

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSENSON
(CHAIRPERSON)

APPELLANT: CLINT KENNETH HARVEY

APPLICATION NO: A30/08/423

DATE OF HEARING: 8 JUNE 1998

DATE OF DETERMINATION: 7 JULY 1998

IN THE MATTER of an appeal by Clint Kenneth Harvey against the decision of the Western Australian Racing Club Stewards imposing a 17 day suspension for breach of Australian Rule of Racing 137A(2)(a).

Mr TF Percy QC instructed by DG Price & Co appeared for the Appellant.

Mr J Zucal appeared for the Stewards.

BACKGROUND

This is an appeal by apprentice jockey CK Harvey, the rider of WILL HE PLAY in Race 5 The Everetts Butchers Class 3 Handicap which was run over 1400m at Kalgoorlie on the 23 May 1998.

On the 2 June 1998 the Stewards conducted an inquiry into Apprentice Harvey's use of the whip over the concluding stages in the race. Present at the inquiry were both the appellant and the appellant's father, trainer Robert Harvey who is also the master of the appellant.

The transcript reveals that the inquiry was a relatively quick and informal affair. At the outset Steward Chadwick who viewed the race from the Stewards' stand adjacent to the winning post at the Kalgoorlie-Boulder Racing Club gave evidence that:

'...over the concluding stages the horse was inclined to lay out a little bit. Apprentice Harvey was still using the whip, then commenced to slap it down the shoulder from recollection and then over the concluding stages, appeared to deliver a flurry of blows to the horse in the region of the neck and head area.'

The film of the race was shown after which the Chairman of the inquiry, Mr J Zucal, stated to the appellant that his horse was tiring and shifting ground when he hit the horse. The Chairman then asked '*Why did you use the whip in that manner?*' to which the appellant replied '*I didn't realise I was using it in that manner, sir.*' The transcript reveals the exchange then continued:

Chairman: *'What, you didn't realise that you were hitting it in the area of the neck?'*

Harvey: *'No, sir.'*

Chairman: *'Well, why didn't you just continue to ride it out hands and heels? Why did you use the whip then?'*

Harvey: *'Cos the trainer instructed me to give it a good hiding.'*

Chairman: *'Give it a good hiding? And that's Mr Huddy, is it?'*

Harvey: *'Yeah. Tony someone. Tony Fararo or something like that.'*

Chairman: *'Alright, now you've seen the film and you've heard what Mr Chadwick has said and what I've said. Can you see that you have done wrong?'*

Harvey: *'Yes, sir.'*

Chairman: *'Where have you gone wrong?'*

Harvey: *'Hitting forward, but I don't, I haven't hit him in the head but I've gone a little bit forward of the brand.'*

Chairman: *'So, in the actual race, you weren't conscious of the fact you were hitting it in the vicinity of the neck? You weren't conscious of that? You were just doing your best to ride your horse out?'*

Harvey: 'Yes.'

Chairman: 'Right. And you know you can't do that? You can't (sic) your horses in that area?'

Harvey: 'Yeah, I know now.'

Chairman: 'It doesn't look good, does it?'

Harvey: 'No, sir.'

Chairman: 'If somebody was to see that film and say who is that riding that horse, you know, it does not look good, it's not a polished ride, is it?'

Harvey: 'No.'

Chairman: 'I understand that you're only an apprentice and setting out but it's not acceptable that you hit horses in the vicinity of the neck or in the head area.'

Mr Harvey is there anything you wish to say?'

Harvey Snr: 'No, sir, no. I think you've covered it quite well. I think the boy realises he's done wrong.'

Chairman: 'Right, with trainers that come to you Apprentice Harvey, and say 'put the whip on this horse, use the whip hard and strong and give it good hiding' - that's all very well. But what you have to remember is that you have to use the whip as the Rules state and if you sit down on straightening up and you pull the whip and give your mount half a dozen cracks and it's apparent that it's not improving or starting to tire and shift ground, then you should not use the whip. You can sit down and push it hands and heels and you do much better for your mount, and much better for yourself by just gathering your horse up, keeping control of him for a start and he'll give as much as he can under those conditions. If trainers or owners say something to you about that, well, you just say, look I am instructed by the Stewards that I'm not permitted to use the whip in that extravagant manner. You come and see the Stewards. Would you go and see the Stewards, please. And we will take up the argument on your behalf because that is what we're saying to you. Under those circumstances, it's not right that you use the whip in the manner that you did. Are you clear on that?'

Harvey: 'Yes, sir.'

Chairman: 'I mean to say your father was a rider in races, he rode in many races, a very successful rider. You've been born into a racing family. These are the things that you're going to learn eventually, but it's important Apprentice Harvey that you understand what we're getting at. We're going to have to

decide whether you need to be suspended or what but it's important, most important that you leave here after seeing the film and have in mind, I can see where I've gone wrong, I can't do that in future. If you gain from that, then it's all worth it, but if you don't then it's of no value. Alright.'

Harvey Snr: '*Do you understand what Mr Zucal said to you?*'

Harvey: '*Yes.*'

Chairman: '*Any questions Mr Chadwick? Anything Mr Harvey, before we do consider the matter?*'

Harvey Snr: '*No, sir, no I think you've covered it very well.*'

The Stewards then adjourned the inquiry. After resuming the inquiry the Stewards announced that they charged Apprentice Harvey under Racing Rule 137A(2)(a). The Chairman of the inquiry then quoted the Rule and commented in these terms:

"The Stewards may punish any rider in a race or trial who uses his whip forward of the horse's shoulder or in the vicinity of its head." You are charged under that Rule, in that over the concluding stages when you rode WILL HE PLAY you used the whip forward of the shoulder. Do you understand the nature of the charge?"

Apprentice Harvey responded '*Yes, sir.*' The Chairman then answered '*And do you wish to plead in answer to the charge?*' to which Apprentice Harvey replied '*No, sir.*' The Chairman then stated '*You don't. Right, Mr Harvey, do you care to say anything in regards to that?*' Mr Harvey Snr replied '*No, it's alright.*' after which the Chairman said '*Well, we'll have to consider the charge. If you'd like to wait outside.*'

When the inquiry resumed Mr Zucal announced '*Mr Harvey and Apprentice Harvey, the Stewards have considered the charge and find you guilty as charged. Before determining a penalty is there anything you wish to address us on in regards to that?*'

There was some further discussion regarding the Apprentice Harvey's inexperience, he having only ridden in 34 races and had only been riding for 3

months. The appellant had not previously been charged with a contravention with the Racing Rules.

After the inquiry adjourned again Mr Zucal announced the outcome on penalty in these terms:

'Apprentice Harvey, in arriving at this decision, the Stewards have taken into account firstly your inexperience. We accept that you've only had thirty-four rides and you weren't really aware of the use of your whip as you stated and as I say, that does go down to your inexperience. Secondly, obviously in that short time you've had no previous conviction. We must penalise you in some form and we've decided to suspend you from riding in races for a period of seventeen days. That ends on a Friday night so you can come back to ride at Kalgoorlie on 20th, Apprentice Harvey. Further to that I'm going to get the Riding Instructor to make contact with you Mr Harvey and to sit down and take you through the film and advise where you've gone wrong and to analyse your ride in this instance and any others that he may see fit. The whole aim of it, Clint, as I said before, is for you to improve. You need to put, basically, just put this beside you. It's a learning curve. You have made a mistake and you're being penalised for it. We wouldn't want to see it happen again in a similar situation. Then we would start to become concerned at the use of the whip by yourself, but it's most important that we sit down and go through with the Riding Instructor together, have an input from your father, for your benefit so you learn how to ride these horses and to keep them under control at all times. And as I say to you, as I said to you before, if you know what your responsibilities are with the use of the whip, then if you do have any trouble with any trainers, or owners, you'll say, well look I've been advised, I've been directed by the Stewards that I'm not allowed to use the whip in this manner. Please go and see Mr Chadwick who is in charge and put that to him. Or please come and see me. But that's the situation as far as you can, when you do get pressure put on you, you can just say, no, well the Stewards have told us differently. Alright?'

Apprentice Harvey appeals against both his conviction and the penalty on the following basis:

'The Stewards were in error in convicting me and imposing a period of suspension, rather than merely a reprimand or a fine.'

An application for suspension of operation of the penalty was sought and refused. In opposing the application for the stay the Tribunal was informed by letter on behalf of the Stewards that Apprentice Harvey:

'...is not in demand to ride in races.

This suspension was done with the apparent full co-operation of his father-master, Mr Robert Harvey, with whom the Stewards discussed this matter on Friday 29th May 1998.

In the opinion of the Stewards, it is a blatant breach of AR137A(2)(a) and has little chance of succeeding...'

In support of the appeal Counsel for Apprentice Harvey made the following submissions:

A. CONVICTION

1. *The Stewards erred in forming a concluded view that an offence had been committed before -*
 - (a) *Laying a specific charge;*
 - (b) *Taking a plea;*
 - (c) *Considering the evidence in the light of the plea and the specific charge.*
2. *The Stewards erred in considering the charge without taking an unequivocal plea.*
3. *The Stewards erred in convicting the Appellant after finding as a fact that he was not aware that he used the whip in a prohibited manner.*

B. PENALTY

4. *Having regard to the circumstances of the case, the antecedents of the Appellant and the findings of fact made by the Stewards, the penalty was manifestly excessive.*
5. *The penalty was manifestly excessive compared to similar penalties imposed by the Stewards for the same offence.'*

DETERMINATION

I am in no position to comment on the reference in the Stewards' letter opposing the stay to the alleged discussion with Mr Robert Harvey. I am in no way influenced by that reference. However, it is clear from the transcript that, at the inquiry before the Stewards, there was harmony between the Stewards and Apprentice Harvey's master - father. Mr Harvey senior was fully accepting of the Stewards' approach. Mr Harvey, gave the clear impression that he was supportive of the need to give Apprentice Harvey an important lesson which would stand him in good stead and mould him at this early stage in his riding career.

Bearing this attitude of Mr Harvey senior in mind I see nothing wrong with the less than normal formality, if not rather casual approach adopted by the Steward chairing this inquiry. Despite the technical points addressed by Mr Percy QC in the first two submissions which are made regarding alleged errors by the Stewards I do not find in the circumstances that any injustice has occurred. Nothing done by the Stewards amounts to an error of the sort alleged in the submission which justifies any interference by the Tribunal.

As to the third of the written allegations senior counsel relies on the decision of the Court of Criminal Appeal in *Duffy v R* (1981) WAR 72. The Appeal concerned a charge of unlawful wounding in breach of the Criminal Code and the defence that the accused was acting in self-defence. The accused claimed he did not know he was holding a glass in his hand when he defended himself.

I do not find this case particularly relevant or helpful in relation to the circumstances confronting the appellant. The obligation on jockeys to comply with the Rules of Racing which are imposed on them contractually are not analogous to the criminal laws applicable to the community at large.

I am satisfied that the Stewards have not erred in convicting Apprentice Harvey. The appeal as to conviction is dismissed.

I have been given a long list of whip related offences covering some 4 $\frac{1}{2}$ pages where the names, the dates of the offences, the briefest description of the offences and the penalties are stated. The list reveals that by far most of the

penalties imposed are fines. They range between \$25 and \$500. Of the balance, 2 jockeys were stood down for 7 and 9 days. The remainder are suspensions of between 8 days and 3 months. As none of the details of the respective offences have been supplied a clear comparison with Apprentice Harvey's offence is not possible. Bearing in mind the appellant's inexperience, his explanation including his riding instructions and the fact that he was not conscious of the fact he was offending I consider the appropriate penalty was something considerably less than that which was imposed.

In view of the fact that a stay was initially refused Apprentice Harvey has already served a suspension from after the time of committing the offence on 2 June until the appeal hearing on 8 June 1998. I am satisfied that any period of suspension in all of the circumstances is manifestly excessive. A fine would have been appropriate in view of all relevant factors. These include Apprentice Harvey's age and inexperience, his explanation of the circumstances and the fact that the majority of offenders who have breached the Rule in the past have been fined.

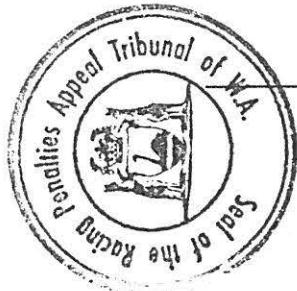
As previously stated, in addressing the Apprentice the Chairman of the inquiry stated:

'We're going to have to decide whether you need to be suspended or what but it's important, most important that you leave here after seeing the film and have in mind, I can see where I've gone wrong, I can't do that in future. If you gain from that, then it's all worth it,...'

Apprentice Harvey should have learned the salutary lesson from this experience which the Stewards quite properly set out to teach him in view of his serious breach of the riding rules.

Having already served a period of suspension it is not appropriate now to impose any further penalty.

For these reasons the appeal as to the penalty only succeeds.



Dan Mossenson

DAN MOSENSON, CHAIRPERSON

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

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APPLICATION NO:

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PANEL:

MR D MOSENSEN (CHAIRPERSON)

DATE OF HEARING:

8 JUNE 1998

DATE OF DETERMINATION:

7 JULY 1998

IN THE MATTER OF an appeal by Clint Kenneth Harvey against the decision of the Western Australian Turf Club Stewards on 30 March 1998 imposing a 17 day suspension for breach of Australian Rule of Racing 137A(2)(a).

Mr TF Percy QC instructed by DG Price & Co appeared for the appellant.

Mr J Zucal appeared for the Stewards.

For the reasons published the appeal against conviction is dismissed and the appeal against penalty is allowed.

In view of the fact firstly, that I am satisfied that a fine would have been appropriate in all of the circumstances and secondly, that the appellant has already served a period of suspension, no further penalty will be imposed.

D. Mossenson



DAN MOSENSEN, CHAIRPERSON