

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS. 12-15/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE CARBERRY, J.A.  
THE HON. MR. JUSTICE ROSS, J.A.

BETWEEN: CLEN SIMMS )  
A N D : LINCOLN ELLIS ) - PLAINTIFFS/APPELLANTS  
A N D : LYNFORD FUE )  
A N D : CLAUD THOMPSON )  
  
A N D : JAMAICA RACING COMMISSION - DEFENDANT/RESPONDENT

Mr. Carl Rattray, Q.C., and Mrs. A. Wells instructed by  
Messrs. Duan, Cox and Orrett for the appellants.

Dr. L. Barnett and Mr. Richard Ashenheim instructed  
by Messrs. Milholland, Ashenheim and Stone for the respondent.

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February 2, 1984; April 26, 1985

KERR, J.A.:

The appellant, Lynford Fue, was a licensed race-horse trainer and the other appellants were licensed grooms. They appealed against a decision of the Full Court, (Smith, C.J., Parnell and Patterson, JJ.) dismissing their applications seeking Orders of Certiorari to quash Orders of the Jamaica Racing Commission made on September 23, 1982, imposing varying periods of "warning off" for breaches of the Racing Rules - particularly Rule 161.

We dismissed the appeals and in keeping with the promise then made, I now set out herein my reasons for concurring in that decision.



By the Jamaica Racing Commission Act (Act 3 of 1972), and which came into operation December 29, 1972, (hereinafter referred to as the Act), Parliament created the Jamaica Racing Commission. The Commission was the successor to the Jockey Club of Jamaica, which up to then, was the body regulating and controlling horse-racing and the operation of race-courses in the Island.

Section 3 of the Act reads:

- "(1) There shall be established a body to be called the Jamaica Racing Commission to regulate and control horse racing and the operation of racecourses 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.
- (2) The Commission shall be a body corporate to which the provisions of section 28 of the Interpretation Act, 1968, shall apply.
- (3) ....."

The Jockey Club, like private organisations of that nature, derived its power and authority through submission to or agreement with its Rules, by members of the Club and other persons dealing with the Club or concerned with horse-racing conducted under its aegis. The change from voluntary private organisation to a statutory corporation demanded transitional provisions to ensure continuity, change without chaos and to avoid the uncertainties of an interregnum.

To that end Section 32 provided:

- "(1) 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.
- (2) Any licence, permit or other authorization granted by the Jockey Club of Jamaica pursuant to the rules relating to horse racing referred to in subsection (1) or pursuant to any provision of the Betting, Gaming and Lotteries

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"Act, 1965 and in force immediately before the commencement of this Act shall continue in force after the commencement of this Act as if it had been granted by the Commission and so, however, that any references in any such licence, permit or other authorization to the Jockey Club of Jamaica shall be construed as references to the Jamaica Racing Commission.

- (3) .....
- (4) In this section 'Jockey Club of Jamaica' means the Club which was, before the commencement of this Act recognized by the Minister under the Betting, Gaming and Lotteries Act, 1965, to be the governing body of horse racing in Jamaica."

On May 29, 1982, there was a race meeting at the Caymanas Park Race-Course. Among the starters were the horses: Royal Star, Royal Chree and Don Corleone, all trained by the appellant Hue. Appellants Thompson, Ellis and Simms were the grooms of Royal Star, Royal Chree and Don Corleone, respectively. Urine samples taken from the horses after their respective races on that day when tested revealed in each case the presence of polyoxyethelene Glycol (known as P.E.G.). The Commission in the exercise of the jurisdiction conferred by Section 25 of the Act, held an investigation and by an order made on 23rd September, 1982 found that P.E.G. was a "prohibited substance" under Rule 2 of the Racing Rules and the appellants were culpable under Rule 161 of the Racing Rules which provides:

"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."

The Racing Commission on these findings "warned off" the appellants for various periods ranging from eighteen months in respect of Simms, Ellis and Thompson to a period of five years in respect of Lynford Hue. These periods run from 29th September, 1982.

Two Grounds of Appeal were filed. The first, which challenged the finding, that P.E.G. was a prohibited substance under the Rule was not pursued and quite rightly in my view. It is therefore enough to say that all three judges dealt with this question and by commendably careful reasoning concluded that the Commission was correct in so finding.

The second Ground which was fully argued before us reads:

"That the Full Court was wrong in law in holding that the Racing Commission upon an investigation under Section 25 of the Racing Commission Act was empowered in Law to impose a penalty of warning off under the Racing Rules as these Rules are contrary to and ultra vires the Provisions of the Jamaica Racing Commission Act Section 30 subsection (1) which limits the penalty to a maximum of \$10,000.00."

Mr. Rattray in support submitted that in 1977 when the Commission made its own Rules (see Vol. 2 :- Proclamation, Rules and Regulations, 1977 - Thursday, December 22, 1977) under powers conferred in that regard by Section 22 of the Act, Rule 258 of these new Rules repealed the Jockey Club Rules under which the Commission had been operating up to the time its own Rules came into effect. That the power to impose a penalty and the nature of the penalties that may be imposed by the Commission are contained in the Act and in particular Section 30(1). These powers did not include the imposition of "warning off" as a penalty. And further, having regard to the Rule making power conferred by Section 22, in the absence of expressed provisions, Rules 247 (XI) and 248 of the 1977 Rules which purport to confer on the Commission the power to "warn off" were ultra vires. He further submitted that Section 32(1) was purely transitional and was repugnant to Section 30(1). With the repeal of the Jockey Club Rules, there was no power in the Commission to make a Rule such as Rules 247 (XI) and 248.

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Accordingly, the preservation of the Jockey Club Rules was for a limited time - i.e. until the Commission made its own Rules. The Commission had acted in excess of its powers and the applications ought to be granted - (R. v. Willesden Justices Ex parte Utley) (1947) 2 All E.R. p. 838.

Alternatively even if the Jockey Club Rules relating to "warning off" while extant conferred a power in the Commission to impose "warning off" that power existed only until the Commission made its own Rules. The Rules so made had to be in conformity with the statutory power which did not grant the power directly or by Rules to impose the penalty of "warning off".

Dr. Barnett in supporting the judgment of the Full Court, submitted that the Rule making power, conferred on the Commission by Section 22 of the Act was designed to facilitate the performance of the wide functions for which the Commission was established; that "warning off" was historically one of the most important instruments of disciplinary control in Horse Racing and Section 32 of the Act was indicative of the legislative intent to create continuity in the administration. With respect to Section 30 of the Act the limitation therein was concerned with pecuniary penalty.

The following Sections of the Act so far as is relevant provide:

Section 22:

- "(1) ..... and the rules relating to horse racing at racecourses (in this Act referred to as 'the Racing Rules') and any variations of such rules shall be prescribed by the Commission.
- (2) The Racing Rules may contain provisions relating to -
  - (a) .....
  - (b) .....
  - (c) .....
  - (d) .....

- " (e) all such other matters, whether similar to the foregoing or not, relating to horses that are bred for racing and matters relating to racing, breeding, training and grooming as the Commission may from time to time require."

Section 25:

"The Commission may, where it considers it expedient so to do, hold or cause to be held an investigation -

- (a) .....
- (b) in respect of the breach of any of the regulations or of the Racing Rules made under this Act or of any terms or conditions of any licence or provisional licence; or
- (c) as respects any matter related to or connected with its functions so as to determine whether any of such functions should be exercised...."

Section 30 (1):

"The Commission shall have power to impose penalties for any breach which has been found to be committed, pursuant to investigations under section 25, so, however, that the penalty in respect of any such breach shall not exceed ten thousand dollars."

In my view Sections 22 and 32 are complementary provisions. Section 32 was designed not only as an interim measure but to ensure certainty and make the Racing Commission the effective successor to the Jockey Club and to confer on it all the disciplinary powers including the power to impose the sanctions which had been exercised hitherto by the Jockey Club. The Rule making power under Section 22 was clearly intended to be in harmony with the power transferred under Section 32 and accordingly subsection 22 (2) (e) should be interpreted generously to enable the Commission to efficiently and effectively carry out its duties and functions under the Act.

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 p. 81 of the Record):

"..... 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'."

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. The first clause in the subsection expressly and generally authorized the imposition of penalties, while the second clause was specifically concerned with placing a limitation on one particular type of punishment, namely a pecuniary penalty. It therefore was clearly not intended to deprive the power of the Commission to impose other recognized and established sanctions. Indeed, the new Rules made by the Commission in relation to penalties, allowing for mutatis mutandis are similar in terms and tenor to corresponding Rules in the Jockey Club Rules.

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.



Accordingly, I am of the opinion that 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.

For these reasons I concurred in dismissing the appeals and affirming the Order of the Full Court.

CARBERRY, J.A.:

I agree.

ROSS, J.A.:

I agree.

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Accordingly, I am of the opinion that rules and to  
particular rules 347 (b) and 348 empowers the Commission to impose  
"warning off" as a penalty were in keeping with the legislative  
intent and infra vires the rule making competence of the Commission.  
For these reasons I concluded in dismissing the appeals and  
affirming the Order of the Full Court.

CARRUTHERS, J.A.

I agree.

JOSE, J.A.

I agree.