APPEAL - 452

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**PAUL JAMES HARVEY**
APPLICATION NO:	**A30/08/452**
PANEL:	**MR J PRIOR (PRESIDING MEMBER)**
DATE OF HEARING	**18 MARCH 1999**
DATE OF DETERMINATION:	**18 MARCH 1999**

IN THE MATTER OF an appeal by Mr P J Harvey against the determination made by the Western Australian Turf Club Stewards on 8 March 1999 imposing a 14 day suspension for breach of Rule 137(a) of the Rules of Racing of the Western Australian Turf Club.

Mr P Harris, instructed by D.G. Price and Co, appeared for the appellant.

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

This is an appeal against conviction and penalty. The Appellant, Mr Harvey was convicted of breaching Australian Rule of Racing 137(a) for his riding of the horse DIAMOND LAURIE at the 550m mark in Race 1, the Admiral Lincoln Handicap at Ascot on 8 March 1999 by crowding the horse ORDERED ridden by Jockey Noske and causing that jockey to check his horse.

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"*

It has been said on a number of occasions by this Tribunal that the most significant words in this Rule and appeals of this nature are *"in the opinion of the Stewards"*. I have previously said in the decision of Knuckey in Appeal 393 that successful appeals of this nature are rare. It is not a case of substituting an opinion of the Appellant or this Tribunal for that of the Stewards. It must be shown that the Stewards erred in a material particular when coming to their opinion and as a result of that, their subsequent findings are in error or that no reasonable Stewards could have come to such an opinion on the evidence.

In this case in relation to the appeal against conviction, there are two grounds of appeal. They are as follows:

"1. 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.

2. The Stewards erred in failing to give reasons or sufficient reasons for convicting the Appellant."

The evidence in this matter was the following:

- the testimony from Jockey Noske, the rider of ORDERED;
- the testimony from Jockey Harvey, the rider of DIAMOND LAURIE;
- the eyewitness account from the Steward, Mr P J Chadwick who was in the 600m tower; and
- the various race films.

That was the totality of the evidence which the Stewards had before them to form their opinion and consider if Rule 137(a) had been breached.

In relation to the first ground of appeal, the substance of the Appellant's argument is the age and inexperience of the horse he was riding, the way Jockey Noske rode his horse and the late call Jockey Noske made in the course of going through the 600m mark, were significant factors which caused the incident. They were primarily evidentiary matters that were considered of some significance in the opinion of Mr Harvey. They were matters which were before the Stewards and it was for them to decide what weight, if any, they gave to that evidence in coming to their opinion.

I am satisfied having heard submissions from Counsel, having seen the race films, having been taken through the transcript and having read the transcript, that there is nothing before me that suggests that on the totality of the evidence, the Stewards erred in coming to the opinion they did that the riding was careless or no reasonable Stewards could have come to such an opinion.

As to Ground 1 Particular (e) where it refers to the Appellant's duty to ride in a competitive manner in accordance with Australian Rule of Racing 135(b), that Rule must always be considered in balance with Rule 137. When someone is convicted of careless riding or one of the other types of offences under Rule 137(a), it is therefore almost axiomatic that the riding was such that reasonable and permissible measures were not taken because the riding was either careless, improper, incompetent or foul.

In relation to the second ground of appeal against conviction, essentially the finding of conviction was that the Appellant was guilty as charged. It is not the first time in this code or the other two codes of racing that come before the Tribunal that I have seen a finding of this nature. There is some criticism as to the lack of reasons for conviction. In considering that argument I think there are two significant factors that have to be considered and they are the following:

1. The time over which the Stewards' inquiry was held. In other words, the circumstances of which the inquiry was held in. What is of significance in this matter is this was an inquiry that took place in two hearings over a race meeting. That is something totally different to an inquiry that is convened on a non-race day.

2. The second matter which is of significance when considering the argument as to whether there are sufficient reasons for conviction is the volume or the type of material that the Stewards are

being asked to consider. Is there significant expert evidential material? Is the issue difficult? Is there a great volume of evidence?

In terms of this matter, careless riding charges are unfortunately not uncommon in this code. The best evidence of the amount of material before the Stewards in this matter, putting aside the race films, is the total transcript of the two inquiries, is sixteen pages in length.

It is implicit from the transcript that the Stewards, in coming to their decision to convict the Appellant for the breach of Rule 137(a), have looked at the charge as they were the persons who framed the charge, the evidence that was before them, which I have already stated, and considered the relevant Rule. In those circumstances I am not satisfied that the way the Appellant was convicted is such that an error of law is manifest in that there was insufficient reasons for convicting the Appellant.

For those reasons I would dismiss the appeal against conviction.

On the question of penalty there are two grounds of appeal as follows:

> *"1. The penalty imposed was excessive in all the circumstances of the case.*
>
> *2. The Stewards erred in failing to give reasons or sufficient reasons for imposing the 14 day suspension which they did."*

In relation to these matters there are also particulars filed in support of each ground.

In relation to the first ground of appeal against penalty, the onus is on the Appellant to satisfy me that either the penalty was manifestly excessive in the circumstances, or the Stewards made an error in imposing the penalty they did. The penalty imposed I consider is consistent with the view the Stewards took of the particular incident on the evidence. In any event, I am not satisfied having seen a number of these penalties and having been referred to in the transcript the penalties that this Appellant has received previously for these type of offences, that the penalty of 14 days suspension was manifestly excessive in the circumstances.

In relation to the second ground, which to some extent reflects the second ground of the appeal against conviction, there is a significant difference in that the Stewards in handing down their penalty have set out some reasons for the penalty. Nevertheless, one of the particulars that has been referred to is that the Stewards failed to refer to any of the mitigating factors relevant to the case. It must be acknowledged in this case, the Appellant was given the opportunity to put to the Stewards factors that he considered were mitigating in the circumstances of the case. In this matter, the Appellant's response was that he didn't think it made any difference and it never seemed to make much difference. I consider in those circumstances it is difficult to find that the Appellant has been able to satisfy me that the Stewards erred in imposing the penalty they did, by failing to take into account any relevant mitigating circumstances.

For those reasons the appeal against penalty is also dismissed.

The only matter I now need to comment on is the last submission which was made by Senior Counsel for the Respondent as to the question of the effect of the stay of penalty granted to the Appellant pending the hearing of this appeal. Counsel for the Respondent has asked me to consider exercising my powers under the Act to increase the penalty imposed by the Stewards to reflect the practical benefit to the Appellant of having being granted the stay until this matter was disposed of on hearing of the Appeal. There are two matters that I am satisfied that in the circumstances, putting

aside the merits of the argument by Senior Counsel for the Respondent, that persuade me not to increase the penalty and they are:

1. The matter that was raised by Mr Harris for the Appellant in reply that the Appellant has received no notice of this application; and

2. In any event, even though I am told tonight that the 14 day suspension penalty was imposed with consideration of the forthcoming rides such as those available to the Appellant in the Bunbury Carnival by the Stewards, unfortunately in his reasons for decision, the Chief Steward has not made any comment in relation to that. I therefore find it difficult in the circumstances now to read into that decision that this was a matter which was taken into account in imposing penalty.

For those reasons I will not increase the penalty from a 14 day suspension.

The suspension of operation of the penalty automatically ceases.

John Prior

Seal of the Racing Penalties Appeal Tribunal of WA

JOHN PRIOR, PRESIDING MEMBER