

THE RACING PENALTIES APPEAL TRIBUNALREASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/353
DATE OF HEARING: 16 APRIL 1997
DATE OF DETERMINATION: 16 APRIL 1997

IN THE MATTER of an appeal by PJ Harvey against the determination of the Western Australian Turf Club Stewards on 22 March 1997 imposing a 16 days suspension for breach of Australian Rules of Racing Rule 137(a).

Mr TF Percy, on instructions from DG Price & Co solicitors, appeared for the appellant.

Mr A Van Merwyck, on instructions from Parker & Parker solicitors, appeared for the Western Australian Turf Club Stewards.

Following the running of Race 6 at Ascot Race Course on 22 March 1997 the Stewards inquired into the incidents which occurred in the straight when passing the 100m mark which involved riders P King, P Knuckey and PJ Harvey. After hearing evidence from Mr Zucal, the Steward positioned in the main tower, and from the 3 riders and after viewing the video of the race the inquiry was adjourned. It was subsequently continued to completion after the last race. At the continuation of the inquiry the Stewards showed the film from behind and all 3 riders were given the opportunity to comment. Subsequently the Stewards charged Mr Harvey with careless riding in terms of Australian Rule of Australian 137(a) which reads:

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

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

The Chairman of Stewards then stated to Mr Knuckey:

"We charge you in terms of that rule with careless riding in Race 6, THE JUNCTION GIRL SPRINT today at Ascot, 22nd March 1997 that passing 150m mark that you allowed HOW SWEET SHE IS to shift in and approaching the 100m crowd MISTY TUDOR which indeed bumped the hindquarters of MISS CONQUISTADOR and MISS CONQUISTADOR having to be then restrained off the heels of HEED ZAMELINA."

Clearly there are 2 elements to this charge. The first is the aspect of shifting in. The other is the crowding of Misty Tudor.

After Mr Harvey pleaded not guilty some more evidence was presented and the film was shown again. Mr King and Mr Knuckey then left the inquiry and further exchanges occurred between Mr Harvey and the Chairman of Stewards. Mr Harvey was asked whether there was anything else he wanted the Stewards to consider before the Stewards considered *"the particular charge"*. Mr Harvey did raise an issue following which he retired. The Stewards then deliberated after which they delivered their decision in these terms:

"Mr Harvey, the Stewards have canvassed the question put forward effectively by yourself in relation to the movement of the horse of King's outwards and the Stewards are unanimous in their thinking that Paul King's horse does move out whilst being ridden forward, but the movement doesn't cause trouble to Peter Knuckey's mount in the opinion of firstly, Peter Knuckey and secondly in the opinion of the Stewards. Now how much that horse moves is somewhat immaterial as to the consequences of the contributing nature to the interference as being dealt with by this charge. Now, the Stewards do not agree that is obvious from the film by way of observations Deputy Chairman of Stewards, Mr John Zucal, that Peter Knuckey's horse was brought outwards two horse widths by Mr King's mount. You stated in your own evidence that you thought you were clear. The Stewards don't believe that you were clear of firstly, Knuckey's mount which takes evasive action from your heels in his evidence, and indeed makes contact with Mr King's

mount. The fact that both riders mention that their horses were tiring and going nowhere is of no significance from the point of view of the interference because the Stewards believe that both those horses were entitled to the running, and indeed, in the case of Greg Hall, put forward in AJC, in the case of Greg Hall against AJC, Judge Perignon made specific reference to the fact that horses are entitled to their ground in running irrespective of whether they were tiring or going nowhere.

Now as such the Stewards find you guilty of the charge. ..."

At the time of lodging his appeal Mr Harvey sought and was granted a suspension of operation of the penalty. When the matter first came on before me on 10 April 1997 Mr Percy sought to amend the grounds of appeal to enlarge them to include an appeal against conviction. The Stewards, who were unrepresented at that hearing, were granted an adjournment so as to obtain legal advice. Mr Harvey's stay was extended.

The amended grounds of appeal read:

"CONVICTION

1. *The Stewards erred in convicting the Appellant of Careless riding in that:*
 - (i) *they failed to properly consider the charge which had been preferred;*
 - (ii) *they convicted the Appellant of a charge which was essentially different to that originally preferred;*
 - (iii) *the conviction was against the evidence and the weight of the evidence.*

PENALTY

2. *The penalty imposed was manifestly excessive in all the circumstances of the case."*

I have had the benefit of viewing the film of the race and of hearing submissions from counsel representing both parties.

As I have already indicated to counsel I am not persuaded that there is any merit in the third subground of the appeal as to conviction. The task of the appellant in demonstrating the opinion of the Stewards is wrong is a difficult one in the context of this particular rule. From what I have seen of the video I do not consider that the Stewards were "*absurd*" in coming to the conclusion which they did (refer to paragraph 6.40 of GRS Forbes 2nd Ed. *Disciplinary Tribunals*).

Subgrounds 1 and 2 can be dealt with together. In essence the appellant says in relation to them that:

- the charge was one of crowding.
- the hearing proceeded on that basis.
- the Stewards failed to consider the proper question.
- the Stewards failed to find carelessness as alleged in the particularised charge.
- in effect a materially different offence was ultimately found to have occurred which the appellant was not asked to defend.
- the Stewards failed to give adequate consideration to the standard of proof in relation to the actual charge in that an absolute standard was adopted whereas interference may have eventuated without fault and the standard of care of riders may vary at different stages in a race.
- Mr Harvey was simply endeavouring to give his horse the opportunity to gain the best reasonable placing in the field.

In order to determine this matter one must consider amongst other things the precise words used by the Stewards in laying the charge and the actual words of the Stewards' finding. I readily appreciate that in conducting their inquiries during race meetings Stewards often are under great pressure and are obliged to work quickly during limited bands of time between races in carrying out

to the pressures on the Stewards as one would expect of a Tribunal or a Court which normally has the luxury of time quite apart from being constituted by legally trained persons. As I have already indicated, however, the Stewards did not attempt to complete this matter between races. By the time the end of the race meeting was reached some of the pressure would have been off the Stewards enabling them to give the matter more relaxed consideration than otherwise. Whilst the words used by the Chairman of Stewards in laying the charge are very clear and precise and afforded Mr Harvey every opportunity to know precisely what the actual charge was, the words used later in the proceedings in specifying the Stewards' findings are capable of being described in opposite terms. I agree with the comments of Mr Percy in relation to the ambiguity of the language used in the latter stage of the adjudication process.

The Stewards have made two clear cut specific findings which are relevant. The first is that the movement out of Mr King's mount does not cause trouble to Mr Knuckey's mount. The second is that they *...don't believe that you were clear of... Mr Knuckey's mount...*" The Stewards in my opinion did not go on and make findings and in their reasons explain adequately or at all, how or why Mr Harvey was *"guilty of the charge"*. Mr Harvey was charged with careless riding due to, on the one hand shifting, and on the other, crowding. These two elements of the charge are not specifically referred to in the reasons and one cannot without being left with some considerable uncertainty say that the elements of the offence can be inferred from the stated reasons.

There are facts which were disputed during the hearing and I am not satisfied that the Stewards have made it entirely clear which of the competing versions has been preferred to the other. The reasons fail to give any clear summary of the evidence, an unambiguous statement of relevant factual findings and a clear cut conclusion in relation to each element of the offence. A person whose livelihood is being deprived by a decision of the Stewards in relation to a matter of this nature is entitled to know what the Stewards have addressed their minds to and the basis of fact on which the ultimate conclusion has been reached.

For these reasons I am persuaded the Stewards erred in convicting Mr Harvey as they did not properly consider and deal with the charge which they had preferred. It is not necessary for me to decide the point, which is at least arguable, that the Stewards also erred by convicting of a charge essentially different from that which was laid.

The appeal succeeds. The penalty is quashed. The lodgement fee is refunded.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

