

REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: LINDSAY BRETT HARPER
APPLICATION NO: A30/08/617
PANEL: MR D MOSSENSON (CHAIRPERSON)
DATE OF HEARING: 21 SEPTEMBER 2004
DATE OF DETERMINATION: 21 SEPTEMBER 2004

IN THE MATTER OF an appeal by Lindsay Brett Harper against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 3 September 2004 imposing 28 days suspension for breach of Rule 163(1)(a) of the Rules of Harness Racing.

The appellant represented himself.

Mr M J Skipper appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

Following the running of Race 10 at Gloucester Park on Friday, 3 September 2004, the Stewards opened two inquiries into separate incidents that occurred in the home straight shortly after the start from the mobile barrier. Mr Harper who drove CANYOUKEEPASECRET was called to give evidence at both inquiries. Mr Harper was charged and subsequently was convicted of two separate counts of breaching Rule 163(1)(a) of the Rules of Harness Racing. That Rule states:

'163. Offence relating to matters during the race

- (1) A driver shall not –
- (a) *cause or contribute to any crossing, jostling or interference;*

As a consequence of the convictions Mr Harper was suspended for 14 days for causing crossing to BRINDABELLATROUBLE and for 28 days for causing interference to JOHN SAMUEL with the penalties to be served concurrently. The Stewards deferred the penalties to allow Mr Harper to fulfil his drives on 6 September 2004.

The transcript reveals that at the outset of the Stewards' inquiry into the second incident, the following exchange took place:

- 'CHAIRMAN In race ten Mr. Vella you drove JOHN SAMUEL and Mr. Harper CANYOUKEEPASECRET, Mr Castillo has a report.*
- CASTILLO Drivers I was the Steward positioned in the tower opposite the winning post which afforded me a side on view to this incident. Racing towards the first corner Mr. Harper, the driver of CANYOUKEEPASECRET drawn barrier 3, came out quite quickly. Racing to your inside was Jason Vella the driver of JOHN SAMUEL. I believe Mr. Harper that you have allowed your horse to shift in tightening the racing room of JOHN SAMUEL, driven by Mr. Vella. As a result Mr. Vella's horse was placed in restricted racing room causing the driver to check his horse. I believe also that Mr. Vella was calling for racing room for some distance prior to you allowing your horse to shift down and that's how I viewed it Sir.*
- CHAIRMAN Mr. Vella?*
- VELLA Yeah, pretty much correct what Mr. Castillo said. I did appeal prior to entering the corner and my room just got taken from me and my horse galloped.*
- CHAIRMAN Mr. Harper?*
- HARPER Yeah, I felt – my horse was going quicker I felt he was going to lead, he wanted – he ducked in and got down a bit. As we raced probably to the winning post Mr. Vella's horse started to gain momentum and had its legs up at my wheel. I stopped my movement down and Mr. Vella kept driving his horse and I believe it baulked and broke. That's my opinion.'*

Various race patrol films were then shown at the inquiry and further evidence was given by both drivers. After viewing the films again the Stewards adjourned to consider the evidence. The Chairman subsequently announced a charge in these terms:

'Mr. Harper after considering the evidence thus far the Stewards are issuing a charge under the provisions of Rule 163 (1) (a), it's a charge of causing interference, the specifics of the charge are that as you raced into the first turn of Race 10 you didn't allow sufficient room for JOHN SAMUEL and as a result that horse has been checked and galloped when it appeared to baulk at your sulky. Do you understand what the charge is?'

The following brief exchange then occurred:

'HARPER Am I being charged with it being checked or with the baulking?

CHAIRMAN For causing it to baulk. Do you understand the charge?

HARPER Yes.

CHAIRMAN Do you wish to enter a plea?

HARPER No.

CHAIRMAN Have you any further evidence you would like to put?

HARPER No. I think we looked at it all, it's just the fact that my horse has got down. I have been trying to restrain off. Mr. Vella's (Indistinct) to alleviate the situation, he has driven into it and kept driving into it when it was clear that there was a problem and the incident happened. I still believe that the film clearly shows that the horse baulked at the striped pole. I am not disputing the other facts of the issue, but I believe that there are mitigating circumstances in it.'

Later in announcing the Stewards' finding that Mr Harper was guilty of the charge the Chairman simply stated:

'...The Stewards find the charge sustained in relation to the incident involving JOHN SAMUEL. We believe that the evidence from Mr. Castillo and Mr. Vella is supported by the film.'

After hearing further submissions from the appellant, the Chairman then announced the penalties for both charges in these terms:

'Your records not in your favour notwithstanding that you do drive, as you say, at least 20 drives a week. We are always mindful – the Stewards are always mindful that incidents into the first turn, we tend to see them as being more serious than not and given your record isn't in your favour we feel that a twenty eight day suspension is appropriate for the incident involving JOHN SAMUEL and for the incident involving BRINDABELLATROUBLE we believe that a fourteen day suspension is appropriate there, and as I said before we order that they be served concurrently.'

The appellant lodged a Notice of Appeal against conviction and penalty on 13 September 2004 in relation to the JOHN SAMUEL incident. The ground of appeal is:

'I don't beleive (sic) I was responsible for the incident and if I was the penalty is excessive considering the circumstances involved.'

At the outset of the appeal hearing Mr Harper raised a preliminary issue relating to the propriety of his conviction. He commenced his submission by drawing attention to the report of the Steward who was positioned in the tower opposite the winning post. I was then taken to the wording of the charge and to the exchange with the Chairman, quoted above, which followed. I was also asked to consider the comments which were made subsequently in considering the penalty. The Stewards were given the opportunity to respond to the argument before I briefly adjourned to consider and determine the preliminary point. I upheld the appeal, quashed the conviction and undertook to publish reasons, which I now do.

Reasons

As Mr Skipper confirmed at the appeal hearing, the charge in question which was laid against Mr Harper was that of *'causing interference'*. The specifics of that charge were clearly stated at the time it was laid to be that of not allowing JOHN SAMUEL sufficient room *'...and as a result that horse has been checked and galloped when it appeared to baulk at your sulky'*.

However, as the exchange which immediately took place following the laying of the charge reveals, when the Chairman of the inquiry asked Mr Harper if he understood the charge Mr Harper responded by querying whether he was being charged with *'...checking or with the baulking'*. The Chairman of the inquiry answered him with the words *'For causing it to baulk'*. At that stage of the inquiry process Mr Harper was entitled to expect that for the Stewards to find him guilty of the offence the Stewards had to be satisfied on the balance of probabilities that his driving had caused some interference to occur to JOHN SAMUEL of the nature prescribed. In the charge as laid the interference in question was specified to have been made up of a number of elements, namely of not having allowed the other horse sufficient room which resulted in that other horse both checking and in it galloping at the time it appeared to baulk at Mr Harper's sulky. However, that position quickly changed. Once the exchange with the Chairman occurred Mr Harper was from that point entitled to believe the inquiry would proceed on the understanding that the specifics of the charge in fact had been confined to the aspect of having caused the horse to baulk only.

The report which was presented at the beginning of the inquiry from Mr Castillo contained no reference to baulking but only to Mr Harper having allowed tightening which caused the driver of JOHN SAMUEL to check his horse.

In handing down the determination to convict the Stewards failed to provide any reasons. No factual findings are made. The only qualification or explanation offered was the expression of the belief that Messrs Castillo's and Vella's evidence is supported by the film. In those circumstances I am unable to assess whether there has been any error by the Stewards in their process of reasoning. This problem is compounded by the fact that, as Mr Harper pointed out to me, later in the proceedings after viewing another angle of the race film that had not previously been viewed the following was stated:

'CHAIRMAN Mr. Harper we are just looking at the back on film we hadn't looked at it before and it's only fair that you see it. (Indistinct) looking at this that Mr. Vella's horse actually breaks after the peg.'

Viewing Film

- HARPER *Just run that film again. I think the film pretty much shows that I have stopped my downward movement. The final film clearly shows that I have got my horses head turned out.*
- CHAIRMAN *Take it back a bit further. Right. Go to camera 3.*
- HARPER *And that clearly shows that the horse side steps around the pole on his near side front, angles onto his off side front and breaks. It may look like he has broken after if you look from behind, but if you look from the front there you can see him do it – there.*
- CHAIRMAN *Its academic in a way, he was down and over the pole because he was in restricted room.'*

As I stated previously in another appeal, *'a person whose livelihood is being deprived by a decision of the Stewards in relation to a matter of this nature is entitled to know what the Stewards have addressed their minds to and the basis of fact on which the ultimate conclusion has been reached'* (PJ Harvey Appeal 353 at 5).

The Stewards' finding fails to give any summary of the evidence, a statement of any factual findings and a conclusion regarding the elements of the offence. How then have the Stewards addressed their minds to these things? On what basis of fact have the Stewards reached their conclusion as to causing interference by allowing insufficient room resulting in JOHN SAMUEL baulking? These questions cannot be answered. The only possible clue is the conclusion given by the Stewards that the evidence of Mr Castillo and Mr Vella *'is supported by the film'*. This does not assist to address Mr Harper's contention as Mr Castillo's evidence made no reference to baulking, but rather to checking only. Further, this aspect was contradicted by Mr Vella's evidence early in the inquiry in response to a question from the Chairman as follows:

- 'CHAIRMAN *Yet you never appear to restrain your fellow, you kept driving him forward, or did you actually restrain him?*
- VELLA *I never restrained him, no. I don't think I am entitled to.'*

An added complication is the fact that the film which was referred to later in the inquiry caused the Chairman of the inquiry to observe *'...Mr Vella's horse actually breaks after the peg.'*

In the light of these circumstances I am satisfied the Stewards fell into error in convicting Mr Harper and the appeal should be upheld.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

