APPEAL 387

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT:	**PETER HUTCHINSON**
APPLICATION NO:	**A30/08/387**
DATE OF HEARING:	**8 OCTOBER 1997**
DATE OF DETERMINATION:	**8 OCTOBER 1997**

IN THE MATTER OF an appeal by Mr P Hutchinson against the determination made by the Western Australian Turf Club Stewards on 11 September 1997 imposing a 6 week suspension under Rule 81A of the Australian Rules of Racing.

Mr T Percy assisted by Ms Homer, instructed by D G Price & Co, represented the Appellant.

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

This is an appeal against conviction and penalty by Peter Hutchinson in respect of a determination of the Stewards of the Western Australian Turf Club wherein the Stewards suspended Mr Hutchinson from riding in races for a period of 6 weeks under Australian Rule of Racing 81A.

Mr Hutchinson was informed of the terms of the charge in the following manner:

"CHAIRMAN Mr Hutchinson, after considering the evidence placed before the Stewards, we have decided to charge you under Australian Rule Racing 81A(i) and I'll read you that rule: 'Any Jockey, Apprentice or Rider who: (i) presents himself to fulfil a riding engagement in a race or trial or for riding trackwork,' presents himself to fulfil, hang on, I'll read that again for you, 'presents himself to fulfil a riding engagement in a race or trial or for riding trackwork and is found to be under the influence of any alcohol, or any drug may be stood down from riding on that day and such person may be punished'. And I'll read you subsection (ii) as well: 'Has delivered a sample of his urine or otherwise taken as directed by the Stewards prior to, during, or after fulfilling his riding engagements in any race or trial or at riding trackwork which upon analysis has detected in it alcohol, or any drug or its metabolite or artifacts may be punished'. Now do you understand those rules Mr Hutchinson?

HUTCHINSON Yes Sir.

CHAIRMAN The charge is that when you Jockey Peter Hutchinson presented yourself to fulfil your riding engagements at the Kalgoorlie-Boulder Racing Club's meeting on Wednesday the 10th September, 1997 you delivered a breath sample, which upon analysis had detected in it an amount of alcohol at an unacceptable level as detailed in evidence given during this Inquiry. Now that's the charge, do you understand the charge?

HUTCHINSON Yes Sir."

The Appellant appealed against the decision and was granted a stay of the penalty pending the hearing of the appeal by this Tribunal. The grounds of appeal were as follows:

1. The Stewards erred in finding that the Appellant "presented himself" to ride in a race under Rule 81A.

PARTICULARS

(i) The Appellant was approached to take a test at around 12.15 p.m. His first scheduled race was for 12.57 p.m.

(ii) Under Rule 118 the rider need not weigh out until half an hour prior to the race.

(iii) There was no evidence that the Appellant had dressed in colours for the race (L.R. 65) or weighed out.

(iv) It could not accordingly be said that the Appellant had "presented himself" to ride; and there was no evidence to this effect.

2. The Stewards erred in finding the Appellant guilty of the offence under rule 81A, there being no admissible or reliable evidence that he was at any time "under the influence of alcohol".

PARTICULARS

(i) The question of whether a person is "under the influence of alcohol" is a question of fact.

(ii) A person will only be 'under the influence of alcohol' "if their mental and physical capacities are so affected that they are no longer in the normal condition".

(iii) There was no physical evidence before the Stewards that the appellant was "under the influence of alcohol" at any relevant time.

(iv) As distinct from an offence under Rule 81A(ii) a trace or metabolite of a drug or alcohol is insufficient to ground a conviction.

(v) In the absence of any deeming provision such as that contained in the Road Traffic Act, the results of any breath test could not be evidence that the Appellant was "under the influence of alcohol".

3. The Stewards erred in convicting the Appellant of an offence under Rule 81A(i) of the Rules of Racing in that they relied on evidence which was not properly admissible or reliable.

PARTICULARS

(i) There was no evidence before the Stewards of the type of apparatus used or its reliability.

(ii) There was no evidence before the Stewards as to the qualifications of the operator of the apparatus.

(iii) The tests were not taken in accordance with any known or recognised standard or procedure and did not comply with s.10 National Measurements Act.

(iv) "Breathalysers" in general are not notoriously accurate instruments and do not attract the common law presumption of accuracy.

(v) A consent under rule 81 to submit to testing does not validate the results of any form of test used by the Stewards.

4. The charge laid by the Stewards was one which was unknown under the Rules of Racing.

PARTICULARS

(i) Rule 81A(i) requires both presentation and a finding that the rider was under the influence of alcohol.

(ii) Rule 81A(ii) requires no presentation, but an actual fulfilment of a riding obligation. The mere presence of a prohibited substance will thereafter infringe the rule.

(iii) There is no element of "unacceptable limit" in respect of an offence under rule 81A(i).

(iv) The Stewards accordingly erred in misdirecting themselves as to the formal elements of a charge under rule 81A(i).

In addition to the above grounds of appeal against conviction, the Appellant also appealed against the penalty on the basis that it was excessive in all the circumstances of the case.

Rules 81A(i) and (ii) are in the following terms:-

> "81A. Any Jockey, Apprentice or Rider who:-
>
> (i) presents himself to fulfil a riding engagement in a race or trial or for riding trackwork and is found to be under the influence of any alcohol, or any drug may be stood down from riding on that day and such person may be punished.
>
> (ii) has delivered a sample of his urine or otherwise taken as directed by the Stewards prior to, during, or after fulfilling his riding engagements in any race or trial or at riding trackwork which upon analysis has detected in it alcohol, or any drug or its metabolites or artifacts may be punished."

In relation to grounds 1, 2 and 4 of the appeal, in my opinion they fall away because it is clear that in substance Mr Hutchinson was charged with an offence against Racing Rule 81A(ii), albeit, the Stewards were somewhat clumsy in conveying the terms of the charge to Mr Hutchinson and used unnecessary surplusage of language in formulating the charge. It does, however, seem clear to me that Mr Hutchinson was told of the essential ingredients of the charge.

Mr Hutchinson, in my opinion, was given an adequate opportunity to answer that charge and accordingly was not denied procedural fairness despite the imprecision on the part of the

Stewards in their identification of the particular rule under which Mr Hutchinson was charged. Rule 81A(ii) unlike Rule 81A(i) does not require proof of the jockey being "under the influence of alcohol" or require the jockey to have "presented himself" to ride in a race.

I discern the elements of Rule 81A(ii) to be:-

(1) "delivery of a sample of urine or otherwise" by the Jockey.

(2) The sample to be taken "as directed by the Stewards prior to, during or after fulfilling his riding engagement".

(3) The sample upon analysis must be found to have detected in it alcohol.

In respect of this first element, in my view on a proper construction, having regard to the entirety of Rule 81A, the reference to "or otherwise" should be construed to be a reference to any other sample of bodily substance from which alcohol can be detected. That would include blood, breath and saliva samples.

In my view the second element involves three alternatives:-

(a) taking a sample prior to the jockey undertaking his riding engagement;

(b) taking the sample during the jockey undertaking his riding engagement; or

(c) taking the sample after the jockey has fulfilled his riding engagement.

If the sample is taken prior to or during the riding engagements, I do not consider, as a matter of construction, it is necessary for the riding engagements to be fulfilled. In my view to construe the rule in that way leads to an unreasonable result and that would have the potential of defeating the purpose and effectiveness of the rule.

Further, in my opinion, if the test is taken prior to the riding engagement, it must be at a time that is not too long before the jockey's racing engagements commence since ultimately the rule

is aimed at preventing Jockeys from racing whilst they have alcohol in their system. There must be reasonable contemporaneity between the time of testing and the time the riding engagements are to be performed. In my view it was reasonable for the stewards to test the appellant at 12.15pm when his first race was due to commence at 12.57pm, ie 42 minutes before the race.

The third element is that the sample must be found to have detected in it alcohol. It is argued by the Appellant there was no admissible or reliable evidence of alcohol in the Appellant's system. (This is Ground 3 of the Grounds of Appeal.) The Stewards are not bound by the strict rules of evidence. They are, however, required to be satisfied that the proof put forward in respect of any matter before them is cogently probative of the matter and is sufficient to satisfy them of the matter on the balance of probabilities. I have reviewed the evidence before the Stewards surrounding the two breathalyser tests administered by Mr Greg Macintosh, the Assistant Racecourse Investigator, and the test subsequently performed at the Kalgoorlie Police Station. The Tribunal also had the opportunity of hearing Mr Macintosh give evidence before the Tribunal in which he, inter alia, told the Tribunal:-

(a) the breathalyser he used was a Drager Alcotest 7410 which device he showed to the members of the Tribunal;

(b) that the unit was 2 years old and is tested for accuracy every 6 months;

(c) that he was trained by Mr Ron Goddard, who is a special constable of the WA Police Force, in the use of the machine in accordance with the manufacturer's instructions; and

(d) that a sterilised mouth piece was used prior to the test.

Mr Macintosh agreed he had no medical qualifications and it was also apparent he did not fully appreciate the precise nature of the measurement the breathalyser recorded (ie percentage of alcohol per volume of blood), but at least understood it detected the presence of alcohol in a breath sample.

The details of the police breath test are contained in Exhibit B of the documents to the Stewards' Inquiry. The question for the Tribunal is whether there was cogently probative evidence to establish on the balance of probabilities that Mr Hutchinson had detectable amounts of alcohol in his system when he was tested. In my opinion the evidence was cogently probative of the fact that Mr Hutchinson had detectable amounts of alcohol in his system. The fact that the detected percentage of alcohol reduced from 0.044 to 0.022 over three tests during a period of 48 minutes does not in my opinion prevent the Tribunal reaching that finding on the balance of probabilities. Despite the eloquence of Mr Percy's argument, this Tribunal is not concerned with applying strict rules of evidence nor with the need for matters to be proven beyond a reasonable doubt. Section 11 of the Racing Penalties (Appeals) Act 1990 requires the Tribunal to act according to equity, good conscience and the substantial merits of the case.

For the reasons set out above I am of the view that all four grounds of appeal against conviction fail.

Appeal Against Penalty

Having regard to:-

(1) the inherent dangerousness of the sport of racing in which mistakes of judgment on the part of Jockeys not only pose a risk to themselves but also to other Jockeys and horses;

(2) the need for the Stewards to be able to send a clear message to Jockeys that fronting up to undertake their racing engagements whilst still having alcohol in their system is a serious offence against the Rules of Racing;

(3) the fact that the 6 week suspension from racing imposed by the Stewards does not prevent Mr Hutchinson from continuing to undertake track work and trial work and therefore does not altogether remove his ability to work as a Jockey; and

(4) that in cases where low levels of cannabis or merely the existence of a metabolite of cannabis in a Jockey's urine sample have lead to suspensions of up to double the amount of the suspension of Mr Hutchinson.

I am not persuaded the penalty was outside the range of penalties appropriate for this offence. I would, however, add that that penalty was towards what I would perceive to be the upper end of the range of severity of penalties that would be open in such a case.

ROBERT NASH, MEMBER

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APPEAL 387

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J HEALY (MEMBER)

APPELLANT:	**PETER HUTCHINSON**
APPLICATION NO:	**A30/08/387**
DATE OF HEARING:	**8 OCTOBER 1997**
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IN THE MATTER OF an appeal by Mr P Hutchinson against the determination made by the Western Australian Turf Club Stewards on 11 September 1997 imposing a 6 week suspension under Rule 81A of the Australian Rules of Racing.

Mr T Percy assisted by Ms Homer, instructed by D G Price & Co, represented the Appellant.

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

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

JOHN HEALY, MEMBER

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

APPEAL 387

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (PRESIDING MEMBER)

APPELLANT:	**PETER HUTCHINSON**
APPLICATION NO:	**A30/08/387**
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IN THE MATTER OF an appeal by Mr P Hutchinson against the determination made by the Western Australian Turf Club Stewards on 11 September 1997 imposing a 6 week suspension under Rule 81A of the Australian Rules of Racing.

Mr T Percy assisted by Ms Homer, instructed by D G Price & Co, represented the Appellant.

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

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

The appeal as to conviction and penalty is dismissed.

The fee paid on lodgement of the appeal is forfeited.

P J Hogan

PATRICK HOGAN, PRESIDING MEMBER

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