IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M 64 OF 1988

CORAM: THE HON. MR. JUSTICE BINGHAM, J.
THE HON. MR. JUSTICE PANTON, J.
THE HON. MR. JUSTICE CLARKE, J.

REGINA

VS.

RACING COMMISSION

EX PARTE CLIVE GREEN

APPLICATION FOR ORDER OF CERTIORARI

D. Morrison and W. Clark Cousins instructed by Rattray, Patterson and Rattray for the applicant.

Dr. L. Barnett and R. Ashenheim instructed by Millholland, Ashenheim and Stone for the respondent.

HEARD: February 28, March 3, 1989

BINGHAM J:

On 28th February, we heard submissions in this matter and at the end of the hearing we came to the conclusion that the decision of the Tribunal set up by virtue of Sec ion 25 of the Racing Commission Act in respect of an investigation conducted on 7th March, 1988 and made on 14th November, 1988, in which it directed that the applicant be warned off for a period of eighteen months and fined $5000, be quashed.

We promised then to put our reasons into writing and this we now do.

It may be sufficient to state that, in so far as there was in substance no challenged made by the respondents to the application for the reliefs sought in the motion, in the light of the fact that the decision of the Tribunal was arrived at on the erroneous view that the Racing Rules in so far as the duty it sought to impose on a trainer was an absolute one.

The facts relating to this application that at a race meeting held at Caymanas Park on 28th October, 1987, a race horse, one "Reo Sandy", trained by the applicant placed second in the third race

in which horses classified in "D" class participated. As is the established practice, this horse having placed "in the frame" and a dividend having been declared on the horse, it became subject to a urine sample which subsequent on examination by the Government Chemist established the positive finding of the horse having raced with a prohibited substance namely, flunixin.

This finding of the Racing Chemist, Dr. Earle Roberts of the Department of Chemistry at the University of the West Indies was subsequently confirmed by tests carried out by Mrs. Patience Dennis, the Government Chemist on a similar specimen of the urine sample taken from the horse.

Rule 207 (3) of the Racing Rules 1977, states in part:-

> "A finding of 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 the dead body of a horse or that a normal nutrient in abnormal quantities or administered or applied in abnormal manner was present in the sample taken from a horse or the dead body of a horse shall unless the contrary be proved by the owner, trainer groom or any person having the charge, custody or care of the horse, be proof that the horse was administered such substance that in the case of a sample at anytime taken in the period commencing three days immediately prior to the day of the race in which the horse has participated the horse carried the said substance in or on its body while participating in the race."

It was the receipt by the Racing Commission of the subsequent report from the Racing Chemist in accordance with Rule 207 (4) that led to the Racing Commission, by virute of the powers conferred on it under Section 25 of the Racing Commission Act, appointed a Tribunal to conduct an investigation into the circumstances which lead to this horse being administered with the said Prohibited Substance.

The applicant first became aware of the proposed enquiry when he went to collect the purse normally due to the owner from the Racing Commission. Having regard to the positive finding the purse was withheld as such a finding meant under Rule 207 that the horse was automatically disqualified from the position it finished in the race.

At the subsequent investigation conducted on 7th March, 1988 by the Tribunal appointed by the Racing Commission its decision which was handed down on 14th November, 1988 the Tribunal came to the conclusion that the

applicant was guilty of negligence and he was subsequently warned off for eighteen months and fined $5000 with effect from 18th November, 1988.

In arriving at this decision the Tribunal found inter alia that:-

> "1. The duty imposed by the Racing Rules on a trainer is an absolute duty.
>
> 2. That the effect of this is that it gives rise to a legal burden of proof on the trainer.
>
> 3. That this burden is not merely a provisional burden raised by the state of the evidence.
>
> 4. That the trainer or other person must prove an affirmative defence to the allegation; he needs to prove further who or what probably caused the administration of the prohibited substance.
>
> It was not sufficient that he did all that he could do as this did not give rise to a defence."

The statement of the grounds filed in support of the Motion before us applying for an Order of Certiorari states that:-

> 1. There was an error of law on the face of the record which was implicit in the finding of the Tribunal that the duty imposed by the Racing Rules on the trainer is an absolute one which could only be discharged by the trainer not merely being under a duty to protect the horse against the administering of a prohibited substance but further proving who or what caused the administration of that substance.
>
> 2. That the Tribunal acted in excess of its jurisdiction in placing such a burden on the applicant and in this regard did not act fairly in the procedure by which it arrived at its conclusion.

As the Statement of the Grounds sets out fairly accurately in a summary form the decision of the Tribunal which appears at pages 64 and 65 of the Record one need not refer to this in detail. The necessity for so doing is further obviated by the fact that Dr. Barnett for the respondent has conceded that the findings of the Tribunal and the conclusion of guilt arrived at based as it was upon what an erroneous statement of the law relating to the burden of proof placed upon the applicant, did not seek to

support the decision.

The arguments presented to us by Mr. Morrison for the applicant and Dr. Barnett to whom we are greatly indebted centred around the need for us to formulate some guidelines aimed at assisting a Tribunal conducting similar investigations in the future in so far as applying the proper principles of law governing the burden and standard of proof in arriving at a decision in such matters. In short, the question which arose is what is the proper construction to be placed upon such an interpretation of sections 161 and 207 (3) of Racing Rules 1977.

Rule 207 (3) in so far as is material has already been set out. It is clear from reading of this Rule that the positive finding of a prohibited substance in the urine sample taken from the horse within the prescribed period "shall unless the contrary be proved," be proof of negligence on the part of the persons having charge, care and custody of the horse. In my view this creates a legal burden on the part of such persons which would in this regard be, when the Rule is examined, for the trainer and the groom to discharge the onus of proof which by virtue of the primary facts established by presence of the prohibited substance the proof of which fact would raise up a presumption of negligence on their part.

The crucial questions which now need to be addressed given this situation are:-

1. What is the nature and extent of the duty placed upon a trainer and a groom?
2. How and in what manner can this duty be discharged?

It is to Rule 161 that one has now to turn to see how the Rules seek to address this situation.

Rule 161 states:-

> "the trainer, groom, or 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."

As we have already stated in M48/88 Regina vs, Racing Commission ex parte Clifton Morgan unreported Judgment of this Court delivered on 28th February, 1989, the Court there said in agreeing with the submission of Dr. Barnett for the respondent that:

> "there is a high duty of care imposed on all who have charge, custody or care of horses. On a true construction of rule 161, any person having charge, custody or care of a horse is obliged to show that all reasonable care had been taken to protect and guard the horse against the administration of a Prohibited Substance."

In dealing with a similar matter involving the administering of a prohibited substance to certain racehorses, the Full Court (Smith C.J. Parnell and Patterson J.J.S.) in M 83 - 86/1982 Regina vs. The Racing Commission ex parte Lynford Hue eta al, an unreported Judgment delivered on March 23, 1983, Parnell J. in language far more felicitious than I am able to describe, in dealing with the principles to be extracted from the Racing Rules, said that:-

> "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 contact 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 has 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."

I agree with the opinion expressed by this emminent Judge and I wish to adopt the views expressed by him as my own.

I would, therefore, in conclusion state the present position in the following manner:-

1. Section 207 in so far as it seeks to deal with a positive finding of a prohibited substance in a horse within the prescribed period creates a presumption of guilt in respect of both the trainer and the groom having charge custody and care of the horse.
2. This presumption is rebuttable in so far as the persons charged are concerned if they can adduce such evidence capable of satisfying the Tribunal hearing the matter that they exercised all reasonable care and skill on their part in securing, protecting and guarding the horse in question against the possible administration of any prohibited substance.
3. The question as to whether the legal or presumptive burden of proof which is cast upon the trainer or groom has been properly discharged is a question of fact for the Tribunal to determine based upon their knowledge of the Racing Rules and experience of the practices prevailing in the Racing Industry and against the background of the clear intention of the Legislature in prescribing the Rules of Racing 1977 and subsequent amendments, having as its main objective to stamp out corrupt practices and clean up horse racing as a sport as far as is practicable for the benefit of the Racing Fraternity and the large numbers of the members of the public who support the sport.

In the light of the strict prohibition on the administration of any prohibited substance to a horse nominated for a race meeting at any time within a prescribed period of three days before the horse is scheduled to take

part in a race meeting and the personal obligation placed upon a trainer to instruct the groom having the charge, custody and care of that horse to be fully occupied in guarding and protecting the horse within that critical period against the possible administration of any such substance, it seems to me that the realities of such a situation would dictate that it would be difficult if not virtually impossible for a prohibited substance to be administered to such a horse without the groom having the charge custody and care of that horse and properly discharging that duty, no knowledge of such a fact.

It would appear that based upon such primary facts being established that as a matter of evidence, the discharging of the presumptive burden placed upon such a person would be a difficult if not insurmountable task.

There being no contest, however, as to the merits of the application no order as to costs was made in respect of the matter.

PANTON, J.

On January 9, 1988, Ellis, J. gave leave to the applicant to apply for an order of certiorari to quash the decision of a Tribunal of the Jamaica Racing Commission to fine the applicant $5,000.00 and to warn him off for a period of eighteen (18) months from all courses and other places where the Jamaica Racing Commission Racing Rules 1977 apply.

In pursuance of that leave, the applicant moved us to make the order on the grounds that -

(a) there is an error on the face of the record in the finding of the Tribunal that the duty imposed on (sic) the Racing Rules on the trainer is an absolute duty to protect the horse against the administration of a prohibitive substance and that the trainer must prove who or what probably caused the administration of that prohibitive substance;

(b) that the Tribunal acted in excess of its jurisdiction in placing a burden on the applicant not warranted or required by the Racing Rules and thus did not act fairly in the procedure by which it arrived at the conclusion that the appellant was guilty.

In delivering its decision, the Tribunal, through its chairman, said;

> "We have come to the view that the effect of this burden is that the trainer or other persons having care, custody, control, must prove on a preponderance of the evidence one of the usual affirmative defences to an action in negligence. If he proves that his action did not cause the injury to the horse he will need to prove who or what probably did instead. Showing that someone or something else possibly caused the injury will not absolve him. Demonstrating that the source of the

> injury is unknown will not absolve him, and an argument that he did all he could do will not absolve him, because the duty under the Racing Rules in terms is absolute and unqualified."

It is clear from the above that the Tribunal was saying that once the Prohibited Substance is found to have been administered, there is nothing that can absolve the trainer or other persons having the care, custody or control of the horse. Further, the Tribunal was saying that the trainer had also to prove how the horse came to have been affected. It did not matter, according to the Tribunal, that the trainer did all that he could have done to prevent interference with the horse.

The evidence presented by the applicant indicated that he employed a groom whom he had instructed to stay at the stable and watch the horse, particularly during the last three days before each race. The stalls are completely meshed and the gate is kept locked. The groom stays with the horse night and day. He has authority to give only water to the horse. The trainer usually feeds the horse. When it was learnt that a positive test had been returned in respect of the horse, the groom was interviewed. He denied administering any substance, and volunteered the opinion that the samples may have been "mixed up or something." He left, without notice, the employment of the trainer a few days before the inquiry was held.

In the circumstances, the Tribunal "did not feel" that the applicant "necessarily had anything to do with the administration of the substance."

Rule 161 reads thus:

> "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 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."

This Rule clearly places an obligation on a trainer, groom or other person having charge, custody or care of a horse to protect it and guard it against interference by persons who may wish to administer Prohibited Substances aimed at affecting its performance in a race. There is a burden on the trainer, groom or other person having charge, custody or care of a horse to show the Tribunal that reasonable measures were taken to protect and guard the horse. A failure to demonstrate this to the Tribunal makes the trainer, groom or other person having care of the horse liable to a penalty. Implicit in this Rule, I find, is room for the trainer to escape liability if he satisfies the Tribunal that he did indeed institute measures to properly protect and guard the horse; and this is so, notwithstanding that the system instituted has been breached.

Rule 207 (3) reads thus -

> "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 the dead body of a horse or that a normal nutrient in abnormal quantities or administered or applied in abnormal manner was present in the sample taken from a horse or the dead body of 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 (where the horse participated in a race) ..... the horse carried the said substance

> or normal nutrient in or on his body while participating in the race and that (where 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 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 by which its nature could affect the speed ..... of such horse and that the trainer ..... has been negligent in the charge, custody or care of such horse."

The finding of a Prohibited Substance in a sample taken from a horse raises the following presumptions -

(1) that it was administered to the horse;

(2) that it was administered with a view to affecting the performance of the horse; and

(3) that the trainer, groom or other person having the charge, custody or care of the horse had been negligent in his care of the horse.

Whereas Rule 161 states the obligation and burden on the trainer, groom or other person having the charge, custody or care of a horse, Rule 207 (3) states the presumptions that apply unless the contrary is proved. These presumptions are therefore rebuttable.

There is no doubt that the Rules place a high duty of care on a trainer. The Rules however do not support the viewing of the trainer's responsibility in absolute terms. The Tribunal cannot ignore the fact that it is impossible for a trainer to have a horse physically in his view at all times and that a trainer has to employ servants, and also to delegate some of his duties in relation to horses under his care

The Rules do not require a trainer to give a guarantee that the system of protection for his horses is not liable to be breached. There is a limit to the level of protection that a trainer may provide. There are economic as well as human

considerations.

Where a horse has been found to have been administered a Prohibited Substance, and the Tribunal is satisfied that the trainer himself did not administer the Substance, and had not given instructions for such Substance to be administered, the trainer is to be regarded as having discharged the burden imposed on him by the Rules, if he produces evidence to show, on a balance of probabilities, that he took reasonable care -

1. to ensure that the premises on which the horse was kept were reasonably secure;
2. to ensure that the horse was under the care and watch of someone whom he had no reason to distrust; and
3. to adequately instruct such person or persons having direct care and watch of the horse that nothing, apart from water and feed, should be administered to the horse except authorised by the trainer himself or by a veterinary officer who has examined the horse.

There is no duty on a trainer to provide evidence as to who administered a Prohibited Substance, or to show how it was administered unless the circumstances indicate that it is reasonable to infer that he knows.

In the instant case, there was therefore a clear error on the face of the record when the Tribunal said that there was an absolute duty on the trainer, from which duty and the subsequent penalty there is no means of escape. For these reasons I agree with my learned brothers that certiorari should go to quash the decision of the Tribunal.

CLARKE, J.

In this application for an order of certiorari to quash the decision of a Tribunal of the Jamaica Racing Commission (the Commission) for error of law on the face of the record my task was made lighter than it would otherwise have been. This was due to the assistance counsel on both sides gave to the Court and to the commendable stance taken by Dr. Barnett in properly conceding that the applicant's contention that the record is bad on its face is well founded.

Not pursued before this Court, and rightly so, for reasons that shall appear hereafter was the other ground relied on in the originating notice of motion, namely, that the Tribunal acted in excess of its jurisdiction in placing a burden on the applicant not warranted by the Racing Rules.

The Tribunal had held an investigation into a positive finding returned by the race horse, Reo Sandy, on October 28, 1987 after it had participated in a race that day. The Tribunal found that the horse had run on that day with a prohibited substance. It went on to hold that the trainer of the horse, the applicant, had committed a breach of the Racing Rules (the Rules) made under the Racing Commission Act and directed that he be warned off for 18 months and fined $5,000.00.

The grounds for the Tribunal's decision are set out in the record. Giving the grounds for the decision the learned Chairman, who showed a laudable desire for the matter to be tested in a higher forum, had this to say in part:

> "First of all we have come to the conclusion that the duty imposed by the statute is in legal terms an absolute duty, that is not to say there is no defence to it, but the effect of it is that it gives rise to a legal burden of proof.
>
> Secondly this gives rise to a legal burden on the trainer not merely the provisional burden raised by the state of the evidence ...

> If he proves that his action did not cause the injury to the horse he will need to prove who or what probably did instead. Showing that someone or something else possibly caused the injury will not absolve him. Demonstrating that the source of the injury is unknown will not absolve him because the duty under the Racing Rules in terms is absolute and unqualified. To put it another way, none of these things are specified by the Racing Rules as giving rise to a defence.
>
> We don't feel that [Mr. Green's] evidence that he took all reasonable steps, even if we accept that to be the fact, would avail him in his particular situation ... having regard to our view of the law ..."

The passage shows that the Tribunal misunderstood the concept of absolute statutory duty, as witness the inconsistent statements made about it. The learned Chairman states variously that the Rules impose an absolute duty which he says gives rise to a legal burden of proof which the applicant could discharge by establishing one of the affirmative defences to an action in negligence, and finally that such an absolute duty is after all absolute and unqualified.

As Mr. Morrison pointed out the question that arises for determination is whether the Rules, and in particular Rules 161 and 207 (3) impose an absolute obligation once basic facts are proved or whether a burden is placed on the trainer or any other person having charge of the horse to displace a presumption against him.

Rule 161 provides as follows:

> "The trainer, groom and any 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 of any prohibited substance ... and if the Commission should find that any such person has failed to show proper protection and guarding of the horse, it shall impose such penalty and take such action as it may deem proper."

From a jurisprudential standpoint there is a bias against absolute obligations in the absence of clear words to that effect. According to the Rule the Commission may only impose a sanction against a trainer etc. if it find "that any such person has failed to show proper protection and guarding of the horse." That plainly connotes that the obligation created by the rule is qualified, for the implication is that the trainer etc. may indeed be able in a given case to show "proper protection and guarding of the horse."

I am fortified in this view by the reflection that, as Mr. Morrison submitted, the cases in which absolute obligations have been held to exist the subject matter has usually been in relation to matters such as public health and the safety and protection of workmen, which is, of course, not this case.

As pointed out by Lord Radcliffe in Brown v. National Coal Board [1962] A.C. 574 at 592 (a case involving a claim for breach of statutory duty which on the facts was held to be a qualified duty) an offender in breach of an absolute statutory obligation to a workman "has not so much a duty to perform as a responsibility for circumstances. Such obligations are typically created by requiring that ... a person is to do some specified thing without qualification."

Hamilton v. National Coal Board [1960] A.C. 633, relied on by the Tribunal, is another case involving a claim for breach of statutory duty and would appear at first blush to support the Tribunal's interpretation of Rule 161 as imposing an absolute obligation.

There the House of Lords held that a statutory provision requiring that machinery forming part of the equipment of a mine "shall be properly maintained" imposed on the mine owners an absolute obligation to keep the machinery in a proper state of repairs. This was a case dealing with industrial safety in which clear and imperative words were used by the statute.

I agree with Mr. Morrison that it is clearly distinguishable from the Rules in the instant case one of which, as he points out (Rule 161) refers to "a failure to show proper protection and guarding" and the other (Rule 207 (3)) expressly refers to "proof to the contrary."

In R. v. Jamaica Racing Commission exparte Clifton Morgan (Suit No. M 48 of 1988) (unreported) this Court in delivering judgment on 28th February, 1989, stressed that there is a very high duty of care imposed on all those who have custody and care of race horses.

Reading the Rules as a whole it is abundantly clear that their dominant objective is to eliminate corruption in the race horse industry by imposing obligations on persons employed in the industry such as trainers, grooms and persons having the custody and care of race horses.

Rule 161 places a legal burden on a trainer to see that all reasonable care is taken in the proper protection and guarding of a horse in his care.

Although in accordance with general principles he may discharge the burden on a preponderance of probability or on a balance of probabilities (both of which mean the same thing) it should be borne in mind by tribunals of fact that there may be degrees of probability within that standard of proof and the appropriateness of the degree in any given case depends on its subject matter. (see Bater v. Bater [1951] P. 35 at 36 - 7 per Denning L. J.)

Manifold ways of breaching the qualified obligations imposed by the Rules may occur and it is as well that as a reviewing Court we stress for the benefit of Tribunals the flexibility of the standard of proof imposed on trainers etc., namely, proof on a balance of probabilities.

As Morris L. J. aptly put it in one case:

> "Though no Court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very element of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities." (Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247 at 266]

Depending on the fact situation of a case of this sort the inability of a trainer to state how or by whom a prohibited drug was administered may or may not be a circumstance which ought to be weighed in the scale on deciding on a balance of probabilities whether he discharged the duty to see that all reasonable care was taken in the proper protection and guarding of a horse in his care.

In the instan case the Tribunal did not make a finding that the applicant had failed to see that all reasonable care had been taken. In fact it was prepared to assume that the applicant had taken all reasonable care but based on its erroneous view of the law as borne out by the record it held that that would not avail the applicant.

As the Tribunal arrived at its finding on the basis that the Rule imposed an absolute obligation on the trainer there is an error of law appearing on the face of the record.

Accordingly I agree with my learned brothers that certiorari should go to quash the decision of the Tribunal.

Cases referred to

(1) M148/83 Regina vs. Racing Commission ex parte Clifton Morgan (unreported) - delivered 28/9/83.

(2) M83-86/82 Regina vs The Racing Commission ex parte Lynford Stud et al (unreported) - delivered 23/3/83

(3) Brown v National Coal Board [1962] A.C. 574

(4) Hamilton v National Coal Board [1960] A.C. 633

(5) Baxter v Baxter [1951] P 35