

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT: PATRICK JOSEPH CARBERY
APPLICATION NO: A 30/08/362
DATE OF HEARING: 17 JUNE 1997
DATE OF DETERMINATION: 30 JUNE 1997

IN THE MATTER of an appeal by Mr PJ Carbery against the determination made by the Western Australian Turf Club Stewards on 24 May 1997 imposing a 13 day suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr TF Percy and Mr P Harris, instructed by DG Price & Co solicitors, appeared for the appellant.

Mr F Powrie represented the Western Australian Turf Club Stewards.

Mr Carbery rode the first placed JUST TOD in Race 5 the Perth Rotary/United Way Handicap at Belmont Park on Saturday 24 May 1997. Following the race an objection hearing took place in which Mr Harvey, the rider of OUR BONNY LASS, stated:

".... it was after round the home turn into the straight probably about the 300 to the 250 metre mark, I was racing in a three off position, Mr Paddy Carbery who come from behind me from my inside has tried to push out onto my horse to gain a clear run on the inside of me which I didn't believe was there at the time. Probably bumped into, sort of back on, onto her girth area which pushed her hindquarter right out on a number of occasions, I'd say about three occasions, its pushed her hindquarters out and unbalanced my horse. Instead of me being able to ride straight

and balance my horse up and go straight to the line, I've had to endeavour to sort of hold my ground to a certain extent and, and keep a straight line and just try to keep her balanced best I could, but instead of being able to ride forward and ride straight to the line have a clear run at the line, been bumped from the inside on three occasions which has certainly placed my horse to a disadvantage."

After upholding the objection and amending the placings the Stewards proceeded to hold an inquiry into the incident. During the inquiry Mr Harvey the rider of OUR BONNY LASS gave evidence that he "... was pretty much keeping a straight course..."

The Chairman of Stewards told Mr Carbery that he shifted out on his horse. Mr Carbery agreed and added "I was attempting a run ...".

The Chairman of Stewards described his own observations of the incident to be that at about the 300 metre mark Mr Carbery took JUST TOD outwards and that Mr Harvey appeared to turn his filly's head inwards but OUR BONNY LASS simply held her ground and did not shift in. According to the Chairman of Stewards the 4 bumps which then occurred were initiated by Mr Carbery having shifted his mount out.

Mr Zucal, the Steward who observed the race from the main Stewards' tower stated that:

"At the 300m I observed JUST TOD (PE. Carbery) shifting out to obtain a run bump heavily on several occasions with OUR BONNY LASS (P. Harvey) on its outside."

In the course of answering the Chairman's question, Mr Carbery stated:

"Well I thought there was a run at the time Sir, you know obviously looking at the film there wasn't."

The Stewards then charged Mr Carbery with careless riding in terms of Australian Rule of Racing 137(a). Rule 137 states:

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

- (a) *He is guilty of careless, improper, incompetent or foul riding, or*
- (b) *He fails to ride his horse out to the end of the race."*

In charging Mr Carbery the Stewards stated:

"...in the opinion of the Stewards you rode carelessly when taking JUST TOD outwards at about the 300 metre mark in Race 5 the Perth Rotary/United Way Handicap today at Belmont bumping OUR BONNY LASS and indeed continued to bump that filly on three other occasions after the initial bump. "

Mr Carbery pleaded not guilty. In support of that plea he made the following statement:

"Oh, the fact that in my first of all, in my movement coming out when I did bump that horse on four occasions as you said, there was no dangerous thing you know, it wasn't dangerous at all, you know there was no unsafe thing about it, you know I, I was, I do believe I was just being competitive you know, you know the states leading rider there you know you sort of, doesn't matter really who, who you're coming out you know to try, sort of take a run you know just trying to be competitive and win the race. Also the fact that I haven't been suspended for, can't remember how long its been a long time, you'd have to , you'd have to look up your records."

After considering the evidence the Chairman of Stewards stated:

"Mr Carbery the Stewards find you guilty as charged and in saying that we believe that there was no room to go where you going and indeed whilst you have a, an expectancy to ride competitively, that competitive must be tempered with deftness and we don't believe that you rode in the manner that of would be purely structured in terms of safety. As such it remains with us to impose a penalty, you've already made mention of the time past since you've been suspended, is there anything else like firstly would you like to elaborate on that and secondly is there anything else you'd like to place before us?"

A brief discussion ensued regarding Mr Carbery's record after which the Chairman of Stewards stated:

"Mr Carbery the Stewards see the level of interference has been somewhat significant or else we wouldn't have consider that the protest should have been upheld. However, in saying that you've revoked (sic) some response suggesting that the race was taken off you. You're record is fairly good taking the area of riding outside of Australia out of the equation, it was a seventeen month period since you were previously suspended her in January of 1996 at Bunbury and indeed there was a six month period of which you rode overseas. We believe that you should be suspended for a period of fourteen days, but in saying that and specifically taking into consideration what you said about the fact you've been penalised by losing your percentages obviously through the win of the race, but we believe we should give you a discount of one race meeting, metropolitan meeting and we bring it back to finish the night before the 7th of June which will be midnight the 6th of June and will reduce it to 13 days. So we've given you specific deduction for what we see the penalty imposed by the loss of percentages, all right."

Mr Carbery appealed against both the conviction and the penalty. The amended grounds of appeal which were substituted at the commencement of the appeal hearing specify:

"A. CONVICTION

1. *The Stewards erred in convicting the Appellant by failing to give due consideration to the requirements of Australian Rule of Racing 135(b) which provides:*

"The rider of every horse shall take all reasonable and permissable measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field".

PARTICULARS

- (a) *the Stewards erred in convicting the Appellant in that they imposed an obligation to ride safely as being the only consideration affecting his judgment whereas there was an equivalent and contemporaneous obligation on the Appellant to ride his mount so as to secure the best possible place in the field;*
- (b) *the Stewards erred in failing to weigh the obligation to ride safely against the requirement to secure the best placing and assessed the quality of the Appellant's riding on that basis; and*

- (c) *in assessing the Appellant's riding "purely" in terms of safety the Stewards fell into error.*
2. *The Stewards finding that the Appellant was guilty of careless riding was against the weight of the evidence and was therefore unsafe and unsatisfactory in all the circumstances of the case.*

PARTICULARS

The Stewards failed to take into account:

- (a) *that no cogent evidence was led to suggest that the manner in which the Appellant rode was unsafe or placed any other rider or horse in danger;*
- (b) *that ZOFFRON shifted out as the Appellant began his run, this being a factor which contributed to the occurrence of the incident;*
- (c) *the Appellant's evidence that as JUST TOD commenced its run Mr Harvey turned his horse's head in and tried to hold JUST TOD in behind ZOFFRON;*
- (d) *the Appellant's evidence that Mr Harvey "definitely wasn't trying to balance his filly";*
- (e) *that the Appellant's mount came from behind to win the race, whereas OUR BONNY LASS has tired and finished third;*
- (f) *the Appellant's belief that there was sufficient room to make the run; and*
- (g) *the Appellant's duty to ride in a competitive manner in accordance with Australian Rule of Racing 135(b).*
3. *The Stewards erred in giving insufficient reasons for convicting the Appellant.*

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- (a) *the elements of the offence charged were not specifically referred to in the Stewards reasons for decision;*
- (b) *there were facts which were in dispute at the hearing and the Stewards did not advise which of the competing versions of evidence they preferred over the other;*

- (c) *the reasons failed to give any clear summary of the evidence, an unambiguous statement of relevant factual findings or a clear cut conclusion in relation to each element of the offence; and*
- (d) *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 upon which their ultimate conclusion has been reached.*

B. PENALTY

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

PARTICULARS

- (a) *the Stewards placed the offence into a category of seriousness which was beyond that warranted by the evidence;*
- (b) *the Stewards failed to adequately consider the contributing nature of the riding by Harvey;*
- (c) *the Stewards failed to properly consider the erratic behaviour of ZOFFRON and its contribution to the interference; and*
- (d) *the penalty imposed failed to adequately take into account or reflect the mitigating features of the case."*

I have had the opportunity of carefully studying the transcript of the proceedings, of considering the submissions which were made to me and of viewing a video of the race. The video shows the incident very clearly indeed. No doubt the Stewards who viewed the race live saw the incident occurring quite graphically. Having viewed the video I can now summarise the salient facts to be as follows:

1. Mr Harvey was riding on Mr Carbery's outside.
2. Mr Carbery, in attempting a run, shifted his horse JUST TOD out.

3. In the process of shifting out, JUST TOD bumped Mr Harvey's horse four times in quick succession.
4. Mr Carbery consciously took this action as a result of his desire to attempt to achieve the best result in the race for his horse.
5. There was insufficient room for Mr Carbery to make a run.

Australian Rule of Racing 135(b) states that:

"The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field."

It is clear to my mind that the obligation imposed on jockeys by this Rule to seek to achieve the best result in races is qualified by the obligation to ensure that all riding measures taken are both reasonable and permissible. Clearly riders are not given carte blanche under the Rules to ride in whatever fashion they consider will give them the best prospects in a race irrespective of the adverse consequences to others. The consequences of the incident in question clearly were adverse and unfair to Mr Harvey. No doubt it is these unhappy consequences which explain why the Stewards were justified in upholding the protest. Those same consequences are relevant to the ultimate conviction of Mr Carbery for breaching the Rules, despite the fact that he clearly was riding to win.

I do not agree with the assertion on behalf of the appellant that the Stewards imposed an obligation to ride safely as "*being the only consideration affecting his judgment*". I do not place the same interpretation on the reasons given by the Stewards as was pressed upon me by Counsel for the appellant. I am satisfied that the fair and reasonable interpretation of what Mr Powrie said and meant was simply that Mr Carbery's competitive riding must be tempered with appropriate skill from a safety viewpoint.

In the context of the relevant Rule "*careless*" means done or acting with insufficient attention, unconcerned in action, inattentive, negligent,

thoughtless or done or caused thoughtlessly or negligently. Mr Carbery departed from the usual standard of care which any jockey must reasonably employ during the course of the running of a horse race. It goes without saying that a jockey is responsible to control the quick movements and powerful actions of a racing animal. In order to do that a great deal of skill and attention are required as otherwise an accident and injury may well occur. Potentially there are great risks to both rider and beast in the course of a horse race. The incident in question was attributable to some lapse in attention, error of judgment or deliberate action on the part of Mr Carbery. The incident would not have happened if Mr Carbery had exercised better care and attention or better skill and judgment.

The question as to whether the riding skills employed amounted to carelessness is best answered by those people whose knowledge of the sport qualify them to judge whether a reasonable jockey riding properly would or would not have done the act alleged to constitute careless riding. The Stewards are the nominated experts under the Rules. They are more than capable of properly making a determination as to whether any particular riding action is careless. The Rule in question expressly authorises and requires the Stewards to form an opinion as to whether a jockey is guilty of careless riding. It is inappropriate for me to substitute my opinion for that of the Stewards. I can only interfere if it can be demonstrated that the Stewards' opinion is totally unreasonable. My observation and interpretation of the video of the race completely supports their opinion.

I am not persuaded that the Stewards' findings reflect the fact that the determination of Mr Carbery's guilt was against the weight of the evidence. The fact that Mr Harvey's horse was bumped so hard and so often during the course of the race around the 300 metre mark amply demonstrates that the appellant's riding was unsatisfactory. JUST TOD clearly was shifted out during the incident. It was Mr Carbery's actions alone which caused the bumping to occur in the first instance and subsequently to reoccur. Mr Carbery's own admission that there was not a run, even without all of the independent corroborating evidence, would be sufficient to support the findings of the Stewards.

The Stewards' reasons could have been elaborated upon and expressed more elegantly. However the Chairman's summary is sufficiently clear to reveal that the Stewards not only have exercised their minds on the relevant considerations but also have made findings adverse to Mr Carbery which clearly do support the conviction of Mr Carbery. In the light of the evidence which was presented, the Stewards have in my opinion given a clear enough summary of the evidence and a sufficient statement of the relevant findings or conclusions on that evidence.

For these reasons I dismiss the appeal as to conviction.

In regard to the penalty, I am not persuaded that the Stewards were in any way in error. The seriousness of the offence in my opinion justified the penalty which was imposed, it clearly falls within the range of penalties available for this type of offence. I am satisfied from the evidence and particularly from viewing the film that neither Mr Harvey's riding nor anything else other than the careless riding of Mr Carbery contributed to the commission of the offence. I am satisfied that all of the mitigating features were adequately taken into account. Mr Carbery did in fact get the benefit of a discount of one metropolitan race meeting. This was a fair and reasonable discount in all of the circumstances.

Accordingly the appeal fails as to penalty as well as conviction.

The appeals should be dismissed. The suspension of operation of the penalty automatically ceases. The lodgment fees are forfeited.



DAN MOSSENSON, CHAIRPERSON

