APPEAL 332

DETERMINATION AND REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: PAUL JAMES HARVEY

APPLICATION NO: A30/08/332

PANEL: MR P HOGAN (PRESIDING MEMBER)

DATE OF HEARING: 4 DECEMBER 1996

IN THE MATTER OF an appeal by Paul James Harvey against the determination made by the Western Australian Turf Club Stewards on 16 November 1996 imposing 27 days suspension under Rule 137(a) of the Australian Rules of Racing.

Mr T F Percy, assisted by Ms F Johnson, instructed by Kavenagh & Co, Barristers & Solicitors, appeared for the appellant.

Mr R J Davies QC appeared for the Western Australian Turf Club Stewards.

This is an appeal against conviction and sentence.

The appellant was the rider of the horse *MERCURIAL MADAM* which ran in the Strickland Stakes, Race 6 at Ascot on 16 November 1996.

After the race, the Stewards opened an inquiry into interference caused by *MERCURIAL MADAM* drifting inwards in the final stages of the race. At the appropriate stage of the inquiry, the Stewards charged the appellant with an offence of careless riding, contrary to Rule 137(a). He pleaded not guilty. After some further submissions, the appellant was found guilty.

By way of penalty, the appellant was suspended for a period of 27 days.

GROUNDS OF APPEAL

The grounds of appeal are as follows:

"*1. The Stewards erred in convicting the Appellant in that they:*

(i) failed to consider or adequately consider the riding tactics of rider D Miller on Summerbeau (sic) *and the interference thereby caused;*

(ii) failed to consider or adequately consider the interference caused by T Jackman on Western Cossack;

(iii) failed to call T Jackman and P Hall as witnesses to the enquiry;

(iv) failed to acknowledge the presumption of innocence prior to their consideration of the charges;

(v) failed to give the Appellant the benefit of the doubt in a difficult case;

(vi) laid a charge which was essentially duplicitous, and failed to separately consider the separate aspects of each part of the two allegations of carelessness.

2. *The Stewards erred in imposing a period of 27 days suspension which was excessive in all the circumstances of the case.*

PARTICULARS

(i) The penalty failed to adequately allow the contributory interference instigated by rider D Miller.

(2) The Stewards failed to properly consider the seriousness of the interference itself, rather than simply the recent convictions of the Appellant.

(3) The Stewards failed to acknowledge adequately the Appellant's previous good record in terms of volume of rides in the past year.

(4) The Stewards failed to allow a sufficient discount of the sentences for the mitigating factors.

(5) The penalty imposed was excessive compared to that imposed on rider D Miller."

THE EVIDENCE - STEWARDS' INQUIRY

The Stewards heard from riders D Miller on *SUMMER BEAU*, D Gundry on *SOURIRE*, and the appellant on *MERCURIAL MADAM*. The Chairman of Stewards gave his own observations of the race, as did the Deputy Chairman. Finally, the race video was played.

THE EVIDENCE - APPEAL HEARING

At the hearing of this appeal, the transcript of the inquiry was received into evidence, together with the race video. Three further documents were received, all in relation to the appeal against penalty. They were a newspaper article dated 19 August 1996, the record of convictions of jockey D Miller, and a letter from the Stewards to jockeys dated 2 November 1996 adverting to an intention to taking a more stringent line in assessing careless riding penalties.

THE LAW - APPEAL AGAINST CONVICTION

Rule 137(a) is in the following terms:

"Any rider may be punished if, in the opinion of the Stewards:

(a) He is guilty of careless, improper, incompetent or foul riding"

The phrase "*in the opinion of the Stewards*" is important. Many times in this Tribunal it has been held that an appeal against conviction will not succeed unless it can be shown that no Stewards acting reasonably could possible have reached that opinion. It was submitted that it is almost impossible for an appellant to overcome that hurdle. I accept that proposition. However, it must also be borne in mind that the Stewards are bound to apply certain legal standards to their deliberations in deciding whether careless riding has been demonstrated to such an extent that their opinion can be formed. Their legal standards would include, but not necessarily be limited to, relevance of evidence and the standard of proof, which is on the balance of probabilities. Within those legal standards, the Stewards are indeed required to come to their own opinion, and that will not likely be overturned on appeal.

With these considerations in mind, I now turn to the grounds of appeal against conviction.

Ground (i) is not made out. The Stewards did consider the tactics of jockey D Miller, and the interference thereby caused. Indeed, jockey D Miller was himself convicted of a careless riding charge. He did not appeal.

Ground (ii) is not made out. The Stewards did consider the interference caused by jockey T Jackman on *WESTERN COSSACK*. Jockey Gundry on *SOURIRE* gave evidence of *WESTERN COSSACK* "rolling in". The Chairman did give his own views on *WESTERN COSSACK's* part. That appears amongst other places at page 3 of the transcript of the Stewards' hearing.

Ground (iii) is not made out. No doubt jockeys Jackman and Hall could have been called. However, the appellant was asked, at pages 8 & 9 of the transcript, whether he wished to have any further witnesses. He declined the opportunity.

Grounds (iv), (v) and (vi) ought to be considered together. The particulars of the careless riding, at page 8, were said to be:

> *"The charge in terms of that rule would be you allowed your horse to shift out at the 200m mark, thereby compounding interference caused by SUMMER BEAU to SOURIRE and indeed, continued, your horse continued to shift and whilst being ridden forward, and indeed buffet SUMMER BEAU near the 140m mark, causing that horse to be either struck on the head or baulk from your whip which you were using at that stage."*

I note at the outset that the particulars are not what is set out at the introduction of the Stewards' transcript. There, it is said that the inquiry was into *MERCURIAL MADAM* drifting inwards. The particulars allege a shifting out.

Clearly, the particulars allege a continuing course of conduct. There is nothing wrong with that particularisation. "Riding" is an activity going on over time and distance.

However, what is of concern is the Stewards' findings on each of those 2 particulars of careless riding, when receiving the appellant's answer to the charge and on announcing the finding of guilt.

As to the first incident near the 200m mark, the appellant said at page 9:

> *"If Mr Miller didn't force up there I really don't think it would have happened because I would have had Mr Gundry, I would have had UNPRETENTIOUS there and you know, you allow yourself so much room and then when someone else starts taking your room, so to speak, and making things as tight as what he did, it's very hard."*

In response, the Chairman said at page 9:

> *"So, whilst we can accept what you say in consideration of the first element, it doesn't necessarily come into play in the second element, does it?"*

At page 10, the Chairman said:

> *"What you're saying about him not being there could be significant in the first issue, it'll be up to the Stewards to determine what they believe in terms of the charge itself."*

On announcing the finding of guilt, at page 11, the Chairman said:

> *"The other thing is that we believe certainly I the latter element of the charge, that you were well aware of Mr Miller's presence and certainly in the first one, that your obligation is to remain, keep your horse straight."*

Those comments, by the Chairman, I am of the view, indicate a level of uncertainty as to whether or not the appellant's knowledge of the presence of Mr Miller at the first incident was a relevant factor.

In my view, the appellants knowledge of the presence or otherwise of jockey Miller at about the 200m mark was a relevant factor. Certainly he should not have attempted to take the run which he did. That is evident from the video, and from Mr Miller's own conviction for careless riding. The appellant himself put it best at page 10 where he said:

> *"We're entitled to that room...."*

The Chairman did say that the presence of jockey Miller on *SUMMER BEAU "could be significant"*. In my view, it was of great significance bearing in mind the interference caused and Mr Miller's conviction for careless riding.

There was difficulty experienced by the Stewards in working out what had happened. This is apparent from the Chairman's comments at page 7 where he said:

> *"Riders, the Stewards have had some difficulty in relation to, when I say difficulty, we've had some difficulty in time passage in working out what has happened...."*

After considering all of the evidence, including the Stewards' observations and the Chairman's comments, I am left with my conclusion that the Stewards did not in this case give adequate consideration to the standard of proof required. The Stewards had to find the charge, in relation to the first particular, proved on the balance of probabilities. That requires some exercise in weighing up all the factors. It is not apparent to me that that exercise has been carried out. I come back to the Chairman's comments at page 7:

> *"Riders, the Stewards have had some difficulty in relation to, when I say difficulty, we've had some difficulty in time passage in working out what has happened and we believe that both riders should be charged with careless riding."*

To me, that indicates an uncertainty as to what has happened and the resolution being to charge both riders rather than one. In my view, that is not a correct application of the standard of proof.

As a final matter, although it was not raised by the parties, it is evident that no consideration was taken of the movements of the horse *SOURIRE*, which was interfered with and blundered.

Jockey Gundry was questioned as a witness and not charged. He was referred to as *"the innocent party"*. It was apparent to me that it was presumed he was innocent of any careless riding because it was his mount which suffered the interference. In my view, that is not a correct approach.

Whilst that omission is not a ground of appeal, standing alone, it does contribute to my general feeling of disquiet about the correctness of the decision making process.

As to the second particular of the careless riding, that was said to occur near the 140m mark. It was alleged at page 8 that *MERCURIAL MADAM* continued to shift, while being ridden forward and buffeted *SUMMER BEAU*.

Certainly, the Chairman's comments in relation to that second particular indicate no level of uncertainty at all as to whether knowledge of Jockey Miller's presence was a relevant factor. That is simply because, by that stage, the appellant certainly did know that Jockey Miller on *SUMMER BEAU* was present with him and heading to the line.

However, again I am of the view that the Stewards did not give adequate consideration to the standard of proof required. The appellant had a positive obligation to ride his horse out to the end of the race. Jockey Miller was where he should not have been, as evidenced by his conviction. It was not alleged against the appellant that he deliberately struck *SUMMER BEAU,* or deliberately caused *SUMMER BEAU* to baulk at the 140 metre mark. If that was relied upon, it should have been charged. On the balance of probabilities, on the Steward's findings in relation to Jockey D Miller, buffeting to *SUMMER BEAU* was caused by Jockey Miller being where he should not have been.

For these reasons, the appeal against conviction will be allowed.

The fee paid on lodgement of the appeal will be refunded.

PATRICK HOGAN, PRESIDING MEMBER
/6/12/96

Seal of the Racing Penalties Appeal Tribunal