restrictive meaning in the interpretation part of the rules. Rule 2 defines the term as follows:

"prohibited substance" means any substance originating externally whether or not it is endogenous to a horse which falls in any of the categories contained in the First Schedule to these Rules."

In biology, the word "endogenous" means originating within an organ or part. (See the American Heritage Dictionary - New College Edition). The first schedule has listed eighteen categories. And it is clear from the wide definition of the term prohibited substance, that all of the eighteen categories listed from (a) to (r) could not possibly form one class or kind in order that the rule of construction known as the "ejusdem generis rule" may be entertained. But the contrary view was argued by Mr. Rattray with skill, in an effort more flavoured with ingenuity and eloquence than with reality and merit.

Synthetic substance

Under category (o), "any synthetic substance" is prohibited. A synthetic substance is not natural. It is artificial and it is either made in the likeness of what nature produces or for what purpose a natural element is capable of demonstrating.

The evidence placed before the Racing Commission was all one way.

I shall attempt to summarise it.

Prohibited substance - synthetic "PEG".

| No. | Witness | Reference | Substance of evidence |
|-----|---------------------|--------------------|--|
| 1 | Dr. David Lee | Volume 2 of Record | <p>The finding of PEG is a lead to the conclusion that something else had been co-administered (P.12)</p> <p>PEG is a synthetic substance (P.23). It does not affect the stamina, courage or speed of a horse (P.17). It is a good carrier base. (Vol. 3 pp. 13 & 31).</p> |
| 2 | Dr. Alton Ellington | Volume 4 of Record | <p>PEG could be regarded as part of a drug delivery system (pp. 13 & 18).</p> <p>It does not act on its own, it is very common and easily available. <i>ibid.</i></p> <p>The presence of PEG in the urine could be interpreted to mean that it represents an indicator or a marker for administering an injection and the dose could be a mixture of PEG, water and a drug. (P.12)</p> |

In his evidence, Dr. Ellington, whose experience, reputation and reliability as the Island Chemist cannot be impeached, told the Racing Commission that polyethylene glycol (PEG) is rapidly absorbed in the system and that it does so at the rate of about one milligram per minute. The molecular weight found in the specimens was high.

The conclusion which flows from the unchallenged and uncontradicted scientific evidence may be put as follows:

- (a) Since the synthetic substance (PEG) does not act on its own, its presence is evidence that it was for the purpose of acting on or concealing some other substance administered to the horse contemporaneously or very early thereafter.
- (b) A synthetic substance originating externally (within the meaning of the definition already adverted to) was introduced into the system of a horse which was a runner in a race.

1. Submissions of Mr. Rattray

As I understand Mr. Rattray's submissions, he has used as his plinth, the provision of Rule 207(2), which the Chief Justice has cited fully. He urged that the mischief under that rule is to prohibit the administration of a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of a horse. If, therefore, the substance by itself is not capable of affecting a horse in the manner outlined, the mischief has not been touched and therefore, the finding of PEG in the system of the horses was not sufficient to place liability and a penalty on the applicants.

I reject this argument as being unsound for the following reasons.

- (1) The argument is hinged on the hypothesis that the ejusdem generis rule of construction is applicable in the circumstances. But as I have already pointed out, the list of 18 categories in the schedule does not form a common class, order or genus of substances. And where a common class is invaded by a substance or thing not of the class enumerated, then in either case, the ejusdem generis rule does not apply.
- (2) Each of the eighteen categories is a prohibited substance. If, therefore, there is evidence capable of fitting a substance, drug, mixture or matter found in a horse on a race day under any of the categories, then a prima facie case has been made out for the Racing Commission to act. The statutory presumption that the dose was given to the horse in order to affect its performance in the race or that there was negligence by the trainer or groom in the handling of the horse is for the purpose of assisting the Racing Commission in apportioning fault, if necessary.
- (3) Even if "PEG" by itself is not a drug capable of affecting the conduct or performance of a horse while in action, the evidence shows that it is capable of concealing or

swamping the administration of a substance which by itself could have affected the horse's performance. In such a case "PEG" would be closely associated with the "principal substance" for an improper purpose and it would be caught within the mischief contemplated. To put in a simpler form, the position may be stated thus: Since "PEG" could be part of a drug delivery system then its presence in the horse is capable of being accepted as evidence of a substance assisting some other substance likely to affect the speed, stamina, conduct or performance of a horse.

2. Warning off

I have already adverted to this aspect of the argument but in closing, I think it fit to return to the subject. Warning off as a penalty has been prescribed under Rules 247 (XI); 248, 249 and 250. And warning off as a punishment is awarded for breaches of Racing Rules in almost all countries where horse racing is adopted as a sport. In order properly to cleanse the stables, the racing authorities may have to ban from their tracks and courses certain persons who are determined to act as tricksters and rascals but dressed in the garb of jockeys, trainers or grooms. The Rules referred to above are salutary, and in effect were in operation long before 1972. What Parliament has done is to put a ceiling of ten thousand dollars (\$10,000) in the imposition of a fine for a breach of a rule.

In other respects, the Racing Commission is free:

"to impose such penalty and take such other action as it may deem proper."

General Comments

A perusal of the record of the proceedings before the Commission has disclosed two matters which for my part, has induced me to make the comments hereunder:

- (1) The cross-examination of Dr. Lee by Mr. Roy Taylor who appeared for the owners of the three horses was somewhat novel in certain areas. As I understand it, there is a big difference between handling an expert

witness and an ordinary witness as to fact.

Where a person who is skilled in a discipline has been called as a witness in any proceeding, he should be given a reasonable opportunity by Counsel, and if he refuses - by the Tribunal to deal with the technical questions and suggestions asked of him or put to him. A mere "yes" or "no" is not expected of a technical witness to whom a technical question has been put. The witness is there to assist the tribunal and any view which he puts forward should be allowed with what reservation or qualification which is given. The reservation or qualification is part of the answer of the witness. Dr. Lee was put under a very tight rein by Mr. Taylor in cross-examination. The rein was slackened a bit where the answers were not too barbed. Where, however, the replies were not "appropriate" to the cause that was being protected, the hold was stiffened. The Racing Commission should watch carefully any move in cross-examination designed to cut short an answer which, though relevant, may not be palatable to the questioner.

- (2) Where the Commission holds an investigation under sec. 25 of the Act, it is embarking on an inquiry for ascertaining the facts of a matter which is the subject of the investigation. The Commission has the power exercised by a Resident Magistrate in the administering of an oath, the summoning of witnesses and the calling for the production of books and document. But the proceeding is not to be regarded as a trial. There is no criminal charge laid against any person and indeed, there is no accused. There is no information or indictment.

At the end of the calling of witnesses by Mr. Ashenheim, Mr. Chin See and Mr. Taylor made what is known as a no-case submission on behalf of their clients based on an

interpretation of Rule 207(2) of the Rules of Racing. The exercise took some time because pages 82 - 163 of volume 4 of the Record bear eloquent testimony of the length and depth of the submissions. The move by learned Counsel was well intended and was executed in good faith.

The Commission sat until after midnight to hear the closing rhetoric of Mr. Taylor. But it was too late to give Mr. Ashenheim what the competent chairman was pleased to call -

"his bite at the cherry".

Volume 5 of the proceedings contains the efforts of Mr. Ashenheim at "his bite at the cherry". (See pages 1 - 45).

It was a commendable contribution. But Mr. Chin See insisted that he had the right to reply "as a matter of law". The Chairman did not resist Mr. Chin See. He gave counsel a fair run. (See pages 46 - 55). At the end of all this exercise by the learned counsel who appeared, the Chairman gave what I will call, with respect, a succinct and sensible ruling. And the ruling was expressed in seven lines - an epitome of common sense. There is no such thing called a "no-case submission" at an enquiry or at any investigation. The term is used in the criminal Court and the right is used by counsel in that forum when at the close of the prosecution's case, the defence takes the view that sufficient has not been put forward by those whose duty is to prove guilt, for the accused to answer, I cannot dictate to the Commission how and in what manner it should conduct its investigation. However, I do not think that lengthy submissions to which I have referred and based on the practice which obtains in the criminal Courts of Jamaica should be allowed. If I am permitted to paraphrase sec. 25 (c) (i) of the Act, it is not a move which:

"the Tribunal may think most effective for ascertaining the facts of the matter under investigation."

Patterson J.

At the conclusion of the arguments herein, we discussed the matter and unanimously agreed that each application should be dismissed. We promised to state our reasons in writing.

On the 29th May, 1982, racehorses Don Corleone, Royal Star and Royal Chree participated in a race meet at the Caymanas Park Race Course. A sample of the urine of each horse was taken and subsequent tests revealed that in each case, the sample contained the substance, Polyoxyethylene Glycol (otherwise called PEG). As a result, the Jamaica Racing Commission, in exercise of powers conferred by Sec. 25 of the Jamaica Racing Commission Act, held an investigation and concluded that the substance was a Prohibited Substance within the meaning of The Jamaica Racing Commission Racing Rules 1977 made under the Act. The applicant, Lynford Hue was the trainer of all three race horses mentioned above, whilst Claud Thompson was the groom for the race horse Royal Star, Lincoln Ellis the groom for the race horse Royal Chree and Glen Simms the groom for the race horse Don Corleone. Each applicant was found by the Commission to be in breach of Rule 161 of the Jamaica Racing Commission Racing Rules 1977 and under the provisions of Rule 247 (X1), each was warned off the race course and other places where the Rules are in force, for a stated period. The race horses were disqualified in accordance with the provisions of Rule 207 (1) for the race in which each participated on the 29th May, 1982.

The applicants sought orders of certiorari to quash the penalties imposed on them by the Commission. They relied on two grounds, the first being:-

"There is an error of law on the face of the record in that the Jamaica Racing Commission in its interpretation of the Jamaica Racing Commission Rules of 1977 found that a substance called POLYOXYETHELENE (sic) GLYCOL is a prohibited substance within the meaning of the First Schedule to the said Rules by reason that it is a synthetic substance although the said substance is inert and innocuous to a race horse and does not affect the the speed, stamina, courage, or racing performance of any racehorse."

The second ground, which was added on the first day of hearing by leave of the Court, reads as follows:-

"There is an error on the face of the record in that the Commission acted without and/or in excess of jurisdiction in imposing sanctions not permitted by the Jamaica Racing Commission Act, further and/or alternating the provisions of the Racing Rules relating to penalties are ultra vires the provisions of the Jamaica Racing Commission Act."

In support of the first ground, Mr. Rattray adverted to Rule 2 of the Racing Rules which defined "Prohibited Substance" as "any substance originating externally whether or not it is endogenous to a horse which falls in any of the categories contained in the First Schedule to these Rules". The list of substances in the First Schedule includes:- "(o) Any synthetic substance." The list itself contains some eighteen different substances, lettered (a) to (r). Dr. David Lee, the Racing Chemist, in his evidence before the Commission, stated that Polyoxyethylene Glycol, is a synthetic substance and fell within category "(o)" of the list in the schedule to the Rules, that all the substances mentioned in the list at (a) to (n) were drugs and would affect the speed, stamina, courage, conduct or the racing performance of the horse, but were not exhaustive of substances that would so affect a horse, that Polyoxyethylene Glycol was not a drug, but the finding led to the conclusion that something else had been co-administered, that by itself, PEG was innocuous and does not up to a point, affect the speed, stamina, courage, conduct or racing performance of a horse, but in these specific cases, he could not say if it did so affect the horses as he did not measure the concentration.

Rule 207 (1) empowers the Commission to disqualify a horse which has been entered or declared to run in a race which, on examination, shows the presence in its tissues, body fluids or excreta any quantity

- "(a) of a Prohibited Substance; or
- (b) of any substance (other than a substance which can be traced to a normal nutrient) being a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of a horse; or
- (c) of a normal nutrient in such abnormal quantities or administered or applied in such an abnormal manner that it could affect the speed, stamina, courage, conduct or racing performance of a horse."

Rule 207 (2) provides as follows:-

"A finding by the Racing Chemist that a Prohibited Substance or a substance other than a substance which can be traced to a normal nutrient is present in the sample taken from a horse or that a normal nutrient in abnormal quantities or administered or applied in an abnormal manner was present in the sample taken from a horse shall unless the contrary be proved by the owner, trainer, groom or any person having the charge and custody or care of the horse, be proof that the horse was administered such substance or normal nutrient, that in the case of a sample taken on the day in which the horse has participated, the horse carried the said substance or normal nutrient in or on its body while participating in the race and that, in the case of a sample taken on the day of a race in which the horse was declared to start but in which the horse did not start, the intention of the person having the charge, custody or care of the horse was that the horse should carry the said substance or normal nutrient in or on its body while participating in the race. Any such a finding as aforesaid shall unless the contrary be proved by any of the persons aforesaid, also be proof that the said substance or normal nutrient was one which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse and that the trainer, groom and any other person having the charge, custody or care of such horse has been negligent in the charge, custody or care of such horse."

Mr. Rattray submitted that the mischief which is sought to be dealt with by this section of the Rules is the prevention of the administering to a race horse of a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse. He argued that when one finds amongst the "Prohibited Substance" list a substance such as "(o) any synthetic substance" one has to interpret "any synthetic substance" to mean any synthetic substance falling within the mischief sought to be dealt with by the Rules and belonging to that genus; alternatively, since the evidence has established that all items in the First Schedule, except "(o)", are drugs, "any synthetic substance" would have to be interpreted to mean any synthetic substance that is a drug. PEG is not a drug and is not a substance which could affect the speed, stamina, courage, conduct or racing performance of a horse. To give the words the meaning attributed to them by the Commission would expose trainers and grooms to a finding that a normal dietary substance that is synthetic is a prohibited substance. That would be against the scope and purpose of

the Act and would lead to an absurdity. He further submitted that the law is, that in determining either the general object or meaning of the language in any particular passage, the intention which accords with legal convenience, reason, justice and legal principles should be applied.

We were of the view that Mr. Rattray's contention in this regard was without merit. Rule 207 (1) in my view, is aimed at preventing a horse which has entered or has been declared to run in a race, from being doped, in the loose sense of that word. It empowers the Commission to disqualify any horse which has been entered or declared to run in a race which on examination shows the presence in its tissues or body fluids or excreta any one of three separate and distinct substances, listed in the section under "(a)", "(b)", and "(c)". "Prohibited Substance", mentioned in the Rule at "(a)", must be given the meaning assigned to it by Rule 2. I am satisfied that PEG falls within the category listed in the schedule under "(o) - any synthetic substance", and is a prohibited substance. Whereas substances mentioned in Rule 207 (1) at "(b)" must, by their nature, be capable of affecting the speed, stamina, courage, conduct or racing performance of a horse, and the nutrient mentioned in 207 (1) "(c)" must also be capable of affecting the horse in like manner to permit its disqualification, the mere presence of a "Prohibited Substance" in the tissues, body fluids, or excreta of a horse permits disqualification. There is no prerequisite to disqualification in that case to show that such a prohibited substance could affect the speed, stamina, courage, conduct or racing performance of a horse. There is an implied unqualified prohibition against administering a "Prohibited Substance" to a race horse.

Rule 207 (2) is of evidential value only and facilitates proof of certain breaches of the Rules by raising certain rebuttable presumptions of fact. Mr. Rattray urged us to interpret Rule 207 (2) by looking at the whole Rule, and to pay particular attention to the last sentence. That sub-rule, he said, clearly established that the

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mischief sought to be protected is the administering to the horse of a substance which could affect its speed, stamina, courage, conduct or racing performance. I do not agree with him. The last sentence is clearly referable to the "said substance" set forth in rule 207 (1) (b) and the "normal nutrient" set forth in 207 (1) (c). Rule 207 (1) (a) is not affected. Mr. Rattray further argued that "(o) any synthetic substance" listed in the First Schedule should be interpreted to be of the same genus as all those other substances listed as "(a) to (n)". He argued that all substances "(a)" to "(n)" are synthetic substances and are such that could affect the speed, stamina, courage, conduct or racing performance of a horse. Dr. Ellington, in his evidence before the Racing Commission said that all substances in those categories are drugs. The substances listed as "(p)" and "(q)" are of a different genus, they being substances which the horse can produce within its body. Mr. Rattray submitted that "where there is a class listed followed by a wider term, that wider term must be interpreted to be of the genus or class enumerated. Its not a "catch all" - the eiusdem generis rule must be applied. I did not share his views. I agree that the substances listed "(a)" to "(n)" in the First Schedule can be said to be of the same class or genus, but looking at the list as a whole, "(p)" and "(q)" are of a different genus and "(r)" seems to stand on its own. In my view, "(o)" ought to be interpreted generally and the eiusdem generis rule has no application. A look at Rule 161, the rule under which the Racing Commission found the applicants to be in breach, fortifies my views that "Prohibited Substance" stands on its own and is not qualified by the requirement that it must be such a substance as could affect the speed, stamina, courage, conduct and racing performance of a horse. Dr. Barnett traced the background to the present provisions of Rules 161 and 207, and submitted that from the evidence, it is plain that PEG is a carrier of co-administered drug. It is used because of its ability to conceal the drug. In other words, when a drug is administered with PEG as the carrier, it is "almost impossible" to determine the drug by testing the urine of the horse, or even its blood. The Racing Commission, in drafting the 1977 Rules

must have been aware of the reason why PEG would be administered to a horse, and that PEG, being inert, would pass through the system unlike any drug it may have been administered with. With that in mind, it becomes even clearer that the eiusdem generis rule is not applicable and that the words "Prohibited Substance" ought to be given a general meaning.

The other ground argued by Mr. Rattray seems to have had its origin in an after-thought. He contended that the Jamaica Racing Commission Act is a statute which enables the Jamaica Racing Commission to hold investigations. The investigation was clearly held under the powers conferred on the Commission by Sec. 25 of the Act. The powers of punishment under the Act are divided, e.g., under S. 21, it is the Minister who may suspend or revoke a licence. Under Sec. 30 (1) the Racing Commission has power to impose penalties not exceeding \$10,000 for breach found to have been committed pursuant to investigations under Sec. 25. Sec. 30 (2) of the Act provides for the payment of the penalty. He submitted that when an enabling statute states the penalties that can be imposed it is ultra vires the statute for the body empowered to formulate Rules to create any penalty that is different in nature or higher in quantum than that prescribed by the Act. Any Rule which provides a penalty outside the provisions of the Act is ultra vires the Act. The penalty imposed on each applicant was in accordance with Rule 247 (X1); to be warned off is a penalty. If a penalty is imposed which is not authorised by law, the whole proceedings must be quashed. Dr. Barnett, in reply, argued that the Legislature must have been aware of the Racing Rules made by the Jockey Club of Jamaica, which Rules were superseded by the present 1977 Rules. By Sec. 32 (1) of the Jamaica Racing Commission Act 1972, the Racing Rules made by the Jockey Club of Jamaica and in force immediately before the commencement of the Act, were specifically enacted. Parliament, by those provisions, has not only enacted the Racing Rules of the Jockey Club of Jamaica, but has indicated the scope of the Rule making powers of the Commission. Sec. 22 (1) authorises the Commission to prescribe

"The Racing Rules" and to vary those rules. The Rules which Parliament so promulgated had the force of Law and contained provisions for warning off in several rules. The present rules contain provisions for warning off in identical terms to the Jockey Club rules.

I have no doubt in my mind that the Commission has power to "warn off" persons who are in breach of certain rules, and that the rules providing for such a penalty are *intra vires*. The Act did not take away the power of the Commission to warn off persons from race courses. By Sec. 32 (1) it expressly preserved the Jockey Club Rules "as if those rules were prescribed by the Commission under S. 22" -- Those rules contained provisions for "warning off". Those rules also gave the Racing Commission power to impose a fine. Sec. 30 of the Act seems to fix the maximum fine that the Commission may impose, but it certainly does not mean that a fine is the only penalty that the Commission may now impose. The Act has not taken away the Commission's power to alter or vary the Rules, and when the 1977 Rules were enacted, thus repealing the Jockey Club Rules, the power to provide for "warning off" as a penalty was still within the powers of the Commission. Sec. 247 is not *ultra vires* the Act.