7 October 2021

**DECISION**

**RACING VICTORIA**

**and**

**BEN MELHAM**

**Date of hearings:** Thursday, 2 September 2021, Thursday, 9 September 2021, Friday, 17 September 2021 and Wednesday, 22 September 2021.

**Panel:** Judge John Bowman (Chairperson) and Judge Graeme Hicks (Deputy Chairperson), Justice Shane Marshall (Deputy Chairperson).

**Appearances:** Ms Raelene Sharp instructed by Mr Patrick Considine appeared on behalf of the Stewards.

Mr Matthew Stirling represented Mr Ben Melham.

**Charges:** Australian Rule of Racing (“AR”) 232(i) states:

A person must not:

1. (i) give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading.

(“AR”) 228(b) states:

A person must not:

 (b) fail or refuse to comply with an order, direction or requirement of the Stewards or an official

**Particulars of charges: Charge AR 232 (i)**

1. You are, and were at all relevant times, a jockey licensed by Racing Victoria.

2. On Wednesday, 25 August 2021, you were at a gathering at an “Airbnb” in Mornington (the Gathering).

 3. On Thursday, 26 August 2021, you were interviewed by Racing Victoria Stewards with the respect to your attendance of others at the Gathering (the interview).

 4. During the interview, you gave evidence along the lines:

* That you, Ethan Brown, Celine Gaudray, Jamie Kah and two other licensed persons were present at the Gathering.

5. The evidence you provided (as noted in particular 4) was false and/or misleading, given you failed to state that licensed jockey Mark Zahra also attended the Gathering, and was accordingly in breach of AR232(i).

**Charge AR 232(b)**

1. You are, and were at all relevant times, a jockey licensed by Racing Victoria.
2. On 22 January 2021, Racing Victoria published COVID-19 Base Protocols for all Industry Participants & Service Providers. The Protocols were revised on 18 August 2021 (the **Revised Protocols**).
3. The Revised Protocols noted that you must comply with, inter alia, any State Government law, requirement, or direction where that law relates, either directly or indirectly, to the COVID-19 pandemic (**State Government Regulations**).
4. The Revised Protocols noted that any failure to comply with State Government Regulations will be deemed to be a failure or refusal to comply with an order, direction or requirement of the Stewards or an official.
5. As at 25 August 2021, the State Government Regulations (namely the Stay at Home Directions (Victoria)(No 6) (the **Directions**)) inter alia, and using general terms:
	1. imposed a “curfew” for Metropolitan Melbourne from 9pm to 5am; and
	2. prohibited private gatherings for persons not otherwise living with one another.
6. The Directions included exemptions and allowances.
7. On 25 August 2021, you were at a gathering at an “Airbnb” in Mornington, which:
	1. was not your ordinary place of residence;
	2. was congregated by six other persons, none of whom ordinarily live with you; and/or
	3. occurred (at least in part) after 9pm.

1. You were not able to do any of the activities noted in particular 7 as a result of exemptions or allowances in the Directions.
2. Your conduct, as outlined in particular 7 constitutes a breach of AR 232(b).

**Plea:** Guilty

**DECISION**

Mr Ben Melham, you have pleaded guilty to a breach of AR 232(i). Your appeal against a three month period of suspension for a breach of AR 232(b) has been withdrawn. The facts surrounding that latter charge constitute the setting or background against which the breach of AR 232(i) occurred. However, the offence in relation to AR 232(i) is a separate and serious offence and shall be treated in that way.

The background facts are now well known. Suffice to say that they concern a get together or party on the night of 25 August 2021 at an Airbnb rented by Ms Jamie Kah at Mornington.

The alleged breach of AR 232(i) occurred on 26 August 2021, when you were first interviewed by the Stewards. We would refer to the following extracts from the transcript of that interview.

“CHAIRMAN: The reason for our interview is that the Stewards received some information that you were at a social gathering last night and early this morning.

MR MELHAM: Yep.

CHAIRMAN: Would that be correct?

MR MELHAM: Yep.”

There was then a brief discussion of the address of the gathering, of which you were uncertain, save that it was in Mornington. The interview then continued.

“CHAIRMAN: And who was present, Ben?

MR MELHAM: Myself, Ethan, Celine, Jamie Kah, Cummo and another bird.

CHAIRMAN: Who’s Cummo?

MR MELHAM: Rob Cummings.

CHAIRMAN: Mr Rob Cummings?

MR MELHAM: Yep.

CHAIRMAN: And one other you’re not sure of. Is that correct?

MR MELHAM: Yeah.

CHAIRMAN: Is that a friend of Mr Cummings?

MR MELHAM: I think so, yeah.”

That concluded that aspect of the interview. As can be seen, there was no mention of the police, the early hours of the morning and the like. There was no mention of Mr Zahra.

You were briefly interviewed again on 27 August 2021, but there is nothing of great relevance in that interview. Certainly there is no mention of Mr Zahra.

On 30 August 2021 there was a further interview. The relevant extracts are as follows.

“CHAIRMAN: Can you explain to the Stewards why you did not mention that Mark Zahra was present, now that we’ve learned that he was?

MR MELHAM: Yeah, well, initially I thought that you said that you were inquiring into late in the morning, early morning and, yeah, I just thought that you meant the time that the police were present.

CHAIRMAN: So why didn’t you tell us during the interview at some stage that there was another rider present, that being Mark?

MR MELHAM: Just for the reason I outlined.

CHAIRMAN: And what’s that explanation, because we were only dealing with the police, are you saying?

MR MELHAM: Well, that’s what I thought. That’s what I thought the whole issue was about.”

You then said that you had not seen Mr Zahra arrive or leave. The interview then went on as follows.

“CHAIRMAN: So you’re not sure when he was there?

MR MELHAM: No, I was blind, to be honest.

CHAIRMAN: But were aware he was there?

MR MELHAM: Yeah, I was aware he was there.”

You admitted that on a later occasion you had been talking to Mr Zahra about what was happening, as follows.

“Well, I just said “We stated that you weren’t there”, that he wasn’t there, because we – I didn’t feel it was relevant”.

There was then the following discussion with Steward Mr Rob Montgomery.

“MR MONTGOMETRY: Ben, you’ve said that the discussion was around – when we interviewed you on the 26th that the discussion was around the police, but the police were never mentioned.

MR MELHAM: Well, that’s how I presumed you’d – that’s what I presumed the whole thing was about.

MR MONTGOMERY: But you never mentioned the police and we never mentioned the police.

MR MELHAM: Yeah, but…

MR MONTGOMERY: You may have said in your second interview that you received a fine from them, but you never mentioned anything about the police arriving.

MR MELHAM: Yeah, but that’s because I thought that, you know, that’s what I thought the whole inquiry was about.

MR MONTGOMERY: No, the inquiry was based on a gathering. We had information about a gathering.

MR MELHAM: Mm. Well I just presumed that ---

MR MONTGOMERY: And you were asked specifically who was there.

MR MELHAM: Yeah, well I thought that information was – I thought the inquiry was based on the police turning up.

MR MONTGOMERY: Well, it wasn’t because they were never mentioned.

MR MELHAM: Mm.

MR MONTGOMERY: They weren’t mentioned by you either.

MR MELHAM: Because I presumed that you knew”.

We have gone into the transcript of the interviews with you at some length. Whilst you have pleaded guilty to the offence, there have been several sets of written submissions on your behalf, and exactly what the facts were that you were admitting has not always been clear. Further, the circumstances of the offending have the potential to be relevant. Bearing this in mind, we set out the following.

We do not accept that you did not list Mr Zahra’s name with the other names because you believed that the Stewards only wanted the names of those present when the police arrived. Almost at the start of the first interview, you were simply asked who had been present. There was no mention by the Stewards of any police presence or of any specific time. You listed those who had been there, even including a person whose name you did not know. You did not mention Mr Zahra.

We can only presume that you did not wish to get him into trouble. True it is that he had not been there when the police arrived and dealt with those who were still in attendance. Presumably you thought that if you did not list Mr Zahra’s name along with the others, word may never have got out that he had been there.

However, word did get out and come to the attention of the Stewards. There was a third interview on 30 August 2021. It was almost immediately evident that they had received information that Mr Zahra had been at the Airbnb. You moved to a fall back position. You had not mentioned him because you thought that the Stewards’ enquiry was as to who had been present when the police, who had never been mentioned, arrived.

As we have said more than once, the work of the Stewards is difficult and demanding enough without having to put up with false or misleading information. That is particularly so in the context of the efforts to keep the industry functioning. General deterrence is an important consideration.

In your particular case, specific deterrence also looms large. It is a topic to which we shall return.

Further, many hours – in excess of three days – passed between your giving false or misleading evidence to the Stewards on 26 August 2021 and your admission on 30 August 2021 of Mr Zahra’s presence. In the meantime, Mr Zahra had ridden at jump outs. We have said before and we say again that, for all you knew, there could have been a calamity.

This charge does not concern your breach of AR 232(b), to which you have pleaded guilty and for which punishment has already been imposed. This charge concerns your giving false or misleading evidence. We emphasise that the relevance of the COVID-19 virus is that it provides the context in which the charge pursuant to AR 232(i) arose and that your false or misleading evidence delayed the Stewards becoming aware of the presence of Mr Zahra at the Airbnb on 25 August 2021.

There are further matters that we will now address. The first is your prior conviction for this very offence – a breach of AR 232(i). On 24 December 2020 this Tribunal imposed on you a penalty of two months disqualification for giving the Stewards false or misleading information. This was in the context of betting offences, for which you received disqualification for three months. The penalties were cumulative. The end result is that you had only resumed riding for just over three months when this offence occurred. Giving false or misleading information to the Stewards is a serious offence. To breach the Rule again, when you had only resumed riding three months earlier after a disqualification period which included two months for this very offence, is something which certainly has the potential to bring a substantially increased penalty into consideration.

The second factor which we take into account includes your obvious remorse and your plea of guilty. We shall bear those matters in mind. We also bear in mind the principles of totality.

The third factor is that you are showing your remorse in a practical manner. You have made arrangements for 20% of any prize money percentage won for a period of three months after your resumption of race riding to be paid to nominated charities. This is commendable and we take it into account.

We are also conscious of your ongoing overheads and particularly the expenses relevant to your family members.

The Stewards have submitted that the appropriate penalty is a suspension for a period of three months, cumulative upon the three months suspension currently being served by you for the breach of AR 232(b). Mr Stirling has argued for a lesser period of cumulative suspension or for part of any penalty being in turn suspended, so as to result in immediate suspension for one month, but with a possible further suspension hanging over you.

We agree with the Stewards. Indeed, the penalty suggested by them might be viewed by some as being merciful. Within the last ten months, you have been disqualified, not suspended, for two months for this very offence.

We accept the submission of the Stewards. The penalty which we impose for the breach of AR 232(i) is suspension for three months, cumulative upon the three month suspension which you are currently serving for the breach of AR 232(2).

We would add the following.

Firstly, were it necessary to so find, we are of the view that your evidence was both false and misleading.

Secondly, amongst other things, Mr Stirling made two very accurate observations in his address to us on your behalf. One is that you are a particularly talented jockey. We accept that without reservation. The other is that your career is at a crossroads. That also seems correct. You will ultimately have been disqualified or suspended for 11 months in a 14 month period. It is not our job to preach to you. We do not do so, but no one wants a talent such as yours to be lost to racing. We simply ask you to bear that in mind.

Mark Howard
Registrar, Victorian Racing Tribunal