

APPEAL 334

DETERMINATION AND REASONS FOR DETERMINATION OF  
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: KELLIE LEANNE KERSLEY

APPLICATION NO: A30/08/334

PANEL: MR D MOSENSEN (CHAIRPERSON)

DATE OF HEARING: 28 NOVEMBER 1996

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IN THE MATTER OF an appeal by Miss K L Kersley against the determination made by Western Australian Trotting Association Stewards on 15 November 1996 imposing 28 days suspension under Rule 440(a) of the Rules of Trotting.

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

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

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This is an appeal by Miss K L Kersley, a reinsperson, in relation to an incident which occurred at the Fremantle Trotting Club Meeting, held at Gloucester Park on Friday 15 November 1996 in Race 6.

After conducting a short inquiry the Stewards decided to lay a charge as follows:

*"... the Stewards believe that you have contravened the "Ease-Out" Rule and under the provisions of Rule 440(a) ... for causing crossing by careless driving. The specifics of the charge are; that as you've manoeuvred NORMS DAUGHTER from the rails to the one wide line Mr. Harper, with SHAKEN STEVENS, was progressing past you and he's been obliged to restrain that horse wider on the track to avoid your outward movement."*

Miss Kersley pleaded not guilty. The Stewards received some further evidence including an acknowledgment by Miss Kersley that she was aware of the position of Mr Harper at the relevant time. In deciding to convict Miss Kersley the Stewards announced that:

*"We've considered your submission that you've put to us regarding, your contention that because you were restraining that Mr. Harper wasn't moving forward, but we don't believe that that's relevant. In relation to your horse, Mr. Harper was going forward and as a result he's lost his racing position from you moving from the rails to the one wide line. So we find you guilty as charged."*

The Stewards then proceeded to entertain submissions in relation to penalty and imposed a 28 day suspension. Miss Kersley appealed to the Tribunal and at the same time sought a suspension of operation of the penalty. The suspension was refused as this appeal was able to be brought on expeditiously amongst other reasons.

In the amended grounds of appeal Miss Kersley raised four separate grounds in relation to the question of conviction:

- “1. *The Stewards erred in convicting the Appellant of an offence under Rule 440(a) when the allegation against her was in terms of the “Ease-Out” Rule, Rule 441.*
2. *The Appellant was denied procedural fairness in that the Respondents failed to properly particularise the charge against her.*
3. *The Respondents erred in the conduct of the Inquiry in focusing on the elements of the offence under Rule 441(a) after advising the Appellant that she had been charged under Rule 440(a). The decision of the Respondents in convicting the Appellant was accordingly void.*
4. *The Stewards erred in convicting the Appellant in that they failed to take into account the evidence pertaining to the prevailing conditions at the time of the race in particular the quality of the vision of drivers.”*

I am satisfied that this appeal largely turns on the interpretation of the Rules of Trotting and in particular as to how one should properly read Rule 441 in relation to Rule 440 of the Rules. I am satisfied that the Stewards were entitled to form the opinion of the incident which they did. Unlike other appeals in this area the appellant is not so much challenging the appropriateness of the conclusion which has been reached by the Stewards but rather the approach which was adopted by the Stewards in laying the charge and in the manner in which they stated the outcome.

Rule 441 is a relatively new rule. It does not stand in the Rules of Trotting in isolation but must be read in conjunction with the rule which precedes it. Rule 441 of the Rules of Trotting states:

*“A driver may change the position of his horse at any time in a race to ensure his horse obtains the best finishing position provided that:*

- (a) *Prior to entering the front straight to receive the bell, any runner making a forward move shall not be obliged to race wider or to be checked or restrained by its driver as a result of the driver of another horse changing the position of his horse;*
- (b) *any driver who on the opinion of the Stewards causes or contributes to any crossing, jostling or interference may be dealt with under the provisions of rule 440.”*

Rule 440 of the Rules of Trotting states:

- “(a) *Any driver who, in the opinion of the Stewards, caused or contributed to any crossing, jostling or interference by foul, careless or incompetent driving shall be deemed guilty of an offence against these Rules and may be dealt with accordingly.*
- (b) *For the purpose of this Rule and Rule 438, “crossing” shall occur when a driver, in changing the position of his horse, compels another runner to shorten its stride or*

*compels the driver of such other runner to pull his horse out of its stride or to take any other measure to avoid the horse or driver whose position is being so changed.*

- (c) *It shall be a defence to the charge of jostling or interference that the true cause was the waywardness, untrue running or erratic behaviour of the offending horse under the conditions obtaining when the driver has fully complied with the provisions of Rule 442."*

There is no dispute that the proviso to Rule 441 applies or is relevant to the incident from the perspective of the time in the race when the incident actually occurred. I am not persuaded that in laying the charge the Stewards made it insufficiently clear to Miss Kersley as to the relevant provisions of the Rules and as to the necessary elements of the Rule for the purposes of properly charging her for the offence arising out of the incident.

The wording of the decision of the Stewards is brief. Despite that fact, I am satisfied that it is sufficiently apparent from the language which the Stewards used that the Stewards have in fact found that the offence which is identified under Rule 440 in relation to this charge was actually committed.

It is for these reasons that I am satisfied that grounds 1, 2 and 3 fail.

As to ground 4, in view of the evidence which was given by Miss Kersley before the Stewards as to her being aware of Mr Harper's position, that ground also fails.

The appeal therefore fails as to conviction.

After the Stewards convicted Miss Kersley, the Chairman of Stewards asked Miss Kersley if there was anything that she wished to put to the Stewards on the matter of penalty before they decided that question.

The transcript of the Stewards' inquiry reflects the fact that Miss Kersley declined the offer. Despite that fact, the Stewards stated when announcing the penalty that they were mindful of the circumstances with this horse and its up coming races. Mr Percy has explained to me that the Stewards were there referring to an important race in Sydney this weekend followed by the Miracle Mile on Friday week, the latter being a \$400,000 race.

The Chairman of Stewards also referred to Miss Kersley's recent driving record or at least to the two recent suspensions for the same offence of 14 and 21 days. The Chairman of Stewards then stated that the incident was avoidable had more care been taken. A 28 day suspension was imposed.

In order for me to interfere with the exercise of the sentencing discretion of the Stewards, it must be demonstrated that the Stewards fell into error. The ground of appeal relied upon asserts that:

- "5. *The penalty imposed by the Respondents was excessive in all the circumstances of the case in that:*
- (a) *the Appellant had no previous relevant convictions under Rule 441;*
- (b) *the Respondents erred in looking only at the previous convictions and not at the culpability of the offences."*

Paragraph (a) is not a good basis for appealing. The charge was expressed to be a breach of Rule 440 and in any event, as I have found in relation to the conviction issue, Rule 441 must be read in conjunction with Rule 440. It is not apparent, from what the Stewards found in imposing the penalty, that they looked at the seriousness of this offence. Whilst Mr Davies has made it very clear precisely what the consequences of Miss Kersley's actions were in relation to Mr Harper's horse and consequently the seriousness of the incident, nowhere in the findings do the Stewards actually address this consideration. No attempt was made by the Stewards to compare or contrast this incident with those recent ones which led to the 14 and 21 day suspensions.

Miss Kersley's record clearly does reflect the fact that since April 1994 the severity of the penalties have fluctuated significantly. I appreciate that the Stewards from around the middle of this year have adopted a much tougher attitude to the penalties which they impose for breaches of Rule 440. However, it is not the case that the Stewards have explained why, on this occasion, they should impose what clearly is the maximum penalty imposed for causing crossing since June 1996.

The task of the Stewards has not been assisted by the appellant who, for example, failed to argue that the adverse conditions experienced in the race were a relevant fact to be taken into account. Similarly, the appellant simply left it to the wisdom of the Stewards to give proper consideration to the relevance and effect of the two important races which Mr Percy has spoken of. Although the Stewards did state that those races were foremost in their minds, it does not appear to have had any influence in view of the fact that the most severe penalty for this type of offence was imposed.

In all of the circumstances, I am persuaded that the Stewards have erred in meting out a 28 day suspension without firstly, categorising where this incident falls in the range of seriousness, and secondly, demonstrating the basis upon which the two very important driving commitments were actually taken into account. Therefore, the appeal as to penalty succeeds.

Miss Kersley has already served the period of suspension from 15 November through to tonight. I am satisfied that a suspension is the only proper penalty which should be imposed for this particular offence. Taking all factors into account, I consider that the period of suspension should expire on midnight of 5 December 1996.

The fee paid on lodgement of the appeal is forfeited.



DAN MOSENSEN, CHAIRPERSON



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