APPEAL - 684

REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: **Stephen SHEEHY**

APPLICATION NO: **A30/08/684**

PANEL: **MR D MOSSENSON (CHAIRPERSON)**

DATE OF HEARING: **20 MAY 2008**

DATE OF DETERMINATION: **20 MAY 2008**

IN THE MATTER OF an appeal by Stephen Sheehy against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 April 2008, imposing a 28 day suspension together with a fine of $500 for breach of Rule 137(a) of the Australian Rules of Thoroughbred Racing.

Mr T Percy QC assisted by Miss J Nikolic appeared for Mr S Sheehy.

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

BACKGROUND

This is an appeal against penalty by Mr S Sheehy the rider of SAINTSTREET which raced in Race 7 at Albany Racing Club on 15 April 2008. After the running of the race the Stewards inquired into an incident which led them to lay a charge of careless riding in breach of Australian Rule of Racing 137(a). The particulars of the charge were:

> *'... that near the 425m, you allowed your mount SAINTSTREET to shift outwards when insufficiently clear of SER ACT ridden by Jarrad Noske,*

causing that gelding to be checked, severely check and bump with CARRALLEN STEEL ridden by Shaun Meers.'

Mr Sheehy pleaded not guilty. After hearing further arguments the Stewards concluded that Mr Sheehy failed to allow sufficient room in his efforts to improve to the outside of the adjoining mount when not fully clear. This failure caused another horse to be checked and to tighten. After finding Mr Sheehy guilty the Stewards proceeded to deal with the penalty. The Stewards concluded that a 28 day suspension should be applied in addition to a fine of $500 in view of the fact that the offence was in the upper range of interference and involved a high degree of carelessness. In announcing the penalty Mr B Lewis, Chief Steward, stated:

'... as with all suspensions we look at the degree of carelessness, we look at the degree of interference, and we look at records, personal circumstances and other facts that you have raised. We see that the degree of carelessness is high, Mr Sheehy. We see that there was a sharp and sudden movement outwards and a rider of your experience should have realised that there was no entitlement to shift outwards at the stage you caused interference to Apprentice Noske. The degree of interference is obviously high. It was a severe check to Apprentice Noske, and he made contact with another runner, so there were two horses involved. Your record as you said Mr Sheehy, shows you were suspended last in December 200(sic), you have only 15 race rides leading into today, before this suspension. So there is certainly no reduction ... Weighing it all up, we looked at the race meetings throughout the next month Mr Sheehy and we believe that a period of suspension of 28-days should be applied. In addition to that a penalty of a fine of $500 as well, given that this is upper range interference and high degree carelessness. To be consistent we believe that a fine should be imposed in this situation. So take your rides from midnight the 20th of April, it goes through to midnight the 18th of May. It is a 28-day period of suspension. Through that period there is 17 race meetings, 7 of those are in the city, 4 metro prime meetings, 3 mid-week meetings, there is 4 provincial race meetings and 6 country race meetings. We break that down and we see that you will certainly miss the Albany meeting here on the 25th, given this date of suspension. It is debateable whether you are going to miss any other race meetings, but despite that, we still believe this suspension is deserved at the 28-day level because of the actual incident itself.'

GROUNDS OF APPEAL

The amended grounds of appeal are:

'1. The penalty of 28 days suspension imposed by the Stewards for careless riding was excessive in all the circumstances having regard to:

(a) the level of interference;
(b) the absence of any fall, or injury to riders or horses;
(c) the fact that the result of the race was not affected and no protest was entered;
(d) the contributory actions of the other riders and horses involved;
(e) the factors pertaining to his personal riding situation;
(f) his good record over a period of five years;
(g) previous penalties imposed for similar offences in this state.

2. *The additional penalty of $500.00 for the same offence was manifestly excessive given that the suspension of 28 days was at the upper end of the scale and any further penalty was manifestly excessive.*
3. *The Stewards erred in imposing a financial penalty without any or any adequate regard to the financial position of the Appellant specifically:*
   (a) his total income, both weekly and annual;
   (b) his income from riding in races;
   (c) his fixed expenses;
   (d) his asset position generally;
   (e) his capacity to pay a fine.'

THE SUBMISSIONS

I was told by Mr Percy QC for Mr Sheehy that his client only rode in the country and further, there was only one Albany race meeting remaining in which Mr Sheehy could ride before the season finished. This apparently meant Mr Sheehy had no other rides until October. Further, the period of suspension had already expired. Despite this somewhat unusual situation it was said there was still some validity or point to the appeal. As senior counsel explained, the question as to the correctness of the 28 day suspension was not simply an academic one because the sentence would be on Mr Sheehy's record and would have some impact potentially later should there be a subsequent transgression (*Parker –v- R* (1997) 71 ALJR 6958).

Senior counsel went on to argue that the length of the suspension was excessive in itself, being the upper limit for this type of interference, and therefore there was no need for a fine to be imposed in addition to the prohibition on riding. The penalty was manifestly excessive having regard to previous cases (*Knuckey* (Appeal 393) and *Arnold* (Appeal 588)). A range of 14 to 21 days was appropriate in a case with no aggravating circumstances (*Knuckey* (Appeal 393)). Mr Percy QC relied on a number of other Tribunal decisions as well to support his arguments.

It was submitted that the riding infringement was at worst mid range, or, if at the upper range, it was only just at the upper level. There were no aggravating factors. There was no fall, no injury and no protest.

Mr Sheehy's record was tendered. Despite having been a rider for a long time, I was told on the scale of success Mr Sheehy could only be described as being 'on the lower echelon'. The record reflected Mr Sheehy was an accomplished rider who was not greatly successful. Mr Sheehy's record was not a particularly bad one having had one suspension in 5 years compared to some other riders (*Morrisey* (Appeal 365) and *Clint Harvey* (Appeal 618 and Appeal 619)).

Mr Percy QC reasoned that it was unfair for Mr Sheehy to be compared with a city rider with the number of rides available in Perth compared to the limited opportunities available to Mr Sheehy. The punitive value of missing just the one meeting for Mr Sheehy was obviously far greater than for a city rider missing a meeting, it was claimed.

In the course of his submissions Mr Percy QC did acknowledge that there was no doubt Mr Sheehy caused the interference. However, the point of the appeal was whether the 28 day suspension was correct or not. This proposition was put on the basis that Mr Sheehy was a country rider who was riding in the last Albany race for the season. It was submitted that the

length of the suspension itself was excessive, being at the upper limit for this type of interference, and therefore there was no need for a fine to have been imposed. The fine, when added to the top of the range suspension was manifestly excessive. The suspension was adequate in itself. The purpose of a fine was 'to take some of the profit out of the transgression'. There was very little profit in this transgression. The Stewards were in error in not having made inquiry of the appellant's means. Mr Sheehy's income, and expenses were highly relevant. As no fine should ever be imposed without regard to this factor it was submitted this was a classic and serious sentencing error (*Perez –v- R* (1991) 21 WAR 470 per Owen J at 482 and 486) which meant the sentencing process miscarried. The appellant was said to be a person of limited means who was supporting a non-working wife and three young children aged five, three and one month. His gross weekly wage was stated. Mr Sheehy has no real assets to speak of. He has enjoyed extremely limited riding success over the past 2 years. These were highly relevant factors. A fine was not appropriate in the circumstances, but even if it were, it needed to be imposed on the basis of the rider's means which were never considered at all. The case is not analogous to a city situation where the riders are highly remunerated by comparison.

Mr Davies QC in response argued that the serious nature of the careless riding which was involved justified the penalty. Senior counsel submitted Mr Sheehy had moved out 45 degrees and in so doing took another mount with him causing three horses to move out. I was then referred to the notice which had been issued by the Stewards addressed to riders reflecting the attitude to be adopted by Stewards for careless riding following a complaint by Mr Luciani regarding poor standards of riding. In the document, which is undated but headed 'Notice to Jockeys for the 2007/08 Perth Racing Summer Carnival', under the heading 'Careless Riding' the following statement appears:

> *'In February 2007, all riders in Western Australia were addressed by the Stewards and advised that penalties in relation to careless riding would be increased and that fines in conjunction to suspension would be imposed in the appropriate circumstances.*
>
> *As such, the base penalty for careless riding in Western Australia is now a suspension from riding in races for a period of three weeks. Stewards now further advise that penalties under A.R137(a) in feature races will attract greater penalties in terms of longer periods of suspension and larger fines. In cases deemed serious by the Stewards, a rider can expect to be suspended for a considerable period, in addition to being fined all, or part thereof the percentage earned for that particular ride.'*

Accordingly Mr Davies QC submitted that it was pointless looking at the earlier cases which the appellant had relied on. Rather, one should consider those offences where fines were imposed in relation to Rule 137(a).

In response Mr Percy QC argued that only the city riders were informed of the new and tougher attitude having been adopted by the Stewards regarding imposition of fines in addition to suspensions. This fact was clearly reflected in the Stewards' reasons for determination in the case of the appeal of CK Harvey (Appeal 670). On the other hand Mr Sheehy, a country rider, had not been privy to the raising of the tariffs. Page 19 of Mr Sheehy's inquiry reflects the fact that this country rider was unaware of it. Mr Percy QC argued the Harvey situation was 'chalk and cheese', there was no evidence that Mr Sheehy had seen the Notice to Jockeys nor had he been told about it, being a 'bush jockey at the

lowest end of the food chain'. Further, Mr Sheehy had been fined double his riding fee which was said to be unfair compared with the fees earned and circumstances of a city rider. In regard to the appropriateness of imposing the fine senior counsel for the appellant relied on *Perez v The Queen* [1999] WASCA 262 where it was held that a fine should not be imposed without an assessment of the means of the offender to pay it and should not be imposed where the offender has no means to pay. A table of offences where fines were imposed in relation to Rule 137(a) was produced. It revealed all of the fines there recorded were in fact for $500. This was said to be a blanket amount irrespective of whether a city or provisional race was involved. However, fines had previously been imposed for a country race.

It was further submitted that a decision to impose a fine cannot be made in the absence of information regarding the capacity to pay. This fact reflected that there was an error even if the fine were appropriate. The Stewards were incorrect in exercising their sentencing discretion as a consequence.

THE DECISION

I was persuaded by the arguments for the appellant. I was satisfied Mr Sheehy was not aware of the tougher penalties which had been communicated and applied to city riders. In deciding to uphold the appeal I was influenced by the penalties which had been imposed in the earlier cases referred to. Those cases can be summarised as follows:

- Knuckey (Appeal 393), where member Mr J Prior indicated in passing that careless riding by tightening causing or contributing to a fall would have justified a penalty in the range of seven to 21 days suspension.

- T Morrissey (Appeal 356), which was a case where a rider with an overall poor record with three suspensions received a 28 day suspension from the Stewards. On appeal this was reduced to a 14 day suspension.

- W Arnold (Appeal 588), where the Stewards had to deal with a rider who allowed his mount to shift out and make substantial contact with another horse which shifted, fell and had to be euthanased. The consequences of the poor riding were described as being at the upper end of the scale, with the level of carelessness in the low to medium range. The Stewards said had the shift been substantial, it would have attracted six weeks or greater, but as it was a 'relatively small shift' a 28 day suspension was imposed. This was confirmed by the Tribunal on appeal.

- CK Harvey (Appeal 618), where there was a high degree of carelessness as reflected by the angle of the shift, and high degree of interference as a number of runners had their chances in a feature race significantly affected. The Stewards took into account the time the jockey had off for injury and imposed a penalty of 21 days suspension.

- CK Harvey (Appeal 619), where Mr Harvey's horse angled inwards from behind another horse. The Stewards considered there was insufficient room causing another rider to be restrained badly and lose ground. This was described as being high level carelessness. This resulted in a suspension of 20 days.

As I was satisfied it had been demonstrated the Stewards were in error in the exercise of their discretion I reduced the penalty from 28 to 21 days suspension. This was despite the fact that I readily recognised the poor quality of the ride and the seriousness of the offence.

In reducing the penalty I was influenced by the fact that Mr Sheehy had limited opportunity for riding engagements at the end of the racing season. Mr Sheehy would not miss out on the usual number of rides a jockey would normally incur for such a suspension. That fact helped satisfy me that the fine was appropriate in addition to the 21 day suspension. I was also satisfied the Stewards erred in failing to investigate Mr Sheehy's financial circumstances before reaching a conclusion to impose the fine. Once those circumstances were made clear to me I concluded it was too severe a punishment to inflict a fine of $500 on top of the period of the reduced suspension. Mr Percy QC persuaded me that the approach of the Stewards in this case had met the description of *'a blind exercise of a discretion'* and in the circumstances, once the relevant personal circumstances were known, it was seen to be too punitive. Applying the reasoning in *Sgroi* (1981) 1999 21 WAR 470 I concluded a fine of $200 was appropriate in the context of Mr Sheehy's capacity to pay.

LODGMENT FEE

Having so decided the outcome and having announced the substituted penalties at the conclusion of argument, that still did not end matters. A rare argument these days as to the lodgement fee then ensued. I was persuaded to take the unusual step of having to consider submissions from counsel regarding the question of the refund of the fee. Mr Percy QC argued strenuously for its refund despite the fact that for many years now the Tribunal has not been prepared to refund lodgement fees in respect of appeals, successful or otherwise. However, in the peculiar circumstances of this case, particularly bearing in mind the financial circumstances of the appellant and the fact that a monetary penalty was imposed in addition to the suspension, I was in the end reluctantly persuaded to order a refund. I only did so however, having first made it entirely clear to both parties that I considered this matter was a most unusual case and after having stated the decision could not be regarded as in any way setting any precedent and was not reflective of any change of attitude on my part as to refunds.

Some of the features which made this unique case and therefore unlikely to be repeated were the unusual circumstances of the limited riding opportunities available to this appellant as a country rider, the length of time since the jockey's last suspension, the fact that the appeal succeeded as to both aspects of the penalty, the financial impact on Mr Sheehy personally and the very limited earning capacity of the appellant derived from racing.

Seal of the Racing Penalties Appeal Tribunal of WA

DAN MOSSENSON, CHAIRPERSON