APPEAL 339

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: **RONALD WILLIAM HUSTON**

APPLICATION NO: **A30/08/339**

DATE OF HEARING: **13 FEBRUARY 1997**

IN THE MATTER OF an appeal by Mr R W Huston against the determination made by Western Australian Trotting Stewards on 14 December 1996 imposing a five year disqualification under Rule 459(a).

Mr T Percy, assisted by Ms F Johnson, instructed by D G Price & Co, Barristers & Solicitors, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

INTRODUCTION

The appellant was an owner of the horse *KENTUCKY GOLD*. That horse was a runner in Race 5, the Professional Stakes, conducted at the Kalgoorlie Trotting Club meeting on 29 November 1996.

The horse was driven by Mr Cammeron Ellery.

One of the other runners in the race was *POWER PAUL*, driven by Mr Shane Young. That horse was the short priced favourite for the event and the eventual winner.

Two days after the meeting, Steward J Biggs received "reliable information" that Shane Young had been offered a bribe in connection with the race. A Stewards' inquiry was instituted and held on 14 December 1996. Witnesses were called and evidence was given.

At the conclusion of the inquiry, the Stewards charged the appellant with the offence mentioned above. The particulars of the charge were:

> *"... you corruptly offered indirectly money to Driver, S.R. Young, in an effort to influence him to not allow POWER PAUL to run on its merits."*

The appellant pleaded not guilty and no further evidence was adduced. After considering the matter, the Stewards convicted the appellant. By way of penalty, the appellant was disqualified from Trotting for a period of 5 years.

The appellant now appeals against conviction and penalty.

THE EVIDENCE AT THE STEWARDS' INQUIRY

The first witness at the inquiry was Steward J Biggs. He informed the inquiry that he carried out investigations after receiving information of the alleged bribe attempt.

The next witness, the first witness of substance, was Mr Young. He was the driver of the favourite, *POWER PAUL*, and the target of the alleged bribe attempt. Mr Young's evidence was as follows:

YOUNG: *Oh well it was just prior to the event and we were waiting to go up to the mobile and I went past Mr. Ellery and he just said that; Ronnie asked or mentioned that a thousand dollars, which virtually was inferring that don't let POWER PAUL run on his merits.*

CHAIRMAN: *You're saying that Mr. Ellery approached you on behalf of someone?*

YOUNG: *Yes sir*

CHAIRMAN: *You said Ronnie. I believe. Who would that be?*

YOUNG: *I would presume it was Mr. Huston, sir.*

CHAIRMAN: *The owner of KENTUCKY GOLD*

YOUNG: *KENTUCKY GOLD*

CHAIRMAN: *which was Mr. Ellery's drive in that race.*

YOUNG: *Yes*

Mr Young went on to say that he refused the offer, in emphatic terms.

Following on from Mr Young's evidence, Mr Ellery was called. His evidence was as follows:

CHAIRMAN: *The Stewards had received information that as the driver of KENTUCKY GOLD you offered Mr. S.R. Young, who drove POWER PAUL, a bribe to, not to allow his horse to run on its merits. Mr. Young in evidence has confirmed that that was correct. Is there anything you'd like to say on the matter, to confirm or deny.*

ELLERY: *Not really, but I did offer him.*

CHAIRMAN: *I beg your pardon?*

ELLERY: *I did say that, yes.*

CHAIRMAN: *Well in your own words could you say what occurred on that night.*

ELLERY: *What occurred. I was circling behind the barrier, at the start and Ronnie Huston said to me ask Shane and so I stupidly did.*

CHAIRMAN: *What did Mr. Huston ask you?*

ELLERY: *Asked me to offer Shane Young a thousand dollars to see if he could stop POWER PAUL.*

Mr Ellery went on to say that Mr Young refused the offer, and that he (Mr Ellery) communicated the refusal back to the appellant.

The appellant was then called in to the inquiry. At the outset, he denied that he had asked Mr Ellery to communicate the bribe offer to Mr Young.

Mr Ellery repeated the substance of his evidence in the presence of the appellant, and maintained the truth of what he had earlier said.

The Stewards then turned the focus of their inquiry on to the subject of the betting on the race, to establish whether there was any financial motive for the appellant to offer the bribe as alleged. The appellant said that he had had $200.00 on his horse *KENTUCKY GOLD* to win. Licensed bookmaker Mr N Giorgetta later confirmed in evidence that he had accepted $2,000.00 to $200.00 from Mr Zecca. The appellant confirmed in his evidence that Mr Zecca placed the bet on behalf of him.

On the evidence from the two drivers and the appellant, up to a point, there appeared to be no financial incentive (apart from stake money) for the appellant to offer the bribe and the incentive in the amounts alleged. However, when Mr Giorgetta later gave evidence it transpired that the appellant, through his agent Mr Zecca, had attempted to bet $400.00, an amount which would have gone some way to establishing financial motive on his part. Mr Giorgetta's evidence was as follows:

CHAIRMAN: *Could you outline in your own words as officiating as a Bookmaker what happened when Mr. Zecca approached you to have a bet on KENTUCKY GOLD in Race 5.*

GIORGETTA: *Oh the bet was, the original bet was 4,000 to 400 and I took half of that bet.*

CHAIRMAN: *4,000 to 400. The horse being at 8 to 1 at that stage*

GIORGETTA: *No 10 to 1.*

CHAIRMAN: *10 to 1 and its, fluctuations were then down to even money.*

GIORGETTA: *That is correct, because I was holding nothing on the race. That's the reasons that was the case.*

CHAIRMAN: *Any reason why you cut Mr. Zecca's bet in half?*

GIORGETTA: *Because I was holding nothing on the race.*

CHAIRMAN: *So to set a book it would be impossible*

GIORGETTA: *Well that's that's correct, yes.*

Following that evidence, the appellant retracted his earlier statement:

BIGGS: *So you're not now. You're now not denying that you've had four hundred dollars given to Mr. Zecca. Four hundred dollars to put on the horse.*

HUSTON: *No, I'm not denying that, no.*

Still on the subject of the appellant's betting on the race, the following exchange took place between the Chairman of Stewards and the appellant:

DELANEY: *Just while Mr. Giorgetta is looking at that. Mr. Huston do you have any idea at all what price the horse was had you heard the openers or anything?*

HUSTON: *No*

CHAIRMAN: *What did you consider the hardest horse to beat in the event Mr. Huston? When assessing you go through what chance your horse has got you must think some horses are hard to beat.*

HUSTON: *Well I've never have a look at any of the horses in the race. I just don't know a lot about the horses and I thought my horse could win you know.*

CHAIRMAN: *Was you aware what the favourite in the event was?*

HUSTON: *No*

CHAIRMAN: *Was you aware that POWER PAUL was racing in the race?*

HUSTON: *No, I didn't know what what. I just had a look at the book earlier and I knew our horse was there.*

CHAIRMAN: *So you didn't know what horse was favourite?*

HUSTON: *No*

CHAIRMAN: *What Mr. Young was driving?*

HUSTON: *No*

CHAIRMAN: *Myself I find that very hard to believe. If you're going to have a bet on a horse.*

Other witnesses were called to the inquiry, none of whom could shed any light on the relevant matters. The appellant's wife, part owner of *KENTUCKY GOLD*, gave evidence to the effect that she was with her husband at the relevant time and no bribe was offered. Mr Saw, the horse's stand-in trainer, was called but could add nothing. Neither could the usual trainer, Mr Hazelwood.

THE STEWARDS' FINDING

The Stewards retired to consider all the evidence. On resumption, the appellant was charged as outlined above. He pleaded not guilty. Some discussion took place but nothing amounting to further evidence. The Stewards retired again and came back with their finding of guilty.

The Stewards gave brief reasons for their finding of guilty. The relevant findings were:

> *"Mr. Huston the Stewards have very carefully considered all evidence tendered to this inquiry. We've heard from Mr. Young and he stated that he had been offered money by Mr. Ellery on your behalf, to not race POWER PAUL on its merits. Mr. Ellery confirmed Mr. Young's evidence and in fact has pleaded guilty to the charge of having offered the money. We found the evidence by both these drivers to be compelling, therefore Stewards preferred their evidence to that tendered by yourself. It is the Steward's* (sic) *opinion that you were evasive and attempted to mislead the inquiry. For these reasons we find you guilty of the charge as laid."*

APPEAL AGAINST CONVICTION

The grounds of appeal are as follows:

1. The Stewards erred in convicting the Appellant in that they failed to acknowledge the danger of acting on the evidence of the co-accused Ellery.

2. The Stewards erred in:

   (i) failing to give any adequate reasons for their decision to convict the Appellant;

   (ii) failing to make adequate findings of fact in respect of:

      (a) what was said by Huston to Ellery;

      (b) what was said by Ellery to the witness Young;

3. The decision of the Stewards to convict the Appellant was against the evidence and the weight of the evidence (See particulars).

PARTICULARS

(i) The Stewards in their reasons mis-stated and enlarged the evidence of the witness Young.

(ii) The evidence of the conversation between Young and Ellery lacked any degree of cogency sufficient to ground a conviction.

4. (i) The Stewards failed in their consideration of the charge to use the evidence of the video tape of the incident in question.

   (ii) In the event that the Stewards were unaware of the existence of the tape at the time of their consideration of the charge the Appellant seeks to produce the tape to the Tribunal by way of fresh evidence.

As to ground 1, it must be stated at the outset that the strict rules of evidence do not apply to a Stewards' inquiry (GIBBS v RACING PENALTIES APPEAL TRIBUNAL [unreported, Supreme Court of W.A., delivered 14 January 1997, Lib. No. 970002] per Wallwork, J at pp.10-11]).

As to the evidence of accomplices, the strict rule of law is to the effect that a corroboration warning may in some circumstances be justified.

EVIDENCE ACT (W.A.) Section 50.
LONGMAN v R (1989) 168 CLR 79.

It is based on a commonsense approach to a fact finding exercise. The reasons behind the need to look carefully at the evidence of an accomplice are set out, for example, in the case of CHAI (1991) 60 A.Crim.R. 305. In that case, Badgery-Parker, J. at page 328, approved of the following direction to a jury:

> *"There are no doubt many reasons why the evidence of accomplices may be unreliable and I am sure you can think of many yourselves. You may think it is only natural for an accomplice to want to shift the blame from himself to others, perhaps to down play his role, perhaps to justify his own conduct. In that process the accomplice may construct an untruthful story, he may play up the part of others, he may even blame innocent people. Experience has shown that once an accomplice gives a version to the police, he may feel locked into that story and be unwilling to tell the truth later. Of course you may think, it is a matter for you, that the risk that an accomplice has told an untrue story may be greater where he has been offered a prospect of receiving some reward or immunity from prosecution either for himself or for someone else. It is a matter of common sense. Freedom from prosecution either here or in some other place in return for giving evidence against an accused person, may although not necessarily will it do so - constitute an inducement or persuasion to give false evidence."*

One matter can be disposed of at the outset. In the hearing of the appeal before us, it was said by counsel for the Stewards, and accepted by counsel for the appellant, that there was no interview of Mr Ellery before the inquiry. In other words, there was no version of events which Mr Ellery had locked himself into.

As to the Stewards approach generally, a perusal of the transcript of the inquiry shows that they were in fact very much aware of the need to scrutinise Mr Ellery's evidence carefully. That is evident from the type of questions asked. For example, at page 30 (transcript):

BIGGS:	*Just if I first ask Mr. Ellery a question Mr. Chairman. Mr Ellery your relationship with Mr. Huston. Have you got a good relationship with Mr Huston?*
ELLERY:	*Yes*
BIGGS:	*So you would have no reason to put bluntly, want to can him for anything.*
ELLERY:	*No, certainly not.*
BIGGS:	*So in other words you wouldn't come in here and tell lies or anything like that, just to deliberately get at Mr. Huston.*
ELLERY:	*Absolutely not.*

At page 28 of the transcript, when Mrs Huston was recalled to give further evidence, the following was said:

CHAIRMAN: *Just one question to you Mrs Huston. Is there any reason in your mind that Mr. Ellery would say something like Mr. Huston had told him to offer Mr. Young a bribe if he hadn't said it.*

MRS. HUSTON: *Well not that I know of, no.*

Ground 1 of the appeal therefore is not made out. The Stewards did have in mind the need to scrutinise carefully the evidence of Mr Ellery. It may not have been stated in as many words, but it is obvious from the transcript that the Stewards took the correct approach.

As to ground 2(i), there is no doubt that reasons are required to be given, otherwise the case runs the risk of being remitted to the Stewards for consideration. The requirement to give reasons is discussed, for example, in the case of LLOYD v FARAONE [1989] W.A.R. 154 per Malcolm, C.J. at pp.163-164.

The question to be answered on this ground of appeal is whether the reasons given by the Stewards, or their findings of fact, were sufficient in the circumstances of this case.

The case before the Stewards involved no issues of a technical nature. There was nothing complicated about it. The differences between the appellant and Mr Ellery were simple. Mr Ellery said the appellant made the offer. The appellant denied it. The Stewards said that they believed Mr Ellery's evidence was compelling. They did not accept the appellant's evidence.

In my view, the reasons given in this case were entirely adequate and ground 2(i) is not made out.

The Stewards made no specific finding of fact about what Mr Huston said to Mr Ellery. It was submitted to us on this appeal that this was necessary because Mr Ellery gave different versions of what Mr Huston said. In particular, Mr Ellery said at page 4 of the transcript "*I was on a thousand if the horse won*". Later, at page 24, he said that he was not certain that he was offered a thousand dollars himself.

In my view, that sort of inconsistency mattered little to the merits of this case. On the crucial issue, which was the evidence of the offer to bribe, Mr Ellery was consistent and emphatic. The Stewards were not required in this case to search for discrepancies in the evidence on peripheral issues and make findings of fact.

In my view, it matters even less whether there were any different versions given by Mr Young of what was said to him by the witness Mr Ellery. Mr Young obviously could not give any direct evidence of what the appellant said to Mr Ellery.

Ground 2(ii) fails.

As to ground 3(i), it is said that the Stewards mis-stated and enlarged the evidence of the witness Mr Young. In particular, at page 2 of the transcript, Mr Young said:

> "*Oh well it was just prior to the event and we were waiting to go up to the mobile and I went past Mr. Ellery and he just said that; Ronnie asked or mentioned that a thousand dollars, which virtually was inferring that don't let POWER PAUL run on his merits.*"

It is submitted that Steward Biggs mis-stated and enlarged this evidence at page 2, where he said:

> *"Yes Mr Chairman. When Mr. Ellery offered you the thousand dollars to, as you say, to stop POWER PAUL from running on its merits, did you take the matter seriously at that time?"*

In my view, this submission is simply not correct. What Mr Biggs was doing was simply paraphrasing the evidence. Further, this exchange took place very early in the inquiry, and was simply a matter of Mr Biggs seeking to clarify a point with the witness. Nothing prejudicial to the appellant's case could be read into such a comment.

Ground 3(i) is not made out.

As to ground 3(ii), I adopt my comments in relation to ground 2(ii). Ground 3(ii) is not made out.

Ground 4 is strictly not a ground of appeal because it did not arise out of the Stewards' inquiry. There was an application on the hearing of this appeal, to permit fresh evidence, which was allowed.

The appellant tendered in evidence a video tape of the race in question. This video tape began shortly after the runners entered the track and before they went up to the mobile. Thus, it showed the horses and drivers and, coincidentally, it showed the appellant and others leaning on the fence. The video, introduced as Exhibit 1, did not show Mr Ellery on *KENTUCKY GOLD* coming anywhere near the appellant. Nor did it show Mr Ellery going anywhere near Mr Young on *POWER PAUL*. Thus, it was submitted, all of the events spoken of by Mr Ellery and Mr Young did not occur because they were not on the video.

The appellant himself went into the witness box and gave evidence as to the obtaining of that tape. During cross-examination, the appellant said, amongst other things, that the closest that he was to his horse *KENTUCKY GOLD* at that relevant time was about 4 to 5 metres.

The Stewards then produced in evidence another video tape, of the same scene, but beginning slightly before Exhibit 1. This video tape (Exhibit 2) clearly showed *KENTUCKY GOLD* passing within an arm's length (at most) of the appellant.

There is no doubt in my mind, having had the opportunity to assess the appellant as a witness, that he is a person prepared to mis-state the facts to suit his own purposes. Before us, he was not a witness of truth.

The Stewards found that the appellant was evasive and tried to mislead the inquiry. They were entitled to come to this conclusion, adverse to the appellant. I agree with the Stewards' assessment.

For all of the above reasons, I would dismiss the appeal against conviction.

APPEAL AGAINST SENTENCE

The grounds of appeal are:

1. The penalty imposed was excessive in all the circumstances of the case.

2. The penalty imposed was excessive in comparison to that imposed on the co-accused Ellery.

The principles applicable to an appeal against sentence are well settled. In R v TAIT (1979) 46 FLR 386, Brennan, Deane and Gallop, JJ said at pp.387-388:

> *"An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."* (see generally Skinner v The King (1913) 16 CLR 336 at 339-340; R v Withers (1925) 25 SR (NSW) 382 at 394; Whittaker v The King (1928) 41 CLR 230 at 249; Griffiths v The Queen (1977) 137 CLR 293*).*

It was not suggested to us that the Stewards made any factual error in the sentencing process.

In a fashion, it was suggested that 5 years was so far outside the range of sentences commonly imposed as to manifest error. That comes about from the submission that 3 years disqualification was an appropriate penalty.

I can find nothing to support a contention that 5 years was excessive. As the Stewards said in this case, it was one of the most serious charges under the Rules of Trotting. A previous decision of this Tribunal has upheld a penalty of 5 years disqualification for a similar offence (S.C. RADALJ (Appeal 140 RACING PENALTIES APPEAL TRIBUNAL OF W.A. delivered 14 September 1993).

It was further submitted that the principle of parity required that the penalty imposed on the appellant be 3 years instead of 5, so as to bring the appellant closer to the 2-year penalty of disqualification imposed on Mr Ellery.

In LOWE v R (1984) 54 ALR 193, Mason, J. said at page 196:

> *"Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."*

In my view, the disparity between penalties imposed in this case is one which was justified in the circumstances. Mr Ellery admitted his involvement whereas the appellant did not. The appellant tried to mislead the Stewards on the inquiry and the Tribunal on the hearing of the appeal. The appellant was the prime motivator and the person who stood to gain if the bribe had been accepted. His position is entirely different from that of Mr Ellery.

For these reasons, I would dismiss the appeal against penalty.

P. J. Hogan

Seal of the Racing Penalties Appeal Tribunal of W.A.

PATRICK HOGAN, MEMBER
26 / 2 / 97

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRMAN)

APPELLANT:	RONALD WILLIAM HUSTON
APPLICATION NO:	A30/08/339
DATE OF HEARING:	13 FEBRUARY 1997
DATE OF DETERMINATION:	26 FEBRUARY 1997

IN THE MATTER of an appeal by Ronald William Huston against the determination of the Western Australian Trotting Association Stewards on the 29 November 1996 imposing a disqualification from trotting for a period of 5 years under Rule 459(a).

Mr T Percy and Miss Johnson, instructed by DG Price & Co, represented the appellant.

Mr R J Davies QC represented the WA Trotting Association Stewards.

I have had the opportunity of reading a draft of the reasons for determination of Mr P Hogan, Member. Those reasons set out in more than sufficient detail the background to this matter, the evidence produced before the Stewards and the basis upon which the Stewards made their findings. I see no need to go into any of those matters.

The Tribunal received fresh evidence on oath from Mr Huston. In addition two different versions of the film of the race were produced and shown to the Tribunal. Both films revealed some of the events preceding the running of the race. The Stewards produced an official version which covered a longer period

of time prior to the commencement of the race than the unofficial version which was produced by Mr Huston.

I fully agree with the conclusion reached by Mr Hogan as to the quality of the evidence which Mr Huston gave to the Tribunal. Having had the benefit of observing Mr Huston in the witness box I am satisfied that the description given by the Stewards in relation to the evidence presented at their inquiry, namely that Mr Huston was "*evasive and attempted to mislead the inquiry*", applies equally to the manner in which he presented himself before the Tribunal. Mr Huston was a most unimpressive witness who did his own cause no service.

The offence which Mr Huston was convicted of is a very serious one. Offering a bribe to a driver can have no place in trotting. Such an offence seriously erodes the image of trotting and undermines the confidence of the public in the industry generally.

I am satisfied that the Stewards did give adequate reasons for their decision, made adequate findings of fact and duly convicted Mr Huston properly upon the evidence which was presented to them. I see nothing untoward in the manner in which the inquiry into this important matter was conducted. In my opinion the criticisms which are levelled at the Stewards by Counsel on behalf of Mr Huston are unfair and unwarranted.

I agree with the reasons set out by Mr Hogan and the conclusions which he reaches both as to conviction and penalty. I would dismiss the appeal in relation to both the conviction and the penalty.

Dan Mossenson.

DAN MOSSENSON, CHAIRMAN

Seal of the Racing Penalties Appeal Tribunal of W.A.

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APPEAL 339

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS P HOGAN (MEMBER)

APPELLANT: RONALD WILLIAM HUSTON

APPLICATION NO: A30/08/339

DATE OF HEARING: 13 FEBRUARY 1997

IN THE MATTER OF an appeal by Mr R W Huston against the determination made by Western Australian Trotting Stewards on 14 December 1996 imposing a five year disqualification under Rule 459(a).

Mr T Percy, assisted by Ms F Johnson, instructed by D G Price & Co, Barristers & Solicitors, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

I have read the draft reasons of Mr P Hogan, Member. I agree with the reasons and the conclusion and I have nothing to add.

PAMELA HOGAN, MEMBER
26 / 2 / 97

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL 339

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**RONALD WILLIAM HUSTON**	
APPLICATION NO:	**A30/08/339**	
PANEL:	**MR D MOSSENSON**	**(CHAIRPERSON)**
	MS P HOGAN	**(MEMBER)**
	MR P HOGAN	**(MEMBER)**
DATE OF HEARING:	**13 FEBRUARY 1997**	
DATE OF DETERMINATION:	**26 FEBRUARY 1997**	

IN THE MATTER OF an appeal by Mr R W Huston against the determination made by Western Australian Trotting Association Stewards on 14 December 1997 imposing a five year disqualification under Rule 459(a) of the Rules of Trotting.

Mr D Price, instructed by D G Price & Co, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

The appeal as to both conviction and penalty is dismissed.

The fee paid on lodgement of the appeal is forfeited.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.