

**REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/496
PANEL: MR D MOSSENSON (CHAIRPERSON)
DATE OF HEARING 13 APRIL 2000
DATE OF DETERMINATION: 13 APRIL 2000

IN THE MATTER OF an appeal by Mr P J Harvey against the determination made by the Western Australian Turf Club Stewards on 20 March 2000 imposing a 1 month suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr T F Percy QC assisted by Mr S Davies, instructed by D G Price & Co, appeared for the appellant.

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

The appellant was the rider of WINORA which ran in Race 2 at Pinjarra on Thursday, 9 March 2000. Following the race the Stewards opened an inquiry into an incident which occurred near the 200m.

In addition to Mr Harvey, both Mr D Staeck, the rider of RON'S WISH, and Mr C Staples, the rider of KINGSTON JUNGLE, were called to the inquiry. At the outset the Chairman of the inquiry, Stipendiary Steward BW Lewis, stated his observations made from the Stewards' tower located adjacent to the winning post in these terms:

'Mr. Staeck when riding RON'S WISH, you attempted to shift out when racing behind the heels of MODRO NEBO ridden by Jason Miller in an endeavour to obtain a clear run. When shifting out slightly, you may have made slight contact with Jockey Paul Harvey who was riding WINORA. Shortly after this I observed Mr. Harvey, you extended your left arm outwards, particularly your elbow outwards towards RON'S WISH and in fact, Jockey Staeck it was quite a marked, marked extension of your elbow Mr Harvey and I would say that, it definitely concerned me at the time, that this may have been a deliberate action on your behalf to prevent RON'S WISH from improving on your inside.'

In response Mr Harvey explained that Mr Staeck *'must come quick because I just sort of seen what he was going to do at the last moment and, and as he sort of pulled out, I pulled back in to more, more so to protect myself than anything else because if my horse had of shifted out into the path of Craig Staples' heels...I would have went down...'* (p4)

'I've actually, I've actually leant inwards and put all my weight to the inside because I didn't want my horse to shift out onto Craig Staples' heels whatsoever, so I was pretty determined to hold my ground. I wasn't going anywhere.' (p5).

After the film of the race was shown Mr Lewis stated:

'I believe that your elbow was extended Mr. Harvey to the point where you became unbalanced yourself. I believe it is a, is in separate, complete contrast to your normal riding style Mr. Harvey and I believe it was designed to place undue pressure on Mr. Staeck and prevent him from improving on your inside.' (p8).

Mr Lewis then put to Mr Harvey that he probably could have held Mr Staeck without the extension of elbow. Mr Harvey strongly denied that. Mr Harvey was asked by Mr Lewis whether he thought the situation needed '*extreme measures*'. Mr Harvey responded 'Yes' to which the Chairman replied '*All right, well perhaps that's where I personally I disagree, I don't know what the other Stewards think.*' (p11).

After deliberating on the matter Mr Harvey was told that the Stewards '*believe*' this is a serious issue, that they would review the evidence given to the inquiry and would advise when the inquiry would be resumed.

Following the continuation of the inquiry on 20 March 2000 Mr Harvey was charged with improper riding under Rule 137(a) of the Australian Rules of Racing. The Chairman of the Inquiry announced the charge in the following terms:

'... that near the 200m when riding WINORA in Race 2 the Healthway Maiden at Pinjarra Park on the (sic) Thursday 9th March, 2000 you extended your left elbow for a short distance towards Jockey Staeck the rider of RON'S WISH in order to prevent him from attempting to shift outwards.'

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...'

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

'Mr. Harvey the Stewards believe that your action on this occasion was an intentional and deliberate act to obstruct Staeck from shifting our (sic). We believe that the extension of your elbow could have resulted in significant contact to Staeck or his horse, thereby placing them in a dangerous situation. We believe that you were not entitled to extend your elbow in the circumstances that you were facing. We do not believe that you were on the heels of Staples at the time and therefore, cannot excuse your conduct. We believe that the extreme measures that you adopted were not appropriate in all of the circumstances of this case Mr Harvey. We therefore find you guilty of the charge Mr. Harvey.'

Following some further submissions, the Chairman of the Inquiry announced the penalty of suspension for one month in the following terms:

'Mr. Harvey the Stewards view this as a serious breach of the Rule or Improper Riding is a serious breach of the Rule, not saying that the specific or your specific offence falls into that category, but previous penalties under Improper Riding, under Australian Rule of Racing 137(a) range from four weeks up to three months. We understand that you were placed in a difficult position with a rider trying to improve his position and accept that you were entitled to hold your position, that we don't agree with the manner in which you have done it obviously, but we do accept that there was some degree of provocation. We also note that you have two previous offences of Improper Riding. We take into account your personal and financial circumstances and the circumstances relating to this particular case that is the nature of the incident that we have dealt with and we believe that a penalty of riding in races for one month to be appropriate, suspension from riding in races of one month Mr. Harvey to be appropriate and that is to commence on midnight the 25th March through until midnight the 24th of April, 2000.'

On 22 March 2000 the appellant applied for and was granted a stay of proceedings by this Tribunal until midnight on 14 April 2000 or as otherwise ordered. Mr Harvey appealed against both the conviction and the severity of the penalty. The grounds of appeal are:

A. CONVICTION

1. The Stewards erred in forming an opinion before hearing all of the evidence and before hearing the Appellant's case.

Particulars

- (a) The standard of proof is a very low one, being "the opinion of the Stewards".
 - (b) In preferring a charge and at all times prior thereto the Stewards may hold a preliminary, provisional or prima facie view, they may not form an opinion on the substance of the matter in issue: *Harvey v WATC*, App No 485.
 - (c) In forming an opinion of any central factual issue prior to a full consideration of the charge, the Stewards were in error.
 - (d) In forming a "belief" as to various central factual issues, the Stewards were in error: Transcript: pp 8, 11, 29, 30, 31, 39, 44 and 48, and Staeck Enquiry p2.
2. The Stewards in convicting the Appellant erred in making findings of fact that were fundamentally inconsistent with their findings in relation to the same facts in the matter of Staeck.

Particulars

- (a) The Stewards' findings of fact in respect of Harvey are contrary to their findings that Staeck:
 - (i) rode contrary to the Rules of Racing;
 - (ii) caused an incident that should never have occurred;
 - (iii) deliberately took a run where there was no room;
 - (iv) put himself in peril; and

- (v) put other riders in peril.
 - (b) The finding that the riding of Harvey was improper was against the weight of the findings made in respect of Staeck.
 - (c) The Stewards failed to identify what form of riding might have been proper in the circumstances or the preventative measures the Appellant may have taken in the circumstances to avoid the patently dangerous situation created by Staeck.
3. In the circumstances of the case it was not reasonably open to the Stewards to find that the riding of the Appellant was improper.

Particulars

- (a) The consequences of the alleged improper riding were only that the rider Staeck was prevented from performing an improper piece of riding. (pp 47-48).
- (b) The Stewards erred in equating "extreme" with "improper".
- (c) The Stewards erred in considering that the Appellant could only be excused if his riding was a "reflex action" (p 48).

B. PENALTY

4. The penalty imposed by the Stewards was excessive in all the circumstances of the case.

Particulars

- (a) The penalty failed to acknowledge that the raising of an elbow by a rider is not illegal *per se*.
- (b) The penalty failed to adequately reflect the fact that Staeck instigated the incident by a breach of the Rules of Racing.
- (c) The penalty failed to adequately reflect the significant degree of culpability found by the Stewards in respect of the rider Staeck.
- (d) The penalty failed to reflect the fact that -
 - (i) under the Rules of racing a rider is entitled to hold his ground, and
 - (ii) the actions of the Appellant were motivated by considerations of personal safety rather than any strategic advantage designed to affect the outcome of the race.
- (e) The result of the race was unaffected.
- (f) There was no protest fourth vs third.

- (g) The penalty imposed was more appropriate for a completely unmitigated incident of improper riding.
- (h) The penalty failed to take into account the parity principle when compared with the reprimand imposed on rider Staeck.

Mr Percy QC at the outset referred me to the brief transcript of the Stewards' inquiry concerning Mr Staeck which was held on the 20 March following the handing down of the determination in relation to Mr Harvey. In the course of the Staeck inquiry, Mr Lewis, who also chaired the matter, stated:

'Mr Staeck, the Stewards have suspended Mr Harvey for one month for improper riding. We're not going to take any action against you on this occasion. It was discussed at quite a length which is why we have taken some time. Not only were we to suspend Mr Harvey, but we were looking at suspending you. You put yourself in that position. Mr Harvey's reacted and we believe over-reacted to the position he was in. The incident should never have happened if you didn't push up there where there was no run. It doesn't matter if you are riding a favourite or riding a hundred to one shot, safety must come first and there has to be a run. You put yourself in peril and you put other riders in peril and we have incidents of this nature, it's not good enough Mr Staeck.

...

Alright, if you're blocked, you're blocked unfortunately that's where you stay, until such time as a run presents itself. So it's going on your record that you have been reprimanded for attempting to take a run where there was insufficient room. We believe the bump in the later stages was probably somewhat due the horses being unbalanced and Mr Harvey being unbalanced and you wanting to get off that horse's heels in front of you Mr Miller. There was a bump there. It could be said that you rode out and bumped Mr Harvey to get a run and we could nearly quite easily substantiate a charge against you just for that, but at that time we don't see you riding forward on the film which has probably saved you on this occasion but I would hope and think, Mr Staeck, that you wouldn't be pushing for runs again in similar circumstances. Is that, would you agree with that?'

It was argued for Mr Harvey that the Stewards must come to their conclusion reasonably in all of the circumstances but that the Chairman of Stewards had come to a belief prematurely. In various places the Chairman had expressed his opinions of the incident by consistently using the word 'belief'. In addition, in articulating the views of the Stewards in the course of announcing the outcome Mr Lewis used the same terminology. Senior Counsel argued that the Stewards had formed an impression that the riding was improper and that in effect the Chairman had determined the matter. Whilst Mr Percy concedes that the Stewards must form some impression in order to reach an opinion it must be tentative and they must keep their minds open. The concerns from Mr Harvey's perspective are heightened by the manner in which Mr Lewis reported his observations. For example on page 8 the Chairman expressly states how the elbow had extended which he 'believed' was in complete contrast to Mr Harvey's normal riding style and further 'believed' he shifted in slightly and 'believed' there was a slight shift from Mr Staples. It was submitted on the basis that once one Steward has a concluded view then it taints all of the Stewards and results in there being a denial of procedural fairness. It was argued that the earlier decision of Harvey (Appeal 485), determined by the presiding member Mr J Prior on the 19 January 2000 was correctly decided. In that case dealing with ground 4 Mr Prior states as follows:

'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.'

I was not persuaded by these arguments and preferred the submissions made by Mr Davies QC. As Mr Davies pointed out at the time of the incident the shift was minor. Further, if Mr Staeck were engaged in an illegal manoeuvre that did not justify another illegal manoeuvre. The appeal was in essence simply a challenge to the Stewards' finding of facts. The Stewards were entitled to conclude that this was an illegal action. The Stewards found that the action taken by Mr Harvey amounted to the deliberate raising of his elbow for a purpose. I agree that the Stewards could properly form that opinion in the circumstances of this matter. The prior Harvey appeal, which was adjudicated on by Mr Prior, is clearly distinguishable. The words used by the Chairman of the Stewards in the present matter, despite the repetition of the word 'belief', do not indicate to me that an opinion had been formed which was anything other than a tentative one. Nothing in the transcript suggests to me that Mr Lewis had a closed mind from the start and through all the investigation stages of the proceeding to the time of formulating the charge.

Mr Davies refers me to *Hall v New South Wales Trotting Club Ltd* (1977) 1 NSW LR 378 at 386-389 where Samuels JA states:

'...it has been well established that members of a domestic disciplinary tribunal are always entitled to act upon their own knowledge of the facts in issue; Australian Workers Union v. Bowen (No. 2)(1948) 77 CLR 601 at p.628 where Dixon J., as he then was, said: "It is important to keep steadily in mind that we are dealing with a domestic forum acting under rules resting upon a consensual basis. It is a tribunal that has no rules of evidence and can inform itself in any way it chooses. Members may act upon their own knowledge and upon hearsay if they are satisfied of the truth of what they so learn and if they give the member with whom they are dealing a proper opportunity of answering the charge and defending himself."

...

The adoption by their members of a multiple role is inherent in the nature and function of many different kinds of domestic tribunals. In the present case, the stewards were charged by r. 10 to ensure that the rules were "observed and enforced in respect of all matters relating to racing" at any trotting meeting to which they were appointed. Without pausing to consider the precise ambit of this power, it is at least clear that the stewards were required to act as policemen and supervisors during the course of the meeting, in addition to the "judicial" function which they might have to assume under rr. (10 (g), (h), (i) and 322. The rules, therefore, contemplate that they might be bound to inquire into, and punish, conduct which they might themselves have discovered or observed.

...

It follows that the proceedings at the inquiry were not invalidated by reason only of the fact that Compton and Pascoe were, in effect, witnesses before the committee of which they were members.

...

It is necessary first to establish what rules of natural justice the stewards were required to observe. In my view, they were these. The stewards were bound to inform the appellant of the nature of the accusations made against him, and to give him "a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice"; De Verteuil v. Knaggs ([1918] AC557 at 560) applied in University of Ceylon v. Fernando [1960] 1 WLR 222 at 232. Moreover, I respectfully agree with what Adam J. said in R. v. Brewer; Ex parte Renzella ([1973] VR 375 at 381): "As it is the duty of the stewards to give a fair hearing to the person charged, they must of course until he has been heard in his defence keep their minds open in the sense of being ready and willing to be persuaded by the party charged."

The stewards did not charge the appellant with any offence under the rules when the inquiry opened. They started by investigating what was alleged to have occurred. Morton, Pascoe and Compton gave their versions, and the appellant his. Then, after deliberation, they found the appellant guilty of misconduct and charged him under r. 10 (g), which I have already set out. And after further deliberation they imposed a penalty. I do not think that there is anything wrong with this procedure, which is often appropriate to the conduct of inquiries of this sort, and may, indeed, be the only practicable way of proceeding. But it follows that the stage of the final adjudication upon guilt or innocence was reached, not after the charge was formulated, but before; and the charge was established for the purpose of formalizing a finding already made. So the stewards were bound to keep their minds open until all the evidence was in; but were entitled to form a view at that point, and before fitting a specific breach of the rules to the facts they found.

...

Compton, as chairman, conducted the inquiry, and performed the role of inquisitor. He adopted a consistently hostile attitude towards the appellant, but not, it must be said, until the appellant, Morton, Pascoe and Compton himself had each given his account. Thereafter, his questions indicate to me that he himself had formed a firm view that the appellant had behaved exactly as alleged, and that this conduct was, to use Compton's own words, "over the fence and disgraceful".

I do not consider that the appellant has any ground for complaint on this score. As Adams J. pointed out in Brewer's case ([1973] VR 375 at 382) the duality of roles which Compton and Pascoe had perforce to adopt made it highly unlikely that they would, in any real sense, set aside their own convictions formed as a result of what they had themselves seen or heard. But this is a consequence of the procedure which the rules, not only permitted, but required.'

The Chairman of Stewards was simply giving his evidence in an appropriate manner to enable Mr Harvey to react to it, to debate the issue and provide his response. It would have been inappropriate for any of the Stewards to keep their point of views to themselves and not put them to Mr Harvey. Those views were being presented during the fact finding stage of the inquiry and prior to the point when the Stewards resolved to lay a charge.

For all these reasons ground 1 is not made out.

The observations which were put to Mr Harvey were proper observations in all the circumstances. The interpretation put on the comments by the Chairman of Stewards in the Staeck matter by Mr Percy I do not agree with. I do not consider that the findings of fact against Mr Harvey were fundamentally inconsistent with the Stewards' findings in relation to the same facts in Mr Staeck's matter. The reference to imperilling himself and others were not findings of fact by the Stewards but rather related to an hypothetical proposition advanced as information or advice.

The Staeck transcript reveals the Stewards put to Mr Staeck that he was reprimanded *'for attempting to take a run where there was insufficient room'* and not as alleged in particular 2 (a)(iii). Particular (b) of ground 2 is not supported and I see no merit in particular (c).

As to ground 3 I am satisfied that it was reasonably open to the Stewards to form the opinion which they did of this riding incident. Further, the opinion was one which any reasonable Steward, armed with all of the relevant information, could reasonably have come to.

As for the penalty, ground 4, I am satisfied that it has not been shown to be excessive. I agree with the proposition put by Mr Davies regarding the argument as to a jockey raising an elbow in racing. The fact that the penalty was at the lower end of scale, despite Mr Harvey's 2 previous convictions, indicates that the Stewards did take into account all of the circumstances of the incident in an appropriate manner. The penalty reflects the role which Mr Staeck played and the respective rights of riders in a race. I do not believe that particulars (e) and (f) are of any real relevance in this matter. The penalty does put into perspective all of the issues particularised in this ground.



DAN MOSSENSON, CHAIRPERSON

