

THE RACING PENALTIES APPEAL TRIBUNAL

**REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)**

APPELLANT: MARK SESTICH

APPLICATION NO: A30/08/469

DATE OF HEARING: 12 AUGUST 1999

DATE OF DETERMINATION: 12 AUGUST 1999

IN THE MATTER of an appeal by Mr M Sestich against the determination made by the Western Australian Turf Club Stewards on the 7 August 1999 imposing a 27 day suspension for breach of the Australian Rules of Racing.

Mr TF Percy QC, assisted by Mr D Manera, on instructions from David Manera solicitor, appeared for the appellant.

Mr FJ Powrie appeared for the Western Australian Turf Club Stewards.

Mr Sestich attended a Stewards' inquiry into an incident which occurred in the initial stages of the final race at Belmont Park on 7 August 1999. Mr Sestich rode MIDDLE OF NOWHERE. Two other jockeys in the race also attended the inquiry, namely Mr P Harvey, the rider of RIA FORMOSA, and Mr P Knuckey, the rider of OUR ROGER.

The Stewards' panel comprised the Chairman of Stipendiary Stewards, the Deputy Chairman, 2 Stipendiary Stewards, a Cadet Steward and an Assistant to the Stewards. The hearing proved to be a particularly short and casual affair. After the Chairman indicated the Stewards were looking at an incident in the

initial stages of the race the jockeys were identified and the patrol film was shown. The incident occurred at approximately the 1450m mark. The Chairman described the film of it in these terms:

'...you'd go a long way to see one worse than that from the point of view of interference, from the point of view of a horse coming across and it would be from my observations, that MIDDLE OF NOWHERE ridden by Mr. Sestich shifts in very abruptly from its outside gate and causes RIA FORMOSA to be taken inwards fairly quickly at about the 1450m mark, which in turn puts OUR ROGER in a very precarious and tight spot indeed with that gelding striking the running rail, two horses behind BEST HERO and PALACE REGAL having to be restrained behind. Now Mr. Wagener you were the Steward head-on and saw the incident live, can you give this Inquiry your observations?'

Mr Wagener as the Steward on the spot then briefly described his observations. He referred to the fact that MIDDLE OF NOWHERE, which jumped from barrier 10, had come across the field quickly. In his opinion it did so in order to obtain a forward position on the rail *'...and in doing so, has taken and bumped RIO FORMOSA ridden by Paul Harvey inward onto OUR ROGER (P. Knuckey) with OUR ROGER striking the running rail and checking severely'*.

After Mr Sestich commented on these observations the Chairman put to Mr Sestich that it was *'pretty rough'* to which Mr Sestich replied *'Film, film speaks for itself'*. Mr Sestich also acknowledged that *'Mr Wagener speaks for himself'*. Mr Sestich indicated he had no questions. The 2 other jockeys were then released and the Chairman asked Mr Sestich:

'Mr. Sestich, is there anything you wish to say with regards to the incident, just, is there anything that you'd suggest to us why we shouldn't charge you with careless riding.'

In reply Mr Sestich stated:

'No, no I'll just leave it in your hands... I've endeavoured to come across quite quickly... Which I thought I was going to clear the horses quite easy, but then all of a sudden, Paul presented himself inside me. I probably should have, being an experienced rider...'

The Chairman then put to Mr Sestich after hearing a further explanation from him 'Basically you "stuffed up" haven't you?'. Mr Sestich readily acknowledged that he had. The exchange which followed was in these terms:

- 'Chairman All right, if you wait outside we'll...*
- Sestich Put my hands up and...*
- Chairman Well wait out...*
- Sestich Leave it with you.*
- Chairman Well yes, we'll really talking about penalty here aren't we?*
- Sestich Yeah*
- Chairman Yes, well say we charge you and you plead guilty...*
- Sestich Yeah.*
- Chairman Yes all right, sit down, then we can work out...*
- Sestich Do I have to sit down to plead guilty?*
- Chairman Yes, all right well we can work out a penalty then.*
- Sestich Yeah.*
- Chairman Yes, so you want to ride at Kalgoorlie, the Kalgoorlie Round.*
- Sestich Kalgoorlie's still a month away.*
- Chairman Yes, well it's inside a month away, 4th August, 4th September Kalgoorlie.*
- Sestich 4th September, well as I said like I'm pleading guilty here, I've put my hands up and it was a mistake.*
- Chairman All right, yes.*
- Sestich I haven't been any trouble for a long time.*
- Chairman Nearly two years?*
- Sestich I've been on my best behaviour.*
- Chairman Yes.*

- Sestich *Remarkable performance I must say for myself and basically I'll just leave it to you Sir. As I said like it's, it's it's, been basically a mistake and that's all I can say Sir.*
- Chairman *Yes, it's a pretty fair mistake isn't it?*
- Sestich *Considering some of the incidents I see, I don't think it is that much of a mistake, but it is a mistake...*
- Chairman *Yes, throw yourself at the mercy...*
- Sestich *Probably, probably for me, it is a mistake.*
- Chairman *Throw yourself at the mercy of the "Court".*
- Sestich *And a good "Court" it is too.*
- Chairman *All right, if you wait outside, we'll work something out.*
- Sestich *Yeah, ok. I could always plead insanity, would it help?*
- Chairman *Too late for that.'*

Mr Sestich then left the room and the Stewards deliberated. When he returned the Chairman made the following statement:

'Mr. Sestich the Stewards appreciate firstly, the manner in which you dealt with this Inquiry and your plea of guilty. We've look at your record and the record shows that you were indeed suspended in April of last year for a period, sorry in April of last year, which is effectively 16 months ago. Now in saying that, those are the somewhat the mitigating circumstances, the circumstances as prevalent in our mind obviously is the fact that a plea of guilty in the face of overwhelming evidence doesn't always, sort of have such great weight as it might do in other sets of circumstances. However, what I'm saying is this, is the level of severity is very severe as you can imagine and quite realistically when you have the two horses that have some chance inside you, namely OUR ROGER and the horses behind I refer to, the level of interference is fairly severe. Stewards' first thinking is that you should be suspended for a period of one month, which is a calendar month. However, in saying that, that would preclude you from the Hannans Handicap and the Boulder Cup. We don't wish to do that, we don't believe that that would be appropriate and we believe that a suspension for a period of 27 days until midnight the 3rd September is the appropriate penalty related to this incident. All right.'

The appellant appealed against both the severity of the penalty and the conviction. The amended grounds of appeal are as follows:

A. CONVICTION

1. *The Stewards erred in convicting the Appellant in that they did not –*
 - (a) *prefer a formal charge,*
 - (b) *particularise any offence, and*
 - (c) *call on the Appellant to plead to a specific charge.*
2. *The conviction was void for uncertainty, the Stewards having given no reasons for their decision to convict the Appellant or their specific findings of fact in support of the conviction.*

B. PENALTY

3. *The Stewards erred in their consideration of the appropriate penalty in that they –*
 - (i) *failed to articulate what they considered to be the starting point for the offence absent any mitigating factors.*
 - (ii) *failed to specify what discount was appropriate in respect of the two main mitigating factors, namely:*
 - (a) *previous good recent record, and*
 - (b) *the “plea” of guilty.*
 - (iii) *took into account as an aggravating feature the fact that the interference was caused to fancied horses, which factor was an improper and irrelevant consideration;*
 - (iv) *the Stewards failed to make an unambiguous finding as to the level of the interference referring to it as both “very” severe, and “fairly” severe.*
 - (v) *The Stewards’ consideration of a proper penalty was vitiated by a factual error as to the date of the running of the Hannan’s Handicap.*
4. *The Stewards failed or failed adequately to discount what might otherwise have been an appropriate penalty for the factors of:*
 - (i) *co-operation and the “plea” of guilty, and*
 - (ii) *the Appellant’s recent good record.*
5. *By reason of the foregoing errors, the Stewards have imposed a penalty that was excessive in all the circumstances of the case.’*

Mr Percy concedes that this was a reasonably dramatic incident with some degree of interference and some degree of blame as a result of Mr Sestich's action. He further admits that there was a general admission of guilt by Mr Sestich at the Stewards' inquiry. The crucial question however, according to senior counsel, is as to the admission of what. Senior counsel points out that the first step in the '*matrix*' was left out as no charge was in fact proffered against Mr Sestich. No particulars were supplied. The Rule which was allegedly breached was not named or in any way identified. It is argued that there is a formal requirement to plead to a formal charge, that this is an inflexible condition precedent to any conviction and that as a consequence the conviction is void for uncertainty. Counsel further argues of the necessity for compliance with these formal requirements in a case such as this where the livelihood of a jockey is at stake.

It is submitted that the Stewards did not know to what extent Mr Sestich had admitted his guilt and this fact also has implications in regard to the penalty. As the proceedings do not reveal whether it is alleged that Mr Sestich interfered with 1 horse only or possibly up to 4 horses, that this omission also makes a significant difference. Indeed there were no findings of fact at all by the Stewards.

So far as the exercise of determining penalty is concerned Mr Percy describes this as a case of '*classical sentencing errors*'. The Stewards did not specify the starting point. They failed to indicate the discounts. It is alleged the Stewards were dealing with an exemplary senior rider who rides all the time. It is claimed it is not possible to determine to what extent the discounts sufficiently accounted for the mitigating factors. The sentence appears to only have been shortened by 3 to 4 days. In the process of computation of the time period over which the penalty applies there is a serious factual error. The Stewards purported to so compute time as to avoid precluding Mr Sestich from competing in the Boulder Cup on the 4 September and the Hannans Handicap on the 8 September. Had a calendar's month suspension been imposed it would expire on midnight of 6 September and would allow riding to occur in the Hannans Handicap.

The other ambiguous finding referred to by senior counsel related to the actual level of severity of the offence. As appears above in relation to what Mr Sestich was told when the penalty was imposed the level of severity is described as '*very*

severe' at one point. At the end of the same sentence it is described as being 'fairly severe'. It is said that this inconsistency compounded the problem.

The fact that the fancied runners were interfered with, counsel argues was neither mitigating nor aggravating. Rather it is an improper consideration.

The case of *Parsons* 66 A Crim R 550 was referred to where Malcolm CJ at 561 stated:

'In my opinion, as the law presently stands, the proper approach to follow is that which was followed by Seaman J (with whom Malcolm CJ and Ipp J agreed) in Foster and D'Anna (1992) 59 A Crim R 14. In that case a starting point was specified which located the offence on a scale of seriousness of offences of the relevant kind, from which deductions or allowances could be made for mitigating factors. In my opinion, the use of such a starting point is very helpful, although it is not an essential step in articulating the sentencing process. It is helpful because it enables the process of reasoning or the steps followed in sentencing to be more readily understood. It must be accepted, however, that the sentencing process is not a matter of mere mathematical calculation and that there is room for a range of discretion. Provisions such as s 21E of the Crimes Act, however, require that the process be articulated in specific terms.'

The next submission is that the penalty was the top of the range for this type of offence. In the case of *P Knuckey* Appeal 393 presiding member John Prior stated in somewhat similar circumstances that the range of 7 to 21 days suspension may have been an appropriate penalty on conviction. According to Mr Percy, Mr Knuckey did not have as a good record as Mr Sestich, and further he had not pleaded guilty as did Mr Sestich.

Accordingly it is submitted that the proceedings were a nullity and should be quashed. I am invited to follow the approach which was adopted in *Montgomery* Appeal 130 where the proceedings before the Committee were determined to be void. Senior counsel suggests that if I were disposed to uphold the appeal there is power to send it back to the Stewards to redetermine in accordance with the reasons. Alternatively, if the decision is merely quashed the Stewards may purport to take the matter further in which event, it is claimed, the appellant would no doubt be back before the Tribunal.

In response Mr Powrie has no argument with the contentions made regarding the procedure. It is acknowledged that Mr Sestich had been treated far too lightly and informally by the Stewards due to the bonhomie which exists between this fully co-operative and experienced rider and the members comprising the Stewards' panel. This rider has had 33 previous appearances in regard to careless riding. As a consequence of Mr Sestich's experience and the relationship between him and the Stewards the Stewards erred by treating the matter far too simplistically. As to the appropriate range of penalties Mr Powrie indicates that prior to Mr Prior's decision the range was a period of suspension from 10 days to 2 months. In one case more recently before the Tribunal the acting chairperson had applied a 3 day suspension as being appropriate for a minor riding offence.

On further questioning of Mr Percy as to the appropriateness of exercising the power to send it back to the Stewards pursuant to s17(9)(b) of the *Racing Penalties (Appeals) Act* Mr Percy argues that the Stewards' decision should simply be quashed without any other order as:

1. The proceeding miscarried through no fault of Mr Sestich,
2. Mr Sestich has already partly served his penalty, namely 5 days. This resulted in him missing a country meeting, a City meeting on the day before the appeal hearing and more than half the usual rides he otherwise would have had during the forthcoming Saturday meeting. In effect he has missed 2.5 meetings, and
3. Mr Sestich has as a consequence been placed in a much more adverse position than otherwise, should he now be reconvicted, due to the fact that by virtue of the passage of time since the offence, it would result in him most likely missing the Kalgoorlie races.

As the conclusion of the hearing after having determined that the appeal succeeds and the conviction be simply quashed a refund of the lodgment fee was sought. This is on the basis that, through no fault of Mr Sestich, the proceedings miscarried and in the meanwhile Mr Sestich had served part of the penalty at a very significant cost to himself. It is argued this is a most unusual case which would not set a precedent. Mr Powrie indicates from the perspective of the

Stewards it makes no difference whether the fee is refunded. He too does not consider this case will set a precedent. In those circumstances I ordered the refund of the fee.

This clearly is a most unusual situation. The inquiry conducted by the Stewards proved to be as friendly and relaxed a session as is imaginable. In fact it was an aberration. It lacked most of the hallmarks of a normal Stewards' inquiry. Mr Sestich's attitude of cooperation and resignation to his fate added to the mood of informality and indifference. The Stewards clearly strayed from the usual high standards that one has come to expect from them. Normally there is close attention to the formal niceties associated with each step of an inquiry process beginning with conducting the investigation stage to the point where the Stewards determine to impose a charge and specify the particular rule in question. The Stewards are well aware of the need to refer to and read out the relevant rule as well as the need to give sufficient particulars of the offence to put beyond doubt what the matter is which the charged party has to respond to. The next steps are to ask how the charged person pleads, to entertain any defence, then to decide guilt or innocence before dealing with the penalty. On this particular occasion, apparently due to the familiarity of the participants and the cooperation and willingness of Mr Sestich, the proceedings became so loose and informal that, when looked at in totality, Mr Sestich clearly was not given a proper or a fair hearing. It is relevant to refer to what the Tribunal said in a trotting appeal of LB Harper Appeal 241 some years ago:

'Even although Mr Harper did not argue the matter on this basis, and indeed the technical legal issue was completely lost on him, this situation does constitute a breach of the rules of natural justice. The three aspects of natural justice that Stewards must abide by, as outlined by the Privy Council in Byrne v Kinematograph Renters' Society [1958] 2 All ER 579, are:-

- (a) the right to be heard by an unbiased adjudicator;*
- (b) the right to have notice of charges of misconduct; and*
- (c) the right to be heard in answer to those charges.*

The rules require a full disclosure of all relevant material known to the adjudicator, which may have the possibility of affecting or influencing the outcome of the hearing. In the circumstances the withholding of the two documents in question combined with the other information which the Stewards had and which was relevant to the matter but which was not disclosed do amount to a breach of the rules.

Had Mr Harper known of this material during the course of the Stewards' hearing it may have influenced the way in which he conducted his defence and consequently may have effected the outcome of the inquiry.

A denial of natural justice is an error of law which deprived the Stewards' hearing of any jurisdiction which it otherwise possessed and rendered their decision void. As was decided by the Privy Council in Calvin v Carr 53 ALJR 471 "A decision made contrary to natural justice is void, not voidable; but, until it is so declared by a competent body or court, it may have some effect, or existence, in law".

Section 17 of the Racing Penalties (Appeals) Act states that:-

"(G) Upon the determination of an appeal the Tribunal may ... (e) confirm, vary or set aside the determination or finding appealed against or any order or penalty imposed to which it relates".

This empowers the Tribunal to declare a decision made contrary to natural justice void. The Tribunal tentatively concluded at the hearing on 19 January 1995, that there was a breach of the rules of natural justice. However, in view of the unusual circumstances in the matter and the fact that the Stewards were not represented an adjournment was afforded to the Stewards to enable them to seek legal advice and to consider their position.

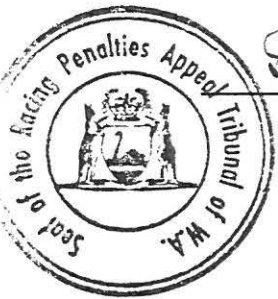
At the resumed hearing on the 6 February 1995, Mr Styles conceded there had been a breach of natural justice. The Stewards invited the Tribunal to send the matter back to the Stewards for rehearing. As a decision which is made in breach of the rules of natural justice is void it was not appropriate for this matter to be directed back to the Stewards. The appeal was upheld and the conviction was quashed.'

For all of the reasons advanced by Mr Percy Mr Sestich is entitled to have the outcomes of the process overturned. It is not appropriate for the matter to go back to the Stewards. I take into account in particular the fact that Mr Sestich had already served 5 days of the penalty, and as a consequence in effect missed out on 2.5 meetings at a considerable detriment to himself. In view of the Kalgoorlie races Mr Sestich would be further jeopardised significantly with the coincidence of timing were the Stewards to redetermine the matter, decide to reconvict and then consequently to impose a further penalty of a similar length to that which was originally imposed.

All of the amended grounds of appeal both as to conviction and as to penalty are made out.

Lengthy exchanges took place between senior counsel, Mr Powrie and me at the appeal hearing regarding the possibility that further action may be taken by the Stewards should the decision be quashed without it being ordered to go back to the Stewards to rehear the matter. In that context it is worth mentioning in passing that a determination of the Tribunal in relation to any appeal is final and binding on the parties (s14(1)(b) of the *Racing Penalties (Appeals) Act*).

The range of penalties for this type of offence was identified and enunciated during the course of the proceedings. I have already referred to it. I see no useful purpose being served in commenting further on that aspect.



A handwritten signature in cursive script, appearing to read "Dan Mossenson", written over a horizontal line.

DAN MOSSENSON, CHAIRPERSON