

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/485
PANEL: MR J PRIOR (PRESIDING MEMBER)
DATE OF HEARING 18 JANUARY 2000
DATE OF DETERMINATION: 19 JANUARY 2000

IN THE MATTER OF an appeal by Mr P J Harvey against the determination made by the Western Australian Turf Club Stewards on 30 December 1999 imposing 25 days suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr T F Percy QC and Ms J Mclean instructed by D G Price & Co, appeared for the appellant.

Mr J A Zucal appeared for the Western Australian Turf Club Stewards.

The appellant was the rider of LIZZY LONG LEGS, which ran in Race 7 at Ascot on Tuesday, 28 December 1999. Following the race the Stewards opened an inquiry into the reason for SIADA BINT checking badly at about the 450m and CORPORATE SUCCESS falling.

As a result of that inquiry Mr Harvey was charged with careless riding under Rule 137(a) of the Australian Rules of Racing. The Chairman of Stewards announced the charge in the following terms:

“ ... in the opinion of the Stewards, you shifted in approaching the 400m in Race 7 the Hahn Premium Light Classic which was run at Ascot on Saturday, Tuesday the 28th December, 1999 and thereby crowd ACADEMY GIRL onto JEVANSWER which in turn tightened SIADA BINT causing it to check severely and in turn cause CORPORATE SUCCESS to blunder and fall.”

Mr Harvey pleaded not guilty. After further deliberations, the Chairman of Stewards announced their finding as follows:

“Mr. Harvey the, the wording of the Australian Rule of Racing 137(a) such, “That any rider maybe punished if in the opinion of the Stewards, he is guilty of careless riding ...” The wording of the Stewards, of the Rule, allows for the Stewards to form the opinion and their own individual opinions, as to the guilt of any rider charged under this Rule. Now the unanimous opinion of the Stewards is that, you are guilty of the charge. In saying that, that some of the reasons why the Stewards formed their opinions and collectively the opinion of

the Stewards is such that, at the time immediately prior to the tightening, that there was no movement in the opinion of the Stewards, outwards from the horses ACADEMY GIRL and JEVANSWER, as those two mares had moved outwards some distance prior in relation to the easing of the horse CALOPHYLLA. Further, the Stewards believe that HOLLY BELLE's movement is brought about the pressure that's put to bear on that mare by SIADA BINT when it indeed was tightened, therefore the Stewards don't believe that it was a contributing factor by the way of its movement and indeed, Jeff Noske, Jockey Jeff Noske places no blame at all on HOLLY BELLE's movement as being contributing to his check. The evidence of Steward Peter Chadwick is fairly significant in that Mr. Chadwick had from his 400m elevated tower, first hand viewing of this particular incident and unaided by video, and he formed the impression that your horse had "Appeared to shift in onto ACADEMY GIRL." Stewards are satisfied with the evidence of Peter Knuckey and Patrick Carbery with regards to where their tightening came from and further, that both Stewards (sic) stated that Peter Knuckey had said during the course of the race and they agreed during the course of the race, "It was Harvey" in reference to the question from Carbery about keeping off. Now as such, I say Mr. Harvey we find you guilty of the charge."

Mr Harvey declined to make any submissions in respect to penalty. The Chairman of Stewards announced the penalty of suspension for 25 days in the following terms:

"Mr. Harvey in assessing a penalty the, the Stewards are not assisted at all by the absence of mitigating circumstances on your behalf. However, we have done out (sic) best to assess the circumstances and we see that the severity of the check is certainly at the upper reaches being that, one horse and rider fell and the horse in question has received some fairly substantial injuries and indeed, there was a severe check to another horse namely SIADA BINT. We're conscious of the number of rides and indeed, the profile of yourself as a rider. We've referred to your record and you're (sic) record shows that only over the last 13, 14 months, that you have been suspended for 14 days on the 27th November, '98 for 15 days on the 1st, sorry on the 9th of January, 1999 for 14 days of (sic) the 8th March, 1999 and 21 days on the 29th of September, 1999. Now quite simply Mr. Harvey although that you ride many races and on many tracks and are indeed, the number one rider in this Sate, those four suspensions in the period of 13 months effectively puts you somewhat in a poor record bracket. The Stewards as I say, are not assisted by the absence of mitigating factors and assessing the penalty we can only take into consideration what our knowledge is as I have announced. Without entering into an exercise into mathematics of pluses and minus, the Stewards believe that a suspension from riding in races for a period of 25 days would be appropriate and such suspension would commence at midnight on the 3rd January, the year 2000 to allow you to fulfil your engagements at Ascot on the 1st January and the 3rd January and would finish at midnight the 28th January, the years 2000."

On 31 December 1999 the appellant applied for and was granted a stay of proceedings by this Tribunal until midnight on 14 January 2000 or as otherwise ordered. On 7 January 2000 the Tribunal extended the suspension of operation of the penalty until midnight on 18 January 2000. I have extended the Stay of Proceedings until midnight on 19 January 2000.

Mr Harvey has appealed against both the conviction and the severity of the penalty.

The grounds of appeal are:

A. CONVICTION

1. The charge was inherently bad for duplicity.

Particulars

- (a) The charge alleged carelessness resulting in two separate sequels:
 - (i) a “check” to SIADA BINT, and
 - (ii) a fall by CORPORATE SUCCESS.
 - (b) Both aspects of the allegation were not necessarily linked, and a finding of carelessness in respect of one of them would not automatically require a similar finding on the other.
 - (c) Both sequels to the alleged carelessness involved consideration of causation, remoteness and external contribution which could only be done by way of separate charges being laid.
 - (d) The non-separation of the two aspects of the charge and the joint consideration of them by the Stewards was erroneous.
2. The Stewards erred in convicting the Appellant in that the findings of fact made by the Stewards:
- (a) included mistakes of fact;
 - (b) relied on irrelevant material;
 - (c) involved internal inconsistencies;
 - (d) was contrary to their earlier decision to dismiss the protest in the race, and
 - (e) were against the weight of the evidence.

Particulars

- (a) **Mistakes of Fact**
 - (i) The Stewards erred in finding that the Appellant crowded ACADEMY GIRL on to JEVANSWER.
 - (ii) The Stewards erred in accepting the evidence of the rider Noske that there was no outward movement by the horse HOLLY BELLE.
 - (iii) The Stewards erred in effectively finding that the movement from HOLLY BELLE was indirectly caused by the Appellant.
 - (iv) The Stewards erred in finding that SIADA BINT was “checked” when in fact it blundered.
- (b) **Irrelevant Material**
 - (i) The Stewards misstated the evidence of Noske.

- (ii) The Stewards relied on the opinions of riders Knuckey and Carberry as to the cause of the interference rather than their evidence.

(c) **Internal Inconsistencies**

- (i) The Stewards both accepted and rejected the evidence of Noske.
- (ii) The Stewards found movement on the part of the horse HOLLY BELLE but found it not to be a factor in the check to SIADA BINT.

(d) **Finding on the Protest**

- (i) The protest by the rider Jackman alleged interference from the 400m mark.
- (ii) The protest was dismissed.
- (iii) The charge of careless riding relates to alleged interference at the 400m mark and was found proved.

(e) **Weight of the Evidence**

- (i) The movement by HOLLY BELLE was beyond any doubt a contributing fact to the fall.
- (ii) Whether or not the movement by HOLLY BELLE was ultimately indirectly attributable to Harvey does not excuse the mistaken finding of fact.

3. The Stewards made inadequate findings of fact and gave inadequate reasons in respect of the fall of CORPORATE SUCCESS.

Particulars

- (a) The fall of CORPORATE SUCCESS was a specific part of the charge.
- (b) The Stewards made no or no sufficient finding of fact as to the Appellant's culpability in respect of the fall.
- (c) The Stewards gave no reasons in relation to the fall, its relation to the initial interference, and the contribution of HOLLY BELLE in respect thereto.

4. The Stewards erred in forming an opinion before hearing the whole of the Appellant's case.

Particulars

- (a) The standard of proof is a very low one, being the 'opinion of the Stewards'.

- (b) Whilst in preferring a charge the Stewards may hold a preliminary, provisional or *prima facie* view, they may not form an opinion on the substance of the matter for determination.
- (c) In forming a concluded opinion on the central factual issues prior to a full consideration of the charge, the Stewards were in error.

B. PENALTY

- 5. The Stewards erred in imposing a penalty on the basis that the Appellant had caused the fall of CORPORATE SUCCESS.
- 6. The Stewards erred in imposing a penalty which reflected the consequences of the carelessness rather than the degree of carelessness and the quality of the riding.
- 7. The Stewards erred in finding the culpable riding to be at the upper end of the scale, particularly in view of their earlier decision to dismiss the protest.
- 8. The Stewards erred in dealing with the matter on the basis of there being no mitigating circumstances whatever, and that the failure of the Appellant to put forward any matters in mitigation entitled them to deal with the matter as if there were no mitigating factors at all.
- 9. The penalty was accordingly void and should be set aside.
- 10. The penalty was in any event outside a broad discretionary range of penalties open on the facts of the case.

APPEAL AGAINST CONVICTION

Ground 1

With respect to this ground, Senior Counsel for the Appellant has referred to the decision of this Tribunal in PG Ball, Appeal 336. The ground on which that Appeal was allowed involved a submission that the charge was bad for duplicity because it dealt with, in one charge, the Appellant's behaviour towards two separate Apprentices and was particularised as conduct which required a separate assessment. I consider this matter to be, distinguishable from the matter of Ball.

The Stewards, in charging the Appellant, stated that his riding at the 400 metre mark in the race was responsible for the crowding of ACADEMY GIRL onto JEVANSWER, which in turn tightened SIADA BINT, causing it to check severely and in turn cause CORPORATE SUCCESS to blunder and fall. I accept that all these various actions of the horses could possibly have not been directly attributable to the Appellant's riding of his horse at the 400 metre mark. Nevertheless, the Stewards charged the Appellant that his riding caused all the various actions of the various horses. The Stewards came to the opinion when considering the evidence that the charge was proved and clearly came to the opinion that the Appellant's riding was responsible for all of the four other horses' various actions. In those circumstances, I am unable to find that the charge was duplicitous, because it was clear to the Appellant that the Stewards, in forming the charge and subsequently finding him responsible in his riding for all these various events occurring and ultimately, the blunder and fall of CORPORATE SUCCESS. The Stewards in formulating the charge clearly were stating the Appellant's riding was solely responsible for all the subsequent acts.

The Stewards, in finding the Appellant guilty, found him "guilty of the charge." The fact that the Stewards found the Appellant's riding responsible for all the subsequent actions of the other horses mentioned, is clearly evident from the Stewards' reasons for conviction and their reasons for imposing the relevant penalty.

This Ground of Appeal is therefore dismissed.

Ground 2

In this ground, it is generally submitted on behalf of the Appellant that the Stewards came into error in convicting the Appellant on the evidence available to them. The evidence that was available to the Stewards, at this Inquiry, was the evidence of five jockeys, including the Appellant, who had participated in the race the subject of the Inquiry, the Steward Chadwick who was viewing the relevant incident from the Steward stand near the 400 metre mark and the various race films which I have had the opportunity to view and submissions have been made on by both the Appellant and Respondent's representatives.

I have been reminded by Mr Zucal for the Stewards, that the conviction occurs as a result of a breach of a rule which specifies that an offence is committed if "in the opinion of the Stewards", a particular thing occurs. (See T.K. Jackman, Appeal 335.)

To some respect, the difficulty in this matter in considering whether the Stewards have come to any error on considering the evidence and convicting the Appellant, has been complicated by the fact that the rider of the horse Holly Belle, jockey Turner, whose horse came into consideration in the Stewards' Inquiry, did not appear before the Stewards. I note with this respect, it was open to the Appellant to have called that jockey and this has been conceded by Senior Counsel for the Appellant.

In this matter, I have also been provided with the transcript of the objection hearing concerning the rider T Jackman heard by the Stewards on the 28 December 1999. The Appellant submits that the finding on the objection hearing by the Stewards dismissing Jackman's allegation of interference by the Appellant, is inconsistent with the conviction of the Appellant at the Stewards' Inquiry on 30 December, 1999. I am satisfied after hearing submissions from the representatives of both parties that the matter the subject of the objection hearing was an entirely separate incident in the race and therefore, is irrelevant in the course of these proceedings.

I am not satisfied on considering the submissions made in support of this ground and all the evidence which was available to the Stewards, that the opinion of which the Stewards came to in convicting the Appellant of the charge was unreasonable and not in accordance with the evidence.

This Ground of Appeal is therefore dismissed.

Ground 3

With respect to this ground, I repeat that the Appellant was charged with causing all the various horses' actions cited in the charge as a direct result of his careless riding, including the horse CORPORATE SUCCESS blundering and falling. My reading of the charge and the evidence before the Stewards' Inquiry, indicates to me that the Stewards have clearly found in their reasons for conviction that in their opinion, the careless riding of the Appellant, in the shifting of his horse in approaching the 400 metre mark, inevitably caused the blunder and fall of the horse CORPORATE SUCCESS.

The Stewards in their reasons for decision in the consideration of the evidence, have clearly rejected that the riding of the horse HOLLY BELLE caused the horse SIADA BINT to check, which in turn caused CORPORATE SUCCESS to blunder and fall. In those circumstances, given the particularisation of the charge, I am satisfied that the reasons were adequate in the circumstances.

This Ground of Appeal is therefore dismissed.

Ground 4

Shortly after the Appellant was charged, the Chairman of the Stewards in response to a request from the Appellant for reasons as to why he was charged, said the following:

“Yes, well the reason, the reasons that we have is that the Stewards as I say in the charge, have formed the opinion that you shifted in approaching the 400m and then thereby, crowded those horses on your inside and in turn causing SIADA BINT to check severely. We've formed that opinion at this stage related to the charge as such, but before we consider the charge in total, we will give you the opportunity to put anything else you wish before us Mr Harvey.”

I consider the use of the words by the Chairman on two occasions in the above statement indicating that the Stewards had jointly formed an opinion that the Appellant's shifting of his horse had caused the crowding on the horses on his inside and in turn, causing SIADA BINT to check severely at that time in the proceedings was inappropriate.

Immediately following that statement, the Appellant was asked whether he wanted to put anything more before the Stewards and not surprisingly, stated "No, there's nothing else." He was then told after this to wait outside for the Stewards to consider the charge and he was then convicted of the charge and given the reasons for such conviction.

Senior Counsel for the Appellant has submitted that the statement by the Chairman of the Stewards, prior to the Appellant having the opportunity to produce any further evidence in answer to the charge, suggests that the Stewards had already decided the ultimate issue, that is, whether the riding was, in their opinion, careless and therefore the charge was in fact proved.

I am satisfied that the effect of this statement by the Chief Steward gives the impression that the Stewards had formed a concluded opinion on the central issue prior to their full consideration of the evidence available on the charge. This may have had significant effect on the Appellant seeking to adduce further evidence such as to request the rider of HOLLY BELLE being called. In those circumstances, I am satisfied the Stewards fell into fundamental error. On this basis, I would allow this ground of appeal.

In the circumstances, considering in particular that this matter was presided over by the Chairman of the Stewards, the Deputy Chairman of the Stewards and two senior Stewards, I can see little merit, in view of this error made by the Stewards, in referring the charge back to the Stewards for further consideration on all the evidence which may be available. In those circumstances, I would allow the Appeal Against Conviction and set aside the conviction.

APPEAL AGAINST PENALTY

The general submissions made by the Appellant against penalty are set out in Items 5-10 of the Grounds of Appeal, which I have already referred to in this decision.

I consider there is no merit in submissions 5,6 and 7 given my reasons for decision in dismissing Grounds 1,2 and 3 in the Appeal Against Conviction.

With respect to the remaining submissions on the Appeal Against Sentence, I have been referred to my previous decision in the matter of PD Knuckey Appeal 393. That decision has subsequently been cited in decisions of this Tribunal as setting a general tariff for careless riding of penalties in a range of 7-21 days suspension. (See M Sestich Appeal 469).

In that decision, in dealing with penalty, I said the following:

“The Stewards have effectively in their findings on penalty, penalised the appellant as the sole cause of the incident in question and therefore, the author of the subsequent consequences. On that basis, I am satisfied they have fallen into error. If in fact the Stewards had charged the Appellant, for example with careless riding by the tightening and by being a participant or contributing factor in the fall, in those circumstances I would have been satisfied that a penalty in the range of 7-21 days suspension may have been an appropriate penalty on conviction”.

I am satisfied that had I not allowed the Appeal Against Conviction pursuant to Ground 4, that the penalty of 25 days suspension was not outside the general range of penalties for offences of this nature to demonstrate error.

I consider the range of penalties that I have stated in PD Knuckey Appeal 393 is distinguishable from the alleged type of careless riding in this case, where the Stewards have clearly charged the Appellant that due to his riding he caused the various actions of the horses that have been identified and ultimately, the fall of the horse CORPORATE SUCCESS.

In those circumstances, in particular when also considering this Appellant's previous record and his experience as a rider, I consider the Stewards were not in error in imposing a penalty of 25 days suspension.

John Prior

JOHN PRIOR, PRESIDING MEMBER

