

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M87/1993

BEFORE: THE HON. MR. JUSTICE ZACCA, CHIEF JUSTICE
THE HON. MR. JUSTICE LANGRIN, J.
THE HON. MR. JUSTICE COOKE, J.

Regina

vs.

The Jamaica Racing Commission
Exparte Harold Clemetson

Earl Witter & B. Frankson instructed by Gaynair & Fraser for
Applicant.

Dr. Lloyd Barnett & R. Ashenheim instructed by Milholland, Ashenheim
& Stone for Respondent.

Heard: May 24, 25, 26, 27, & July 29, 1994

LANGRIN, J.

At the conclusion of the arguments on May 27, 1994 we dismissed the application and promised to put our reasons in writing. This we now do.

This is an application for an order of certiorari by Harold Clemetson a Race Horse Trainer to quash the decision of a Tribunal of the Jamaica Racing Commission made on 22nd March, 1993 in which it found the applicant in breach of Rule 159 of the Jamaica Racing Commission Racing Rules 1977 for employing unlicenced stable employees without obtaining the sanction of the Registry Office. Also, in breach of Rule 207 of the said Racing Rules in that having charge, care and custody of the horse "Easy Living" he failed to properly protect it and guard it against the administration of the prohibited substance.

The applicant was 'warned off', his Trainers Licence suspended for three years and a fine of \$5000.00 was imposed. An appeal to the Jamaica Racing Commission resulted in the 'warning off' only being removed.

The grounds upon which the application is based are:-

- (1) That the applicant was not accorded a fair hearing
- (2) that the decision of the Tribunal and/or the Jamaica Racing Commission to suspend the applicant's Trainer's Licence and to impose a fine of Five Thousand dollars (\$5000.00) was in breach of the rules of Natural Justice
- (3) that the sentence imposed is ambiguous and null and void
- (4) that the sentence was manifestly excessive and cannot be allowed to stand.

Ground 4 of the appeal was later abandoned and ground 3 was not seriously pursued.

The horse "Easy Living" won the 6th Race on Race day the 13th June, 1992. A urine sample taken from the horse after the running of the race by the Racing Chemist of the Jamaica Racing Commission indicates the presence of a prohibited substance, namely Flunixin otherwise known as Banamine contrary to Rule 207 of the Jamaica Racing Commission Racing Rules 1977.

The Jamaica Racing Commission conducted an investigation under Section 25 of the Jamaica Racing Commission Act to enquire into whether any breaches of the Rules had occurred. As far as it is relevant the Section states:

S.25 "The Commission may, where it considers it expedient so to do, hold or cause to be held an investigation -

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

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

- (i) the person or persons holding the investigation (hereinafter in this section referred to as "the tribunal") shall do so in such manner and under such conditions as the tribunal may think most

effectual for ascertaining the facts of the matter under investigation;

- (ii) the tribunal shall have for the purpose of the investigation all powers of a Resident Magistrate to summon witnesses, call for the production of books and documents and to examine witnesses and the parties concerned on oath;"

The applicant, trainer of "Easy Living" was summoned by letter dated 12/2/93 to appear before a Jamaica Racing Commission Tribunal at the Jamaica Racing Commission's office on 22nd March, 1993. In the letter which summoned the applicant he was duly informed that he may be represented by an attorney-at-law or other persons and that he should bring any witnesses that he might have. The applicant attended the enquiry on the appointed day without any form of representation or any witnesses. The applicant at the end of the investigation was found to be guilty of negligence in causing the prohibited substance Flunixin to be administered to the horse "Easy Living" contrary to 207 of the Jamaica Racing Commission Racing Rules and also guilty of breaching Section 159 of the said Rules, that of employing unlicensed persons.

As far as is relevant rule 207 states:-

207. "A horse which has been entered or declared to win in a race which on examination shows the presence in its tissues, body fluids or excretes 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, 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."

In any investigation held pursuant to section 25 of the Act the production of a certificate signed by the Racing Chemist shall be conclusive proof of all the facts therein stated.

Further, Rule 159 states:-

159. "No trainer shall employ an unlicensed stable employee nor a stable employee who was previously employed to another trainer without first attending at the Registry Office and obtaining the sanction of the Registry Office to such employment which sanction shall only be granted in races where the provision of the next succeeding rule have been fully complied with."

Mr. Witter, learned Counsel for the applicant submitted inter alia that the applicant was not accorded a fair hearing and therefore there was a breach of natural justice. He argued that the Tribunal having informed the applicant that it proposed to embark upon an investigation into the positive finding returned by the horse "Easy Living" and then at the end of the hearing to condemn the applicant of the two racing offences without the applicant being charged with the offences before the hearing or adequately intimating to the applicant before the hearing that he stood in peril of conviction or sentence was a breach of the principles of natural justice. A man should be made aware of any charges he is to answer before appearing before a tribunal. To this view counsel for the applicant relied on the majority decision in the case of Rv. Jamaica Racing Commission ex parte Anthony Subratie Suit No. E.182/1993. In that case by a majority decision it was held that certiorari should go to quash the decision of the Jamaica Racing Commission that not having informed the applicant in that case that he had charges to answer before the investigation was a breach of the principles of natural justice.

Dr. Barnett for the respondent submitted inter alia that there was no breach of natural justice. Dr. Barnett's argument was that the terms of the summons by which the applicant was brought before the investigating tribunal was in itself sufficient notice that he stood in peril of Rule 161 of the Jamaica Racing Commission Racing Rules 1977 which states:-

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."

Dr. Barnett also submitted that the instant case is easily distinguished from the situation in R.V. The Jamaica Racing Commission exparte Anthony Subratie 182/1983. Suffice it to say the Court agrees with Dr. Barnett, but of this more will be said later.

Mr. Witter also argued that the Tribunal of the Racing Commission heard evidence and took into account material which it ought not to have done and further that the tribunal did not hear evidence or take evidence which it ought to have done to the detriment of the applicant. Mr. Witter apparently had in mind the mentioning of another matter involving another horse "Bounty Star" for which the applicant's trainer's licence was withdrawn or not renewed in 1988 and secondly not hearing evidence, reference being made of two persons mentioned namely, Cladius Smith and Delroy Stevens. I cannot accept these contentions.

In addressing the first part of this argument it must be pointed out that the Tribunal is not a court of law and therefore is not obliged to conduct itself as such. There is no basis for saying that the tribunal took irrelevant matters into consideration in coming to their decision.

Of the two persons that references were made, namely Delroy Stevens and Cladius Smith it was established that Delroy Stevens was not available as he was in Police custody on the criminal charge of carnal abuse. Evidence was heard at a later date, on the 6th September, 1993 from Mr. Cladius Smith. At the end of Smith's

evidence it was established that his evidence adds nothing to the finding of the tribunal and affected the applicant not one way or the other. In the end no finding was made against Mr. Smith. It must be pointed out, as was pointed out by the tribunal that the tribunal is under no obligation to call witnesses. If witnesses are to be called to prove innocence, then the onus is upon the applicant to call such witnesses.

Counsel for the application also argued that there was no evidence to substantiate the finding that the applicant employed unlicensed groom. The evidence at the tribunal indicate otherwise. At page 24 of the record the following is extracted:

Mr. Levy: Mr. Clemetson, Mr. Cladius Smith you say he is a licensed groom.

Answer: Yes.

Question: When was he a licensed groom: I see there is an application here for him signed by Clement Trowers for 1991.

Mr. Clemetson: Yes.

Mr. Levy: Right now in 1992, I thought you said you had applied for him.

Answer: I know that after I got those horses I sign for him.

Question: Well, the 1992 application is signed by V. Murray.

Answer: That is Vincent Murray

Question: Yes. Well, it is not signed, the application is by Murray but is not signed and according to this thing, the application was denied. This says across here Denied which I take to mean that the application for the licence was denied.

Answer: Yes.

The applicant's answer established quite clearly that although he had applied for a licence for Mr. Smith he took no steps to

determine if indeed a licence was in fact granted or approved. The evidence concerning Delroy Stevens also demonstrated that he was employed without a licence. There then can be little doubt that the applicant employed unlicensed persons, and he was certainly negligent in not putting out the best effort to find out whether these people were licensed or not.

Mr. Witter also submitted that no reasonable tribunal could have arrived at the conclusion that the tribunal did. He relied on the well known principle expounded by Lord Greene MR. in the English Court of Appeal case Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1947) 2 ALLER 680. To determine the so called Wednesbury unreasonableness, it is necessary to look at the situation as a whole and therefore this aspect of Mr. Witter's submission will be more fully addressed later on in the judgment.

Mr. Witter further submitted that the tribunal did not exercise fairness. Counsel claimed that there was no evidence demonstrating negligence. But what did the evidence at the enquiry reveal? At page 82.

Mr. Rampaul:

I am always there or I am there most of the time.

Chairman:

And you say that Mr. Clemetson was not there?

Answer:

Mr. Clemetson is hardly there and there is no padlock on the stall door. I have never seen a padlock on any of the stall door from I have been there last year.

And at page 84

Mr. Levy:

You sound as if you are there more often than Mr. Clemetson.

Answer:

Not really, most of the times when I go there he is there but as I said he is not there until 9 o'clock, most of the time when I am leaving I take him with me.

It should be noted that Mr. Rampaul's evidence was unchallenged. There is a presumption of negligence against persons who have charge, care or custody of the horse whenever prohibited substance is found in a horse. It is for the applicant to rebut this presumption and he has failed to do so. It is quite clear that the tribunal was entitled to return a finding of negligence on the part of the applicant.

Earlier in the judgment a reference was made to Dr. Barnett's submission that the instant case can be distinguished from the case of R.v. The Jamaica Racing Commission ex parte Anthony Subartie 102/1982. The court expressed agreement and will now give its reasons. In the first place the chairman at the hearing in the Subratie case assured Mr. Subratie's counsel that the applicant was not in any peril of charges being instituted against the applicant, the matter being only an investigation. It is also to be noted that at that stage of the proceedings the applicant was excluded and could not therefore hear what was being said against him. Also in the Subratie case the applicant at the material time was not allowed effectively to give his side of the story. In that situation then one could establish a breach of natural justice.

In our judgment, Lord Wilberforce stated the principle that ought to be applied to the instant case in the Privy Council case of Calvin v. Carr [1979] 2 ALLER 440. That was a case dealing with the Jockey's Club in Australia where the applicant was disqualified for interfering with a race horse, thus preventing it from running on its merit after an enquiry. The appellant appealed to the Privy Council on the basis that there was a breach of natural justice. The court held that those who took part in Racing were deemed to have accepted the Rules of Racing and to be bound by the decisions of bodies set up under rules provided they had received fair treatment and fair consideration. Lord Wilberforce said at page 451:-

"Those concerned know that they are entitled to a full hearing with opportunities to bring evidence and have it heard. But they know that

this appeal 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, plays a large part and in which the standards are those which have come to be accepted over the history of this sporting industry. All those who partake in it have accepted the Rules of Racing and the standards which lie behind them; they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as, when the process of reaching those decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits".

In the instant case the applicant knew or ought to have known the rules of the Jamaican Racing Commission and therefore must have or ought to have realized the implication of being summoned before a tribunal. He cannot now claim that he wasn't aware of any charges and therefore there was a breach of natural justice. The applicant has been in the business of racing well over 44 years. He was clearly negligent and could properly be penalized.

The Jamaica Racing Commission was established by an Act of Parliament which gave it wide powers to negotiate and control the sport of horse racing in Jamaica and thus under section 25 of the Jamaica Racing Commission Act, the commission may set up a tribunal to investigate the conduct of any person which falls under the Act. A Domestic Tribunal so set up under the Jamaica Racing Commission Act is not obliged to follow the strict rules of evidence. However based on its rules and regulations, justice must be done to the person or persons affected by the decision of the tribunal. Thus a decision arrived at by the Domestic Tribunal which looking objectively, the decision is an affront to justice then judicial review is available to right the wrong.

The procedure invoked by the Supreme Court to deal with cases of injustice by Domestic Tribunals is by way of certiorari. The tribunals are concerned with questions of facts and this Court is constrained to accept those findings of fact unless there is no

basis for them. The court is then entrusted with a supervisory jurisdiction bereet of an appellate role when it hears certiorari proceedings from any Domestic Tribunal.

Lord Diplock in the House of Lords case of Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 ALLER 935 at 950 classify under three heads the grounds on which administrative action is subjected to the control of Judicial Review. They are firstly, illegality, secondly irrationality and thirdly procedural impropriety. It is the view of the court that the three heads are equally applicable to Domestic Tribunal, such as the one appointed by the Jamaica Racing Commission.

A Domestic Tribunal in order to prevent the ground of illegality coming into play, must demonstrate not only a correct understanding of the law that regulates its decision making power, but must give effect to it. In other words the Domestic Tribunal appointed by Jamaica Racing Commission must understand and apply its rules correctly in any given situation. Whether or not this is done is a question of fact. Can it then be said that the Jamaica Racing Commission (JRC) tribunal acted within the "illegality" concept so as to subject itself to judicial review by the courts. In the opinion of the court, the answer is no. The tribunal as well as the applicant understood the rules and based on the evidence presented there is no room for argument that elements of illegality as used in this context was present. The Tribunal presided over by distinguished Counsel understood the rules and applied them correctly.

Attention then must be focused on the ground of "irrationality". Irrationality hinges on Wednesbury unreasonableness as stated in Associated Provincial Houses Limited v. Wednesbury Company [1947] (supra). The ground was succinctly stated by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (supra).

"It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards

that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Whether a decision can be said to be unreasonable is a matter for the court to determine. In all cases it is the judge's discretion to determine whether there is ground to exercise the irrationality principle. The courts have for example set aside decision for irrationality where the court has taken the view that the decision was without conceivable justification. See for example R.v. Secretary of State for the Home Department ex parte K. [1991] 1QB 270.

The question then to be asked is whether the Jamaica Racing Commission's Tribunal could have reasonably arrived at the decision it did. In other words was the decision so perverse that it lacks logic or violates the fundamental values of our society. The court thinks not. Based on the facts and evidence, there is nothing to suggest that the court could not have arrived at the conclusions it did and therefore the applicant's case fails on the ground of irrationality.

The third ground is procedural impropriety, a fairly broad heading which covers not only breaches of natural justice and procedural fairness, but also covers failure of the decision making body to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred. Traditionally the courts have approached expressed statutory procedural rules by distinguishing between mandatory and directory procedural requirements. A directory procedural requirement is relatively unimportant. Whenever a directory requirement is broken the court may overlook the matter. For example, if the procedure has been substantially complied with or there is no injustice or hardship. A mandatory procedural requirement is essential and breach of this makes the decision invalid. It is the court which essentially determines whether a procedural requirement is mandatory or mere directory. In its deliberations, the court will be guided by statutory language and the particular presumptions which governs the

right of the individual.

The evidence presented before this court indicated that the procedural requirement as authorized by the Jamaica Racing Commission Act has been complied with and therefore it is not necessary to determine the question as to whether the procedural aspect was directory or mandatory. On this limb therefore the applicant's case fail. Procedural impropriety also include fairness. Actually the law has developed at least in terminology from natural justice to fairness. See Council of Civil Service Union v. Minister for the Civil Service (supra) [1984] 3 ALLER 935 at 954. The concept of fairness is therefore much wider than natural justice. It is to be noted however that what is fair is still based upon an objective standard. And the courts have consistently held that what is fair depends entirely on the circumstances of each case. See Lloyd v. McMahon [1987] 1 ALLER 1118. Fairness in effect is what is necessary to do justice in the particular circumstances and no more.

It is true that fairness can include an advance notice of charges or accusations but this of course depends on the circumstances. In the instant case the applicant, a trainer with over 44 years experience knew of the Rules surrounding the Jamaica Racing Commission investigating tribunal. The applicant cannot therefore ignore the rules of the commission when it suits his purpose.

It is now only to be determined if the applicant was accorded fairness by the Jamaica Racing Commission Domestic Tribunal.

There was a presumption of negligence in causing the administering of prohibitive substance to the horse. "Easy Living". That presumption has not been rebutted by the applicant. In fact the evidence revealed that the applicant was negligent not only in employing unlicensed grooms but also failure to pay enough attention to the care and custody of the horse as required by Rule 161 of the Jamaica Racing Commission Rules 1977. In the circumstances the decision was one in which the tribunal fairly arrived.

For the reasons given the application is refused.

Cost to the respondent to be agreed or taxed.

Zacca, C.J.

I agree.

Cooke J.

I agree.

Zacca, C.J.

The application for the Order of Certiorari is refused.