7 October 2021

**DECISION**

**RACING VICTORIA**

**and**

**ETHAN BROWN**

**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 Ethan Brown.

**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, Ben Melham, Jamie Kah, Celine Gaudray 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 Ethan Brown, 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 against which the breach of AR 232(i) occurred. However, the breach of AR 232(i) is a separate and serious offence and shall be treated in that way.

The background facts are now well known. They concern a get together or party on the night of 25 August 2021 at an Airbnb at Mornington rented by Ms Jamie Kah. You reside in Mornington. Ms Gaudray and Mr Melham have been staying at the same address. You drove yourself and them to the Airbnb.

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, which commence after you told the Chairman that you had been “visiting a friend” on the previous night.

“CHAIRMAN: Can you explain what was taking place, please?

MR BROWN: So obviously Jamie is staying at the Airbnb. I’ve got Celine Gaudray and Ben Melham living with me at the moment. Jamie and Celine are good mates and she, Jamie, asked for Celine to go over, so we went. We tagged along.

CHAIRMAN: So who was present in total?

MR BROWN: Sorry?

CHAIRMAN: Who was present in total?

MR BROWN: Myself, Ben Melham, Jamie Kah and Celine Gaudray and Rob Cummings.”

There were then some further questions and answers concerning the travelling arrangements, you staying the night and the like. You estimated that your group’s time of arrival at the Airbnb to be “5 or 6 o’clock”, although you subsequently said that it was organised at “4.30, 5 o’clock, as I said. Pretty much went straight there”.

There had earlier been the following exchange:

“CHAIRMAN: So you mentioned five people present.

MR BROWN: Yep.

CHAIRMAN: Are you aware---

MR BROWN: There was actually another one of Rob Cummings’ mates, another girl there. I didn’t really know her to be honest with you.”

Thus, you volunteered that a friend of Mr. Cummings, a friend who you “didn’t really know”, was present, but made no mention of Mr Zahra. Further, throughout the whole interview, which was quite detailed, there was no mention of the police by anyone.

There was a further telephone interview with you on 27 August 2021. Save that you were twice given the opportunity to add anything else that you had to say and added nothing, there is little of great relevance in that interview. Mr Zahra was not mentioned.

We turn now to the interview of 30 August 2021. Your answers as to who had been present at the gathering were read back to you. There were then the following questions and answers.

“CHAIRMAN: Can you explain to the Stewards why you did not tell us that Mark Zahra was present, because we are now aware that he was.

MR BROWN: Look, obviously he was only here – to my knowledge he was only there for an hour or so. It was obviously a long night and, yeah, when I answered the question of who was there, I obviously thought it was when - - yeah, you know, when the cops spoke to us.

CHAIRMAN: So did you see Mark Zahra arrive and did you see him leave?

MR BROWN: Yeah, I seen him there.

CHAIRMAN: Yes. Did you see him arrive? Were you there when he arrived?

MR BROWN: Yes, I was already there.

CHAIRMAN: So he arrived after you?

MR BROWN: Yeah, not long after, but---

CHAIRMAN: And did you see him leave or can you remember seeing him leave?

MR BROWN: No, not really”.

After some further questioning, there was the following exchange.

“CHAIRMAN: Okay. So your explanation around not disclosing to us that Mark Zahra was present was because you’re saying it was a long night and ---

MR BROWN: And he left – yeah he left early.

CHAIRMAN: He left early.

MR BROWN: Yeah. Popped in for a few beers or whatever and he left pretty much.

CHAIRMAN: He left before the police arrived?

MR BROWN: Yes.”

There was then discussion with Steward Mr Rob Montgomery, including the following:

“MR MONTGOMERY: Okay. Just in the last interview that we had with you --- you also failed to mention that the police arrived. Why did you fail to mention that?”

MR BROWN: At the gathering?

MR MONTGOMERY: Yes.

MR BROWN: Not sure, but it’s quite evident that they did.

MR MONTGOMERY: Yes. Well, we didn’t know that.

MR BROWN: Okay.

MR MONTGOMERY: So when Mr Cram – I think he asked you who was there and what happened, why wouldn’t you mention that the police arrived?

MR BROWN: I’m not sure, sir.”

In answer to questions of Steward Mr James Hitchcock, you confirmed that Mr Zahra had not been present when the police arrived. You were “pretty sure” that he had gone back to your place.

We have gone into the transcript of the interview at length. Whilst you have pleaded guilty to the offence, there have been several sets of submissions on your behalf and exactly what the facts were that you were admitting to 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 mention Mr Zahra because you believed that the Stewards only wanted the names of those present when the police arrived. When first questioned, there was no mention by the Stewards, or by you, of the police. You listed those who had been present, even volunteering the fact that there was a person present whose name you did not know.

However, you did not mention Mr Zahra, even though he had been at your place and you believed that he had returned there. Presumably you did not want to get him into trouble and hoped that word would not get out of his attendance at the Airbnb.

Word did get out and you moved to a fall back position. You had not mentioned him because you thought that the Stewards were enquiring about a later time when the police, who had never been mentioned, arrived.

We repeat what we have said elsewhere. The work of the Stewards is difficult and demanding enough without having to put up with false or misleading information. That is particularly so when they and many others, including the vast majority of jockeys, have done their best to keep the industry going and to date have been outstandingly successful in so doing. General deterrence is a very important consideration.

In excess of three days passed between your giving false or misleading evidence to the Stewards and your ultimate admission that Mr Zahra had been present. During that time, Mr Zahra had been active in the industry. 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 a penalty has been imposed. It concerns your false or misleading evidence, which, were it necessary, we found to be both false and misleading. 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 the fact that your false or misleading evidence delayed the Stewards becoming aware of the presence of Mr Zahra at the Airbnb on 25 August 2021.

We also bear in mind the principles of totality.

There are further matters that we will now address. You are 22 years of age. You have a very good record. You have not breached this Rule or been found guilty of any other serious offence. In 2018 you were Victoria’s champion apprentice and Rising Star. Your former master, Mr Michael Kent, has provided a powerful reference for you. He has referred to your exemplary manners, honesty and integrity. He has described this trouble in which you find yourself as being totally out of character. He has also described your battle with rising weight, your dedication to winning that battle and the work which you have put into that struggle. Happily, you are starting to get some good results in that regard.

We also bear in mind that you have shown your remorse by making arrangements for 20% of any prizemoney percentage won for a period of three months after your resumption of race riding to be paid to nominated charities.

Hopefully you have learned your lesson about the necessity for being open and frank with the Stewards.

After weighing up all these matters, we are of the opinion that a period of suspension is appropriate. We fix upon a period of eight weeks, cumulative upon the three months suspension imposed for the breach of AR 232 (2). However, we are also of the opinion that five weeks of that eight week period should be in turn suspended for two years, conditional upon you not again breaching this particular Rule during that period. If you do, the adjourned period of five weeks suspension shall be activated.

Mark Howard  
Registrar, Victorian Racing Tribunal