

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: DAMIAN RICHARD MILLER
APPLICATION NO: A30/08/454
PANEL: MR P HOGAN (PRESIDING MEMBER)
DATE OF HEARING 8 APRIL 1999
DATE OF DETERMINATION: 8 APRIL 1999

IN THE MATTER OF an appeal by Mr D R Miller against the determination made by the Western Australian Turf Club Stewards on 9 March 1999 imposing a 14 day suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr D G Price, instructed by D G Price & Co, appeared for the Appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

BACKGROUND

The appellant was the rider of SUPER THRUST in Race 2 at Bunbury on 26 January 1999. At an inquiry on 8 February 1999, the Appellant was charged with careless riding. He was convicted and suspended for 23 days. The Appellant lodged an appeal (Appeal 446) against both conviction and penalty. He was given the benefit of a stay of proceedings.

On 8 March 1999, the Appellant rode FRIENDLY MANNA at Ascot. At the time he was riding under the stay of proceedings, because Appeal 446 had not then been heard. Following an inquiry on 9 March 1999, the Appellant was again charged with careless riding. He was suspended for 14 days. Mr Miller lodged an appeal (Appeal 454) against both the conviction and penalty.

I determined Appeal 446 on 24 March 1999. The appeal was dismissed both as to conviction and penalty. At the conclusion of that matter, I invited the Stewards to correspond with Counsel for the Appellant to set out how the Stewards were treating the operation of the 14 day penalty. That is, was the penalty to be served cumulatively or concurrently with the 23 day penalty?

The Chairman of Stewards by letter dated 29 March 1999 advised Counsel for the Appellant that the Stewards were treating both penalties as cumulatively. The following are extracts from that letter:

"The purpose of this letter is to supplement the record and clarify that the Stewards' Panel, which sat on the case related to Appeal 454, considered that a 14 day suspension from

riding in races was appropriate and such penalty should be served cumulative on any other penalties. The relevant expiry date following the unsuccessful Appeal 446 is now midnight 22 April, 1999.

Further, the Stewards in assessing the 14 day suspension from riding in races, did not take into consideration the 23 day penalty, the operation of which was subject to a Stay of Proceedings."

THE APPEAL

Preliminary Point

The Appellant was found guilty on 9 March 1999 of this offence of careless riding. That offence was committed whilst he was riding on a stay of proceedings arising out of Appeal 446. On 9 March 1999 the Stewards imposed a penalty of 14 days suspension. In imposing the 14 day suspension, no reference was made to the 23 day suspension which had been imposed, the subject matter of Appeal 446. Because no reference was made at all to it, no reference was made to that period of suspension being either cumulative or concurrent.

The Stewards went away and calculated the expiration date of this 14 day suspension in accordance with it being cumulative. The Appellant went away from the proceedings apparently on the understanding that the 14 days was concurrent.

At my invitation at the end of the last proceedings, that position has been clarified. By way of sentence calculation, and not by way of decision making, the Stewards have confirmed that that is their position. Mr Price today confirms that the Appellant's position is that the penalty was concurrent.

I will now deal with the point that Mr Price raised, namely that the letter of 29 March 1999 was a decision which was made *functus officio* and in breach of natural justice. The letter of 29 March 1999 wasn't. It was simply an expression of what the sentence calculation was rather than anything else. That is why the Appellant is here today so he can be heard on the point.

The two points of substance that Mr Price raises are that the penalty wasn't expressed to be cumulative, therefore it is concurrent and secondly, that there is no power to make a penalty like this cumulative. Some authorities have been given to me.

As to the first point, I don't accept the position to be that because the penalty was not expressed to be cumulative, therefore it is concurrent. There are a number of reasons for that. The Stewards were mindful of the fact that the Appellant was riding on a stay of proceedings, and was subject to a 23 day period of suspension. At the time, there was an appeal pending and there was a stay of proceedings being given by this Tribunal. One can understand the Stewards being somewhat cautious in trying to take that into account in any way at all in dealing with this new matter. They were invited by the Appellant not to take it into account, so one can understand that they might have been perhaps overly cautious in not referring to it all. But I don't accept the point that by not making any reference to being cumulative, the Stewards intended the penalty to be concurrent.

The real point is whether the Stewards have any power to make a period of suspension cumulative. It is true that the Rules don't refer to any such power. Normally, if a Court or Tribunal or body of any persons makes a decision and says something is going to happen, then it starts to happen from the time when it is said. One has got to look for some provision upsetting that. The position has always been, as I understand it at common law before we were dealing with sentencing acts and things of that nature, that there has been power to impose sentences of imprisonment to begin at the

expiration of previous sentences. That was in particular where the offences were misdemeanours. That was a power that was always there at common law. It didn't depend upon any statute. It appears that the position was somewhat different in the case of felonies, things which don't exist these days. I should say I am referring to authority referred to in the text *Justices Acts of Queensland* by Kennedy Allen 3rd Edition published 1956 at page 416.

Since the days of common law, at least in Western Australia, we moved through a number of different sentencing statutes. We've moved through the *Criminal Code* section 20, we've moved through the *Justice's Act* section 156, all talking about the power to impose cumulative penalties, giving Courts express powers to do it. We now have the *Sentencing Act 1995*, section 88, referring to the power to impose cumulative or partly cumulative penalties. So legislation has moved on a long way since the common law. But it does appear to me that at common law, at least in the situation of misdemeanours, there always was a power to impose cumulative penalties. There is nothing in the Rules of Racing which talks about the power to impose a cumulative penalty. So the position I suppose is as it was at common law.

I am satisfied that there is power in the Stewards to impose a cumulative penalty in the sense that there is no impediment, there is nothing to say they can't impose a cumulative penalty. I am not invited in this case, and I do not express any opinion on whether they should have. We are not here to argue the merits of concurrency or otherwise. The submissions put up, which are rather technical in nature, by Mr Price is that there is no power to do it and it shouldn't have happened.

For those short reasons, I dismiss that preliminary point raised by Mr Price and determine that the Stewards were able to make a cumulative penalty. The calculation as set out in the letter of 29 March 1999 stands at this stage.

Determination

Counsel for the Appellant sought and was given leave to withdraw the appeal, after determination of the preliminary point.

Accordingly, the appeal is dismissed.



PATRICK HOGAN, PRESIDING MEMBER