APPEAL 733

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**CLINT KENNETH HARVEY**
APPLICATION NO:	**A30/08/733**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
	MR A MONISSE (MEMBER)
	MR J PRIOR (MEMBER)
DATE OF HEARING:	**3 AUGUST 2011**
DATE OF DETERMINATION:	**31 AUGUST 2011**

IN THE MATTER OF an appeal by CLINT KENNETH HARVEY against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 21 June 2011, imposing an 8 month suspension for breach of Rule 175(a) of the Australian Rules of Thoroughbred Racing.

Mr TF Percy QC, assisted by Ms E Arcaro, instructed by Michael Tudori & Associates, represented Mr Harvey.

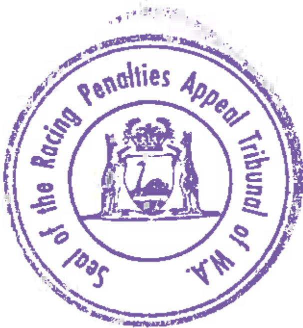
MR RJ Davies QC, represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

For the reasons published, the appeal against penalty is dismissed.

The 8 month suspension penalty imposed by the Stewards on the Appellant is confirmed, commencing on 27 April 2011.

DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR

APPELLANT:	**CLINT KENNETH HARVEY**
APPLICATION NO:	**A30/08/733**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
	MR A MONISSE (MEMBER)
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Mr RJ Davies QC, represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

INTRODUCTION

On 14 June 2011, the Stewards opened an Inquiry regarding an investigation which had been carried out by RWWA Principal Investigator Mr P O'Reilly concerning alleged illegal conduct by former RWWA Handicapper Mr B J Ryan and the involvement of the Appellant who was a licensed jockey.

At the Inquiry, by leave of the Stewards, the Appellant was represented by his solicitor and senior counsel Mr D Grace QC.

At the Inquiry, Mr P O'Reilly, read a copy of his report into his investigations which was the following:

> "On Sunday December 10th 2010, I received certain information from Mr David Hunter, the Manager of the Thoroughbred Racing Department. Mr Hunter explained, that following an interdepartmental audit, he had concerns that payments of late scratching fees of $165.00 per scratching, were being paid to jockeys rather than being paid to the proper recipient, the Race Clubs holding the corresponding race meeting.
>
> The audit trail revealed that the Race Programming Co-ordinator, Mr B J Ryan, was accessing RWWA computer records of race day, scratchings and riders, information following a race meeting and where there was a late horse scratching and a fee due to be paid to the Club, B J Ryan was unlawfully re-directing the payments to a number of jockeys.
>
> On Monday morning December 20th, I attended the RWWA offices in Osborne Park, where we were accompanied by Ms Munroe and Mr Hunter. I conducted a video record of interview with B J Ryan shortly after his arrival at work. Mr Ryan admitted that he used his official position as Race Programming Co-ordinator with RWWA to access the computer details of race meeting reports and where a late scratching fee was shown to be paid to a club, he would re-direct the payment to one of four jockeys' bank accounts.
>
> Mr Ryan said he had the consent of four jockeys, who were also his close friends, to pay the money into their accounts and then met them outside of working hours to obtain the cash once the money from the fraud had been cleared from RWWA and entered the jockeys' bank accounts.
>
> On Monday December 20th, I had occasion to conduct a video interview with licensed RWWA jockey Clint Harvey in my office at Ascot. Mr Harvey made admissions to his involvement in the practice. He said it commenced after B J Ryan, who he considered one of his best mates, asked him to help Mr Ryan out of a financial hardship: however, Mr Harvey added he was never comfortable with being involved.
>
> Mr Harvey said while he was uncomfortable with what was happening, once the money had started entering his bank account, the process just continued. Mr Harvey said he had spoken to B J Ryan about his concerns in being involved and he had called a stop to it after approximately six months.

> Mr Harvey explained that once the money had been deposited into his account, B J Ryan would come to his house with a list of fees that had been paid into his account and he, Clint Harvey, would pay Mr Ryan the moneys he had recorded as being received by him. Mr Harvey said he did not receive any personal financial benefit from this practice."

After making his report to the Stewards Mr O'Reilly advised that when the investigation was completed as per RWWA policy the report of the matter was referred to the Crime and Corruption Commission (WA) and to the WA Police. Mr O'Reilly then advised that the Police had interviewed the Appellant and charged him with 21 offences of Fraud. The Appellant had pleaded guilty to these charges at the Perth Magistrates Court on 31 May 2011 and on 14 June 2011, was fined $3,000.00 and ordered to pay court costs of $121.00.

There was evidence before the Stewards at the Inquiry that indicated that the 21 offences related to 78 scratching fees of $145.75 per scratching being paid to the Appellant so that the Appellant had received a total sum of $11,368.50. The evidence before the Stewards at the Inquiry indicated that the fraudulent payments had been made to the Appellant between the period 9 March 2007 to 19 November 2007.

In relation to the investigation and the evidence before the Stewards at the Inquiry as I have described above, at the hearing on 14 June 2011 the Appellant was charged with the following offence pursuant to Australian Rules of Racing 175(a):

> "You jockey Clint Harvey knowingly consented to receive rider engagement fees, totalling some $11,000.00 which you were not entitled to into your bank account during the period of approximately 8 months, from March to November 2007 which in the opinion of the Stewards is a dishonest practice in connection with racing"

The Appellant entered a plea of guilty to the charge and senior counsel for the Appellant Mr D Grace QC delivered a plea in mitigation. Mr Grace QC provided to the Stewards a significant amount of material in support of the plea in mitigation, which included a number of character references and some detailed medical reports from the years 2005 and 2006 which related to medical treatment the Appellant had received for serious injuries he sustained following a fall from a horse on 6 October 2005.

A brief medical report from Dr Kim Fong, a specialist in rehabilitation medicine, dated 13 June 2011 was also provided to the Stewards.

Mr Grace QC also made submissions on what should be the appropriate penalty to be imposed on the Appellant for the breach of the rule.

On 14 June 2011, the Stewards reserved their decision on penalty to 21 June 2011.

On 21 June 2011, the Stewards handed down their penalty and gave detailed reasons for the imposition of such penalty which is recorded in 9 pages of the transcript of the Stewards' hearing on 21 June 2011. The Stewards in their reasons set out the significant mitigating and aggravating factors that applied to the Appellant.

The penalty imposed by the Stewards was that the Appellant's jockey's licence be suspended for a period of 8 months.

The Stewards also ordered that the penalty be backdated to commence as from 27 April 2011, that being the date where the Stewards had issued a directive to the Appellant standing him down from riding. The effect of this penalty and directive means that the 8 month suspension period is due to expire on 26 December 2011.

The Appellant appeals against the penalty imposed by the Stewards on 21 June 2011 upon 5 grounds. Leave was granted by the Chairperson of the Tribunal to substitute these grounds from the original ground filed on 22 June 2011 at the hearing of this appeal on 3 August 2011.

The grounds of appeal are the following:

1. The Stewards erred in their approach to suspending the penalty.

2. The Stewards erred in finding that the offences:

   (a) had seriously damaged the integrity and image of the racing industry

   (b) were at the most serious end of the scale.

3. The Stewards erred by:

   (a) failing to adequately allow for the Appellant's impaired mental condition

   (b) assessing the case as one requiring strong general deterrence.

4. The Stewards erred by not ordering that the period of suspension be suspended.

5. The Stewards erred by imposing a sentence which was manifestly excessive in length having regard to all the circumstances of the case.

GROUND 1

As at the Stewards' hearings on 14 and 21 June 2011, an amendment had already been made to the Australian Rules of Racing ("the Rules").

Rule 196(4) states:

> "Any person or body authorised by the Rules to penalise any person may in respect of any penalty in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period of not exceeding 12 months upon such terms and conditions as they see fit".

Prior to the amendment being made to the Rules on 1 June 2011, the penalty option of suspending a penalty of suspension was not available to the Stewards as a penalty at first instance under the Rules.

Although the Stewards did not mention the penalty under Rule 196(4) as a penalty option at their hearing on 14 June 2011, this amendment to the Rules and the penalty option available was referred to by the Stewards in their reasons for imposing the penalty on 21 June 2011.

The Stewards in their reasons specifically recognised that if they determined a suspension was an appropriate mode of penalty over disqualification, they had the discretion under Rule 196(4) to suspend a suspension partially or otherwise. The Stewards considered due to the seriousness of the matter that it was inappropriate to suspend the suspension penalty they imposed.

The submission made by the Appellant in support of this ground of appeal is that the Stewards did not fully understand their power to suspend penalties pursuant to Rule 196(4), or in exercising their discretion under Rule 196(4) to suspend a suspension, they fell into error in their approach, in particular when one considers the principles as set out by the High Court of Australia in *Dinsdale v R* (2000) 2002 CLR 321.

In *Dinsdale v R* the High Court of Australia considered the power of a sentencing judge in Western Australia to impose a term of suspended imprisonment conferred by Sections 39(2) and 76 of the Sentencing Act 1995 (WA) when sentencing for a criminal offence. Gleeson CJ and Hayne J found that Section 39(2) of the Sentencing Act 1995 authorises the imposition of a term of actual imprisonment only if the Court is satisfied that it is inappropriate to impose a term of suspended imprisonment. Kirby J found that pursuant to Section 76 of the Sentencing Act 1995, the first step for a sentencing judge is to determine that a sentence of imprisonment is called for. The second step is to determine whether that sentence should be suspended for a period set by the court. (See *Cartwright v State of Western Australia* [2010] WASCA 4 per McLure P at [8]).

When the Stewards were imposing a penalty on the Appellant on 21 June 2011 they were acting as a domestic tribunal and not a criminal court. The Stewards were therefore not bound by the statutory criteria of the Sentencing Act 1995 (WA) but bound by the Rules. The two step process described by Kirby J in *Dinsdale v R* did not apply to the Stewards when they were exercising their discretion to impose a penalty on the Appellant and in particular, when they were considering the penalty option available pursuant to Rule 196(4).

I am satisfied that in considering the option of suspending the Appellant's suspension, pursuant to Rule 196(4), the Stewards did not fall into error. The Stewards considered both a partial and full suspension. They considered this penalty option but when considering all the mitigating and aggravating factors as set out in their reasons found a suspension of the suspension penalty was inappropriate due to the seriousness of the facts relating to the breach of the rule.

I would dismiss this ground of appeal.

GROUND 2

In the Stewards' reasons for imposing the penalty, the Stewards described the Appellant's behaviour in breaching the rule and the surrounding factual circumstances as:

"a very serious set of circumstances"

"has brought the racing industry into disrepute"

"These events bring the integrity of the sport into grave disrepute and cast a shadow over the confidence of the industry"

"The image of racing has been tarnished"

"To knowingly engage in such conduct as you have shows a complete contempt for the integrity of racing"

"That your actions in this matter are directly associated with racing therefore significantly increases the seriousness of them"

"this matter goes to the heart of personal and general integrity. It casts the industry into disrepute"

In objectively looking at the facts of the Appellant's offending behaviour and his breach of the Rule, I am satisfied the Stewards' comments, such as those I referred to above, were reasonable in the circumstances. Although the Appellant's behaviour did not affect the outcome of races or betting, it certainly did strike at the general integrity of racing.

The Appellant was a party to a number of reasonably serious criminal offences. The offences were committed over a considerable period of time. They were offences involving an element of deliberate dishonesty. The Appellant's role as a licensed person in the racing industry was a significant factor in the principal offender being able to commit the offences.

On occasions, licensed persons come before the Stewards for inquiries following conviction for criminal, road traffic or regulatory offences. Fortunately, it is rare for persons to come before the Stewards where the offending behaviour directly relates to that person having a role in the racing industry. When such offending does occur, in my view public confidence in the racing industry is significantly impacted.

Counsel for the Appellant, Mr Percy QC, at the hearing of this appeal described the Appellant's behaviour as "at worst mid range". In my view, the Appellant's behaviour was between the mid and upper range of offending behaviour and I am not satisfied the Stewards' descriptions of his behaviour referred to in this ground indicates they fell into error in exercising their discretion on penalty.

I would dismiss this ground of appeal.

GROUND 3

Evidence before the Stewards of someone having a mental impairment at the time a rule is breached can be relevant, as a mitigating factor and whether a penalty which reflects the principle of general deterrence is required. (See *R v Tisaras* [1996] 1 VR 398 at 400 and *Thompson v The Queen* (2005) 157A Crim R 385 at [53]-[55] in relation to sentencing for criminal offences).

In *Phillips v The State of Western Australia* [2011] WASCA 69 at [48] Buss JA stated:

> The effect of mental illness or psychological difficulties (falling short of insanity) on the moral blameworthiness or culpability of an offender is variable. It depends upon the nature, effect and severity of the condition and its symptoms. See ***R v Verdins*** [2007] VSCA 102; (2007) 16 VR 269 [25]; ***Wheeler v The Queen [No 2]*** [2010] WASCA 105 [9]. An offender who seeks to rely on mental illness or psychological difficulties as a factor which reduces his or her moral blameworthiness or culpability must prove on the balance of probabilities that the condition impaired his or her mental functioning to such an extent as to reduce the blameworthiness or culpability of the offending behaviour. See ***Wheeler [No 2]*** [10].

The Appellant's offending behaviour occurred from March to November 2007. There was limited evidence before the Stewards at the Inquiry as to the nature, effect and severity of the Appellant's mental condition at the time of his offending and how this affected his offending behaviour.

There was evidence before the Stewards that the Appellant sustained brain damage as a result of the injuries he suffered from his fall from a horse on 6 October 2005. The evidence of the ongoing impact of the brain damage sustained by the Appellant at the time of his offending was limited to Dr Fong's medical report dated 13 June 2011.

Dr Fong's medical report of 13 June 2011 stated:

> "Following a period of rehabilitation Mr Harvey appeared to be making a steady recovery and was discharged from follow-up in May 2006.
>
> Brain trauma can affect a patient's judgement and behaviour in subtle ways even though that person may appear to be well recovered. It is plausible that Mr Harvey's episode of severe brain trauma may have clouded his decision making, leading to some current disciplinary actions against Mr Harvey. Over a 20 year period of rehabilitating patients with brain trauma, it is my observation that brain injured patient's can engage in actions which are out of character for them".

There was no psychiatric or psychological evidence before the Stewards at the inquiry. The medical evidence before the Stewards did not include any assessment made of the Appellant at the time of his offending behaviour. The opinion of Dr Fong contained in his report dated 13 June 2011 was speculative.

On the evidence before the Stewards, the limited evidence as to the Appellant's brain trauma and its effect on his offending behaviour if there was a lessening of his moral culpability for the offences, it was of minimal value. In terms of general deterrence, the factual seriousness of the Appellant's behaviour which resulted in the breach of the Rule still required a penalty to make an example to others. General deterrence remained a very important criteria in the Stewards' exercising their sentencing discretion.

In any event, the Stewards' reasons for imposing the penalty indicate that they gave specific consideration to Dr Fong's report dated 13 June 2011. The Stewards were also "very conscious" of all the medical evidence before them. The Stewards' reasons indicated that, "in particular the medical evidence before us", were special circumstances which caused them to impose a penalty of suspension instead of disqualification.

I would dismiss this ground of appeal.

GROUND 4

In my reasons for dismissing Ground 2, I have referred to the seriousness of the offences the Appellant committed which gave rise to the breach of the rule.

There were a significant number of mitigating factors that applied to the Appellant's case. In my view, they were all considered by the Stewards in imposing the penalty, as indicated by their comprehensive reasons. Those mitigating factors were also used by the Stewards when they came to a conclusion that they would not impose a disqualification penalty on the Appellant.

In my view, the Stewards were correct in concluding that without these significant mitigating factors the more severe penalty of disqualification would have been an appropriate penalty based on the seriousness of the facts relating to the Appellant's offending behaviour.

I am satisfied that the Stewards did not fall into error in not ordering the 8 month suspension penalty they imposed on the Appellant be suspended pursuant to Rule 196(4).

I would dismiss this ground of appeal.

GROUND 5

This ground of appeal submits that even if the Stewards were correct in their decision that the appropriate penalty was a suspension, the 8 month length of the suspension was manifestly excessive in all the circumstances of the Appellant's case.

To determine whether the penalty is manifestly excessive it is necessary to examine the penalty from the perspective of the maximum penalty allowed by the Rule, the type of penalty customarily imposed for breach of the Rule, the place which the conduct the subject of the Rule breach occupies in the scale of seriousness for breaches of the Rule in question and the person circumstances of the Appellant. (See *Chan v* R (1989) 38 A Crim R 337 per Malcolm CJ at 342). An express error by the Stewards is therefore not relied upon in this ground of appeal. (*House v The King* (1936) 55 CLR 499 at 505).

The facts of the Appellant's case are unique. Generally, there is likely to be a great variation in the factual circumstances that occur when Rule 175(a) is breached. The Rule covers a wide range of activity. It is therefore not surprising that Senior Counsel for the Appellant, Mr Percy QC, was unable to provide this tribunal with a range of penalties for offences where Rule 175(a) is breached.

Without at least having the benefit of any range of penalties or comparable examples where Rule 175(a) has been breached in a similar way to which the Appellant breached the Rule, I am unable to be persuaded, for reasons that I have already stated above, that the 8 months length of suspension imposed on the Appellant was manifestly excessive in the circumstances.

I would dismiss this ground of appeal.

CONCLUSION

For the above reasons, I would dismiss the appeal.

JOHN PRIOR, MEMBER

APPEAL 733

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**CLINT KENNETH HARVEY**
APPLICATION NO:	**A30/08/733**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
	MR A MONISSE (MEMBER)
	MR J PRIOR (MEMBER)
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MR RJ Davies QC, represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr J Prior, Member.

I agree with those reasons and conclusions and have nothing further to add.

DAN MOSSENSON, CHAIRPERSON

APPEAL 733

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANT:	**CLINT KENNETH HARVEY**
APPLICATION NO:	**A30/08/733**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
	MR A MONISSE (MEMBER)
	MR J PRIOR (MEMBER)
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A C Monisse

ANDREW MONISSE, MEMBER