

was carried in causing MAGIC PASS ridden by J. Whiting to blunder from that gelding's heels."

Mr Harvey pleaded not guilty.

The Chairman in announcing a guilty finding stated:

"Well Mr Harvey we believe that Mr King was entitled to ride forward at this stage of the race in the best interest of his horse. We believe the side-on film doesn't show you any more than one length clear in front of Mr King and we believe that you should have been more aware of where Mr King was racing at this particular time. And we believe that there is an obligation on you to ensure that you (sic) clear of runners to your inside and we believe that you failed to do that on this occasion. For those reasons Mr Harvey we find you guilty. We're now going to look at a penalty Mr Harvey and you put forward the Kalgoorlie scenario already. Significant races coming up, the Hannan's, The Cup, the Boulder Cup all in the next two weeks. You're the State's leading rider obviously, well sought after."

After consideration of the question of penalty the Chairman made the following announcements:

"Mr Harvey those things we discussed we had a look at and the level of interference obviously we're dealing with a blunder here. Mr Whiting's got onto heels and blundered so you know that's, that's pretty severe so that's the upper level of the scale of you like. The degree of carelessness we see in the mid range given the degree of shift from your mount in. Your record we've had a look at that also and it shows in February you were suspended for ten days and in June it was one of fourteen so I suppose in the last six and a half months this is your third suspension. We know you ride a lot obviously but it probably doesn't go in your favour at the end of the day because it's not really a good record we wouldn't say.

...

Alright normally ordinarily we would look at a 21 day penalty.

...

But because of the composition of the major races in this penalty we've discounted it three days. Alright so we believe a suspension of 18 days to be appropriate. In that 18 days there's three Saturdays and they include the Boulder and the Kal Cup. There's also two Mid Week meetings and The Hannans which we had a look at well which is a significant race, one of the richer Provincial type races throughout the year. If we applied the 21 days it would have been an extra mid-week meeting so because the penalties a little bit more severe I suppose at this time of year given the Kalgoorlie Round's coming up we thought there should be some discount there.

...

Alright so it's 18 days and that starts midnight the third of September so it allows you to take your rides Wednesday through until midnight the 21st of September, 2003."

Mr Harvey fulfilled his riding engagements at Belmont Park on 3 September 2003. The next day a Notice of Appeal was lodged together with an application to suspend the operation of the penalty. The Chairperson of the Tribunal refused to grant the application to suspend.

The Grounds of Appeal as stated on the Notice of Appeal were:

"I am appealing against both conviction and penalty. The Stewards were in error in convicting me with careless riding. In addition, the penalty imposed was manifestly excessive."

Prior to the hearing of this appeal counsel for the Appellant submitted the following Amended Grounds of Appeal:

1. *The Appeal against Conviction is not pursued.*
2. *The Stewards erred in imposing a penalty of suspension for 18 days which was excessive in all the circumstances of the case.*

Particulars

- (a) *The Stewards erred in finding that the interference was at the upper end of the scale for interference in races rather than at the lower to mid range.*
- (b) *The Stewards erred in holding that the degree of carelessness was at the mid level for careless riding rather than at the lower end.*
- (c) *The Stewards erred in failing to take into account as a contributory factor the riding of Paul King which was a significant factor in the assessment of penalty.*
- (d) *The Stewards failed to make any appropriate allowance for the fact that the Appellant would miss the three feature races of the Kalgoorlie Carnival.*

At the conclusion of the appeal hearing I dismissed the appeal against conviction, which was not argued, and also the appeal against penalty. Following are my reasons for dismissing the appeal against penalty.

REASONS

This was a 1200 metre race, and the incident occurred near the 1000 metre mark. According to Mr King, his horse MR SANDGROPER jumped out a fraction slowly, and didn't appear to level with the rest of the field. He gave his mount a dig up to get in a forward position. He said that he was clear to go forward in order to get that forward run. However, Mr Harvey's mount, LONICERA, started coming across and he had to follow that horse in before coming back to get clear.

Mr Harvey agreed that the runners inside him appeared to be slow out, and he said that he was working across. He said that he thought he was clear. He went on to say that, from his viewing of the film, Mr King had ridden along up inside LONICERA, looking for a forward position after his slow start.

The Chairman of Stewards saw the film, and his opinion was that LONICERA shifted in, carrying MR SANDGROPER inwards quite significantly. He said that Mr Harvey on LONICERA shifted in when not clear of Mr King on MR SANDGROPER.

It was common ground between Mr Harvey, Mr King, and the Stewards that Mr Harvey came across when only one length clear of Mr King's mount. The accepted safety margin is two lengths.

As the inquiry progressed, Mr Harvey accepted responsibility for the incident, but said that Mr King was partly responsible for riding forward when he should not have. He should not have continued to ride forward because he had been slow out, and he knew that Mr Harvey was coming across. Mr Harvey said at T8 - 9

"Yeah but we're telling apprentices all the time if your horse is slow out. I, I think its especially at that stage if we. Where was that at about five when he started pushing up at about 6 seconds? If you go to the head-on you can see I'm already coming across, you don't when someone's crossing and they've got a length on you, you don't then kick up when they're crossing you. Fair enough if they're going in a straight line and you've got, you've got room there and the other one's crossing you, but when you can see all the coming in and you've got horses to your inside you don't then kick up just to make trouble. I mean he can

see I'm moving in, he knows he's got horses on his inside yet he's you know he's had no regard for his horses inside. He's kicked up inside a horse that's shifting forward and shifting inwards you know."

The Stewards decision to convict Mr Harvey was made on the basis that Mr King was entitled to ride forward, and Mr Harvey shifted inwards when not sufficiently clear. Mr Harvey's appeal against penalty relies on the assertion that Mr King was at least partly responsible for the resultant interference and blunder. It is that assertion which is particular numbered (c) in the grounds of appeal. In my opinion, the riding of Mr King was not blameworthy. It was not a factor which the Stewards should have taken into account in assessing penalty.

It is true that where more than one person is involved in an incident resulting in harm, the level of culpability of the person doing wrong can be reduced by the behaviour of the other. That is understood in law, and in everyday life. People are expected to go about their business avoiding being harmed or inconvenienced by the wrong actions of others. If they do not, then the wrongdoer is not completely responsible for the harm which results. This is the concept of "contributory negligence", which is well known to civil law and is most often applied in traffic cases. However, driving cars on roads or going about everyday business is not a contest. A horse race is a contest. So long as a rider is operating within the rules, he is not expected to ride so as to avoid being harmed by another rider's actions. That would be contrary to the meaning of a "contest".

Without a charge and a finding of guilt against Mr King, it is not possible to say that his riding was a contributory factor to the blunder which resulted from Mr Harvey's riding.

The particulars of appeal also assert that the Stewards erred in finding that the interference was at the upper end of the scale for interference rather than at the lower to mid range, and that the degree of carelessness was at the mid level rather than at the lower end. I have seen the film, and I am able to make my own assessment, which does not differ from that of the Stewards. The effect of MR SANDGROPER being taken in was that it was taken on to MAGIC PASS, which blundered and almost dislodged Mr Whiting. There was further resultant interference to Mr Knuckey on EBONY'S MY DAD. Short of a fall itself, there would be little more serious than a blunder of this type. As to the degree of carelessness, there is a sustained and deliberate shift in. It could not be categorised as a momentary lapse of attention.

Finally, it is apparent that the Stewards did in fact take into account that Mr Harvey would miss the feature races of the Kalgoorlie carnival. The period of suspension was reduced by three days to take that fact into account.

For all of these reasons, I dismissed the appeal against penalty.

P. J. Hogan



PATRICK HOGAN, PRESIDING MEMBER