THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION

APPELLANT:	**CLIFFORD LINDSAY SMITH**
APPLICATION NO:	**A30/08/535**
PANEL:	**MS K FARLEY (PRESIDING MEMBER)**
DATE OF HEARING:	**27 SEPTEMBER 2001**
DATE OF DETERMINATION:	**27 SEPTEMBER 2001**

IN THE MATTER OF an appeal by Mr C L Smith against the determination made by the Stewards of the Western Australian Turf Club on 23 June 2001 imposing a $500 fine for breach of Rule 175(a) of the Australian Rules of Racing.

Mr T F Percy QC appeared for the appellant.

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

This appeal was heard on 27 September 2001. At the conclusion of the proceedings I dismissed the appeal against conviction and undertook to publish reasons, which I now do.

Following the running of Race 6 at the Kalgoorlie-Boulder Racing Club on 23 June 2001 the Stewards opened an inquiry into an incident near the weighing in enclosure. Called to the inquiry were the appellant, a licensed trainer and Jockey R Kirkup. Mr Kirkup's mount which carried saddle cloth number 6 in the race was placed fourth necessitating him to weigh in. Mr Smith had two runners in the following race, one of which was to carry saddle cloth number 6.

At the outset of the inquiry the Chairman made the following statement:

> *"Just following the running of the race I was in the mount, in the scale area where the riders were weighing in and as you've come in to the, near the door Jockey Kirkup, I've heard you say to Mr Smith, take this. You've handed Mr Smith your breastplate, you've then come in and weighed in and then, when you've walked back out, you've then handed your number, saddle cloth number to Mr Smith and Mr Smith's handed you back your breastplate. Now, firstly to you Mr Smith, what would you say in relation to that statement?"*

After hearing explanations from both Trainer Smith and Jockey Kirkup, the Stewards charged each of them with a breach of Rule 175(a) of the Australian Rules of Racing. Both pleaded not guilty. After each was found to be guilty as charged the appellant was fined $500 and Jockey Kirkup suspended for 18 days. Mr Kirkup did not appeal to this Tribunal.

Rule 175(a) states:

> *"175. The Committee of any Club or the Stewards may punish:*
>
> *(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing."*

Rule 147 states:

> *"147. If a horse runs in a muzzle, martingale, breastplate, or clothing, these must be put in the scale and included in the rider's weight."*

Mr Smith was charged in the following terms:

> *"The Stewards believe that you should be charged for improper action and the improper action being that you following the running of Race 6 the Kalgoorlie Handicap, "The Round" Handicap 1760 metres conducted at Kalgoorlie Boulder Racing Club on Saturday the 23rd of June 2001 accepted a breastplate from Jockey R. Kirkup following, prior to him weighing back in following the running of the race."*

The Amended Grounds of Appeal against the conviction are:

> *"1. The Stewards erred in convicting the Appellant in that they failed to afford him Natural Justice or Procedural Fairness.*
>
> ***Particulars***
>
> *(a) The Chairman of Stewards ("the Chairman") was entitled to give evidence notwithstanding his position as judge and tribunal of fact, provided he kept an open mind on the matters in issue and remained open to persuasion until the end of the evidence and submissions.*
>
> *(b) The Chairman had formed and articulated a concluded view on the central factual issue before either the Appellant or the witness Kirkup was offered the opportunity to call evidence or make submissions.*
>
> *(c) The Stewards accordingly failed to comply with their obligations to afford the Appellant procedural fairness.*
>
> *(d) The conviction should accordingly be set aside.*
>
> *2. The Stewards erred in convicting the Appellant by failing to properly consider the test of what constituted an "improper action" for the purposes of Rule 175.*
>
> ***Particulars***
>
> *(a) The rule requires that there be an action which on its face was one which was improper in all the circumstances in which it was committed.*

(b) The thrust of the Stewards' allegation at the inquiry appeared to be that the Appellant had intentionally assisted the rider Kirkup to avoid weighing in overweight.

(c) The present case required both:

(i) evidence, and
(ii) a finding

that the handing of the breastplate to the Appellant was done for an improper purpose.

(d) An innocent or naive acceptance of the breastplate from Kirkup to Smith would not constitute an offence under the Rule.

(e) The finding by the Chairman was erroneously confined to the factual issue as to the physical circumstances in which the breastplate came into the possession of the Appellant rather than the intent with which it was done.

(f) In the absence of any –

(i) evidence as to the Appellant's intent , and
(ii) any specific finding in that regard

the charge could not be made out.

(g) The Stewards' finding that the offence was complete once they had found as a fact that the Appellant had come into possession of the Breastplate directly from Kirkup overlooks the further required finding of improper intent and accordingly misconceives the nature of the offence.

3. The Stewards erred in convicting the Appellant by effectively reversing the Onus of Proof and taking into account an irrelevant matter.

Particulars

(a) The Chairman saw it to be of some significance that the Appellant called no evidence to support his version of events.

(b) There was no onus on the Appellant to call any evidence and this was not a proper or relevant factor that could be used in determining guilt.

(c) To the extent that the Stewards considered the failure of the Appellant to call evidence as being in any way relevant the Stewards were in error.

(d) The Stewards by taking this failure to call evidence into account effectively reversed the onus of proof and thereby fell into further error.

(e) *The conviction should accordingly be set aside."*

APPEAL AGAINST CONVICTION

Ground 1

With respect to this ground, Senior Counsel for the Appellant submitted that the Stewards had formed a concluded opinion on the central issue prior to fully considering the evidence put forward in relation to the charge. In this regard he referred to a comment made by the Chairman of Stewards in dealing with Mr Kirkup (page c at line 5) *"...at that particular stage"* (being when Mr Kirkup had offered to reweigh) *"I was satisfied that you had committed an offence."*

Previously (page c at line 2) the Chairman had stated *"As far as I'm concerned at the time, you, you and Mr Smith had committed an improper act."*

The improper act referred to by the Chairman was the passing of a breastplate from Mr Kirkup to the Appellant prior to weighing in. It was common ground that it is well known Rule of Racing that this article must be included when a rider weighs in.

It was Mr Biggs, the Chairman of the Inquiry, who had himself witnessed the incident in the scale area of the mounting yard. At the commencement of proceedings (page 1 at line 6) Mr Biggs advised the Appellant and Mr Kirkup of what he saw, saying *"...as you've come in to the, near the door Jockey Kirkup, I've heard you say to Mr Smith, take this. You've handed Mr Smith your breastplate, you've then come in and weighed in and then, when you've walked back out, you've then handed your number, saddle cloth number to Mr Smith and Mr Smith's handed you back your breastplate."* The Appellant and Mr Kirkup were then invited by the Stewards to comment on this. Essentially, the Appellant's evidence was that he requested Mr Kirkup's saddle cloth number (apparently he required the number for a horse racing in the next event). Mr Kirkup stated he had to weigh with it and during this discussion the breastplate dropped to the ground. The Appellant picked it up and gave it back to Mr Kirkup as he exited the weigh-in area, in exchange for the saddle cloth number. Mr Kirkup's evidence was similar to that of the Appellant.

Having heard from Mr Kirkup and the Appellant, the Stewards adjourned for a short time before reconvening (page 4 at line 4) to further question Mr Kirkup. At the conclusion of this questioning the Appellant was asked whether he had anything further he wished to put forward. He stated, inter alia, that he knew that Mr Kirkup was supposed to weigh in with the breastplate but that he *"wasn't really thinking about that."* (page 6 at line 7) and that he realised it was a serious matter that the Stewards could not take lightly. After a further adjournment (page 8 at line 3) the Stewards indicated they believed there was a charge for the Appellant to answer and invited him to put forward further evidence, which he did. After further deliberations (page 11 at line 1) the Stewards found the Appellant guilty of the charge.

Senior Counsel for the Appellant referred me to the decision of Paul James Harvey (Appeal 485) where Mr Prior the Presiding Member upheld that the Stewards had formed a concluded opinion prior to the Appellant having the opportunity to produce evidence.

I am of the opinion that this case can be distinguished from that of Harvey. The Chairman of the Inquiry was of course in a position of playing multiple roles in the inquiry. He was the chief eyewitness to the incident, was in effect the prosecutor and was also the finder of fact. Senior Counsel for the Appellant conceded that this was permissible so long as he did not form a concluded opinion before hearing all the evidence and remained open to persuasion until the end of the evidence and submissions.

I do not accept that the Appellant has established that the Chairman had prejudged the central issue in this case. He is entitled to believe the facts of the incident as he saw it, and ample opportunity was given to the Appellant to put forward his version of events. Unlike the situation in Harvey, I

can find no indication in the transcript that he had formed an opinion AS TO THE CHARGE AS SUCH until all the evidence was heard. In fact at page 11 at line 4 the Chairman states *"You were given the opportunity to put any further evidence forward...that you wished for the Stewards to reconsider and after considering all of that, we believe that you should be found guilty of the charge as laid..."* I am satisfied that the Stewards considered all matters put before them prior to finding themselves satisfied as to the Appellant's guilt.

This ground of appeal must therefore fail.

Ground 2

Senior Counsel for the Appellant submitted that over and above the actual passing or picking up of the breastplate, the Stewards had to find that the action was "improper" for the purpose of Rule 175(a).

This ground can be dealt with by referring to the details of the charge against the Appellant. It was that the improper action was the acceptance of a breastplate from Jockey Kirkup prior to him weighing back in following the running of the race. By Rule 147 it is clear that a breastplate must be put in the scale and be included in the rider's weight. The Appellant's action allowed the jockey to fail to comply with Rule 147 and to potentially weigh inappropriately and inaccurately. The Appellant admitted that he knew of Rule 147 and knew that Jockey Kirkup should have weighed with the breastplate. His evidence was that he had other things on his mind and did not avert to the consequences of his actions at the time. This evidence is a matter of relevance on penalty (as to which there was no appeal before me) but does not have bearing on the question of the impropriety of the action. Although I am of the view that it would have been preferable for the Stewards to have articulated a finding that the action of the Appellant was improper, it clearly was improper when one considers the wording of the charge against the Appellant and therefore Ground 2 must fail.

In passing, I would comment that there was some strength in the Appellant's argument that his mind was otherwise occupied at the time of the incident and that he did not avert to the seriousness of his actions. This is supported by Jockey Kirkup's immediate offer to reweigh which was rejected by the Chairman of Stewards. I find it somewhat surprising that the Kalgoorlie-Boulder Racing Club does not have at its meetings two sets of saddle cloth numbers. It seems to me that the necessity to locate numbers from the previous race in order to appropriately equip a horse and rider for the next race puts unnecessary pressure on trainers or other connections which could be alleviated by the provision of an alternative set of numbers.

Ground 3

This ground alleges that the Stewards effectively reversed the onus of proof and took into account an irrelevant matter, namely that the Appellant *"called no evidence to support his version of events."*

The Appellant of course gave evidence himself and his version of events was to some extent supported by that of Jockey Kirkup. Insofar as this evidence related to how he came into possession of the breastplate that evidence was rejected by the Stewards and in my view they were entitled to do so.

The Appellant was under no obligation to call other witnesses. He chose not to do so. It would of course be totally improper for the Stewards to take this into account when deciding on the Appellant's guilt.

I do not accept that the Stewards gave any weight to the failure to call other witnesses in deciding the case. Although the Chairman (page 7 at line 6) comments to Mr Kirkup that *"one would have*

thought if you'd dropped it there would have been a few other people that would have seen it, I would have thought", the Appellant answers that he didn't *"really know if anyone did or not because I mean I didn't take any notice who was around me."* This evidence accords with his consistent contention that his mind was on other things.

At page 11 line 4 the Chairman states *"You were given the opportunity to put any further evidence forward...that you wished for the Stewards to reconsider and after considering all of that, we believe that you should be found guilty of the charge as laid."*

I do not believe that this comment, or any comments made by the Stewards in the course of the inquiry, indicates that the Stewards have given weight to the failure of the Appellant to call other witnesses. The comments simply refer to the procedure employed by the tribunal and in fact indicate that the Stewards have considered all matters put before them.

Having found that the Stewards cannot be shown to have taken into account this irrelevant matter, it is not necessary for me to consider whether there was an effective reversal of the onus of proof.

Ground 3 therefore fails.

It is for these reasons that I dismissed the appeal against conviction in this matter.

Kare Farley

KAREN FARLEY, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA