

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: DAMIAN MILLER
APPLICATION NO: A30/08/602
PANEL: MR P HOGAN (PRESIDING MEMBER)
DATE OF HEARING: 19 AUGUST 2003
DATE OF DETERMINATION: 19 AUGUST 2003

IN THE MATTER OF an appeal by Damian Miller against the determination made by the Stewards of Thoroughbred Racing on 2 August 2003 imposing 14 days suspension for breach of Rule 137(a) of the Australian Rules of Racing.

The Appellant represented himself.

Mr W J Delaney appeared for the Stewards of Thoroughbred Racing.

The Stewards opened an inquiry into an incident that occurred approaching the 100m in Race 6 at Kalgoorlie on 2 August 2003.

Called to the inquiry were:

Jockey Damian Miller	Rider of MINT PLAY
Jockey R Kirkup	Rider of MR DEBERNALS
Apprentice C Farrell	Rider of VIOLENT WIND

The Stewards' Panel was:

Mr W J Delaney	Provincial Chairman of Stewards
Mr J Biggs	Stipendiary Steward - Kalgoorlie

After hearing evidence from the riders and viewing the patrol films, the Chairman of the inquiry announced a charge against the Appellant in these terms:

"Mr Miller, Australian Rule of Racing 137 states any rider may be punished if in the opinion of the Stewards and subrule (A) of that rule states a) he is guilty of careless, improper, incompetent or foul riding. The stewards feel that at this stage of the inquiry you have a charge to answer and it is a charge of careless riding and the specifics are that in Race 6 The Goldfield's Tattersall's Club Cup over 2300m approaching the 100m whilst riding MINT

PLAY along you have allowed that gelding to shift in with not sufficiently clear of MR. DEBERNALS causing that gelding to bump with VICTORY sorry, VIOLENT WIND and be restrained."

Mr Miller pleaded not guilty.

After hearing further submissions from the Appellant the Chairman in announcing a guilty finding stated:

"Mr Miller we've given very, very careful consideration to what you've put forward here. It is our opinion that MINT PLAY shifts in approaching the 100m when not sufficiently clear of MR. DEBERNALS which results in that gelding bumping VIOLENT WIND and MR. DEBERNALS being restrained. It is also our opinion that the subsequent shift by MOROCCO BOUND is not a factor in that restraint. We see you riding along with the whip in your left hand and it is our view that you've made insufficient effort to keep MINT PLAY straight. Accordingly we find you guilty as charged."

Mr Miller lodged a Notice of Appeal on 7 August 2003 and was granted a stay of proceedings until midnight on Tuesday, 19 August 2003 or as otherwise ordered.

The Grounds of Appeal are:

"Stewards erred in their finding of a guilty verdict, due to their incorrect conducting of an inquiry. And Stewards erred by including inadmissible evidence in their decision when finding Mr D Miller guilty under Rule 137a and subsequently suspending him."

The ground of appeal does not challenge the merits of the Stewards' decision. It claims that the inquiry was conducted incorrectly, and that inadmissible evidence was thereby admitted. The factual assertion behind that ground of appeal is that one of the witnesses, Jockey R Kirkup, may have been affected by alcohol at the time of giving his evidence, and therefore the evidence should not have been received at that time.

The Inquiry

The inquiry took place at about 7.00pm on Saturday night, 2 August 2003. One of the reasons for the lateness was that there had earlier been a triple objection hearing. In accordance with the usual practice, and in accordance with Regulation 51 of the Rules of Racing, jockeys involved had not been given permission to leave the course until those hearings had been completed. However, after completion of the objection hearing and prior to the inquiry the subject of this appeal, Jockey Kirkup had mistakenly been given permission to leave the course. Mr Kirkup asked an assistant to the Stewards whether he was still required, and he was told that he was not. This was a surprise to the Stewards when they came to commence the inquiry. Mr Biggs contacted Mr Kirkup by telephone and asked him to return, which he did.

Mr Kirkup gave evidence at the inquiry. He was an important witness. At the conclusion of the inquiry, after conviction and penalty, the Appellant raised the issue now in the appeal for the first time. He said at T27

"...I also find it completely inappropriate that a rider who has been off the course has been under the influence of alcohol is brought back to an inquiry and evidence that he has given has led to this charge."

This led to an exchange between the Chairman, Mr Miller, and Mr Biggs.

Mr Miller said that he spoke to Mr Biggs outside the inquiry, before it commenced. Mr Biggs told him that Mr Kirkup was on his way. Mr Miller asked Mr Biggs whether Mr Kirkup had been at the bar. Mr Biggs told Mr Miller that he had not, and that he was coming from dinner. Mr Miller went on to ask Mr Biggs whether Mr Kirkup had been drinking, and Mr Biggs stated that Mr Kirkup had not been drinking.

Mr Biggs' version was slightly different. He said that, when Mr Kirkup spoke on the phone, he told Mr Biggs that that he was just sitting down to dinner. Mr Kirkup did not mention anything about drinking, and Mr Biggs did not ask him.

Mr Biggs did not contradict Mr Miller's assertion that he had told Mr Miller that Mr Kirkup had not been drinking (T27).

I find as a fact that Mr Biggs' statement to Mr Miller that Mr Kirkup had not been drinking was correct so far as he knew. It was an entirely consistent answer given the context in which Mr Miller asked the question about being in the bar, and Mr Biggs' receipt of the information that Mr Kirkup had been sitting down to dinner.

As it transpired, Mr Kirkup had in fact been drinking, although to what extent remained a question.

Mr Miller said that, on the way walking in to the inquiry, Mr Kirkup told him that he (Mr Kirkup) had had about "three or four" wines. In the inquiry that followed, Mr Miller did not relay this information to the Chairman or Mr Biggs. The issue was not spoken of until the completion, when Mr Miller raised it at T27.

Evidence at the Appeal

Mr Miller gave evidence at this appeal. He confirmed that he had asked Mr Biggs prior to commencement whether Mr Kirkup had been at the bar. He confirmed that Mr Biggs told him no, and that Mr Kirkup was actually coming from dinner. He confirmed that Mr Biggs told him that Mr Kirkup had not been drinking.

Mr Kirkup gave evidence at this appeal, by way of telephone. He said that he told Mr Miller that he had been drinking. He told Mr Miller that he had had one glass of wine. He was certain that he told Mr Miller that he had had only one glass of wine.

Possible Adjournment

It was conceded by the Stewards at this appeal that an adjournment would have been considered if it was apparent that the witness Mr Kirkup was under the influence of alcohol. However, there was no indication from his demeanour during the inquiry that this was the case. Furthermore, Mr Miller did not raise it as an issue during the proceedings, nor did he inform the Stewards that Mr Kirkup had told him that he had had "three or four" glasses of wine.

Findings of Fact

At the end of the day, the question of fact for me to decide is whether there is any evidence that the witness Mr Kirkup was so affected by alcohol that his evidence was unreliable. Mr Miller said in his evidence at this appeal that he did not raise it as a possible issue at the inquiry because he did not want to "undermine" Mr Kirkup, whom he described as a colleague. However, it is equally possible that Mr Kirkup did not display any sign of being affected, which was certainly the view taken by the Chairman (T27) and Mr Biggs (T28).

I find as a fact that Mr Kirkup had consumed one glass of wine. I further find as a fact that the consumption of one glass of wine with dinner is not sufficient to adversely affect any normal person. A reading of the transcript gives no indication that Mr Kirkup was in any way affected, and the observations of the Stewards at the inquiry gave them no cause for concern. Mr Miller's decision not to raise the point, whilst understandable, means that he lost the opportunity for him to provide any further evidence for the assertion he now makes at this appeal. For all of these reasons, I am not persuaded that there is any evidence that Mr Kirkup gave unreliable or inaccurate evidence.

Decision

There can be no doubt that the requirement for a fair hearing would dictate that a witness should not be adversely affected so as to not be able to give accurate evidence. Mr Miller's ground of appeal claims that this is exactly what occurred in this case. I have found as a fact that it did not so occur. That being so, it necessarily follows that the appeal should be dismissed.

A handwritten signature in cursive script, reading "P. J. Hogan", written over a horizontal line.

PATRICK HOGAN, PRESIDING MEMBER

