IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE FULL COURT

BEFORE: ORR, BINGHAM AND DOWNER, JJ.

SUIT NO. M.90 OF 1987

REGINA VS. RACING COMMISSION
exparte Hezekiah Fraser

APPLICATION FOR ORDER OF CERTIORARI

R.C. Rattray, Q.C. and W. Scott instructed by
Andrea Rattray for the Applicant.

Dr. L. Barnett and Richard Ashenheim for the Respondent.

HEARD: MARCH 9, 10, 1988 AND
JULY 26, 1989.

This is a judgment of the Court. It relates to a hearing of the Full Court as far back as March 1988. At the end of the hearing the Court reserved its decision. Since then one of the members of the Court has been elevated to a higher Court and another was off on long vacation. Despite several attempts since then to prepare a judgment this has not been possible due to the over burdened duties of each of the members of the panel who heard the matter. It has now taken the pending departure of the third member of the Court on long vacation to bring about what it is admitted is this long overdue judgment. The delay in it being only now forthcoming is of sincere regret on our part.

The applicant who is a racehorse trainer sought to move this Court for an Order of Certiorari to quash a decision of the Tribunal appointed by virtue of section 25 of the Racing Commission Act made on 9th November, 1987. After a hearing the Tribunal found the applicant guilty of negligence by virtue of rules 161 and 207 of the Jamaica Racing Commission Rules 1977 and he was fined $10,000.00 and

warned off all race courses to which the Rules of Racing apply for a period of three years.

The Statement of the Grounds upon which the applicant sought to rely were:

> "(a) that the presumption of negligence under section 207 of the Racing Rules 1977 was rebutted by the evidence of the groom and there was no evidence upon which the Tribunal could have made a finding of negligence and that the Tribunal was, therefore, in breach of the principles of natural justice;
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> (b) that the Racing Rules 1977, and particularly Rules 161 and 207 under which the applicant was found guilty and sentenced, are ultra vires the Jamaica Racing Commission Act and therefore null and void;
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> (c) that the finding against the applicant was based upon the condition of the stables and that the Tribunal had no jurisdiction to make this finding as Rule 155 of the Racing Rules 1977 which places upon the Commission the duty of approving and inspecting stables and sets out a procedure with final provisions which was not followed by the Tribunal and which is not relevant in an investigation under section 25 of the Jamaica Racing Commission Act;
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> (d) that the applicant was never charged by the Commission with any offence, and therefore, the finding of guilt and sentence are in breach of the principles of natural justice."

The subsequent investigations which was directed by the Tribunal appointed by virtue of section 25 of the Racing Commission Act was brought about by a positive test being found in the urine sample taken from the horse "Royal Ike", which horse was at that time one of the horses then in the charge, custody and care of the applicant and followed the result of tests carried out on the horses upon whom dividends were declared in the 2nd race run at Caymanas Park on 7th February, 1987. The horse "Royal Ike" finished first in that race.

As is the established practice, the urine sample of all horses who finished in "the frame" and upon whom dividends were therefore declared were taken for analysis by the Racing Chemist. A similar

test was also conducted on the urine sample by the Government Chemist which test is intended to be confirmatory of the analysis carried out by the Racing Chemist. Both tests carried out on the horse in question in the light of the certificates issued by these two experts revealed the presence in the urine sample taken from the horse of a prohibited substance, namely Methylphenidate. This meant that in accordance with the provisions of rule 207 of the Racing Rules 1977, the horse was automatically disqualified and the purse usually paid to the winner was withheld. The effect of such a finding also meant that in accordance with rule 207 this amounted to a presumption of negligence in respect of the applicant and all persons having charge, custody or care of the said horse which could only be rebutted if the owner, trainer, groom or such persons falling into this category could establish that they had exercised all reasonable care in guarding and protecting the horse against the possible administering of the prohibited substance.

The Racing Commission, as earlier indicated, following on an investigation under section 25 of the Act held into the circumstances as to how the said substance came to be found in the urine samples taken from the horse came to the decision that they did.

In arriving at their finding the Commission's investigations were confirmed to the applicant and the groom, one Headley Tinoll, into whose care the horse had been placed. In so far as their finding in relation to the groom was concerned it is true to say that the evidence was overwhelming as he was the person who was fixed with the primary duty to guard and protect the horse and this meant that he was required to exercise a constant watch over the horse, and particularly so during the critical period of 72 hours prior to the holding of the race meeting at which the horse was nominated to take part. Although the groom at first denied any knowledge as to how the prohibited substance was administered to the horse, he later admitted to being present and to being aware of the circumstances in which the substance was injected into the horse. Despite this he took no steps

to inform anyone, not even the applicant to whom he was employed. He has not sought to challenge the correctness of the decision to which the Tribunal came.

In so far as the applicant was concerned our jurisdiction to hear the matter rests mainly upon the contention as set out in the statement of the grounds in support of the application is based in so far as they allege that there were breaches of the rules of natural justice.

Although this Court does not exercise an appellate function our jurisdiction to enquire into the correctness of the decision of the Tribunal is founded by virtue of the rules of natural justice in seeking to enquire as to whether in coming to its finding of negligence on the applicant's part the Tribunal acted fairly, impartially and without procedural impropriety. In so proceeding it is not our function to determine whether on an examination of the facts presented before the Tribunal we would have come to a different conclusion, as so do so would in effect by that same token amount to a usurpation on our part of their functions.

The facts upon which the Tribunal based its decision, in so far as it relates to the applicant, were not disputed and related to the physical conditions of the stables at which the applicant's horses were kept. There is no question that on the evidence presented before the Tribunal that these conditions left much to be desired and were of such a nature as to lead eventually to the conclusion that they were unsatisfactory. Once this fact was established it had to be recognised that such conditions amounted to a lack of the required standard of care on the applicant's part and a finding of negligence by the Tribunal on his part was therefore inevitable and reasonable in the circumstances and one which they could properly arrive at as the primary duty of care was one for the Trainer (applicant) to exercise and one of the

factors which he was obliged to provide was a stable which was secure for all intent and purposes.

With this situation being evident the four grounds argued were all concerned with points of law. Mr. Scott presented the arguments in respect of Grounds (a) and (d) and Mr. Rattray took upon himself the task of presenting grounds (b) and (c).

In so far as the argument submitted in respect of the first ground is concerned this is with respect without merit. Rule 207 fixes a primary duty of care upon the trainer (applicant) into whose charge a particular horse is entrusted by a owner to protect and guard that horse against the administering of any prohibited substance.

It would not be sufficient for such a person to merely leave a horse nominated for a particular race meeting in stables which were not securely fenced and unprotected from outside interference. Whether the standard of care required under the Rules were satisfied is a matter for the Tribunal investigating the matter as it is they who are more versed in practices which prevail at Caymanas Park and within its environs being selected no doubt based upon their experience and expertise in determining what are the proper standards required to be maintained in order to carry out the policy of the Racing Commission Act as set out in section 3(i) of the said Act. This duty of care placed upon the applicant would not be discharged unless and until there was proof based upon a prepondence of probability that the interference with the horse was not due to any lack or want of reasonable care on the applicant's part. Given the evidence as to the physical conditions of the stables, a fact which also can be applied in considering ground (c) one cannot say that any reasonable tribunal properly applying their minds to the matter would not have come to the same conclusion as the Tribunal in this case.

In so far as ground (d) was concerned this ground is equally without merit. The short answer to it is that the very procedure by which an investigation is conducted under section 25 of the Racing Commission Act mandated the Commission with very wide powers to enable the Tribunal (section 25(c)(1))in holding the investigation to -

> "do so in a manner and under such conditions as the tribunal may think most effectual for ascertaining the facts of the matter under investigation."

Moreover as a Trainer the applicant would be presumed to be fully acquainted with the Racing Rules 1977, and in particular these provisions that apply to him. Apart from this the letter of March 11, 1987 from the Manager of the Racing Commission informing him of the positive test returned in respect of the urine sample taken from the horse and the memorandum of October 30, 1987 from the Secretary of the Commission which alerted the applicant to rule 207 in so far as it relates to the presence of the prohibited substance in the urine sample taken from the horse. This memorandum also made the applicant aware of the fact that an investigation was to be conducted under section 25 of the said Act -

> "to enquire whether any breaches of the Rules of Racing had occurred."

The applicant was also summoned to attend at this investigation, to bring an Attorney-at-Law to represent him and any witnesses which he may have. All this information would have made it clear to the applicant and whoever else was required to be present at the enquiry that the proceedings to be conducted may have serious consequences for them.

Indeed, there would be no gainsaying the fact that no reasonable race horse trainer, faced with such a situation, could for one moment fail to realise the importance of the nature of these investigations. The applicant certainly did not. He briefed leading Counsel along with a very experienced junior counsel to represent him.

The nature of the proceedings envisaged by section 25 of the Act to which reference has already been made, makes it clear that what is contemplated in such an investigation conducted by the tribunal is to enquire into the circumstances as to how the prohibited substance came to be administered to the horse. In short the tribunal is mandated to attempt to unearth the true facts surrounding the matter. The enquiry is not, however, intended to follow the strict procedure along lines similar to a judicial enquiry but may proceed in a most informal manner. Hence there is no indictment or formal charge drawn up. In this regard there is no complaint being made on behalf of the applicant that he was not given every opportunity to put forward an explanation and that this explanation was not considered by the Tribunal. There is no case here that he was not given the right to hearing or that he was not heard. In this regard, therefore, there can be no basis for a complaint on this ground, or that the rules of natural justice was not adhered to. We would further pray in aid in support of our stand in this regard the dictum of Campbell, J. (as he then was) in M.40 1980 Ziadie vs. Racing Commission unreported Judgment of the Full Court delivered on 3rd June, 1981, citing with approval the dictum of Lord Willberforce in Calvin vs. Carr [1979] 2 AER 444 pages 451-452.

> "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 these decisions have been terminated, they can be said by an objective observer, to have had fair treatment and consideration of their case on its merits."

Mr. Rattray in his contribution sought to argue grounds (b) and (c) in his usual frank manner. In so far as ground (b) is concerned his

submissions were predicated on a basis somewhat similar to the arguments advanced by him before the Full Court (Smith C.J., Parnell and Patterson, JJs.) in M.83-86/1982 Regina vs. Racing Commission exparte Lyndford Hue, Claud Thompson, Lincoln Ellis and Glen Simms unreported Judgment delivered on 23rd March, 1983, and in the Court of Appeal, civil appeals 12-15/83 Glen Simms et al vs. Jamaica Racing Commission delivered on April 26, 1983 which decision affirmed the Judgment of the Full Court. In so far as Counsel sought to contend that the Racing Rules 1977 and in particular Rules 161 and 207 are ultra vires the Jamaica Racing Commission Act this point was fully argued and rejected by both the Full Court per dictum of Smith C.J. pages 7 and 8 and Parnell, J. at page 16 and the Court of Appeal per dictum of Kerr, J.A. at pages 6 and 7 in the references given supra.

We merely wish to state that we are bound by the decision of the Court of Appeal that the Racing Rules 1977 and the provision as laid down therein are intra vires the Jamaica Racing Commission Act.

In dealing with the particular question now being raised in ground (b) Kerr, J.A. having cited with approval from the dictum of Parnell, J. in the decision of the Full Court as to the legislative intent in prescribing the Rules of Racing 1977 in the form that it had been drafted, had this to say.

> "This question was raised before the Full Court in substantially the same form although certain embellishments have apparently been added to the main theme. Parnell, J. in dealing with it, with his customary concern for the practicalities said (at page 81 of the record) -
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> > "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 salutory and in effect were in operation long before 1972.

> What Parliament has done is to put a ceiling of ten thousand dollars ($10,000.00) in the imposition of a fine for a breach of a rule. In other respects the Racing Commission is free
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> > 'to impose such penalty and take such other action as it may deem proper' ".
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> I share the views so eloquently expressed by the learned judge. Section 30(1) though infelicitously worded was clearly not intended to limit the categories of penalty that the Commission could impose".

Further on at page 7 he continued in this vien:

> "To have given the relevant provisions the narrow interpretation sought by Mr. Rattray would be to ignore the primary purpose and functions for which the Commission was created, namely, to take over the reins of control from the Jockey Club and to have no less power than its predecessor to maintain discipline in the Horse Racing Industry.
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> Accordingly, I am of the opinion that the Rules and in particular Rules 247(xi) and 248 empowering the Commission to impose "warning off" as a penalty were in keeping with the legislative intent and intra vires the Rule making competence of the Commission".

In our opinion the effect of this dictum of Kerr, J.A. with which the other members of the Court concurred fully and effectively disposes of this particular ground which also fails.

In so far as ground (c) is concerned this has little to support it. We need only repeat what was earlier stated that irrespective of whatever duty is placed upon the Racing Commission as the body responsible for regulating and conducting horse racing under the Rules of Racing and in ensuring that those persons who come under its aegis are made aware of what are the required standards that they must comply with, persons such as the applicant who are so engaged, as well as others who hold themselves out as trainers, jockeys and grooms, etc. all of whom are taken to be familiar with the Rules of Racing in so far as it relates to what is required of them and that Rule 207, in particular, in so far as that provision falls to be complied with the duty of care will only be discharged if and only if the trainer (applicant), etc. can show that

he exercised all reasonable care in protecting and guarding a horse against the administering of any prohibited substance. That duty is a primary duty which the rules places upon a trainer irrespective of any supervisory role which may be added by section 155 of the Rules in so far as it allows for the inspection of stables to be carried out by the officials of the Racing Commission.

In this regard, therefore, it is our view that the Tribunal hearing the matter came to a correct decision and this application is accordingly refused with costs awarded to the respondent, such costs to be taxed if not agreed.