APPEAL - 631

REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**DOMINIC CHRISTIAN TOURNEUR**
APPLICATION NO:	**A30/08/631**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
DATE OF HEARING:	**14 JANUARY 2005**
DATE OF DETERMINATION:	**14 JANUARY 2005**

IN THE MATTER OF an appeal by Dominic Christian Tourneur against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 1 January 2005 imposing 33 days suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr B A Ryan was granted leave to appear for the appellant.

Mr R J Mance appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

On 1 January 2005 at the Geraldton Racecourse, the Racing and Wagering Western Australia Stewards of Thoroughbred Racing opened an inquiry into the reason for Jockey Robert Quartermaine having been dislodged from KNIGHTS HONOUR near the 200 metre mark in Race 6 run over 1200 metres at Geraldton on 27 December 2004.

In this incident Jockey Quartermaine suffered fractures to both ankles. Mr Quartermaine gave his evidence to the inquiry by telephone from hospital in Perth. Mr Tourneur, who rode CORPORATE KATE, and Apprentice Shane Cull, the rider of MASTER OF MONEY, both attended the inquiry.

After hearing evidence from the three riders and viewing the race patrol films, the Chairman of the inquiry, Mr Mance announced a charge against Mr Tourneur as follows:

> *'...after considering all evidence, well after presenting all, yes presenting all evidence put to us thus far we do believe you have a charge to answer to under Rule AR13 (a) and it just reads "AR137(a) any rider may be punished if in the opinion of the Stewards a) he's guilty of careless, improper, incompetent or foul riding and the charge against you is being one of careless riding and that being that nearing the 200m when urging CORPORATE KATE forward you've allowed that mare to shift inwards causing MASTER OF MONEY, Apprentice Cull to shift in onto KNIGHTS HONOUR which ran out of racing room, struck heels and blundered dislodging its jockey Robert Quartermaine.'* (T14)

Mr Tourneur pleaded not guilty to the charge. After hearing further from the appellant and then deliberating, the Chairman of the inquiry announced a guilty finding in these terms:

> *'Mr Tourneur, we believe at the time of the incident KNIGHTS HONOUR was racing, that's Mr Quartermaine's mount was racing truly and not shifting outwards and that was stated by Jockey Robert Quartermaine. It is our opinion that you have started to shift inwards just prior to using the whip and at no stage have you attempted to straighten your mount which has caused MASTER OF MONEY onto KNIGHTS HONOUR causing that horse to clip heels and dislodge its rider. We believe the video confirms this along with my observations of the incident and after considering all evidence presented we do find you guilty as charged. Now we must look on the matter of penalty which you've brought up a bit before.'* (T18)

The Chairman subsequently announced the penalty arrived at as follows:

> *'Thanks Mr Tourneur when looking at penalty we look at the degree of carelessness which we see on the scale of high. We believe that had you shown more care the incident wouldn't have happened. We also look at the level of interference. On this occasion we believe to be on the scale as a serious interference. A horse has blundered dislodging its rider who has suffered multiple fractures and will be out of the saddle for a long period of time so we see the level of interference as high. We believe the penalty should not only be a deterrent to yourself but others who may offend in a similar matter. In saying that we believe the penalty should reflect the seriousness of the incident. Now penalties have ranged for careless riding and range from as low as 10 days to as high as something in the region of 28 days and 28 days when your getting up to that region getting your getting up to the level of interference being high and carelessness being high. Now with the majority of those suspensions it means that riders miss many meetings to ride at especially the ones that are given the higher penalties. We've taken in to account that you virtually ride this time of the year at Geraldton only. You've had the one ride at Ascot but we've taken into account that virtually do ride this time of the year at Geraldton and that's as your riding performance as we mentioned to you the printout suggests. We've taken into account the riding record and you've said you haven't been suspended for a period of two years and we see that as a good record so we've taken that into account. We've taken into account the important races the Cup you'll be missing however we believe you should receive and we believe this to be the correct penalty a 33 day suspension which in*

real terms as suggested with your riding printout over recent years and this year. Now I know you've said that you have, may have other rides but there's nothing confirmed we see that you will be missing, serving really a three meeting penalty. Now with those other there is seven Provincial and four, sorry no there's four Saturday meetings one mid week and eight provincial but we don't see that you'll be riding at those meetings. So we look at it as a three meeting suspension which is two Geraldtons and one Walkaway. Alright, now that's the decision of the Stewards and of course against our decision you do have your right of appeal within 14 days.' (T 23–24)

The Chairman went on to advise Mr Tourneur that the suspension commenced at midnight on 1 January and expired on 3 February 2005.

On Friday, 7 January 2005 Mr Tourneur faxed to the Registrar a Notice of Appeal and an application to suspend operation of the penalty. Mr Tourneur advised the Registrar that he would arrange for payment of the requisite lodgement fees. However, although payment was made on his behalf later that afternoon it did not allow time for the stay application to be processed on that day.

On Monday, 10 January the Stewards advised the Tribunal Registrar in writing of their opposition to the stay application. The transcript (24 pages) of the Stewards' inquiry was made available to the Tribunal that morning.

Based on the all the papers before me, I declined to determine the stay application and agreed to hear oral submissions from both parties on 12 January. In the course of that hearing it became obvious that Mr Ryan was unaware of the basis on which this Tribunal determines applications for the suspension of operation of penalties. The relevant principles which are applied are set out in the Tribunal's Practice Direction No 1 of August 1993.

After hearing submissions from Mr Ryan for the appellant and Mr Mance for the Stewards, I agreed to:

- grant Mr Tourneur a stay until midnight on Friday, 14 January 2005, or as otherwise ordered, and
- list the appeal for hearing on Friday, 14 January 2005 not before 12 midday.

As a consequence, Mr Tourneur was able to take a full book of seven rides at the Geraldton Sprint meeting on 13 January 2005.

The Appeal

After taking into account the transcript of the Stewards' inquiry, the submissions made by Mr Ryan on behalf of the appellant and having viewed the race patrol films, I dismissed the appeal against conviction without the need to hear from Mr Mance. The suspension of operation of the penalty consequently ceased immediately.

As to penalty, after hearing argument, I agreed with the submission Mr Mance made on behalf of the Stewards that Mr Tourneur should serve a penalty of three Geraldton meetings as originally determined by the Stewards. Accordingly, I varied the 33 day suspension to a suspension of 38 days to take into account the meeting at Geraldton on 10 February 2005.

I now set out my reasons.

Conviction

This appeal involves consideration of the application of Australian Rule 137(a) which states:

> *'Any rider may be punished if in the opinion of the Stewards*
>
> *(a) his is guilty of careless, improper, incompetent or foul riding…'.*

As has been said in this Tribunal on many occasions, in order for an appeal to succeed against such a rule which is couched in terms of '*in the opinion of the Stewards*', an appellant must persuade the Tribunal to the requisite standard of proof that the opinion formed by the Stewards was so unreasonable that no reasonable Stewards could arrive at it in all the circumstances. The opinion of an appellant, his/her counsel or advocate and any expert witnesses has no probative value or relevance to determining whether the Stewards fell into error and the Tribunal should interfere in the exercise of this wide discretion. For such an appeal to have prospects of success an appellant must demonstrate in all the circumstances the unreasonableness of the approach and outcome on the part of the Stewards.

Mr Ryan, whom I granted leave to appear for the appellant in these proceedings, is a long serving President of the WA Jockeys' Association. At the outset of the appeal, Mr Ryan sought to have the appellant give sworn evidence. I refused that request on the basis that Mr Ryan was simply intending to attempt to have Mr Tourneur express his opinion of the incident. Such an approach is inappropriate in view of the way the rule needs to be addressed.

Mr Ryan was highly critical of Mr Mance's decision to hold the inquiry on a race day, at a time when the injured rider was not present and where no notice of the inquiry had been given to the appellant. Some of the allegations made by Mr Ryan on this issue were:

> *'the inquiry was badly done'*
>
> *'… it's entirely out of order …'*
>
> *'… it will be the last time it's held like this …'*
>
> *'… the inquiry was a bit of a sham …'*

The allegations were not only disrespectful to Mr Mance personally but also called into question the authority of the Stewards generally. They were completely unjustified and of no assistance to the determination process involved in this type of appeal. The approach did not assist the appellant's cause nor the best interests of the racing industry generally.

The Australian Rules of Racing read with the Local Rules clearly give the Stewards wide powers to investigate all matters pertaining to racing and, where applicable, to punish offenders. The actual format of and approach in conducting Stewards' inquiries is determined by the Chairman of each inquiry. There is no prohibition in the Rules of Racing of evidence being given by telephone link up. Further, it is not unusual for inquiries involving race riding incidents to be held on a race day during intervals between races. This is generally convenient for both riders and the Stewards. There is no requirement for parties to be put on notice that such an inquiry is to be held. Despite what Mr Ryan complained of at

the appeal hearing all riders should be aware that Stewards' inquiries into riding incidents are generally held on the day of the race meeting.

In this matter, the inquiry was commenced and adjourned on the day of the race without any evidence having been taken. Mr Mance was the Senior Steward at the meeting held on 27 December 2004. Assisting him were Cadet Steward, Mr Timperley and Club Steward, Mr O'Brien. At the inquiry held on 1 January 2005, Mr Mance, Cadet Steward, Mr Timperley and Deputy Steward, Mr Cahill were present. Pursuant to the provisions of AR9, only Messrs Mance and Cahill were entitled to vote or contribute to the determination of any matter. Had the inquiry been held and completed on 27 December 2004, Mr Mance would have had sole authority and discretion over all matters. The unavailability of the injured rider, Mr Quartermaine made it inappropriate for the inquiry to proceed that day in any event.

When convening inquiries Stewards will always have to weigh up and balance the best interests of all relevant direct participants as well as the industry generally as to location and time. In this case, Jockey Quartermaine was available by telephone link up and riders Tourneur and Cull both had riding engagements at Geraldton when the substantive hearing took place on 1 January, 2005.

Evidence given by Mr Tourneur at the inquiry included the following:

> *'Mr Cull's horse and my own horse were probably shifted out half a horse outwards initially. Then my horse when I've given my horse one crack it's only come in half a horse at the most and then that's when Robbie came down.'* (T5)
>
> *'It's only shifted that initial probably half a horse and it didn't seem much.'* (T12)
>
> *'Because my horse has come off a half with Mr Cull and I've gone back that half so Robbie probably got there and then I've sort of pushed Mr Cull's horse back that half a horse and that's when Robbie was there you know and then he might have just took the back probably just the slightest nick you know but its enough obviously a clips a clip and its enough to come down but ...'* (T16)
>
> *'I say, so, I've studied that head-on a thousand times and we've come out and come back in and that's when it's happened you know.'* (T18)

Jockey Quartermaine's evidence was that the incident happened that quickly that all he could recall was that he received a bit of a bump on the outside from MASTER OF MONEY before he was dislodged.

Apprentice Cull stated to the inquiry *'Mr Turner (sic) [Tourneur] did cause my horse to run in'.* (T3).

As to the merits of the appeal regarding conviction, nothing put forward by Mr Ryan credibly supported the proposition that the Stewards were in error in forming the opinion which they did. The race films and the transcript of the inquiry in my assessment only confirmed the opinion which was formed by the Stewards of the incident.

The submissions made on behalf of the appellant in support of the appeal against conviction and the allegations levelled against the Stewards were devoid of merit and led me to take the

unusual course of action of not having to hear from the Stewards prior to determining that aspect of this matter.

Penalty

When asked to address me on penalty, Mr Ryan simply stated *'I'm stunned sir.'* Mr Ryan then referred to the response from the Stewards in opposing the stay application and stated:

> *'... and Mr Mance decided for himself that Mr Tourneur didn't really serve any suspension because he was back and rode in the Geraldton Cup ... so he's been waiting for 2½ years nearly 3 years to be able to stop Dominic Tourneur from riding in the major races at the Geraldton Carnival.'*

Extracts from the response dated 10 January 2005 from Mr Lewis, Chief Steward Thoroughbreds in opposing the stay application are relevant and are reproduced as follows:

> *'Although not opposing the application for a Stay of Proceedings by Mr Tourneur at this time, should an Appeal date be unable to be convened by Wednesday 12 January 2005 Stewards are strongly opposed to Mr Tourneur being permitted to ride until such time as this Appeal is heard for the following reasons:*
>
> - *This appeal results from a serious racing incident at Geraldton Turf Club on Monday, 27 December 2004 in which Jockey Robert Quartermaine was hospitalised after sustaining two broken legs in a race fall. Stewards allege that Jockey Dominic Tourneur was responsible for this incident and he was suspended from riding in races for a period of thirty-three (33) days to expire midnight, 3 February 2005. Mr Tourneur resides in Geraldton and rides predominantly in that area only. Consequently, this period of suspension equates to three local race meetings. Two of these three meetings are to be held this week, on Thursday 13 January and Sunday, 16 January 2005. In assessing penalty the Stewards were mindful of this, and the fact that feature races are programmed on these dates, they being the Geraldton Sprint and Geraldton Cup respectively. These two races are the most significant in terms of prize money for the 2004/2005 Geraldton racing season. If the appeal hearing is delayed and Mr Tourneur is permitted to ride at these two meetings, and subsequent unsuccessful appeal will result in a penalty that is automatically significantly reduced.*
>
> - *Mr Tourneur has previously been able to use the appeal system to his advantage whereby in March 2002 he was suspended for careless riding and after receiving a Stay of Proceedings, conveniently was able to ride in the Geraldton Cup of that year. His subsequent Appeal Number 566 was unsuccessful, however he effectively served no period of suspension as there were no race meetings held in the Geraldton region for some time later. If such a situation was to eventuate in this matter, Stewards would wish to seek leave to make application to the RPAT for Mr Tourneur's penalty to be varied to ensure that a commensurate penalty is ultimately imposed.'*

Mr Ryan alleged that Mr Mance was the only arbiter in the Stewards' inquiry. As already stated above, this allegation is completely unfounded. Deputy Steward Cahill sat throughout the inquiry and participated in the deliberations on conviction and penalty.

Mr Ryan argued that the 33 day penalty amounted in real terms to a suspension from riding in over 20 TAB meetings. He based that on the fact that the appellant was a Licensed Jockey who could ride anywhere in Australia. Whilst the comment may have been theoretically potentially possible, it was unrealistic and lacked substance. Mr Tourneur's riding record over the past two seasons indicated that he rode predominately in the Geraldton region, the only exceptions being one appearance at an Ascot meeting and another one at Northam.

It is relevant to refer to D. Tourneur (Appeal 566) where the Presiding Member, Mr Hogan, said at page 3:

> *'In fixing the penalty, the Stewards needed to impose a penalty with some substance. There had to be a deterrent, as that is one of the purposes of a penalty. The primary deterrent was that the Appellant would miss his upcoming ride in the Geraldton Cup, and 2 minor meetings in the weeks following that. The penalty was specifically aimed at the Appellant missing his cup ride (T11). As it transpired, the Appellant rode in the cup on his stay of proceedings. Particularly in this case, had the Stewards given notice to the Appellant that they would seek a higher or different penalty on the hearing of the appeal against penalty, I would have given consideration to varying the penalty by increasing it pursuant to Section 17(9)(c) of the Racing Penalties (Appeals) Act.'*

Mr Ryan also raised objection to the fact that in the course of the inquiry, Mr Mance had questioned the appellant about his income derived from outside the racing industry. As I stated to Mr Ryan during the appeal hearing, this line of inquiry by the Stewards in the circumstances of this type of case is completely understandable. Indeed I might have raised the issue myself in the appeal had it not already been addressed by the Stewards. Any penalty involving a lengthy disqualification or suspension not infrequently evokes this type of inquiry from the Stewards. It is relevant and proper to take such a personal circumstance into account.

To assist his submissions, Mr Ryan attempted to introduce a video of what was claimed to be a similar incident at Geraldton involving a race fall and Apprentice Tamara Zanker. I agreed with Mr Mance who objected to the video, that there was no relevance to this proposed course. Accordingly, I disallowed this further evidence. Mr Ryan finally requested that any suspension imposed on Mr Tourneur be deferred to commence at midnight on Sunday, 16 January 2005 to allow the appellant to fulfil his contractual arrangements to ride at the Geraldton Cup meeting.

Mr Mance responded that the original penalty only related to three Geraldton meetings. He submitted that the penalty should be varied to a suspension of 38 days to incorporate the Geraldton Cup meeting on 16 January, the Walkaway meeting on 3 February and the Geraldton meeting on 10 February.

I was persuaded that it was appropriate when assessing penalty to treat the appellant as a Geraldton rider for the purposes of calculating meetings to be missed. Nothing put forward by Mr Ryan satisfied me that special circumstances existed to allow Mr Tourneur to ride at

the Geraldton Cup meeting. Connections of the horses in question would no doubt have been aware of these appeal proceedings and would have had replacement riders on standby.

Mr Tourneur has not been made a scapegoat for the industry. There have been several occasions when this Tribunal has determined a jockeys' eligibility to ride in a major race. Jockey Peter Knuckey (Appeal 401) and Paul Harvey (Appeal 603) are two examples. Mr Knuckey was unable to ride in a Perth Cup and Mr Harvey missed riding in a Hannans' Handicap and Kalgoorlie Cup.

Mr Ryan plays an important role as President of the Jockeys' Association and he has enjoyed many years of experience in the industry. Despite that, during the course of representing in this appeal, Mr Ryan displayed little respect for the role of the Stewards and the overall process in the way he handled the matter before me. This included a somewhat disparaging approach to the Stewards, some gratuitous comment coupled with inappropriate remarks as well as ignoring directions I was giving him. Such situation deserves some brief observations to put certain matters into true perspective.

The racing industry plays an important role in the community as a source of revenue to Government, as an employer, and by being a pastime with considerable profile which affords stimulation and challenges for a wide range of people. For the industry to prosper all levels of participation do play an integral part. One weak link in the industry chain can have adverse consequences for many innocent people.

The Stewards are charged with a somewhat onerous task of helping to ensure the racing industry runs smoothly and in conformity with the Rules of Racing. Collectively, they are at the front line in assisting in protecting the integrity of the industry. Whilst they cannot be expected to be infallible, one can reasonably expect any occasional shortcomings to be identified respectfully and appropriately. It is not appropriate during an appeal to demean the adjudication process with a lack of cordiality and respect to those Stewards who appear for the respondent to an appeal. On occasions where a Steward or panel of Stewards' actions or decisions are seen to be short of the mark this should be pointed out or expressed with appropriate civility. Equally, when anyone stands before the Tribunal on an appellant's behalf that person should not punctuate a presentation by engaging in off the cuff, ad hoc and sporadic comments on the side. Equally some knowledge and understanding of the relevant provisions of the Racing Penalties (Appeals) Act, which appeared to be absent on this occasion, is obviously desirable. This appeal, which lacked substance, was in no way enhanced by the way it was presented on behalf of the appellant.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.