APPEAL 427

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**PAUL JAMES HARVEY**
APPLICATION NO:	**A30/08/427**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**13 AUGUST 1998**
DATE OF DETERMINATION:	**13 AUGUST 1998**

IN THE MATTER OF an appeal by Mr P J Harvey against the determination made by the Western Australian Turf Club Stewards on 29 July 1998 imposing 12 days suspension under Rule 137(a) of the Australian Rules of Racing.

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

Mr B Lewis appeared for the Western Australian Turf Club Stewards.

INTRODUCTION

This is an appeal against conviction and penalty.

The appellant was the rider of OFF THE TAP. That horse won Race 7, the Fremantle Dockers Handicap, over 1400 metres at Belmont Park on Wednesday, 29 July 1998.

Following the race, the Stewards opened an inquiry into interference suffered to MOONIJIN FLYER (ridden by P Knuckey) and WESTERN PUMA (ridden by Danny Miller) over the last 100 metres. The Stewards heard evidence from the appellant himself, Mr Knuckey and Mr Miller.

EVIDENCE AT THE INQUIRY

None of the Stewards present gave direct evidence of observations of the race. However, the Chairman of Stewards gave his comments on the race film after it had been viewed by all parties. The Chairman's comments at page 4 of the transcript were as follows:

> *"Riders my reading of that film that OFF THE TAP ridden by yourself Mr. Harvey has from about the 150m commenced to shift in, you continue to ride OFF THE TAP along quite vigorously, getting to about the 60m probably about the 75m even you caused MOONIJIN FLYER ridden by P. Knuckey to be carried inwards causing Mr. Miller on WESTERN PUMA to restrain from MOONIJIN FLYER's heels. You continue to ride along and getting to about the 25m, probably just inside the 25m, as a result of your shift inwards*

Mr. Knuckey himself has had to ease as a result of crowding from the outside, but I would say it's as a result of your moving inwards that caused both Mr. Knuckey and Mr. Miller to be inconvenienced to varying degrees Mr. Harvey. What would you say on my reading of the film and also your own observations of the film?"

Following the investigation part of the proceedings, the Stewards charged the appellant with an offence against Australian Rules of Racing 137(a). That rule 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 specifics of the charge were related by the Chairman at page 11 of the transcript. They were:

" ... inside the final 100m whilst riding your mount along, you allow OFF THE TAP to shift inwards, carrying MOONIJIN FLYER ridden by P. Knuckey in, causing WESTERN PUMA (D. Miller) to restrain near the 50m. You continue to ride OFF THE TAP along and near the 25m, shift in causing MOONIJIN FLYER to ease."

The appellant pleaded not guilty. However, he was convicted and suspended for 12 days.

The appellant's version of events, in relation to the alleged interference to WESTERN PUMA, was given at pages 4 and 5 of the transcript, as follows:

"I think my horse has put a degree of pressure on both Mr. Knuckey's and Mr. Miller's, but even before my, my horse has nearing the line, but even before I put pressure on Danny Miller's mount, his horse shifts in himself, his horse is shifting in under pressure himself. I don't know from what I see Danny's was finished you know, his horse wasn't going, going anywhere anyhow and if it would he could have held his position, but to me he certainly hasn't checked and you said he restrained I guess.

Ease or restrained you know, I think he's well and truly beaten and just getting out of the way I think, if I'd stopped riding my, my mount and you know cost my horse the race, I think it'd be a bit of injustice to the punters because it you know, from being out there and seeing the film I, I don't think there's you know, really been any interference to any real degree."

In relation to the alleged interference to MOONIJIN FLYER, the appellant said at page 8 of the transcript:

"Yeah, yeah I, I've carried Mr. Knuckey in, I never said I haven't, yeah I have, but I felt at the time I was never placing any rider in any, any danger and I think that's evident on the film."

GROUNDS OF APPEAL

The grounds of appeal against conviction were as follows:

"1. The Stewards erred in convicting the Appellant of the offence in that their finding of carelessness was unreasonable, against the evidence and the weight of the evidence.

Particulars

(i) The Stewards made a finding of interference without finding that the interference was caused by carelessness on the part of the Appellant.

(ii) Not every incident where interference is suffered is necessarily referable to carelessness.

(iii) The evidence of Knuckey was that whilst the Appellants mount was on an inward course there was no effective interference until the result of the race was beyond doubt. His mount finished fifth. He did not protest nor did the Stewards.

(iv) For the Appellant to be guilty of carelessness within the meaning of Rule 137(a) there would need to be evidence that he displayed a lack of care that was inappropriate in the circumstances. Given his obligation under the Rules of Racing to ride his mount out and obtain the best possible place in the field it could not be said that the riding was careless.

2. *Insofar as the charge related to interference to the horse WESTERN PUMA there was no evidence that WESTERN PUMA was effectively interfered with by the Appellant's riding.*

Particulars

(i) Any interference suffered by WESTERN PUMA was a result of contact with the horse MOONIJIN FLYER.

(ii) The horse WESTERN PUMA was tiring and shifting inwards before there was any suggestion of the Appellants mount being in the vicinity.

(iii) Any interference sustained by WESTERN PUMA had no effect on the result of the race.

(iv) WESTERN PUMA's rider said that the horse ought to have finished between 7th and 8th without the interference. He finished 7th.

3. *The Stewards erred in charging the Appellant with one charge relating to two separate incidents. There ought properly have been two charges and the conviction should accordingly be declared void.*

Particulars

(i) The single charge alleged that;

(a) inside the final 100m he interfered with MOONIJIN FLYER and WESTERN PUMA; and

(b) that near the 25m mark he continued to ride his mount along, shifted in and caused MOONIJIN FLYER to ease.

(ii) As different considerations applied to each allegation, and the Appellants answer to each allegation, they should have been dealt with separately.

(iii) The Stewards finding made no attempt to differentiate between the two allegations and is seriously defective failing to separately consider the Appellant's answer to each particular allegation.

(iv) The Stewards finding and reasoning was accordingly defective and the conviction should be set aside."

DECISION

In my view, there is no merit in ground one. The question of what weight was to be placed on the evidence, and what inferences drawn, was one of fact. The Stewards were in the best position to do that, and I am not persuaded that their decision was so unreasonable that no Stewards acting reasonably would have reached those conclusions. Similarly, ground two lacks merit, for the same reasons. Accordingly, grounds one and two must fail.

Ground three however, is made out. The specifics of the charge, as mentioned above, clearly relate to two separate incidents. The Chairman refers to a shift inwards carrying MOONIJIN FLYER inwards and causing WESTERN PUMA to restrain near the 50 metre mark. The Chairman then refers to a shift in near the 25 metre mark.

Significantly, the specifics of the charge were different than the Chairman's initial comments on the reading of the film, given at page 4 of the transcript. There, the Chairman does not differentiate between any shifts inwards, but rather refers to one continuous piece of riding.

In my view, considering all of the evidence given, the appellant could not reasonably know which charge he was facing. Indeed, he may have thought that there was only one incident alleged. At the very least, it was not made clear to him.

This case is similar to that considered in Appeal 353, Paul James Harvey. Although that appeal concerned the Stewards' failure to properly consider the elements of one single charge, the comments of the learned Chairperson of the Tribunal, Mr Mossenson, are relevant. The Chairman said at page 5 of the judgement:

> *"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."*

In this appeal, the Stewards in fact alleged two separate incidents. The appellant could not know which incident led to the finding of guilty. In the case of VRISAKIS v AUSTRALIAN SECURITIES COMMISSION (1992-93) 9 WAR 395, Ipp J said at page 438:

> *"However, even where the trial takes place before a judicial officer without a jury, duplicity in the charge means that there is a significant risk of injustice. A defendant should not be placed in the position where he is faced with having to exculpate himself in regard to what are in effect several charges, so that, at the end of the evidence, the prosecutor can select and press the charge where the defendant's answer turns out to be the weakest: see Johnson v Miller (1937) 59 CLR 467 at 495, per Evatt J. Further, as his Honour said (at 497-498):*

> *'It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him.'*
>
> *Apart from anything else a defendant is entitled to have the offences specified in individual complaints so that he can plead guilty to one or more if he wishes: see Johnson v Miller (supra) (at 498). He must know precisely what he is called upon to answer."*

Those comments are entirely relevant to this appeal.

In giving these reasons, I do not suggest that the Stewards lay a multiplicity of charges in future arising out of every race incident. Riding in a race is a continual thing. It takes place over time and distance. So a particular piece of riding may also take place over time and distance, and if contrary to the rules may result in one single charge being laid. The difference in the present appeal is that the specifics of the charge clearly relate to two separate pieces of riding.

It is for these reasons that I allowed the appeal at the conclusion of the hearing on 13 August 1998.

P. J. Hogan

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Appeal Tribunal of W.A.