

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF TOMMY BERRY

Appeal Panel: **Mr R Beasley SC – Principal Member**
Mr C Tuck
Mr K Langby

Appearances: **Racing NSW: Mr T Moxon**

Appellant: Mr P O’Sullivan

Date of Hearing: **20 February 2020**

Date of Reasons: **20 February 2020**

REASONS FOR DECISION

The Panel

Introduction

1. This Appeal is by licensed Jockey Tommy Berry, against the finding that he failed to ride a horse out to the end of a race in breach of AR131(b) of The Australian Rules of Racing. The charge and the finding of breach resulted from the appellant’s ride on the horse *Kentucky Wildcat* in race 5 run at Warwick Farm racecourse over 1100m on 12 February 2020. *Kentucky Wildcat* finished third in the race, beaten a nose for second.

2. The particulars of the charge are as follows:

“...you did fail to ride Kentucky Wildcat out to the finish of the event.”

3. Mr Berry pleaded not guilty to a breach of the rule, but was found guilty by Stewards, and penalised with a 15-day suspension of his licence to ride. He has

appealed to the Panel in relation to both the finding that he breached the rule, and as to the severity of penalty imposed.

4. At the appeal hearing, the Stewards were represented by Mr T Moxon. Mr Berry was represented by Mr P O'Sullivan, solicitor. The appeal book was entered into evidence as exhibit A, and film of the race from two angles as exhibit B.

Proposed evidence from Mr Birch

5. One issue raised at the commencement of the appeal concerned whether evidence from Mr W Birch, the Deputy Chairman of Stewards, should be allowed. Mr Birch was not present at the race meeting on 12 February, and was not part of the Stewards' Panel that found Mr Berry in breach of the rule. However, a statement was prepared from him entitled "Written Outline of Expert Evidence". In the statement, Mr Birch expresses the view that the explanations given by Mr Berry to Stewards for his ride, in particular inside the last 50 metres, do not accord with his ride at three other parts of the race – on the turn, at the 300m, and approaching the 100m. On each occasion, Mr Berry rides his horse with full vigour while allowing it to shift from a straight line. This, it was said, was inconsistent with Mr Berry's explanation to Stewards for taking hold of his horse near the line, which was to straighten his mount. The ultimate view expressed by Mr Birch in the statement was that it was "[his] *opinion that the credibility of explanation offered by Tommy Berry is so severely diminished that it cannot be accepted by Stewards*".
6. Although it does not say so, we have interpreted the word "Stewards" to be a reference now to "the Panel".
7. Mr O'Sullivan objected to Mr Birch giving evidence on a number of grounds. First, he said Mr Birch was not impartial or independent. He is employed by Racing NSW, and is a member of the same panel of Stewards who have found Mr Berry in breach of the rule. Secondly, he submitted that any evidence of an expert nature in the statement relates to the ride at the turn, 300m and 100m, but not to the conduct the subject of the charge.

8. Mr Moxon supported use of the statement, and calling Mr Birch to give evidence, on two bases. First, he submitted that given his nearly twenty five years of experience, including as Chief Steward and subsequently as General Manager of Stewards in Queensland, Mr Birch was well qualified as an expert. Secondly, Mr Moxon said calling Mr Birch was similar to the way appellant riders sometimes call retired jockeys to give evidence of an expert opinion kind in relation to their conduct in races.
9. There is some force in both Mr O'Sullivan's objections. However, we think there is another fundamental problem with the statement. Ultimately, it is a submission, and not expert evidence. Mr Moxon, of course, is free to (and did) submit to the Panel that there are good reasons not to accept Mr Berry's explanation for his ride. He can point to what he considers to be inconsistent evidence in aid of that submission. He can submit that the Stewards' analysis of what happened is to be preferred to any of Mr Berry's explanations. However, it is not proper in our view to "dress up" submissions of that kind as "expert evidence". They are not. Even though the rules of evidence do not apply to an appeal here, the rules of fairness do, and the Panel is entitled to also make rulings as to what is or isn't relevant. The proposed evidence from Mr Birch is not truly expert evidence, it would not be fair to admit it or consider it, and it is not relevant or necessary for this appeal in any event.
10. None of the above should be taken as an indication that the Panel does not consider that Mr Birch, or other Stewards, have expertise in assessing races, and the conduct of riders. They do. It may be that in some appeals, evidence of an expert opinion kind is permissible from a Steward. This might relate to their observations and analysis of a race – which might in part be simply factual observation, or could be expert opinion of a kind relating to the conduct of a jockey in a race, or a blend of both. Telling us who we should believe though is not expert evidence – that is the territory of submission.

Evidence on appeal

11. Mr Berry was called to give evidence by Mr O'Sullivan. His evidence – which includes his explanation for why he says he has not breached the rule – can be summarised as follows:

(a) At the top of the straight, he steered his horse out to make sure he got to the middle of the track. The track was wet, and the inside running was a disadvantage.

(b) At the 300m, he again steered his mount out slightly. He was reprimanded for this under the careless riding rule, as he was not two lengths clear of the horse Bedtime Stories.

(c) At the time on the film indicated by 47.17 (near the 100m), his horse shifted in when he loosened his grip to change from riding with the whip in the left hand, to riding and striking his horse using the right.

(d) Inside the 50m, perhaps at about the 35m, Mr Berry's horse shifted out suddenly perhaps two horses. He felt he had to straighten his mount. A couple of strides before the line he took hold of his horse to straighten it, as he felt he had a duty to do this. That may have cost the horse second place given the narrow margin, but was action he felt bound to take for safety reasons.

12. In submissions, Mr O'Sullivan pointed to the transcript of the hearing, in which Mr Berry consistently maintained a similar explanation to that given in evidence on appeal. This includes from his first answer at lines 20-30 from page 1 of the transcript. He asked us to note Mr Berry is an experienced rider, and his evidence should be accepted. He reminded us that the Stewards bare the onus of proof.

13. Mr Moxon described the defence as one of "convenience". He pointed to the prior incidents in the race as showing that Mr Berry made no attempt to

straighten his mount when it shifted. He also pointed to the fact that Mr Berry demonstrated a capacity to straighten his horse while still riding with vigour. He noted that the appellant really stopped riding in the last few strides, and this cost Kentucky Wildcat second place (although that need not be proven for the charge to be sustained). He also submitted that the film shows that if Mr Berry had ridden with proper vigour to the line, his mount would not have been in danger of interfering with any other runner, including the mount of Glyn Schofield (Bright Idea), which was referred to in the evidence. Mr Berry's response is that is only clear in hindsight.

Findings

14. The Panel accepts Mr Berry's explanation for what is shown in the film at the turn, the 300m, and at film 47.17/100m. We accept he steered his horse to get a mid-track run. We accept the horse shifted in when he changed his whip hand.

15. We also consider that he did stop riding with vigour in the last few strides. This did, in our view, cost Kentucky Wildcat second place. The question is though, were Mr Berry's actions in the last five or so strides a breach of AR 131(b)?

16. It may be that there is, as Mr Moxon submits, an element of convenience in Mr Berry's defence. However, for the Panel to find that, we must reject Mr Berry's explanation of what happened in the last 35 metres of the race. His horse does shift out – that is clear from the film. Did he attempt to straighten it as a safety precaution, and then take hold of it? He says he did, and there is no obvious reason for the Panel to reject that explanation. It is a fine run thing, and is the sort of appeal where the burden of proof is important. Ultimately, we can't find sufficient evidence to reject Mr Berry's explanation. Equally, and related to this, we are not comfortably satisfied on the balance of probabilities that he has breached the rule.

17. Accordingly, the appeal must be allowed. The Panel's orders are:

1. Appeal allowed.

2. Finding of breach of AR 131(b) set aside.
3. Penalty of a 15-day suspension set aside.
4. Appeal deposit to be refunded.