



APPEAL of BRENDON DAVIS – AR 175(q)

Appeal Committee: Mr John Stewart (Chairman) and Mr Charles Burkitt

Date of hearing: 27 May 2010

REASONS FOR DECISION

Stewards Inquiry

On 1 April 2010 Stewards inquired into the conduct of Jockey Brendon Davis following the Coleman's Printing Handicap run that day at Fannie Bay.

At the inquiry Apprentice Scott Hillebrand informed Stewards that after the race: "Oh, there was just a few words exchanged from Brendon Davis and Vanessa Arnott towards me, and as we were cantering back Brendon Davis hit me with his stick." Apprentice Hillebrand asserted that the strike was intended and impacted on him "Just down the shoulder."

Jockey Vanessa Arnott gave evidence. She said: "Brendon said to Scottie, you know, you crossed too tight, whatever, and Scottie was giving him a bit back, too, and then I said: 'Scottie, you crossed too tight. Settle down.' And he was giving me and Brendon lip, and then he tried to put me through the fence on my horse twice – over there and then down here."

When asked if she saw Jockey Davis hit Apprentice Hillebrand with the whip, Jockey Arnott replied: "No."

Unfortunately, the evidence at the inquiry was confusing. As has already been noted, Jockey Arnott referred to two events. It is necessary to differentiate between events in the race and the subsequent altercation.

Apprentice Hillebrand said at the inquiry: "When – I stated earlier, sir, that when Brendon's hit me with his whip, my horse has ducked in and it hasn't made contact with Vanessa's horse but we were on the fence, but, yes."

Jockey Davis didn't agree. He said that at no stage had he hit Apprentice Hillebrand with the whip.

The other episode occurred in the race and was described by Apprentice Hillebrand in these terms: "The other one that I think, like, she's talking about is where we come down the straight here. I been probably two or three horses off the inside fence and she was on my inside and she was still having a go at me, and I was just pointing my horse up. Not at one time there did I try put her through the fence."

Stewards interviewed Shaydon Martin, a camera operator, on 10 April. Mr Martin gave evidence of what he saw:

"I saw two jockeys pulling into the – they were close to the inside fence running back. One was a woman, one was a man. I couldn't really see any facial features from the distance. And another jockey was tearing back down to sort of meet up with them and swearing at the male jockey, it seemed. And he was saying something along the lines of 'What the fuck were you doing? What were you doing?' and as he pulled up close to the other male jockey, he took a swing at him. I didn't see him use the whip and it didn't look like he used the whip, but he may have. Yes, and I saw the other jockey raise his hand to defend himself, like sort of block it, and I didn't see anything past there. It looked like that was the only real physical contact they had, but there was more sort of aggravated speech after that."

Mr Martin immediately brought the incident to the attention of Stipendiary Steward Mills who noticed that three riders (Jockeys Arnott and Davis, Apprentice Hillebrand) appeared to be involved. They were on the only horses in the area which Mr Martin was observing.

Jockey Davis was present when Mr Martin was interviewed by Stewards. Mr Mills was also present. Jockey Davis didn't ask any questions of either Mr Martin or Mr Mills. He said he didn't recall the incident. As will be seen, he subsequently clarified that remark.

The Stewards' Inquiry resumed on 6 May 2010 in the presence of Jockey Davis and Apprentice Hillebrand. Mr Westover began by saying: "It was reported to myself immediately after the running of that event by S Hillebrand's Master that he had been struck with a whip whilst returning to scale."

Mr Mills told the Inquiry: "I had my back to the track, giving the Camera man a hand to unpack the camera. He said that: 'Shit! That young jockey's just struck the other fellow.' And I quickly turned around, noted who the jockeys were, which were you two and Vanessa Arnott, and indicated your saddle cloth numbers in my race book and then came back and reported it to Mr Westover."

When asked at the Inquiry if he was struck with force Apprentice Hillebrand said: "No sir." When asked to explain his lack of recall Jockey Davis said: "I don't recall the incident of me hitting Mr Hillebrand because I didn't hit him. I never. I never hit him with my whip." He added: "Even what the young fellow [*referring to Mr Martin*] said that I didn't hit him either, you know, and Mr Hillebrand, when he came back to the enclosure, like with this whole enquiry going on, he never showed any marks on him from where I hit him. So he might have been mistaken. When I caught up to him, I might have pulled my goggles down or.. ." And then: "I never took a swing at him, sir."

Apprentice Hillebrand said that when they pulled up after the race Jockey Arnott was the first to complain to him about his race riding. When Jockey Davis caught up with their horses he also remonstrated with Apprentice Hillebrand. When asked if there was any swearing Apprentice Hillebrand told the Inquiry: "The swearing was mainly from Vanessa."

Apprentice Hillebrand repeated his accusation: "When we've pulled up, we're pretty much adjacent, all three of us, and came back. And my horse, he was in the middle, and Brendon's like taken a swing at me. My horse has pretty much shied away from Brendon and he's knocked on to Vanessa on to the fence. Like, you know, there was Brendon, myself, Vanessa."

There was some conflicting evidence about where the conversation occurred between Jockey Davis and apprentice Hillebrand. Davis said: "Well the incident where Scottie was struck is on the corner, which is what the inquiry is about."

Shortly after that Jockey Davis repeated his denial. When asked to comment on Apprentice Hillebrand's evidence he said: "All correct bar the striking bit. I never struck him with the whip." He denied Mr Martin's evidence that he raised his arm and that Apprentice Hillebrand raised his arm to defend himself.

Stewards found Jockey Davis' evidence "unreliable and misleading". He was charged with a breach of AR 175(q) in these terms:

"We the Stewards of TRNT now charge you under that rule with Improper Conduct, the Improper Conduct being that when you returned to scale on *Determined* in the Coleman's Printing Handicap over 1100 metres on 1 April 2010, at about the 1600 metres you struck Apprentice Jockey Scott Hillebrand with your whip."

Jockey Davis reserved his plea. Stewards suspended his licence for one month from midnight 7 May 2010 up until and including 7 June.

The Appeal

Jockey Davis appealed against the finding of guilt. In addition he sought a stay of proceedings which was granted by the appeal committee.

Significant issues raised by the grounds of appeal were that:

- (1) The Stewards could not have been satisfied, on the evidence, beyond reasonable doubt, that Jockey Davis was guilty as charged.
- (2) In particular, the Stewards' finding that Jockey Davis struck Apprentice Hillebrand with a whip was contrary to the evidence.

On hearing of the appeal Jockey Davis was represented by Mr Kevin Ring of the Australian Jockeys' Association. Stewards were represented by a lawyer, Mr David De Silva. We received submissions exploring the evidence in fine detail. We do not propose repeating the submissions except where necessary to explain our reasoning.

The hearing proceeded upon the transcript of the Stewards' Inquiry and of the interview of Mr Martin. A small amount of additional evidence was received without argument.

As has been mentioned Jockey Davis raised the question of the applicable standard of proof, suggesting that it is the criminal standard which applies, that is, proof beyond a reasonable doubt. Mr De Silva submitted that we should apply the civil standard - proof on the balance of probability but also bearing in mind the need to be satisfied in accordance with the decision of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

We prefer Mr De Silva's submission. The words of Dixon J in *Briginshaw* still hold good: "Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable

satisfaction is not a state of mind to be established independently of the nature and consequences of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

At the Inquiry, Stewards quite properly informed Jockey Davis of the seriousness of the accusation made by Apprentice Hillebrand. We are conscious that a finding of guilt would put on Jockey Davis' record a serious breach of the rules ordinarily meriting a suspension of licence.

Evidence

It is true that Apprentice Hillebrand complained that Jockey Davis struck him with the whip. The Stewards were clearly justified in proceeding with an inquiry having regard to that complaint and the information received from Mr Martin. However, unfortunately we consider that there were significant shortcomings in the evidence received at the Inquiry.

The adjective "inexact" can aptly be applied to much of that evidence including the evidence of Jockey Davis and Apprentice Hillebrand. Given Jockey Davis' denials, the totality of the evidence did not enable us to reach a state of "reasonable satisfaction" about proof of the charge.

We note these concerns:

- Mr Martin said: "I didn't see him use the whip and it didn't look like he used the whip but he may have." Far from a positive assertion that Jockey Davis had used the whip!
- Mr Martin then added: "Yes and I saw the other jockey raise his hand to defend himself, like sort of block it." Neither Apprentice Hillebrand nor Jockey Arnott was asked to comment on this evidence.
- Jockey Arnott did not see the whip used. She said she was in front of the other two riders. She could, of course, have turned around. She wasn't even asked whether she was in a position to see any of Jockey Davis' actions or whether she heard anything that might be relevant to the complaint.
- Apprentice Hillebrand gave two distinctly different versions of his conversation with Jockey Davis after the race.
- One of these versions included abusive swearing by Jockey Davis. Yet Apprentice Hillebrand said at the Inquiry: "The swearing was mainly from Vanessa." He wasn't asked to clarify his evidence.
- Mr Martin gave evidence that he saw (or perhaps heard – it is unclear) Jockey Davis swearing as he approached Apprentice Hillebrand. At the Inquiry neither Mr Martin nor Apprentice Hillebrand was given the opportunity to clarify these apparent discrepancies.
- Jockey Hillebrand complained that he was struck on his left shoulder. At the Inquiry he showed Stewards his shoulder. At the appeal hearing we were told that there was no mark to be seen. We were also told that the absence of a mark could have been explained by the fact that the rider was wearing a safety vest but the Inquiry was incomplete on this point in that there were no observations made or explanation received.

- Jockey Davis advanced the possibility at the Inquiry that he might have been pulling his goggles down after the race and that this action may have appeared like a “swing” at Apprentice Hillebrand. This possibility was not explored.
- Stewards informed Jockey Davis that they found his evidence to be “unreliable and misleading”. They did not explain on what basis they came to that conclusion.

Mr De Silva asked us to accept that this evidence given by Jockey Davis constituted an admission: “Well the incident where Scotty was struck is on the corner which is what the inquiry is about”. When taken in the context of Jockey Davis’ repeated denials we do not regard this as an admission. Rather, it was a slip of the tongue and we find that, had he adverted to the possibility of being misunderstood, Jockey Davis would have used “supposedly” before “struck”. At any event, the Stewards did not confront Jockey Davis with the so-called admission at the Inquiry as would be expected given his other denials. Instead Acting Chief Stipendiary Steward Westover quite properly reminded Jockey Davis that “...the inquiry itself is about an alleged striking.”

We did not consider that there was necessarily any conflict between the evidence of Apprentice Hillebrand (that he was struck by Jockey Davis) and the evidence of Mr Martin (that Jockey Davis took “a swing”). Both versions were capable of being reconciled but that wasn’t done. As Mr Ring pointed out, the possibility of another explanation for what Mr Martin witnessed (such as the actions of jockey Davis in removing his goggles) was not explored. All of these concerns leave us in a state of mind where we cannot be satisfied that Jockey Davis was guilty as charged.

Decision

The decision of the Stewards is set aside. The appeal deposit will be refunded.

Dated

18 June 2010

.....
John Stewart

.....
Charles Burkitt