APPEAL 386

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**PAUL JAMES HARVEY**
APPLICATION NO:	**A30/08/386**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A MONISSE (MEMBER)** **MR S PYNT (MEMBER)**
DATE OF HEARING:	**1 OCTOBER 1997**
DATE OF DETERMINATION:	**2 OCTOBER 1997**

IN THE MATTER OF an appeal by Mr P J Harvey against the determination made by Western Australian Turf Club Stewards on 15 September 1997 imposing a three month suspension under Rule 137(a) of the Australian Rules of Racing.

Mr T F Percy, instructed by D G Price & Co, represented the appellant.

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

This is the unanimous decision of the Tribunal.

The appellant was the rider of the horse EARLY BREAK, which ran in Race 8 at Kalgoorlie on Saturday, 13 September 1997. During that race at approximately 25 metres from the finish, an incident occurred which led to the Stewards opening an inquiry.

The inquiry took place over two sittings, commencing on Saturday 13 September and concluding on Monday 15 September.

At the conclusion of the inquiry stage of the hearing, the appellant was charged as follows:

> *"... Now Mr. Harvey you're charged under that rule with improper riding, the improper riding being that in the opinion of the Stewards, approximately 25m before the finish of the race, you have deliberately ridden your horse inwards towards Mr. Miller and intentionally bumped Mr. Miller, unbalancing his mount."*

The appellant pleaded not guilty and made his submissions. He was ultimately found "*guilty as charged.*" He was suspended for three months.

The appellant now appeals against his conviction and penalty, on the grounds set out in the notice of amended grounds of appeal dated 25 September 1997.

APPEAL AGAINST CONVICTION

By way of evidence, the Stewards heard from the appellant himself, and from Jockey Stephen Miller. They also viewed the film of the race. The Chairman of Stewards gave his observations on the film as follows:

> " *... the relevant positions of the horses passing the 100m and racing to this incident is that Stephen Miller on EYE ON STEEL was approximately five horses out from the running rail. SHABEEN (J. Patton) which was in front of Mr. Miller was approximately six horses out from the running rail and P. Harvey on EARLY BREAK was back to the outside of SHABEEN was approximately seven horses out from the running rail. Approaching the incident which occurred at the 25m, it's from my observations that you have Mr. Harvey taken your mount in, ridden in onto Mr. Miller, coming into contact which I would put as a heavy bump unbalancing Stephen Miller. From my observations of the incident, I would have to say there is clear intent of you to come into the position of bumping Mr. Miller. There was no reason why you could not have maintained your line and that was on the outside of SHABEEN, but you have as I say taken your mount inwards and bumped with EYE ON STEEL. Now you've heard my observations of the film, are there any questions of me on those*?"

The appellant's version of the incident, given very early in the proceedings, was as follows:

> *CHAIRMAN* *"Right. Mr. Harvey did you shift in onto Mr. Miller?*
>
> *HARVEY* *Yeah, there was an incident prior to this Sir and I was a little bit unhappy with the way Stephen had rode, sort of coming around the home turn and, and into the straight, I think my horse eventually had to come out of it. I think sort of after the race was over, I did come in to say something to Stephen so I let him know how I felt about it. I think we did come in contact I certainly didn't mean to, I sort of pulled my horse in to sort of see Stephen and, and tell him what I thought about what he'd done, I think we might have bumped, but I certainly didn't mean to, to bump Stephen ...*"

It can be seen, therefore, that the appellant has at least admitted to intentionally taking his mount in to Mr Miller and as a result bumping Mr Miller. The appellant has at all times denied the other particular of the charge, namely intentionally bumping Mr Miller.

The initial charge laid by the Stewards was different to that of which the appellant was ultimately convicted. The initial charge did not allege an intentional bumping, but was in these terms:

> "*... You are charged under that rule with improper riding, that improper riding being, that in the opinion of the Stewards, approximately 25m before the finish of the race, you have deliberately ridden your horse inwards towards Mr. Miller and as a result bumped heavily with Mr. Miller unbalancing his mount.*"

The appellant had earlier in the hearing pleaded not guilty to this charge in those terms. Following his plea of not guilty, there was much discussion between the appellant and the Stewards as to whether that initial charge included an allegation of intentional bumping. The Stewards assured the appellant that the charge did not include that particular allegation. However, it was never conceded by the Stewards that no such intention had existed.

Shortly after, or during, that discussion, the inquiry had to be adjourned due to time constraints. The inquiry resumed on Monday 15 September 1997.

At the resumption of the inquiry, the new charge as set out above was laid. Clearly, the new charge, did allege the particular of intentional bumping. The reason for laying the new charge was explained by the Chairman of Stewards as follows:

> *"On Saturday, there was, it was clear to me anyway that you were unclear of the actual particulars of the charge."*
>
> *"You should be clear in your own mind and without any doubt what you're facing here."*
>
> *"That's, that's why we've done this."*

Grounds 1, 2 and 3 of the appeal against conviction essentially complain of two things. Firstly, that the finding of guilt did not specifically include any finding of fact that the appellant deliberately bumped Mr Miller. Secondly, that the Stewards previous assurance that there was no allegation of intentional bumping was contradicted by their finding of guilt on the new charge, which included the allegation of intentional bumping.

We are of the opinion that there is no merit in any of the grounds of appeal.

The Stewards did find as a fact that the appellant deliberately bumped Mr Miller. The new charge was read to the appellant, and indeed was reduced to writing. The appellant's submissions following his plea of not guilty addressed that very point. By their finding of *"guilty as charged"*, in the context of all that had gone before, that finding could only mean and include a finding that the appellant had intentionally bumped Mr Miller.

The Stewards decision to lay the new charge with the more serious particular did not indicate a desire to do anything other than to clarify the nature of the charge for the benefit of the appellant. The inquiry was an ongoing thing, and no conclusion had been reached at the time the new charge was laid. The Stewards' decision, in effect to amend the first charge, by changing the particulars, was done in order to clarify for the appellant what he was facing.

The reasons given for the decision were as follows:

> *"Mr. Harvey the Stewards have considered the charge. We are of the opinion that after initially being held up in the early part of the straight, you have shifted out to obtain a clear run. You were successful in doing that, taking up a position back from and on the outside of the horse SHABEEN. You're approximately two horses from Stephen Miller, who's racing on your inside. Near the 25m mark, the Stewards believe that you shift in towards Miller, eventually bumping with Miller. We believe this movement inwards by you to be deliberate and definite. We are of the opinion that you have ridden improperly and we find you guilty as charged."*

It must be remembered that the Stewards are lay persons, not legally trained. They preside over a domestic tribunal, and apply the Rules of Natural Justice. Those Rules include a duty to give reasons, sufficient for any right of appeal to be exercised. Bearing in mind the proceedings during the inquiry as a whole, and in particular the lengths to which the Stewards went to inform the appellant of the particulars alleged against him, we are of the opinion that the reasons were adequate.

For all of the above reasons, we dismiss the appeal against conviction.

APPEAL AGAINST PENALTY

The appellant was suspended for a period of three months. The grounds of appeal allege that the Stewards failed to take into account the appellant's good record in recent times, the large number of racing in which he rides, and the financial consequences of the suspension. Obviously, if the Stewards failed to take those things into account, then the appellant would succeed in his appeal. They would be relevant to penalty, being part of his personal circumstances, or antecedents.

Two things arise out of those grounds of appeal, and the appellant's own submissions to the Stewards on penalty. Firstly, the appellant did not bring those things to the attention of the Stewards. Secondly, even without those submissions, the Stewards would have been aware of those factors. The Stewards have the role of policing the racing industry, as well as adjudicating, as in this case. The Stewards do not operate in a vacuum. Mr Harvey is the State's leading rider. The Stewards would have known that he would lose a number of important rides in the calendar in the forthcoming three months. Equally, the Stewards would have been aware of Mr Harvey's previous convictions.

In our opinion, it cannot be demonstrated that the Stewards failed to take into account, or failed to give adequate weight to, the matters complained by the appellant.

The grounds of appeal against penalty go on to allege that the Stewards failed to consider that the offence occurred in circumstances where the outcome of the race was unaffected, and the fact that the appellant attempted to rectify the situation as soon as it occurred.

In our opinion, those two appeal grounds were not made out. The Stewards watched the incident occur, and again would have been aware that the outcome of the race was unaffected. The appellant's attempt to rectify the situation was really a matter of self interest and self preservation, rather than a mitigating factor.

All that is left is the proposition that the penalty imposed was so far outside the range of penalties commonly imposed as to manifest error.

We cannot agree with that submission. Summaries of previous cases supplied to us on this appeal (part of Exhibit A) indicate that periods of suspension of three months are commonly imposed on conviction for improper riding. In Western Australia, a period of three months was imposed in respect of Jockey J Oliver on 1 March 1993. In Victoria, three months was imposed in respect of Jockey S T Aitken on 5 March 1982. In New South Wales, three months suspension was imposed in respect of Jockey D Beadman on 30 March 1991.

Those cases are by no means exhaustive. Further, the determination of the appropriate penalty in any case must depend on its circumstances. In our opinion, three months suspension for a jockey not without a previous conviction for improper riding is not so far outside the range as to manifest error.

For these reasons, we dismiss the appeal against penalty. The fee paid on lodgement of the appeal is forfeited.

PATRICK HOGAN, PRESIDING MEMBER