

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANG KUASA RAYUAN)  
RAYUAN SIVIL NO. W-02-119-2005**

ANTARA

SHAYNE COREY CAHILL

... PERAYU

DAN

KAKA SINGH DHALIWAL

(didakwa di bawah Seksyen 9 (c) Akta Pertubuhan  
1966 sebagai pegawai awam berdaftar Persatuan  
Perlumbaan Malaya)

... RESPONDEN

[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur  
(Bahagian Sivil)  
Saman Pemula No. S1-24-1148-2003

Antara

SHAYNE COREY CAHILL

... PLAINTIF

DAN

KAKA SINGH DHALIWAL

(didakwa di bawah Seksyen 9 (c) Akta Pertubuhan  
1966 sebagai pegawai awam berdaftar Persatuan  
Perlumbaan Malaya)

... DEFENDAN

Coram: Low Hop Bing, J.C.A.  
Raus Sharif, J.C.A.  
Wan Adnan Muhamad, J.C.A.

## **JUDGMENT OF THE COURT**

1. This is an appeal by the plaintiff against the decision of the learned High Court Judge, given on 6 January 2005 in respect of the plaintiff's Originating Summons dated 25 June 2003. The learned High Court Judge had dismissed the plaintiff's application for the declaratory orders sought in the Originating Summons.
  
2. On 26 September 2007 we heard and dismissed the plaintiff's appeal with costs.
  
3. The plaintiff is a professional jockey from Australia. Sometime in March 2003, he applied and received the approval from Selangor Turf Club to be a visiting jockey. The Selangor Turf Club is a member of the Malaysian Racing Association ("MRA"). MRA is a body that regulates the profession and sport of horse racing in Malaysia and Singapore. The other members of MRA are Penang Turf Club, Perak Turf Club and Singapore Turf Club.

4. On the 30 March 2003, the plaintiff rode a horse named “KIM MUSIC”. Subsequent to the race, on 4 April 2003, he was charged before the Stipendiary Stewards under Rule 144 (2) of the MRA Racing Rules. The charge was for not taking all reasonable and permissible measures throughout the race to ensure that “KIM MUSIC” was given full opportunity of winning or obtaining the best possible placing in that race. The charge is punishable under Rule 144 (5) of the MRA Racing Rules.
5. The plaintiff was found guilty of the charge. He was imposed the minimum sentence of disqualification of one year from racing. Being aggrieved, the plaintiff appealed to the Racing Stewards as allowed under the MRA Racing Rules.
6. On 5 April 2003, the plaintiff was granted a stay of the sentence pending hearing of his appeal before Racing Stewards. During the stay of the sentence, the plaintiff participated in another race. This was the 4<sup>th</sup> race held on 6 April 2003 at the Selangor Turf Club. At this race, he rode a horse named “JAKISHA”.

Subsequent to the race, on 9 April 2003, he was again charged before the Stipendiary Stewards. The charged was also under Rule 144 (2) and punishable under Rule 144 (5) of the MRA Racing Rules. But this time, the charge was for not taking all reasonable and permissible measures throughout the race to ensure that "JAKISHA" was given a full opportunity of winning or of obtaining the best possible placing in that race.

7. The plaintiff was found guilty of the said charge. He was sentenced to 3 years disqualification from racing. The disqualification was to run consecutively after the disqualification imposed in respect of "KIM MUSIC". He was also fined RM50,000.00. Again, being aggrieved, the plaintiff appealed to the Racing Stewards against the said decision.
8. Both appeals were heard by the Racing Stewards on 20 June 2003, and both were dismissed on the same day.
9. On 25 June 2003, the plaintiff filed this Originating Summons. He sought the following orders:-

- (i) A declaration that the Racing Stewards' decision of 20.6.2003, dismissing the plaintiff's appeal against the decision of the Stipendiary Stewards on 4.4.2003 on the plaintiff's 1-year disqualification for breaching Rule 144 (2) of the Malayan Racing Association's ("MRA") Rules of Racing as the jockey of "KIM MUSIC" in Race 4, 2<sup>nd</sup> Day, Sunday 20.3.2003 in the March/April 2003 Selangor Meet, and in further deciding that the sentence shall commence from the date of breach, is invalid and unenforceable because the Racing Stewards erred in taking the view that it is unnecessary for the Stipendiary Stewards to prove all the ingredients of a charge, and that as long as one

ingredient of the charge is proven it is sufficient, as this is wrong in law.

- (ii) A declaration that the Racing Stewards' decision of 20.6.2003, dismissing the plaintiff's appeal against the decision of the Stipendiary Stewards on 9.4.2003 on a 3-year disqualification, to commence after the expiry of the 1-year disqualification for "KIM MUSIC", that the fine of RM50,000 in relation to the plaintiff's breach of Rule 144 (2) MRA Rules of Racing as the jockey of "JAKISHA" in Race 4, 4<sup>th</sup> Day, Sunday 6.4.2003, of the Sultan of Selangor Gold Trophy Meet 2003 be confirmed, and that the deposit for the appeal be forfeited, is invalid and unenforceable because:

(a) after the Racing Stewards dismissed the plaintiff's appeal, the Racing Stewards failed to give the plaintiff's solicitors an opportunity to mitigate the sentence even though in the appeal petition, the plaintiff had appealed that the sentence meted out by the Stipendiary Stewards is harsh and excessive, and this is a breach of natural justice;

(b) the Racing Stewards erred in taking the view that it is unnecessary for the Stipendiary Stewards to prove all the ingredients in a charge, and that as long as one ingredient is proven, it is sufficient, and this is wrong in law; and

(c) the Racing Stewards erred in law in deciding that the charge is not wrongful in law.

(iii) An order that the deposit be returned to the plaintiff.

(iv) An order for damages to be assessed and paid by the defendant to the plaintiff.

10. On 30 June 2006, five days after filing the Originating Summons, the Racing Stewards issued a letter to the plaintiff's solicitors, admitting that they had made a mistake on the sentence imposed in the appeal in respect of "JAKISHA". The letter went further to inform the plaintiff that the Racing Stewards, who heard the appeal, wished to reconvene to review their decision on sentence and requested the plaintiff to attend this reconvened hearing and to make further submission

on the sentence imposed. For ease of reference, the letter is hereby reproduced.

“Appeal by Jockey S. Cahill against three (3) years disqualification and fine of RM50,000.00 in connection with the running and handling of “JAKISHA” which finished 2<sup>nd</sup> in Race 4, 4<sup>th</sup> day, Sunday, 6<sup>th</sup> April 2003, Selangor March/April (Piala Emas Sultan Selangor) Meeting 2003

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The Race Meeting Stewards who presided at the above appeal have now resolved to re-convene to hear submissions from Mr. Cahill on the appropriate sentence arising from the dismissal of the appeal lodged by him.

The Race Meeting Stewards now realise that the appropriate sentence following their decision to disallow the appeal is not a mandatory three-year term as originally envisaged by them but a discretionary, as is evident from Rule 144 (5). This is to be determined based on the facts leading to the particular conviction.

Accordingly, acting under the powers conferred upon them by Rule 18 (2) (c), the Race Meeting Stewards propose to review their own previous decision to disqualify Mr. Cahill for a period of three years.

This letter accordingly serves to inform you that a further hearing will be held on Friday, 4 July 2003 at 4.00 pm at the Enquiry Room, Selangor Turf Club, where Mr. Cahill can be present in person and/or with his counsel, to make submissions on the appropriate sentence to be imposed upon him pursuant to Rule 144 (5) arising from the dismissal of his appeal against conviction in the above matter.

If the date of hearing is not suitable to you, kindly notify us of a suitable date.”

11. By a letter dated 9 July 2003, the plaintiff’s solicitors requested for the hearing date be fixed in the month of August. The request was accommodated by the Racing Stewards. In a letter dated 31 July 2003, the Racing Stewards informed the plaintiff’s solicitors that 13 August 2003 was the new hearing date. However, neither the plaintiff nor his solicitors attended the hearing.
  
12. In his application before the High Court, the plaintiff had cast his case in two parts:

- (i) that the Racing Stewards had 'erred in law in the case of "KIM MUSIC" and "JAKISHA" when they did not require every ingredient in the charge to be proven'.
  - (ii) that in the "JAKISHA" proceedings the Racing Stewards had failed to allow the plaintiff the opportunity to mitigate his sentence.
13. When the application was heard, the plaintiff's counsel informed the learned High Court Judge that the plaintiff would not be continuing with his application in respect of the "KIM MUSIC" proceedings. The plaintiff's counsel further informed the learned High Court Judge that in respect of "JAKISHA" proceedings, the plaintiff would not be pursuing the contention that every ingredient in the charge was required to be proven.
14. Thus, before the High Court, the argument was confined to the findings of Racing Stewards on the sentence imposed in the appeal for "JAKISHA". In his judgment the learned High Court Judge accepted the defendant's admission that it had

committed an error in the sentencing at the appeal. He held, however that the Racing Stewards have the power to correct the error by virtue of Rule 18 (2) (c) of the MRA Racing Rules. The plaintiff had no basis to complaint.

15. However, before us, the plaintiff had confined its submission to one single issue:

“whether the Race Meeting Stewards have the jurisdiction to review their decision on the plaintiff’s appeal to correct an admitted error, after the appellant had filed his Originating Summons in the High Court.”

16. It is the submission of the plaintiff that after the filing of the Originating Summons on 25 June 2003, the Racing Stewards were functus officio and had no jurisdiction to review their decision. The matter was firmly within the jurisdiction of the Court and it was only Court which had the jurisdiction to review the findings of the Racing Stewards. The Racing Stewards’

jurisdiction has been ousted by the filing of the Originating Summons. In support, the plaintiff's counsel cited case authorities, **Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858, Doleman & Sons v Ossett Corporation [1912] 3 KB 257 and Re Baker and Wessenger [1981] 125 DLR (3d) 167.**

17. The defendant contended that the issue raised by the plaintiff was never raised in the Court below and was only raised for the first time in the appeal herein. Thus, it should not be entertained. Alternatively, it is the contention of the defendant that the Racing Stewards were not functus officio and had the jurisdiction to review their decision. The authorities cited by plaintiff's counsel, are distinguishable.

## Findings

(i) Raising a point not raised in the court below

18. The general rule is that an issue which was not raised in the court below cannot be raised on appeal (**Innaya v Limbard [1963] 1 MLJ 30; V. Letchumanan v Central Malaysia Finance Bhd. [1980] 2 MLJ 96**). However, as an appeal is conducted by way of a re-hearing, an appellate court retains the discretion as whether to entertain a point raised for the first time on appeal (**Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55; Huang Han Chao v Leong Fook Meng & Anor [1991] 3 MLJ 337; Lim Geah Liang v East West UMI Insurance [1997] 3 MLJ 517**). In **Luggage Distributors (M) Sdn. Bhd. v Tan Hor Teng [1995] 1 MLJ 719** Gopal Sri Ram JCA held that the categories of cases in which an appellate court will admit a new point not raised in the court below are not closed.
20. It is our respectful view that this is a case where we should exercise our discretion, in favour of hearing the new point

raised by the plaintiff. This is because the new point raised by the plaintiff is solely on the point of law, based on undisputed facts. Hence, this Court should not be precluded from hearing it.

(ii) Were the Racing Stewards functus officio and had no jurisdiction to review their own decision the moment the Originating Summons was filed.

21. The plaintiff's position is that the moment the Originating Summons was filed, the Racing Stewards were functus officio and had no jurisdiction to review their decision. With respect, we disagree. We are of the view that the Racing Stewards were not functus officio and their jurisdiction has not been ousted by the filing of the Originating Summons. This is because the jurisdiction and function of the Racing Stewards are distinctly different from the jurisdiction and function of the courts. The function and jurisdiction of the courts in these type of cases is supervisory in nature. The courts are only concerned with the correctness of the decision making process, i.e. the procedure involved in the sentencing of the plaintiff, and

not with the merits of the decision itself i.e. the actual sentencing. Simply put, the courts will not decide on what is the appropriate sentence for the plaintiff, which function is properly vested within the jurisdiction of the Racing Stewards.

22. It is in this respect that the cases of **Wah Bee Construction Engineering, Doleman & Sons**, and **Re Baker** relied by the defendant can be distinguished. Whilst is not disputed that the courts in those cases held that the arbitral tribunals were *functus officio* once the matters were properly before the courts, one must understand the rationale behind those decisions in that there cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. Those cases concern the jurisdiction of the court as against the jurisdiction of the arbitral tribunal pursuant to an arbitration agreement. In such cases, once both parties have elected to have their disputes adjudicated in court, the court is properly seized with the exact jurisdiction as the arbitral tribunal in deciding the rights of the parties. The courts therein do not merely exercise a supervisory jurisdiction.

24. It is for those reasons that the courts in **Wah Bee Construction, Doleman & Sons** and **Re Baker** decided that the arbitral tribunals were functus officio, as one cannot have two tribunals deciding the same overlapping issues. In the present case there is no question of whether the High Court is deciding on the same issues as the Racing Stewards. Hence, it is our respectful view that the Racing Stewards were not functus officio notwithstanding the filing of the Originating Summons.

25. In any event, as stated earlier, the function of the courts in these types of cases is supervisory in nature. In this case, the main complaint of the plaintiff as to “JAKISHA” proceeding before the High Court was only on sentence. The Racing Stewards admitted their mistake and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules, for the plaintiff to make further submission on the sentence. The Racing Stewards even accommodated the request by the plaintiff for an adjournment. But the plaintiff chose not to turn

up at the scheduled hearing. Thus, he could not now complain and use this issue to knock out the entire disciplinary proceeding where his guilt has been proven and not challenged before the High Court. At best, we can remit the case to the Racing Stewards to hear further submission on sentence and to impose the appropriate sentence on the plaintiff. But that was exactly what the Racing Stewards sought to do four years ago but was refused by the plaintiff. Hence, we see no purpose of sending the case back to the Racing Stewards to hear further submission by the plaintiff on the sentence.

26. For the above reasons, we unanimously dismissed the plaintiff's appeal with costs. Deposit to the defendant towards account of taxed costs.

Dated 31 December 2007.

Raus Sharif  
Judge  
Court of Appeal Malaysia

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