

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: CLINT KENNETH HARVEY
APPLICATION NO: A30/08/460
PANEL: MR R NASH (PRESIDING MEMBER)
DATE OF HEARING 5 MAY 1999
DATE OF DETERMINATION: 5 MAY 1999

IN THE MATTER OF an appeal by Mr C K Harvey against the determination made by the Western Australian Turf Club Stewards on 24 April 1999 imposing a one month suspension for breach of Rule 83(a) of the Australian Rules of Racing.

Mr T F Percy QC, instructed by D G Price & Co, represented the appellant.

Mr P J Chadwick appeared for the Western Australian Turf Club Stewards.

This is an appeal against conviction and penalty.

The Appellant is a licensed apprentice jockey.

Following an inquiry into an incident that occurred in the jockeys' room at Kalgoorlie-Boulder Racing Club on 24 April 1999, the Appellant was charged with a breach of Rule 83(a) of the Australian Rules of Racing as follows:

"The Stewards believe you have a charge to answer under that rule with misconduct in that following the running of Race 2 the BOC Mining Supplies Maiden over 1400 metres you were involved in a violent altercation with Apprentice B. Mathews in the jockeys' room during which you delivered several blows to Apprentice Mathews."

Rule 83 states:

"Every jockey or apprentice may be punished:

(a) If he misconduct himself in any way ..."

The Appellant pleaded guilty and was suspended from riding in races for one month.

Senior Counsel at the commencement of the appeal sought to substitute Amended Grounds of Appeal as follows:

"A. CONVICTION

1. *The Stewards erred in accepting the Appellant's plea of guilty.*

Particulars

- (i) *The Appellant made it clear that he had engaged in the behaviour complained of as a result of the provocation and/or self defence.*
 - (ii) *It was not made sufficiently clear to the Appellant that he may have had a defence.*
 - (iii) *The Appellant was not legally represented at the hearing.*
2. *The Stewards erred in convicting the Appellant of the charge in that they did not make any or any adequate assessment of the circumstances surrounding the incident and as to whether the Appellant may have had a defence by way of provocation, self defence or justification.*

Particulars

- (i) *The Appellant's evidence had always been that he had an argument relating to an incident in the race which the co-accused blamed on him and that the co-accused had initiated the physical confrontation.*
 - (ii) *The Appellant had always maintained that he had acted under provocation and/or self defence.*
 - (iii) *It was incumbent on the Stewards to examine the defences which obviously arose on the evidence before making any determination of guilt.*
3. *The Stewards erred in finding the Appellant guilty on the charge such finding being against the evidence and the weight of the evidence.*

B. PENALTY

4. *The penalty imposed by the Stewards was excessive in all the circumstances in that:*
 - (a) *The Stewards erred in placing the matter at the higher end of the scale of seriousness and failed to adequately take into account that it was not observed by any member of the public.*
 - (b) *The Stewards failed to adequately consider the questions of provocation and self defence as mitigating factors.*
 - (c) *The Stewards failed to give any adequate consideration to the fact that the incident was not instigated by the Appellant.*
 - (d) *The Stewards failed to give adequate weight to the fact that an incident occurred during the course of a race.*
 - (e) *The Stewards erred in finding that the incident reflected badly on the public image of racing.*
 - (f) *The Stewards erred in failing to impose a fine and in failing to give any adequate reasons as to why a fine would be inappropriate.*
 - (g) *The Stewards erred in imposing a penalty which was disproportionate to that imposed on the rider Mathews when there was no significant reason to differentiate between the two riders.*
 - (h) *The Stewards erred in failing to give any or any adequate reasons for imposing different penalties against the two riders."*

APPEAL AGAINST CONVICTION

During the course of the appeal the decision of three members of this Tribunal in the matter of Usher, Appeal No. 190, was brought to the attention of Mr Percy QC, who had previously been unaware of that decision. The Tribunal in that case said in relation to an appeal against conviction in respect of a breach of Rule 83(a):

*"The Stewards found as a fact that provocation existed in this case.
We are not of the opinion that self-defence or provocation in a charge
such as this can amount to an absolute defence."*

Mr Percy, on having this decision brought to his attention, abandoned the appeal against conviction. In my opinion that was the proper course for him to take.

APPEAL AGAINST PENALTY

In this case the Stewards have imposed a penalty of 1 month suspension on the Appellant for his involvement in a physical confrontation with another apprentice jockey, Apprentice Matthews, in the Jockeys Room following Race 2, the BOC Mining Supplies Maiden, at the Kalgoorlie-Boulder Racing Club on 24 April 1999.

The background to the incident is that following the race Apprentice Matthews approached Apprentice Harvey about an incident which occurred during the running of Race 2. According to Apprentice Harvey, he had walked through the door of the Jockeys Room and as soon as he got there, Apprentice Matthews *"grabbed me by the colours and started raving on about steering my horse, so I grabbed him back"*.

The following is an extract of evidence at pages 4-5 of the transcript of the Stewards' Inquiry:

*"CHAIRMAN: Alright. How many punches can you recall that you
threw to Apprentice Matthews?"*

HARVEY: 2 or 3 sir.

*CHAIRMAN: Right. Did Apprentice Matthews throw a punch at you
first, or did you throw the first punch?"*

HARVEY: He grabbed me first, sir.

CHAIRMAN: And then you threw a punch?"

HARVEY: Yes, sir.

CHAIRMAN: And this was in full view of all the other jocks?"

HARVEY: Yes, sir.

CHAIRMAN: Alright. Why did you throw a punch?"

*HARVEY: Well, because he was grabbing me and I don't like being
grabbed."*

Later, at page 5 of the transcript, Apprentice Harvey stated that he threw punches after Apprentice Matthews had started pushing him.

Apprentice Matthews at page 6 of the transcript stated:

"Sir, just on what Apprentice Harvey said, he said he threw a punch after I started pushing him, I didn't push him much, I put my hand there to talk to him and he's pushed me and that's when I've grabbed hold of the colours because I was falling backwards and, I haven't pushed him or anything, that's it, and I fell back into my chair".

Apprentice Matthews claimed that he had put his hand on Apprentice Harvey's shoulder to tell him "when someone calls him in a race to listen" and that Apprentice Harvey pushed him away and that was when he grabbed hold of Apprentice Harvey by the colours.

There was only one other witness to the incident who gave evidence to the Inquiry before the Stewards and that was Mr Biggs, a Deputy Stipendiary Steward. Mr Biggs stated that while he was weighing riders back in in the weighing-in enclosure, he heard a disturbance in the Jockeys Room. He went into the Jockeys Room to investigate. At page 10 of the transcript Mr Biggs stated:

"As I say, I entered the room and I went straight over into the corner where they were. At that particular stage Apprentice Matthews was backed into the corner and he had his left hand out trying to, on scruff of the neck of Apprentice Harvey, and whilst I was attempting to break the incident up, Mr Harvey did strike three quite vicious blows, I thought, with a clenched fist to the upper body, to the lower head area of Apprentice Matthews and as I say it was quite a vicious altercation, I believe, and in doing so I was actually forced down, pushed down to the floor and struck my left knee with abrasions as a result of striking the seat bench where the altercation was taking place."

The initial part of the Inquiry occurred about 5 minutes after the altercation had taken place. It seems, from reading the transcript, that Apprentice Harvey was still in a fairly upset charged state and was quite defensive in his answers to questions from the Stewards. It would be fair to say he wasn't totally frank with the Stewards with his answers.

At the resumed hearing of the matter, after the last race of the race meeting, it is quite apparent from reading the transcript that Apprentice Harvey displayed contrition and remorse for the events which had taken place earlier in the day. At page 11 of the transcript, Apprentice Harvey stated to the Chairman of Stewards:

"I'd just like to say sorry for what I done, I was just, at the spur of the moment, the horse give me a hard ride and when Brett come in, riling up, I was a bit pumped up myself and I just like to say sorry for what I've done".

It was also said on Mr Harvey's behalf by Mr Grljusich that Apprentice Harvey didn't initiate the altercation, but it was Apprentice Matthews who grabbed him and in the heat of the moment Apprentice Harvey had "fired up" without time to think.

Both jockeys after the Inquiry were charged under Rule 83(a) with misconduct. Both jockeys pleaded guilty to the charge. The Stewards took into account in considering what penalty they should impose that Apprentice Harvey had apologised for what he had done. They also took into

account the time he'd been involved in the racing industry, namely 12 months, his record and in particular the fact that he had not been charged in relation to an incident of the same kind, however, he had been previously charged for misconduct under Rule 83(a). The Stewards stated that they understood that Apprentice Harvey was retaliating to being approached by Apprentice Matthews. However, they were of the opinion that he did deliver blows of a vicious nature to Apprentice Matthews. They accepted it was a heat of the moment thing, but stated that as a professional rider there was responsibilities placed on him and he was expected to conduct himself both on and off the racecourse in a proper manner.

The Stewards took into account the affect of an incident like this on public relations for the industry. They were of the view that the events were serious and that it was at the upper end of seriousness for an offence under Rule 83(a). The Stewards stated that a fine would be inappropriate in the circumstances and believed the penalty of suspension for 1 month was an appropriate disposition.

In relation to Apprentice Matthews the Stewards noted that he had initiated the incident, but considered that after the altercation had begun, Apprentice Matthews' actions were *"to some degree ... in self-defence, in terms of the blows that were first struck were from Apprentice Harvey"*. The Stewards indicated that they took into account that Apprentice Matthews had no prior record and his good behaviour during the course of the Stewards Inquiry. In the end the Stewards considered that an appropriate penalty for Apprentice Matthews was a 2 week suspension.

Therefore, the suspension imposed on Apprentice Harvey of 1 month was twice as long as the penalty imposed on Apprentice Matthews. During the course of the hearing of the appeal, the Stewards conceded that Apprentice Matthews, being a Kalgoorlie based rider, would in effect only miss 1 or 2 race meetings as a consequence of a 2 week suspension. It was also conceded that Apprentice Harvey, being a Perth based rider, was likely to ride in more race meetings in a given week than Apprentice Matthews. Mr Percy QC informed the Tribunal that Apprentice Harvey had missed the Northam Race Meeting on 25 April where he was booked for 4 rides, the Ascot Anzac Day Race Meeting on 26 April where he had been booked for 4 rides, the Bunbury Race Meeting on 28 April, and the Pinjarra Race Meeting on 29 April. A stay of penalty was granted on 29 April, but Apprentice Harvey had, according to Mr Percy, missed the nominations cut off time for rides on Saturday, 1 May and Sunday, 2 May. Therefore, it was submitted that he had missed 6 race meetings so far as a consequence of the suspension, despite the fact that a stay had been granted on 29 April.

The Stewards, although conceding that Apprentice Harvey had missed the Northam and Ascot Anzac Day Meetings disputed the claims in relation to the other race meetings in the sense they did not accept that Apprentice Harvey could not have made earlier arrangements for a stay application and thereby have accepted rides subject to the determination of the stay application. It does seem accepted by the Stewards that Apprentice Harvey was a popular Perth-based apprentice rider and that the impact of the suspension on him in terms of lost rides would clearly be greater than the impact of the suspension on Apprentice Matthews. Mr Chadwick, on behalf of the Stewards, agreed that the Stewards understood this when imposing a penalty of 1 month on Apprentice Harvey in contrast to the 2 week suspension imposed on Apprentice Matthews. I formed the view having listened to the submissions of both counsel, that it was fair to say that in terms of lost rides and riding fees, the impact of any given suspension on Apprentice Harvey would be at least twice as severe as the impact of the same suspension on Apprentice Matthews. Therefore, by doubling the period of the suspension imposed on Apprentice Harvey to that imposed on Apprentice Matthews, the Stewards must have considered it appropriate to impose a penalty on Apprentice Harvey at least 4 times as severe in terms of consequence as the penalty imposed on Apprentice Matthews.

Accordingly, I have approached the question of whether or not the penalty is too severe on that basis.

It was submitted by Mr Percy that the Stewards were in error in placing the matter at the higher end of the scale of seriousness. In my opinion, physical confrontations between jockeys in the Jockeys Room cannot be condoned and, depending on the seriousness of the physical altercation, may warrant a suspension. It is also not appropriate for a jockey, who is aggrieved about the riding tactics of another, to take the law into their own hands by physical confrontation of other jockeys after the race. In this case, as the Stewards had recognised, Apprentice Matthews inappropriately instigated this confrontation, not Apprentice Harvey. However, it appears that the retaliation by Apprentice Harvey was quite extreme and was disproportionate to the instigating conduct of Apprentice Matthews. The incident occurred, however, in the closed doors of the Jockeys Room and therefore could not be visually observed by members of the public, although it was suggested by Mr Chadwick that there was quite a noise coming from the Jockeys Room. Both jockeys were apprentices and both were immature in terms of years. Apprentice Harvey is only aged 16. Although it was submitted by the Stewards that other younger jockeys look up to Apprentices like Apprentice Harvey, I did not consider this to be a particularly strong or significant factor in considering penalty.

In my view, the Stewards did take into account the question of provocation and self-defence as mitigating factors in relation to Apprentice Harvey and the fact that the incident was not instigated by him. I agree with the Appellant's contention that the Stewards did not take into account the fact that the incident was not observed by members of the public and seemed to wrongly emphasise the detriment of this kind of incident on the public image of racing without at least acknowledging the fact that the incident occurred inside the Jockeys Room away from the public view.

I do not agree with the Appellant's contention that the Stewards fell into error in failing to impose a fine in this case, nor do I agree that the Stewards failed to give adequate reasons for imposing the penalties that they did.

However, in my view, the Stewards have not satisfactorily explained why the penalty imposed on Apprentice Harvey was so much more severe than that imposed on Apprentice Matthews. Although, I agree that Apprentice Harvey's conduct, having regard to the totality of the incident and the evidence of Mr Biggs, was more serious than the conduct of Apprentice Matthews, to categorise it as 4 times as serious was, in my opinion, not justifiable having regard to the evidence nor having regard to the difference between the disciplinary records of the two jockeys. In the end, I am of the view that the Stewards fell into error in exercising their discretion as to penalty. Accordingly, it is incumbent upon me to consider the question of penalty afresh.

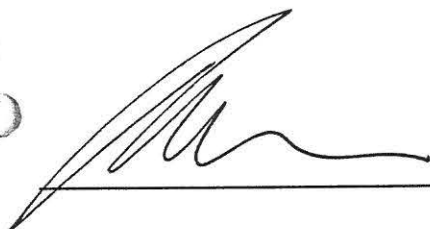
In my opinion the conduct of Apprentice Harvey was more serious than that of Apprentice Matthews. It seems to me that he became unnecessarily aggressive and vicious in response to the approach by Apprentice Matthews. That viciousness was attested to by Mr Biggs in his evidence. There is no doubt that jockeys can be placed under a great amount of pressure and stress during the course of a race meeting. For a 16 year old who has achieved significant success in the racing industry at such an early stage of his career expectations of others on his performance may be such as to result in intemperate and immature reactions to stress which a person of more mature years would not succumb to. However, it is important that the penalty imposed properly reflects the seriousness of the conduct and takes into account the record that Apprentice Harvey has in terms of prior misconduct and other breaches of the rules of racing.

In my opinion Apprentice Harvey should receive a 2 week suspension. However, I have taken into account that although Apprentice Harvey obtained his stay on 29 April, he missed nominations for racing on 1 and 2 May and also, due to the fact that the hearing of the appeal was listed for the

evening of 5 May he did not take rides for 6 May. He therefore has missed up to 7 race meetings so far. In the circumstances, I am of the opinion that his suspension should now resume and continue until 14 May 1999, which will enable him to take rides again from 15 May 1999.

Accordingly:

- (a) the appeal against conviction is dismissed;
- (b) the appeal against penalty is allowed in part;
- (c) the suspension of 1 month imposed by the Stewards is set aside and is substituted by an order that the Appellant shall be suspended from riding up to and including 14 May 1999; and
- (d) the stay granted on 29 April 1999 shall cease immediately.



ROBERT NASH, PRESIDING MEMBER