

REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

<u>APPELLANT:</u>	PATRICK JOSEPH CARBERY
<u>APPLICATION NO:</u>	A30/08/669
<u>PANEL:</u>	MR D MOSSENSON (CHAIRPERSON)
<u>DATE OF HEARING:</u>	8 March 2007
<u>DATE OF DETERMINATION:</u>	8 March 2007

IN THE MATTER OF an appeal by Mr P J Carbery against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 February 2007 imposing a 2 months suspension for breach of Rule 175(q) of the Australian Rules of Racing.

Ms B Lonsdale, instructed by DG Price & Co, appeared for the Appellant.

Mr RJ Davies QC appeared for Racing & Wagering Western Australia Stewards of Thoroughbred Racing.

This appeal came on for hearing before me on 8 March 2007. I dismissed the appeal. I now publish my reasons.

BACKGROUND

Senior jockey Mr P J Carbery was charged with improper conduct of making an offensive and insulting comment to apprentice jockey Miss Rosalyn Bynder on 16 November 2006 in the jockeys' common waiting room at Pinjarra Racecourse in breach to Australian Rule of Racing 175(q). Mr Carbery pleaded not guilty to the charge but was eventually convicted after a protracted hearing before the Stewards. Throughout the hearing, which took place on 2, 13 and 22 February 2007, Mr Carbery was allowed legal representation. A considerable

amount of hearing time was involved with Mr Carbery's counsel, Mr T Percy QC, cross-examining witnesses and presenting submissions.

The Stewards delivered some five pages of detailed reasons supporting their decision to convict. Leaving aside how the Stewards analysed and evaluated the evidence the following principal issues can be extracted from the reasons:

- that in reaching their decision the Stewards were conscious of the standard of proof required;
- the significance and far reaching implications of the decision;
- the need to carefully assess and weigh all the evidence presented;
- the passage of time since the incident and its impact on the recollections of the parties and witnesses;
- the different conflicting versions of the incident presented from the relatively large number of witnesses involved;
- the need to ignore the background to the incident and to decide the matter only on what had occurred on 16 November 2006;
- the fact that the alleged offensive remark was only made once;
- despite the denials the Stewards were satisfied the alleged remark had in fact been made
- despite the thorough cross examination of Miss Samson by senior counsel, Miss Samson was adamant on critical points and categorically asserted hearing the words in question.

In addressing penalty the Stewards stated that they took into account, amongst other things:

- the serious nature of the matter;
- the fact that the offensive and insulting remark was directed towards a 22 year old female apprentice jockey of Aboriginal background;
- the comments were crude and included a racial slur;
- the comments had the potential to impact on an inexperienced apprentice's ability to compete in races;
- Mr Carbery is a leading rider who is expected to act professionally;
- the comments were made in the jockeys' waiting room;
- the need for both general and specific deterrence;
- the wide discretion as to the range of penalties that may be imposed.

As a consequence the Stewards suspended Mr Carbery from racing for 2 months effective from 28 February 2007. Mr Carbery appealed against both the conviction and penalty and sought a suspension of operation of the penalty. Initially I granted an interim stay to allow him to ride on the forthcoming weekend. After hearing submissions from the parties on 6 March 2007 I refused to extend the stay and listed the appeal for hearing on 8 March 2007.

REASONS

Ground one alleges that the decision was unsafe, unsatisfactory and against the evidence and the weight of the evidence. In relation to this ground both counsel took me in some detail to passages in the transcript and argued that different parts of the evidence supported their respective propositions. By the end of that process I was satisfied by the line of reasoning presented by Mr Davies QC, that the approach adopted by the Stewards in analysing and evaluating the evidence and arriving at their conclusions, was in no way in error.

The Stewards, unlike me, had the benefit at the hearing of the witnesses being present to give their evidence before them, save for one jockey who was telephoned from the hearing room. The Stewards had full opportunity to evaluate the numerous witnesses who were involved. In that regard they were aided by the cross-examination of senior counsel in their assimilation of the large body of material before them.

I was persuaded there was credible evidence which supported the Stewards' conclusions that there was only one occasion when the offensive words were uttered by Mr Carbery and the incident had occurred before the race. Despite the best efforts of Ms Lonsdale to persuade me otherwise and to demonstrate the merit of the propositions contained in the particulars pleaded in support of this ground, I reached the conclusion the Stewards were entitled to make the findings which they did. They properly weighed and balanced the conflicting testimony and were entitled to reach their conclusions of the unhappy affair.

The second ground alleges the charge was void for duplicity as the Stewards failed to sufficiently particularise the charge. In view of the treatment of the evidence as presented by Mr Davies and the conclusion I reached on that evidence in relation to the first ground I was satisfied there was no duplicity, as alleged. In those circumstances, I was satisfied there was no obligation on the Stewards to nominate when the offence took place.

Ground three alleges composite findings of fact were improperly adopted. I was not persuaded there was in fact any improper adoption of composite evidence of what was said to have occurred prior to and after the race. The Stewards fairly and logically explained the basis for arriving at their conclusions. Those conclusions were open to them on the evidence which had been presented and tested by the cross examination before them.

The fourth ground asserts the onus of proof was reversed. I was persuaded the reversal of proof argument had no merit. There was no reversal of the onus based on the way Mr Davies argued the position and I adopted that argument. The Stewards fully explained the basis upon which they arrived at their findings of fact. They made it clear which evidence they accepted and acted upon.

There was no merit to ground 5 either. That ground addresses inadequate findings of fact in relation to the charge. There was in my opinion a perfectly adequate analysis of the evidence by the Stewards and no inadequate findings of fact.

The next ground, (which is also stated in the Grounds of Appeal to be ground 5), deals with hearsay complaint evidence and the treatment of the distressed condition of Miss Bynder as being corroborative of the offence, has no merit. For reasons advanced by Mr Davies I am satisfied the Stewards did not err in regard to these aspects.

Finally it is pleaded that affirmative evidence was treated as neutral in ground 6. Again I adopted Mr Davies' argument and considered there to be no merit in this ground.

As to penalty, the appeal notice asserts a suspension was inappropriate to the offence and manifestly excessive in all the circumstances. I was given the benefit of a table of outcomes by both sides of offences involving improper conduct under the former and current rule. The table produced by the Stewards was far more comprehensive and covered a wider range of penalties. Many of the penalties referred to on the lists certainly did include fines. However, a number of the more serious offences did attract more serious penalties, including:

DM Abbott	2 months' disqualification.
DM Attwell	3 months' disqualification.
JW Berry	1 month 3 weeks suspension.

CB Cousins 3 months 17 days disqualification.

CL Hislop 30 days suspension.

CL Hislop 3 months 1 week suspension

NJ O'Halloran 5 months 30 days disqualification.

DA O'Heare (Appeal 442) 2 months' suspension.

MC Thornley (Appeal 325) 2 months suspension.

There is no doubt the words used by Mr Carbery were clearly both offensive and racist. They amounted to racial vilification. They were stated by a senior jockey and were particularly demeaning of the young female industry novice. The conduct was highly improper in civilised society and clearly has no place in the racing industry. The Stewards were required to determine how serious this misbehaviour was in the total context of all the relevant matters. The Stewards are the persons charged with the responsibility of controlling the conduct of the sport. They must ensure standards are maintained and control is preserved. In so doing Stewards owe it to apprentices male and female to try to ensure satisfactory levels of conduct occurs from older more experienced participants.

The Stewards were perfectly entitled to treat Mr Carbery's conduct as a more rather than a less serious matter in the exercise of the discretion vested in them. I was satisfied, based on the nature of the misconduct and the range of penalties that had previously been imposed, the penalty arrived at was an appropriate punishment for the improper conduct in question.



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

DAN MOSSENSON, CHAIRPERSON