Appeal decision

Date: 18 March 2014

Code of racing: Thoroughbred

Appeal panel: Judge W Carter (chair), Mr B Miller and Mr P James.

Appearances: Mr B Whyburn, solicitor, appeared on behalf of jockey Damian Browne.
Mr J Dart, stipendiary steward, appeared on behalf of the stewards.

Decision being appealed: Suspension of licence to ride in races for a period of six weeks – AR135(b).

Appeal result: Appeal upheld.

Extract of proceedings – in the matter of the Quest Breakfast Creek QTIS 3yo C&G Maiden Handicap over 1200 metres at Eagle Farm on 26 February 2014. Jockey: Damian Browne

THE CHAIRMAN: This appeal involves a consideration of the proper application of Australian Rule 135(b). Before dealing with the merits of Mr Browne's appeal, it is timely for this Board to say something about Australian Rule 135(b) and its proper application. This is the first appeal by a metropolitan rider for a breach of the rule since the establishment and reconstitution of the Racing Disciplinary Board on and from 1 August last year.

Prior to the insertion of Rule 135(b) into the rules some years ago, the only rule which focused on the running and handling of a thoroughbred in the course of any race was Rule 135(a), which provides: "Every horse shall be run on its merits."

There was a perceived difficulty for racing authorities in the application of Rule 135(a). For a person to be properly convicted for a breach of that rule, the stewards had to be satisfied to the required standard of proof that the rider and/or the owner and trainer had formed a prior intention that in the particular race this horse would not be allowed to run on its merits. In short, that there was the intention that the horse would not win and that it would be seen to perform at an inferior standard. To use the racecourse vernacular: that there was an intention "to hold the horse" and to get it beaten. It is unnecessary for us to dwell on the integrity implications for the racing industry if such practices were to be left unchecked. There was, and still remains, the need for a rule such as Rule 135(a).

There were however perceived difficulties in the application of that rule. It was essential that an intention on the part of the alleged offenders that the horse not be allowed to win or to run on its merits be proved by acceptable evidence, in accordance with the proper standard of proof before conviction and penalty would follow. This was often a somewhat difficult and demanding process. In short, the test of culpability in respect of Rule 135(a) was essentially subjective because it required proof of a corrupt or dishonest intention that the horse be not allowed to run on its merits.

Rule 135(b), however, is essentially different. It provides:

> "The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that the horse is given full opportunity to win or to obtain the best possible place in the field."

The alleged offender under Rule 135(b) is identified as the rider. The core focus of the rule is the quality or otherwise of the jockey's ride. That is, if he/she, the rider, fails, given the circumstances of the race, to take all reasonable and permissible measures throughout the race to ensure that the horse is given full opportunity to win or to obtain the best possible place in the field, he/she is in breach of the rule and liable to penalty. It is now well established by the decisions of respected Racing Appeals Tribunals in other States and Territories that in the application of Rule 135(b), the test is not subjective but essentially objective. An objective assessment of the ride is the core requirement both for the stewards and for the appeal body. Proof of a possible dishonest intent has no place when objectively assessing this ride by this jockey in this race on this particular day.

That means that one must make an objective assessment of the jockey's ride, given all of the relevant circumstances of the race, and in particular the quality of the jockey's ride having regard to the facts and circumstances of this race. Certain other matters of principle flow from that, and these have been identified in prior decisions in other jurisdictions.

The leading statement of principle involving Rule 135(b) is generally regarded as being that of Mr T E F Hughes, QC, the then chairman of the New South Wales Racing Panel, on 5 June 2003 in an appeal in respect of Rule 135(b) by jockey Munce. Mr Hughes QC said with reference to Rule 135(b):

> "The task of administering this rule is not always easy. One must keep in mind that on its true interpretation it is not designed to punish a jockey unless on the whole of the evidence in the case the tribunal considering a charge under the rule is comfortably satisfied that the person charged was guilty of conduct that, in all the relevant circumstances, fell below the level of objective judgment reasonably to be expected of a jockey in the position of the person charged in relation to the particular race. The relevant circumstances in such a case may be numerous. They include the seniority and experience of the person charged. They include the competitive pressure under which a person charged was riding in the particular race. They include any practical necessity for the person charged to make a sudden decision between alternative courses of action. The rule is not designed to punish jockeys who make errors of judgement unless those errors are culpable by reference to the criteria that I have described."

Judge Lewis, the chair of the Victorian Racing Appeals and Disciplinary Board, in an appeal by apprentice jockey Rodder on 1 December 2011, developed this principle somewhat further. He said:

> "The onus is on the stewards to prove that the appellant has been in breach of the Rule. The appellant is, in the circumstances, required to give an explanation for his/her actions. However, the onus always remains with the stewards. This is a serious offence. The standard of proof is that referred to in the well-known High Court case of Briginshaw v Briginshaw, 1938, CLR, 336. The standard is on the balance of probabilities. However, the board must have a reasonable degree of satisfaction that the charge has been proved. It is not a matter of mechanical comparison between competing views. Matters which the board must take into consideration include the seriousness of the allegation and the gravity of the consequences flowing from the particular finding.
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> The rule imposes an objective standard of care. The standard of care takes into account, among other things, the views and explanations of the rider and the views and the opinions of the stewards. A mere error of judgment is not a sufficient basis for a finding that the rule has been breached. The rider's conduct must be culpable, in the sense that, objectively judged, it is found to be blameworthy."

Then His Honour with reference to the particular facts of the case continued. He said:

> "Putting the issue in context, the board must be comfortably satisfied that, in the circumstances which existed, and viewed objectively, the manner in which the jockey rode her mount and the degree of control which she exercised over her mount in the stages of the race specified in the charge fell well short of what would be reasonably expected of a rider in her position."

And further:

> "The question for the board is: was the appellant's ride an error of judgement or was it, in all of the circumstances, culpable in the sense that, objectively judged, it was deemed to be blameworthy."

And finally:

> "This is not a case where, for example, a horse with a definite racing pattern was ridden upside down, or where a clear run existed and was not taken."

It seems to us that the following statements of principle emerge: (1) It is the quality of the ride in the circumstances of the particular race which has to be judged. (2) That judgment must be based on an objective assessment of the jockey's ride in this particular race. (3) A mere error of judgement by a jockey is not a sufficient basis for an adverse finding that this rule has been breached. (4) The rider's conduct must be culpable in the sense that, objectively judged, it is found to be blameworthy. That is the task that confronts us.

The stewards in charging the appellant jockey for a breach of Rule 135(b) particularised:

> "From the 400 metres you failed to improve Kingtantes's position between Captain Kittinger and Busy where there was sufficient racing room when it was reasonable and permissible for you to do so."

And further:

> "That approaching the 300 metres until approaching the 200 metres you failed to ride Kingtantes with sufficient vigour when it was reasonable and permissible for you to do so in order to improve Kingtantes's position when afforded clear running."

We are indebted to Mr Whyburn and also to Mr Dart for their helpful submissions. As indicated, the stewards' case against the appellant was: that from the 400 metre mark until about the 250 metre point, jockey Browne, who was riding Kingtantes, failed to take a run which was available to him, and which the stewards would submit was a reasonable and permissible measure for him to take. And further, that had that run been taken, the horse would have been able to improve its position in the field and to finish closer.

It is clear from the evidence of the film that from about the 350 metre mark, there was a run available to the jockey, and we are of the view also that if he had taken that run he would have been able to improve his position in the field. The jockey concedes on the other hand – and Mr Whyburn also submitted – that what occurred at this point of the race was in fact an error of judgement on the part of the appellant.

The jockey himself gave evidence that at the relevant point he had momentarily considered taking a run to the inside of El-Issa's mount, which was racing closest to the fence, but that when he sought to execute that move, El-Issa's horse was insufficiently clear, in relation to the fence, for him to take the inside run. He then took the run to the outside of El-Issa's mount after he had balanced his mount for the run home. His evidence was that there was also a call from the outside – probably from jockey Stewart, who was about four horses off the fence. He, the appellant, was apparently concerned about any movement which might occur from the horse Busy, which was ridden by apprentice jockey Schmidt, to his immediate outside.

Therefore, the appellant says that in the circumstances "I erred in my judgement. It was not my best ride." He concedes that the run became available, and that it could have been taken. On the other hand, it is submitted that his instructions were to ensure that the horse was given the best chance in the race by riding him quiet so that he would finish. The trainer was anxious that the horse should be given every opportunity to race strongly to the line, which the jockey said it did. He finished third. Had he taken the run earlier he may have finished second.

In making an objective assessment of the ride, we do not lose sight of the fact that the jockey in question is a highly regarded jockey, well regarded not only in this State but elsewhere, and he is of course a very experienced rider.

The question for us is: should we accept that the jockey's failure to take the run earlier and to advance his horse at that point was an error of judgement only on his part, or was it, objectively assessed, culpable and blameworthy and deserving of conviction and penalty? The penalty imposed for this offence is not insignificant.

We have discussed the matter at some length, and it is our view – a unanimous view – that given the standard of proof which governs us, we cannot comfortably be satisfied to the required degree that the ride of jockey Browne at the relevant point and in the circumstances was culpable and blameworthy. We concede that a run was available and might have been taken. There are other questions, legitimate questions based on the jockey's evidence. There are like questions in relation to the quality of the horse and whether or not it was appropriate to pressure it at that point. It was clearly an inexperienced horse.

On the other hand, the thing that troubles us is the fact that the experience of the jockey might well have determined that he ought to have taken a different course. But given all of the circumstances and the nature and extent of the required proof in accordance with which we must be comfortably satisfied that the jockey's error was culpable and blameworthy, we are of the view that we cannot comfortably come to that conclusion.

The result is therefore that the appeal will be allowed. The conviction and the penalty will be quashed.

Further right of appeal information: The appellant and the stewards may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **14 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au