APPEAL - 565

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**PAUL KING**
APPLICATION NO:	**A30/08/565**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**16 APRIL 2002**
DATE OF DETERMINATION:	**16 APRIL 2002**

IN THE MATTER OF an appeal by Paul King against the determination made by the Stewards of the Western Australian Turf Club on 1 April 2002 imposing 21 days suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr T F Percy QC and with him Mr P G Randall, instructed by D G Price & Co, appeared for the Appellant.

Mr J A Zucal appeared for the Stewards of the Western Australian Turf Club.

This is an appeal against both conviction and penalty.

Following the running of Race 7 at Ascot Racecourse on 1 April 2002, the Stewards opened an inquiry into an incident that occurred near the 500-metre mark.

The Appellant, Jockey P Carbery, and Stewards G M Bush and W J Delaney all gave evidence at the inquiry. In addition, the patrol films were shown. After adjourning to consider the evidence, the Chairman of Stewards, at the resumption of the inquiry, read Rule 137(a) of the Australian Rules of Racing to Mr King and then announced:

> *"Now we are charging you under that rule with careless riding, careless riding being that in the opinion of the Stewards near the 500 metres, when riding BRILLIANT, BEAUTIFUL DYNA, you've allowed your mount to shift out causing DAZZLING DANE (P. Carbery) to restrain."*

Rule 137(a) states:

> *"137. Any rider may be punished if, in the opinion of the Stewards:*
> *(a) He is guilty of careless, improper, incompetent or foul riding..."*

Mr King pleaded not guilty. The Stewards convicted him of the charge and announced their findings in these terms:

"Mr King we've considered all the evidence and all that you have placed before us. That evidence includes the evidence of Stewards Delaney and Bush, who witnessed the incident live. After considering all the evidence, the Stewards are of the opinion that you have allowed your mount to shift out near the 500 metres causing DAZZLING DANE to restrain. Accordingly Mr King we find you guilty as charged. Do you wish to address us on penalty Mr King?"

Mr King responded as follows:

"No sir, just like I said I don't think it was a severe amount of interference, probably on the lighter side, that's really about it. I would like to probably be able to ride HONOR LAP in the Derby if possible, I don't know when the Derby is, it's..."

After deliberating, the penalty was announced in these terms:

"Mr King we have considered all that you've placed before us, before the Stewards in regards to penalty. We have considered your record, which I must say is not good, you were suspended on the 24 November, 2001 for twelve days and on the tenth of the first you were suspended for fifteen days and on the twelfth of the first, 2002 you were suspended for twenty one days. Now the twenty-one days and the fifteen were served concurrently. And I do note that for a bad record which is not a good record, you don't get more Mr King, but you don't get concessions...But you don't, by virtue of a bad record you don't necessarily get more. We've considered the degree of interference and we see it is starting to approach mid way on the scale. We are aware that the result and interference to Mr Carbery was a restrain, so we've certainly that has been the charge and we make note of that. We have also taken into account that you are on a favoured horse in the Derby, that being HONOR LAP, the Derby is run on the thirteenth of April.

...

The point I was going to make Mr King is that on Saturday the Stewards did address you in regards to interference. We haven't been happy with the level of interference and Jockey's were put on notice that we were going to lengthen the periods of suspension, by virtue of the fact that of recent times riding has not been up to an acceptable standard with a number of falls taking place. After considering all those factors Mr King, we believe that you should be suspended for twenty-one days from midnight tonight until midnight the twenty second of April, 2002."

On 5 April 2002 Mr King lodged a Notice of Appeal and sought a stay of proceedings. The Tribunal Chairperson, Mr Mossenson granted the Appellant a stay of proceedings until midnight on Thursday, 18 April 2002 or as otherwise ordered

At the hearing of this appeal, leave was given to amend the Grounds of Appeal. The Amended Grounds of Appeal are:

A. CONVICTION

1. The Stewards erred in convicting the Appellant of careless riding by failing to specifically and correctly address the question of whether the interference caused by his mount occurred as a result of the Appellant's carelessness.
2. The finding of the Stewards that the Appellant had ridden carelessly was not reasonably open to them on the evidence, and was against the weight of the evidence.

B. PENALTY

3. The Stewards in determining penalty erred in finding that the carelessness was of a mid-range level, the carelessness being at the lowest end of the scale.

4. The Stewards in determining penalty erred in equating the level of the interference with the level of carelessness.
5. Alternatively, the Stewards erred in imposing a penalty commensurate with severe level carelessness and interference for an offence involving only low to mid-level carelessness and interference.

A. CONVICTION

In support of ground 1, Mr Percy for the Appellant submitted that the fact that there was interference to DAZZLING DANE did not necessarily mean that It was the Appellant's riding which caused that interference. That much can be accepted. The result does not necessarily mean that there was carelessness. There is support for that view in the case of ***Geneff –v- Townshend (1970) WAR 20.*** That was a driving of a motor vehicle case, in which there had been a collision and the appellant there had been convicted of careless driving. In that case, Hale J. said at page 22: " A driver is bound to take into account anything that is reasonably possible, but he is not bound to conduct himself on the basis of unlikely possibilities." By charging and then convicting the Appellant, the Stewards must have been of the opinion that the resultant interference was not an "unlikely possibility". In that sense, the accepted law does not take the Appellant much further. The real question would seem to be whether there was any factual basis for their opinion.

The extent of the Appellant's liability was conceded to be that he moved out, and that Mr Carbery restrained as a result. The submission put was that the moving out was proper in all the circumstances of the race at that time. It was a deliberate, rather than an inadvertent move by the Appellant, but he was simply giving his horse every opportunity to win by trying to move into a better line. There was however, a factual dispute between the Appellant and the Stewards. It concerned the position of Mr Carbery's horse at the time the Appellant made his move. The Stewards alleged that Mr Carbery's horse was back and to the outside (T3). The Appellant described Mr Carbery's position as "right back" (T3), "too far back" (T4), and "that far back" (T6). The Appellant's description was therefore somewhat different than that of the Stewards. The Stewards had some support for their interpretation in the evidence of Mr Carberry himself, who described both his horse's movement and its position as " Sort of tracking up MAIN STAGE..."(T1). It is relevant to note that Mr Carbery described his horse's movement as well as its position. He described it as "tracking up". Whatever that may precisely mean, it certainly does not describe a beaten horse which was falling away from the field. The Appellant in his description did not say that he gave any consideration to the rate at which Mr Carbery's horse was coming home.

The Stewards were of course entitled to form their own view of the facts in coming to their opinion. In my view, they did apply the correct test in that they considered all the factual circumstances relating to whether or not the riding was careless. They went further than simply looking at the result. They had Mr Carbery's evidence and their own observations of the rate at which Mr Carbery's horse was coming home.

For the above reasons, I dismiss ground 1 of the appeal.

The above reasons can be applied equally to ground 2 of the appeal. That ground too is dismissed.

B. PENALTY

Ground 4 asserts that the Stewards in determining penalty erred in equating the level of the interference with the level of carelessness. There is no substance in that ground. The two things are inextricably bound up in this particular case. The carelessness was the moving out so as to cause the interference. That is reflected within the drafting of ground 5 of the appeal itself, where the carelessness and the interference are spoken of as one and the same thing. This is not to criticize, simply to point out that the distinction complained of in ground 3 is one which does not readily appear without some degree of splitting of hairs. Ground 4 is dismissed.

Grounds 3 and 5 can be treated together. It is said that the Stewards wrongly categorised the level of carelessness, and then followed upon that with a penalty which was too severe. Within those two grounds it is implicit that, for the purposes of penalty, there are three levels of carelessness,

being low, mid range and severe. In my view, that is a distinction which should not be made for the purposes of considering careless riding penalties on appeal. The reason is apparent. Unlike other offences, riding which can be punished is already divided into four categories within Rule 137(a), namely careless, improper, incompetent or foul. To set a tariff on appeal on the basis of sub - categories within each part of that rule would be to effectively rewrite the rules. If this Tribunal on appeal were to adopt that approach, it would require the Stewards (and this Tribunal on other appeals) to go too far by comparing cases involving different circumstances. The Stewards are entitled to describe the level of seriousness, as part of giving their reasons for decision in each case. Their discretion ought not to be limited by a strict level of categorisation.

The correct approach in considering penalty on appeal does not involve precise comparison with other cases. Comparison with other cases is a proper exercise, but always within the limits spoken of in ***Lowe's*** case (see below). In saying here that there should be no further definition of the offence, I am mindful of the fact that in a previous decision (Miller – Appeal 446), I have used the terminology of sub-categories of culpable riding. However, the issue did not squarely arise for determination in that case.

It is worthwhile to revert to some first principles in imposing penalty, and considering penalties on appeal. The first is that the imposition of a penalty at first instance is an exercise of discretion. For that reason, there is a strong presumption in favour of the correctness of the decision appealed from: ***House –v- The King*** (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 504-505. The second is the principle of parity, namely that punishments imposed should be as far as possible consistent between people who are convicted of similar offences. That principle is sometimes expressed differently, namely that an appeal court will intervene when a penalty imposed is so far outside the range of sentences commonly imposed for offences of its' type as to manifest error. Whichever way it is put, it is a statement of the principle in Lowe's case. ***Lowe v R*** (1984) 154 CL.R 606 at 611 per Mason CJ.

The above principles come from the criminal law. They are relevant here for the reason that the criminal law is concerned with the application of penalties following upon convictions, as are the Rules of Racing. They are relevant here as well because they do no more than state fundamental rules of procedure and fairness.

Applying those principles to this case, I am of the opinion that grounds 3 and 5 are not made out. The Stewards made no error of principle in imposing the penalty. The imposition of 21 days suspension is presumed to be correct. Senior counsel for the Appellant quite correctly referred me to a number of previous decisions where lesser periods of suspension had been imposed by this Tribunal on other careless riding cases. I was urged to approach the matter by reference to those cases, and to apply the principle of parity and then reduce the Appellant's penalty. For the reasons given above, I am not inclined to accept that the Appellant's culpable riding should be further defined into a sub-category of careless riding. It remains to consider whether the penalty was so far outside the range of penalties imposed ***for careless riding*** (emphasis added) as to manifest error. I was informed and I accept that penalties commonly imposed range between 8 days and 2 months. The Appellant's penalty was within that range.

At the hearing of the appeal, a further matter was raised on behalf of the Appellant, which was not one of the grounds of appeal. It was submitted that the Appellant was subjected to a higher penalty because the Stewards had decided to lengthen the periods of suspension generally for careless riding offences. It was submitted that it was not open for the Stewards to do that.

As noted above, the Chairman of Stewards said at T9:

> *"The point I was going to make Mr King is that on Saturday the Stewards did address you in regards to interference. We haven't been happy with the level of interference and Jockey's were put on notice that we were going to lengthen the periods of suspension, by virtue of the fact that of recent times riding has not been up to an acceptable standard with a number of falls taking place. After considering all those factors Mr King, we believe that you should be suspended for twenty-one days from midnight tonight until midnight the twenty second of April, 2002."*

In my view, it was permissible for the Stewards to take the approach that they did. If the penalty was higher than they would have otherwise imposed, it was still within the range. The Stewards are entitled to have a degree of flexibility in the way they go about the imposition of penalties for this type of offence. That is the very point of the exercise being a discretionary one.

For the above reasons, I dismiss the appeal against penalty.

The suspension of operation of the penalty automatically ceases.

PATRICK HOGAN, PRESIDING MEMBER