APPEAL - 336

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: BRADLEY GRANT BALL

APPLICATION NO: A30/08/336

PANEL: MR J PRIOR (PRESIDING MEMBER)
MR R NASH MEMBER)

DATE OF HEARING: 7 AUGUST 1997

DATE OF DETERMINATION: 7 AUGUST 1997

IN THE MATTER OF an appeal by Mr B G Ball against the determination made by Western Australian Turf Club Stewards on 19 November 1996 imposing a 3 year disqualification for Breach of Rule 175(a) of the Australian Rules of Racing.

Mr D Price, instructed by DG Price & Co, represented the appellant.

Mr Powrie, represented the Western Australin Club Stewards.

The appeal as to both conviction and penalty is upheld.

The fee paid on lodgement of the appeal is to be refunded.

John Prior

JOHN PRIOR , PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL 336

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT: BRADLEY GRANT BALL

APPLICATION NO: A30/08/336

PANEL:

MR D MOSSENSON	(CHAIRPERSON)
MR R NASH	(MEMBER)
MR J PRIOR	(MEMBER)

DATE OF HEARING: 3 JUNE 1997

DATE OF DETERMINATION: 7 AUGUST 1997

IN THE MATTER OF an appeal by Mr B Ball against the determination made by Western Australian Turf Club Stewards on 19 November 1996 imposing a 3 year disqualification for breach of Rule 175(a) of the Australian Rules of Racing.

Mr T F Percy, assisted by Mr P Harris, instructed by D G Price & Co, Barristers & Solicitors, appeared for the appellant.

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

I have read the draft determination of Mr R Nash, Member. I agree with the reasons and the conclusion and I have nothing to add.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

APPEAL 336

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT: BRADLEY GRANT BALL

APPLICATION NO: A30/08/336

PANEL:

MR D MOSSENSON	(CHAIRPERSON)
MR R NASH	(MEMBER)
MR J PRIOR	(MEMBER)

DATE OF HEARING: 3 JUNE 1997

DATE OF DETERMINATION: 7 AUGUST 1997

IN THE MATTER OF an appeal by Mr B Ball against the determination made by Western Australian Turf Club Stewards on 19 November 1996 imposing a 3 year disqualification for breach of Rule 175(a) of the Australian Rules of Racing.

Mr T F Percy, assisted by Mr P Harris, instructed by D G Price & Co, Barristers & Solicitors, appeared for the appellant.

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

I have read the draft determination of Mr R Nash, Member. I agree with the reasons and the conclusion and I have nothing to add.

John Prior

JOHN PRIOR, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL 336

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT: BRADLEY GRANT BALL

APPLICATION NO: A30/08/336

PANEL:

MR D MOSSENSON	(CHAIRPERSON)
MR R NASH	(MEMBER)
MR J PRIOR	(MEMBER)

DATE OF HEARING: 3 JUNE 1997

DATE OF DETERMINATION: 7 AUGUST 1997

IN THE MATTER OF an appeal by Mr B Ball against the determination made by Western Australian Turf Club Stewards on 19 November 1996 imposing a 3 year disqualification for breach of Rule 175(a) of the Australian Rules of Racing.

Mr T F Percy, assisted by Mr P Harris, instructed by D G Price & 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 a disqualification from riding imposed by the Western Australian Turf Club Stewards on the appellant for three years for improper practice, namely intimidating two apprentice jockeys, Grant Lemos and Shaun Meeres, contrary to Rule 175(a) of the Australian Rules of Racing. The appeal is against both the conviction and the penalty.

At the hearing of the appeal Mr Ball's counsel was granted leave to substitute amended grounds of appeal as follows:

"A. *CONVICTION*

1. *The Stewards erred in preferring and convicting the Appellant of a charge which was bad for duplicity.*

PARTICULARS

(a) *The charges in respect of Lemos and Meeres ought to have been separate charges.*

(b) Each allegation of specific intimidation ought to have been a separate charge.

(c) The charge as preferred was accordingly duplicitous and unfair in that the Appellant was unable to mount a separate and specific defence to each allegation in relation to each complainant.

2. *The Stewards erred in convicting the Appellant in respect of matters that had already been the subject of previous inquiry and determinations.*

PARTICULARS

(a) The Stewards relied on evidence of previous incidents, namely:-
(i) Onslow 24th August 1996 (Seapoint).
(ii) Exmouth 6th July 1996 (Tonsorial).
(iii) Exmouth 6th July 1996 (Rapid Silk/Palladium).
which had previously been the subject of inquiries and/or protests determined by the presiding Stewards.

(b) The findings of the presiding Stewards on those occasions did not result in any adverse finding in respect of the Appellant.

(c) In the circumstances the matters the subject of those incidents were unfairly used against the Appellant, the matters being essentially res judicata.

(d) The Stewards were functus officio in respect of the said incidents.

3. *The quality of the evidence relied upon by the Stewards in convicting the Appellant was unsatisfactory and insufficient in all the circumstances of this case.*

4. *The Stewards' finding that -*
(a) the Appellant had intimidated Lemos,
(b) the Appellant had intimidated Meeres, and
(c) the intimidation of both complainants had continued over a prolonged period
were against the weight of the evidence and were unsafe and unsatisfactory in all of the circumstances of the case.

5. *The Stewards erred in giving insufficient reasons for convicting the Appellant.*

B. *PENALTY*

6. *The penalty imposed was excessive in all of the circumstances of the case.*

PARTICULARS

(a) The Stewards placed the offence into a category of seriousness which was far beyond that warranted by the evidence.

(b) The Stewards failed to apportion the penalty so as to indicate which portion related to each of the two complaints.

(c) The penalty imposed failed to adequately take into account or reflect the mitigating features of the case."

Background

On 25 October 1996, the Stewards held an inquiry into a statement that had been made by Grant Lemos, an apprentice jockey, in relation to events which occurred whilst riding in the Gascoyne region during the 1996 season.

At the inquiry, Apprentice Lemos was questioned in relation to an interview he had previously had, on 3 August 1996, with Stewards at the Belmont Racecourse. The matter of concern to the Stewards was an allegation by Apprentice Lemos that the appellant, who was an experienced jockey, had told him during the course of the Gascoyne racing circuit words to the effect that he would *"put Lemos over the rail"* or *"come hunting for him"* if he got in his way.

At the time of the inquiry Apprentice Lemos had been riding for 11 months.

Another apprentice jockey, Shaun Meeres, was also questioned at the inquiry during which he said that the appellant had put pressure on him during the course of the Gascoyne circuit in that the appellant had said to him not to get in his way or he would knock him down.

At the time of the inquiry Apprentice Meeres had been riding for 18 months.

During the inquiry on 25 October 1996, Apprentice Lemos said that the appellant always used to say those kinds of things but had never actually done it to him. Apprentice Lemos told the Stewards he believed the appellant was joking because he would laugh after he made such comments. Apprentice Lemos said, when asked, that he did not feel intimidated by what the appellant said whilst riding in races in which the appellant was also riding, he said he was not. In fact, Apprentice Lemos went so far as to say he did not feel the comments of the appellant put any pressure on him at all.

Apprentice Meeres stated that he did not take what the appellant said to him as a joke. He said he felt pressure. At page 9 of the transcript he said:-

> *"... you really can't take that as a joke from anyone, because there is one day, they're going to think about doing it and they'll do it."*

Apprentice Meeres said he took what was said by the appellant to him seriously. He attributed an incident when he was riding *TONSORIAL* in Race 6 at Exmouth on 6 July 1996, during which race the appellant was riding *GOTHIC MIST*, when *TONSORIAL* was forced over the windrow by *GOTHIC MIST* moving inwards, as a situation where he felt the appellant was putting his threats into effect.

Apprentice Meeres stated that he did not agree that he was frightened or intimidated by being in a race with the appellant when asked. At page 10 of the transcript he said:-

> *"... I thought, well if he wanted to tighten me up, all I could do was hold my ground and, you know, I could dish it out just as much as what he [the Appellant] could ...."*

When Apprentice Meeres was asked if there were any other instances between he and the appellant, Apprentice Meeres said:-

> *"probably nearly every race I rode in for Mr Grantham and anyone else, he would either cut me short or tighten me up or do something like that. There were just too many. Too many to remember."*

Mr Grantham, who was the trainer responsible for Apprentice Meeres during the Gascoyne racing circuit in 1996, said that Apprentice Meeres was nearly in tears as a result of the *TONSORIAL* incident.

Another jockey who rode in Race 6 at Exmouth on 6 July 1996 was Les Spinks. His mount was *BANKINA*. He gave a description about the appellant moving his horse over and putting pressure on Apprentice Meeres who was riding *TONSORIAL*. The most significant aspect of what Jockey Spinks said was that after the race, the appellant said:-

> *"I got that little bastard."*

Jockey Spinks said that he understood the appellant was referring to Apprentice Meeres. According to Apprentice Meeres, the appellant made statements of the same kind all the way through the Gascoyne circuit.

The above is a summary of the salient aspects of the evidence to the inquiry on 25 October 1996 at which the appellant was not present.

The inquiry was reconvened on 1 November 1996 with the appellant present on that occasion. At that stage the appellant had only received the transcript of the earlier hearing 1½ hours prior to the continuation. He was not prepared to answer questions on the basis that he had not had sufficient time to go through the allegations contained in the transcript of the proceedings of 25 October 1996. After some debate the Stewards acceded to the appellant's request and granted an adjournment to give him a reasonable opportunity to read the transcript and to ascertain what allegations had been made against him. That was, I respectfully suggest, a very wise decision on the part of the Stewards.

The inquiry resumed again on 19 November 1996. On that occasion the appellant was in attendance and advised he was ready to proceed. The appellant agreed he had read the transcript of 25 October 1996 and was aware of the allegations that had been made.

The Appellant, in his evidence to the inquiry, said that he disputed what Apprentice Lemos had originally stated and also said he disputed that he even said words to that effect. The appellant said he never spoke to Apprentice Lemos about knocking anyone down or cleaning anybody up.

According to the appellant he had gone to the Gascoyne racing circuit for a working holiday and to have a good time. He said he wasn't there to cause trouble or frighten or intimidate anybody. He said he would occasionally muck around and say things tongue in cheek although he couldn't recall ever saying the things that had been alleged.

The appellant denied that he ever spoke to Apprentice Meeres privately and said the only conversation he had with Apprentice Meeres was in public. He denied he made any intimidating remarks to Apprentice Meeres as alleged by Apprentice Meeres. The appellant said he had no idea why Apprentice Meeres said the things he did about the appellant.

The appellant also denied that he said after Race 6 at Exmouth on 6 July 1996, as alleged by Jockey Spinks:-

> *"I got that little bastard."*

The appellant cross-examined Apprentice Lemos who agreed he wasn't intimidated or threatened by anything the appellant said and agreed that he understood the Appellant was joking.

In cross-examination of Apprentice Meeres by the appellant, Apprentice Meeres maintained that he believed the appellant was trying to intimidate him and denied that he had made anything up about the appellant.

Jockey Spinks maintained, under cross-examination by the appellant, that the appellant did say *"Got that little bastard"* as they were pulling up the horses after the Exmouth race.

Other witnesses gave hearsay accounts of what they were told by Apprentices Meeres and Lemos.

The appellant gave evidence to the Stewards that he did not intimidate any rider whilst in he was in the North-West.

After deliberating the Stewards advised the appellant (at page 91 of the transcript) that after considering all the evidence they had decided to charge him under Rule 175(a) with improper practice. The improper practice was alleged to be, that in the opinion of the Stewards, the appellant's conduct towards Apprentices Meeres and Lemos over a prolonged period in the Gascoyne region was of a nature that amounted to intimidation. The appellant pleaded not guilty to that charge.

It is noteworthy that the appellant then inquired, when asked if he had anything to say in relation to the charge:-

> *"Well, sir I just would like to know, firstly, which area can I ask, are you charging me, which area of the so called evidence that you've heard are you charging me under this rule?'*

The Chairman responded:-

> *"Well, as I say, the Stewards believe that your conduct towards Apprentices Meeres and Lemos over a prolonged period, this is from the generality of the evidence in front of us, is of a nature which amounts to intimidation."*

The appellant called no further evidence but gave a short submission in relation to the charge which can be read at pages 92-93 of the transcript of the inquiry.

The Stewards after some deliberation found the appellant guilty of the charge. The Stewards commented, *inter alia*, that they found Apprentice Meeres' evidence convincing and also accepted the evidence of Jockey Spinks.

Duplicity Point

The appellant's first ground of appeal has been set out earlier in these reasons for decision. In effect it is contended that the conviction should be overturned because the charge is bad for duplicity.

The ground that the conviction was bad for duplicity was extended in the appellant's outline of submissions and in oral argument to encompass the proposition that the charge was not properly formulated or particularised and therefore was procedurally unfair.

Rule 175(a) of the Australian Rules of Racing states:-

> *"The Committee of any Club or the Stewards may punish:*

(a) *Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing."*

The Stewards particularised the breach at page 91 of the transcript as follows:-

> *"The charge under that rule is that with the improper practice being that in the opinion of the Stewards, your conduct towards both Apprentices Shaun Meeres and Grant Lemos over a prolonged period during the course of racing in Gascoyne racing area this year, was of a nature which amounted to intimidation."*

It was following the laying of the charge that the appellant asked what area of the evidence was the charge based on to which the Chairman of Stewards replied that it was the generality of the evidence in front of the Stewards which in their opinion amounted to intimidation.

The rule is particularly broad in its terms. As a general rule greater particularity is required when the rule or offence is broad in its terms, in order to ensure the person charged is accorded procedural fairness.

The appellant was placed in a rather difficult position to know how to deal with such a broad and unspecific allegation. It is also noteworthy that when the Chairman came to give the Stewards' decision at page 94 there is no reference to a single incident of intimidation but rather a statement in general terms wherein the Stewards expressed they were satisfied that the appellant behaved in the *"manner"* alleged.

The respondent submits that a charge of improper practice under Rule 175(a) could relate to a continuing course of conduct. The Stewards were, in my opinion, entitled to form their opinion that it was the course of conduct of the appellant which amounted to improper practice. The mere fact that there are several incidents involved does not, in my opinion, itself give rise to duplicity or ambiguity in an offence of this kind.

However, since the improper practice, to the extent it is particularised, is described by the Stewards as "*conduct of a nature which amounted to intimidation*", which in my opinion involves a separate assessment of the affect of the appellant's conduct on each apprentice, then as a matter of fairness that charge should have been brought separately in relation to the complaints of the two apprentices. It is clear that the affect the appellant's conduct had on Apprentice Meeres was very different to the evidence of the affect it had on Apprentice Lemos.

It also is not enough for the Stewards to simply particularise the course of conduct by reference to the *"generality of evidence"* taken in the preceding inquiry. In my view it is necessary for sufficient and proper particulars to be given to the person charged which would enable the person to identify the particular incidents relied upon by the Stewards as the basis of the course of conduct they allege.

If the person charged is to be able to fairly defend himself against a charge of this kind he must be able to direct his defence at specific allegations rather than allegations made *"in generality"*. That is clearly just a matter of affording him natural justice or as it has now become known, procedural fairness. The Stewards could, no doubt, have done that in this case.

For the above reasons, the conviction should be quashed. I propose that the matter should be refered back to the Stewards for rehearing as proposed in paragraph 22 of the Appellants written outline of submissions, on the grounds that there has been a failure to afford procedural fairness to the appellant which was encompassed within ground 1 of the grounds of appeal.

Other Appeal Grounds

The second ground of appeal was in effect that the Stewards erred in convicting the appellant in respect of a matter that has already been the subject of a previous inquiry.

The general proposition put forward by the appellant's counsel is that the appellant should not be prosecuted twice for the same offence. In my view the charge against the appellant under Rule 175(a) for improper conduct by intimidation of two apprentices during the course of the racing season in the Gascoyne region, had not been the matter which had previously been determined. It was not a case of *autrefois acquit* nor *res judicata*. The fact that three racing incidents which formed part of the body of the evidence upon which the allegation under Rule 175(a) was drawn from, had previously been inquired into without giving rise to any charge against the appellant, does not amount to a defence on the basis of *autrefois acquit* or *res judicata*. Further, in my opinion the Stewards were not *functus officio* in relation to this matter.

In grounds 3 and 4 of the appeal the appellant submits that the Stewards relied upon unsatisfactory and insufficient evidence to convict the appellant and that the conviction was against the weight of the evidence and was unsafe and unsatisfactory in all of the circumstances.

It would be artificial to attempt to express a view whether the Stewards could reasonably have reached the opinion they did about the appellant's conduct where I have already found that the charge should have been separated into two charges. Further, the lack of particularity in the charge itself makes the task of assessing the sufficiency of the evidence a matter of speculating about which aspects of the generality of the evidence were relied upon by the Stewards in reaching their opinion.

In relation to ground 5 which contends the Stewards erred in giving insufficient reasons for convicting the appellant, it is my view that having made a finding that the particulars of the charge were insufficient in the first place, it is unnecessary to consider the sufficiency of the reasons given by the Stewards.

ROBERT NASH, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA