APPEAL - 687

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: Clifford Lindsay SMITH

APPLICATION NO: A30/08/687

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATE OF HEARING: 28 July 2008

DATE OF DETERMINATION: 4 November 2008

IN THE MATTER OF an appeal by Clifford Lindsay Smith against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 18 May 2008, imposing a $500 fine for breach of Rule 143 of the Australian Rules of Thoroughbred Racing.

Mr T Percy QC, assisted by Ms J Cass, represented Mr Smith.

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

BACKGROUND

Mr CL Smith, a licensed trainer of thoroughbreds, appeals against his conviction and $500 fine for breach of Australian Rule of Racing 143. That rule specifies that:

> *'If a horse carries less weight than the weight it should carry –*
>
> *(a) it shall be disqualified for the race, provided that a rider shall be allowed by the Clerk of Scales a half kilogram for the weight of his bridle; and*

(b) notwithstanding paragraph (a), the rider and/or any other person at fault may be punished.'

The horse in question, POWER TORQUE, was disqualified by the Stewards after a short inquiry following the race which took place in Kalgoorlie on 25 April 2008. The Stewards' panel comprised Mr D A Hensler (Deputy Chief Steward Thoroughbreds), Mr J Biggs (Senior Stipendiary Steward - Country) and Mr AJ Davies (Deputy Steward). Following the decision to disqualify the horse the panel addressed the question of the gear which had been involved. The Clerk of Scales had recorded on weigh out there were two pieces of packing, but one piece subsequently went missing.

The inquiry was adjourned and resumed on 11 May 2008. Of the original panel, only Mr Biggs was present on the resumption. After a short exchange Mr Smith was charged with a breach of Rule 143 in the following terms:

'as the trainer of POWER TORQUE a runner...at the Kalgoorlie Boulder Racing Club on 25 April 2008 presented that gelding to race without a rubber sponge pack, rubber sponge packing which had been included in the gear when Jockey B. Mathews weighed out to ride....which resulted in Jockey B. Mathews returning to scale to 0.08 (sic) kilograms under the declared weight.'

Mr Smith pleaded not guilty to the charge. Discussion took place regarding the circumstances surrounding the saddle and gear after weighing out. A second saddle had been handled by Mr Smith for a horse which was trialled. Questioning as to whether any of the gear became mixed ensued. Mr Biggs then adjourned the inquiry to a date to be fixed.

Mr Biggs continued the inquiry on 18 May 2008 when he announced a finding of fault in the following terms:

"We then gave you the opportunity to put forward any further evidence which you wish (sic) to do so and which you did and you quite strongly argued the case as to why you believe you shouldn't be found guilty of the charge. We've taken all that evidence into consideration. We've also taken into consideration the fact that Jockey Brett Mathews weighed out correctly at 59.0kg which was recorded on the Clerk of Scales sheet and that has never been in dispute. We also take into consideration that he weighed back in at 58.2kg which was 0.08kg (sic) under his weigh out weight and that also has never been in dispute. I am also satisfied that Mr Mathews weighed out with two sponge, pack, saddle packing one rubber and one breastplate which was recorded on the Clerk of Scale sheet. We have evidence from Mr Mathews, that's Jockey Brett Mathews that he weighed out, took the saddle directly to you in the area where you receive the saddles. That was also confirmed by the Clerk of Scales Mr Alistair Mathews, who observed Mr Jockey Bret Mathews take the saddle directly to you. There has been no evidence presented to this Inquiry that the saddle slipped or that any packing was dislodged in running, therefore Stewards are satisfied that this packing has gone missing from the time Mr Mathews handed you the saddle and on his return to scale. Therefore Mr Smith Stewards now have to consider the penalty and of course in considering the penalty, Stewards have the option either to suspend, disqualify or fine. On this occasion we believe the only appropriate penalty to be one of a fine and we will certainly not be considering any other options. However we will be taking into consideration the serious nature of the offence. Now is there anything that you would like to put forward that I should consider when considering penalty."

There was no dispute between the parties at the inquiry and later at the appeal reference to the shortfall in the weight referred to in both passages quoted was intended to mean, and all parties took it to mean, 0.8kg.

Mr Smith responded to the invitation to put forward further material by disputing the decision until he was checked by Mr Biggs on the basis that he had already been found guilty and should confine himself to the penalty. Mr Smith was reminded that after the completion of the evidence on the charge and before the decision was made he had in fact been asked if he had any more questions to which he had responded "*no.*" The hearing then concluded after Mr Biggs pronounced on penalty as follows:

> *"... I've given the matter of penalty consideration, we've taken into consideration the serious nature of the offence and that fact that the horse run fourth in that particular race and the stakes which were $240 which were lost to the owners of which of course you were a part owner, ...*
>
> *We've also taken into consideration that it was a quartet betting race so that anybody that included POWER TORQUE in the quartet of course lost their money. We've also taken into consideration your record which you've been training for many many year, you've never been charged for an offence similar to this and not only of an offence similar to this, that I believe that your record as far as a trainer is concerned is one of a very good record. You've never given Stewards any concerns at any stage that I can recall. Also taken into consideration that there was no intent on your part to break the rules it was simply one of an unfortunate case of negligence or accident or some means or whatever and that it was just one of those very unfortunate incidents that has occurred. In considering all that Stewards to believe that the penalty should be one of a fine and that fine is to be one of $500..."*

THE APPEAL

The first of the amended grounds of appeal asserts that the decision to convict was void on the basis that it was made by one Steward. In support of that ground I was referred to the consent order made by the Tribunal in Chris Wolfe (Appeal 487). I was not influenced by that decision as the order was consented to only on the basis that under the relevant Rule in force at the time it was necessary for more than one Steward to adjudicate at an inquiry. Since then the Rules have been amended. Local Rule 8 (e) now specifies:

> *"a sole Steward or Deputy Steward at a meeting or organised trial shall have and may exercise all the powers vested in the Stewards under the Rules."*

I was satisfied that when Mr Biggs took charge and continued to handle the conduct of the inquiry alone on both 11 May 2008 and when he finalised it on 18 May 2008 that he did have vested in him the appropriate power to do so by virtue of Local Rule 8 (e). That Rule covered the situation he was dealing with and authorised the actions which he took. It is true Mr Biggs did not chair the sitting which took place following the running of the race. However, on the basis that Mr Biggs was clearly present at the race meeting and had participated in the discussion at inquiry level following the running of the race I was satisfied he was cloaked with appropriate authority to continue through to finality on his own. Mr Biggs clearly proceeded to exercise the powers of the Stewards after the first sitting at the reconvened hearing as he was entitled to do under Local Rule 8 (e).

In any event, as pointed out by senior counsel for the Stewards, if the actions had in fact been a nullity the Stewards could still pursue the matter of their own initiative or could have invited the Tribunal to make an order referring it back to Stewards to deal with it.

I therefore ruled that there was no merit in the first ground of appeal.

The appeal then continued before me in regards to the other two grounds. The second ground was the decision to convict:

> *"was manifestly against the weight of the evidence, was unsafe and unsatisfactory, was not reasonably open to the Stewards on the evidence before them."*

The other ground was that the appellant should have been allowed to re-open his case to prove the weight of the saddle cloth.

I reserved my decision in relation to grounds two and three and now publish my reasons in respect of those grounds.

REASONS

Rule 143 automatically requires a horse to be disqualified if it carries less weight than it "*should carry*". The Rule provides for an allowance of "*0.5kg for the weight of his bridle.*" The Rule goes on to empower the Stewards at their discretion to punish "*any other person than the rider at fault…*"

I have carefully considered all of the arguments which were raised in support of the appellant. These include the fact that:

- none of the equipment was missing at the end of the day's racing;
- there was no direct evidence that the Clerk of Scales had actually inspected the equipment used on weigh out;
- it was not proven that some equipment had been dropped;
- there was the possibility that the wrong saddle had been given to the trainer; and
- there was no proof of negligence on the part of Mr Smith.

Despite the fact that Mr Smith had pleaded not guilty and protested his innocence throughout the inquiry he was found by the Steward to be at fault and punishable on the basis of the following facts and circumstances:

1 There was no dispute as to the correct weighing out at 59.0kg.

2 There was no dispute that weighing back was at 58.2kg, which, after taking into account the 0.5kg allowance, was underweight.

3 At the time of weighing back all equipment which had been recorded by the Clerk of Scale at the weigh out was present.

4 The jockey had taken the saddle directly to Mr Smith following weighing out and was handed over to Mr Smith.

5 There was an absence of evidence that the saddle slipped or any packing had been dislodged in running.

6 The Steward was satisfied that the packing had gone missing from the time the saddle was handed to Mr Smith until his return to scale.

All of the elements identified in the reasons for convicting combine together to be sufficient in my opinion to justify the exercise of the discretion to conclude that the discrepancy in the weight following the race compared to prior to the race was caused or contributed to by Mr Smith. I believe it was reasonably open to the Stewards on the evidence to reach the conclusion which they did.

Further, there was no argument or dispute regarding the accuracy of the scales. At best there was some attempt to demonstrate that the Clerk of Scales had not directly observed precisely what was the totality of the equipment employed.

It was submitted and I accept the matter was serious because the weighing process is an essential ingredient in horse racing which allows appropriate handicapping of horses. Special care and attention is required by all parties involved in that process. Enforcement of the Rule relating to correct weight is the only method by which the handicapping of horses is achievable in order to even up racing. The handicapping process is a fundamental element of racing. It is a matter of considerable importance to all licensed participants that the equipment utilised in the course of a race must be '*spot on*', to adopt the terminology employed by senior counsel for the Stewards. I am not satisfied there is merit in the second ground and I dismiss it.

The argument regarding the refusal to allow Mr Smith to re-open his case required the appellant to demonstrate there had been a failure in procedural fairness. I am satisfied in the light of what transpired at the hearing, as is evidenced by what I have already referred to and other aspects regarding the conduct of the inquiry which are apparent from the transcript generally, that this was not the case. I do not believe there was any error caused by the refusal to allow Mr Smith to re-open his case.

In the light of all of the circumstances involved including the role he played in the handling of the equipment and seriousness of the matter, I am satisfied it was appropriate for Mr Smith to be convicted and punished, I would therefore dismiss grounds two and three of the appeal and confirm the decision of the Steward.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON