16 September 2021

**DECISION**

**RACING VICTORIA**

**and**

**JAMIE KAH**

**Date of hearing:** 15 September 2021

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

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

Mr Damien Sheales represented Ms Jamie Kah.

**Charge:** 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 engage in:

1. (b) misconduct, improper conduct or unseemly behaviour;

**Particulars of charge:** 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, Celine Gaudray, Ben Melham, Ethan Brown 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).

**Plea:** Not Guilty

**DECISION**

Ms Jamie Kah, you have pleaded not guilty to an alleged breach of AR 232(i). This Rule reads as follows:

“A person must not:

1. Give any evidence at an, interview, investigation, inquiry, hearing and/or appeal which is false or misleading”.

This charge arises out of what occurred at an Airbnb house (“the premises”) at Mornington on 25 August 2021. This has received a lot of publicity, but we will set out our findings of fact.

**THE FACTUAL BACKGROUND, WITH SOME COMMENTS**

1. You rented the premises.

(b) Fellow jockeys Ms Celine Gaudray, Mr Ben Melham and Mr Mark Zahra were staying at the house of jockey Mr Ethan Brown, this house also being in the Mornington area.

1. In the late afternoon, you contacted Ms Gaudray and invited her to the premises.
2. When Ms Gaudray arrived at the premises, she was accompanied by Mr Brown and Mr Melham.
3. Mr Zahra arrived some time later.
4. A non-licensed man and subsequently a non-licensed woman also arrived.
5. Thus, the maximum number of people who were at the premises at any one time (leaving to one side the police who later arrived) was seven.
6. Mr Zahra had left the premises before the arrival of the police.
7. The exact length of time that Mr Zahra was on the premises is unclear, but it was at least long enough for him to have a couple of drinks.
8. You were interviewed by the Stewards on 26, 27 and 28 August 2021.
9. In the interview of 26 August, you named or identified the persons who had been at the premises on the night in question. You made no mention of Mr Zahra. We shall expand on this in our Reasons.

(l) There was also the following exchange with the Chairman:

“CHAIRMAN: So did you intend to stay there on your own? Is that what you’re putting to us?

MS KAH: Yes, I did.

CHAIRMAN: So then how did you end up with the other five people?

MS KAH: I just messaged Celine…”.

There were in fact six other people.

(m) You were interviewed again on 30 August. On this occasion, the Chairman repeated some of your earlier answers and then put it to you that Mr Zahra had been at the gathering. You agreed that he had. You were asked for your explanation for not telling the Stewards that Mr Zahra had been at the gathering. Your answer was a lengthy one and was as follows:

“Well, look, you never actually asked me if Mark was there and I – from your question, when you said, “Who ended up being there?” I just thought you meant who ended up there, meaning, you know, there was the cops that came, it was late into the night and they were the people that were there. They were the reason that the cops came, why there was the noise complaint. If you’d asked me if Mark Zahra had popped in at all or was there earlier in the night, I wouldn’t have any reason not to tell you that. I just – as you asked who “ended up” being there, I just replied with who was there and who – who was there into the late night and who was there into the morning and, like I said, the reason why the cops came”.

We say now that this explanation is far from convincing. Apart from anything else, the point that you would have told the Stewards about Mr Zahra’s presence had you been specifically asked is scarcely an adequate or logical excuse for not including his name when listing those who were present.

(n) You further went on to say that you did not see Mr Zahra leave, adding the following:

“I think he came and had a few beers and there was a barbecue and I saw him briefly. But like I said, I didn’t see him leave or get there but he wasn’t there for long.”

You also provided the following answer:

“Like I said, Mark was there briefly early on. He didn’t end up being there – didn’t end up staying or wasn’t there when the police came…”.

You later repeated that he was not there for long and that you briefly saw him.

(o) There was also the following exchange, when you were told that you would be charged with a breach of AR 232 (i):

“CHAIRMAN: …anything further you wish to tell us?

MS.KAH: No, sir. Look, I’ve been very up-front with you today and, look, honestly, if you’d asked me if Mark was – you know, if he was there at any time early in the night, I would have said that, but I just thought you asked who ended up there, meaning the incident and the reason the police came.

CHAIRMAN: …would you agree that during that part of the interview, it wasn’t mentioned about the police and there were no questions about who was there before the police arrived? Would you agree with that?

MS.KAH: Look sir, I just answered the question that you said, “Who ended up being there?” and that’s what I thought my response would be to who ended up there”.

1. This whole event, including the interviews, took place in the context of the COVID-19 pandemic, the rules applying to the general public, and the Protocols introduced by Racing Victoria. You were reminded of this early in the first interview of 26 August 2021. We would refer to the following:

“CHAIRMAN: Yes. Are you aware of the Victoria government COVID-19 directions in place at the moment?

MS KAH: Yes, for sure.

CHAIRMAN: Yes. So did you discuss with anyone about having a gathering which would be in breach of that?

MS KAH: Yes, I completely understand that---.”

That concludes our findings of fact.

**2. DECISION AND REASONS FOR DECISION**

Based on the above, we say now that we are comfortably satisfied that Mr Zahra was one of the seven people at the gathering; that he was there at least long enough to have had a couple of drinks, if not participate in the barbecue; that you knew that he had been there; and that, when interviewed by the Stewards, you referred to and listed six people as being at the gathering before there was any reference in the interview to the police arriving. Indeed, you did not mention Mr Zahra at any time during the first interview.

Both Ms Sharp, Counsel on behalf of the Stewards, and Mr Sheales, Counsel on your behalf, made detailed and helpful submissions. We shall not set them out in full.

We prefer those on behalf of the Stewards. We would make the following points.

Firstly, we shall set out in full an early part of the interview of 26 August 2016 which we regard as being as being important in relation to the Particulars of Charge:

“CHAIRMAN: Okay. So did you invite the other people to arrive?

MS KAH: No, that wasn’t my intention. I did message Celine. We’re quite good friends and I just thought I need someone to talk to at the moment and I wasn’t really planning on her staying but I just asked her to come over and the rest of them came over too.

CHAIRMAN: And who ended up being there?

MS KAH: Ethan Brown and Ben Melham and their friend, Rob Cummings.

CHAIRMAN: Yes. Was there another female there?

MS KAH: Yeah, there was another girl later on. Look, I’m not really quite sure who she is. I honestly – honest truth, I couldn’t really tell you who she is, and that was not the intention for her to be there”.

We agree with Ms Sharp that this is a very significant passage that effectively forms the basis of the Particulars of Charge. You were asked a simple question. You answered it to the extent of even mentioning a girl whose name you did not seem to know and who arrived “later on”. Mr Zahra in fact arrived “later on”. You did not give his name to the Stewards. To this point of the interview, there had been no mention of the police, noise, a late night or the like.

We would repeat that the question, “And who ended up being there?” is a clear enquiry as to who attended at the premises. The failure to answer that truthfully and completely is essentially what is being asserted in the Particulars of Charge. Your later explanation in the third interview makes it clear that you were at all relevant times aware that Mr Zahra had been present at the Airbnb on that night.

When, in the third interview, you did admit that Mr Zahra had attended, you did not claim a memory lapse or the like. Further, it was not something which you volunteered. It was in response to a direct question of the Stewards, prefaced by the words “We’ve now learned that Mark Zahra was at the gathering.”

You did not suggest that this was something which you had previously forgotten when interviewed. The excuse which you proffered was that you thought that the enquiries of the Stewards were as to who was present when the police arrived. We find this to be totally unbelievable. You were aware of the COVID-19 situation and the Protocols. If that is so, you were aware of the crucial importance of identifying all who had been present at the gathering, regardless of the length of their stay.

The defence put forward by Mr Sheales was quite technical in nature and focussed on the wording of the Rule. Without wishing to oversimplify his arguments, his conclusions were that this Tribunal is bound by the common law definitions of false evidence and misleading evidence. He attacked the wording of the Particulars of Charge. Further, he argued that your original answers resulted from a question as to who “ended up” at the gathering. It is argued that you interpreted this as meaning at a later time, such as when the police arrived.

We disagree.

In our opinion, the words “false or misleading” are broad enough to include what could be described as falsity or being misleading by way of omission or silence. In the first interview, you were asked very important questions as to the identification of who had been present. In your answers, you did not name Mr Zahra, although you knew that he had been present. That was a false answer. It was a breach of the Rule.

We are not of the opinion that we need even go that far. The wilfully false answer to the Chairman’s question “And who ended up there?“ is sufficient to establish the breach. The Charge is clear. The Particulars are clear. The breach is clear.

We do not accept that you were somehow misled by the Chairman’s use of the words “ended up”. When viewed in context, and in the context of a COVID-19 situation, it was clear that the Stewards wanted the names of all persons, and particularly licensed persons, who had been present. That is understandable. They were dealing with a COVID-19 situation and the Protocols.

In summary, we are comfortably satisfied that the charge has been proven. We shall hear the parties on the question of penalty at a suitable time.

Mark Howard
Registrar, Victorian Racing Tribunal