16 September 2021

**DECISION**

**RACING VICTORIA**

**and**

**MARK ZAHRA**

**Date of directions hearings:** Thursday, 2 September 2021 and Friday, 3 September 2021.

Hearing conducted “on the papers”.

Decision handed down on Tuesday, 14 September 2021.

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

**Appearances:** Mr Daniel Bolkunowicz appeared on behalf of the Stewards.

Mr Patrick Wheelahan instructed Mr Tony Hannebery represented Mr Mark Zahra.

**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 Saturday 28 August 2021, you were interviewed by Racing Victoria Chairman of Stewards Mr Robert Cram at 11:53AM with respect to your attendance at the Gathering (the **Interview**).
4. During the Interview, you denied being present at the Gathering.
5. On Saturday 28 August 2021 at 5.30PM, you contacted Mr Cram to report that you were in fact at the Gathering.

1. The evidence you provided (as noted in particular 4) was false and/or misleading, and accordingly in breach of AR 232(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).

**Pleas:** Guilty

**DECISION**

Mr. Mark Zahra, there are two aspects of your case before this Tribunal.

Firstly, you are appealing against the penalty imposed on you by the Stewards in respect of a breach of AR 232(b). Secondly, the Stewards have charged you with a breach of AR 232(i), a charge to which you are pleading guilty. We shall deal with the charges in that order. We say at the outset that, in relation to each charge, we take into account your plea of guilty.

1. **The breach of AR 232 (b)**

You are pleading guilty to this charge and the only issue is that of the quantum of the penalty. The Stewards imposed a penalty of three months suspension. You are appealing that decision.

The offence occurred at an Airbnb property at Mornington on the night of 25 August 2021. This has received a lot of publicity and we need not go into what took place in detail. Suffice to say that you breached COVID-19 regulations by participating in drinks at a get together or party with a number of other people, most of whom are in or are connected with the racing industry. Two were non-licensed.

AR 232(b) is a broad rule. It makes it an offence to fail or refuse to comply with an order, direction or requirement of the Stewards or an official. There is no argument but that such failure or refusal occurred in your case.

This breach occurred in the context of Racing Victoria’s COVID-19 Protocols. They have been highly successful. Whether racing be considered a sport or an industry, or a mixture of both, it has been able to continue without interruption for the period of approximately eighteen months that the scourge of COVID-19 has been with us. In Victoria, that makes it virtually unique amongst higher profile sports. Potentially massive unemployment and financial loss has been avoided. That has only occurred because of the almost overwhelming compliance by the vast majority of participants with the Protocols, and particularly by jockeys.

We might add that non-compliance such as yours had the potential to bring undone all the good work and sacrifice that had gone before. Of course, it also had the potential to increase the spread of the virus throughout the larger community. This could have been disastrous.

Additionally, much damage has been done to the good name and reputation of racing generally. The sacrifices and efforts of all in the industry have been tarnished by behaviour such as yours. General deterrence has a real role to play in arriving at an appropriate penalty.

Turning to your personal situation, you are a highly successful and very prominent jockey. You have years of experience at the top level. You have a very good reputation and this is your first offence of this nature.

We also appreciate that the Spring Carnival has just commenced. This is a time when a leading jockey such as yourself could expect to have very large earnings. We note that you had been doubly vaccinated. However, whilst that is prudent and to be commended, that does not excuse your breach of the Rule. As we understand it, double vaccination is no absolute guarantee against contracting or passing on the virus. In any event, the Rule and the Protocols make no exception for the doubly vaccinated.

The written submissions on your behalf contain a reference to the decision of this Tribunal in *Racing Victoria v Mitchell Aitken* (20 November 2020). We agree with the Stewards that the offending in that case was quite different and of lower gravity – indeed, we would say of much lower gravity – than what took place in your case. There were also background matters affecting Mr Aitken’s situation of a kind that have not been advanced on your behalf.

The written submissions on behalf of the Stewards include reference to four interstate cases involving industry participants and COVID-19 breaches. We shall not set them out here, but they can be found in the Stewards’ submissions posted on the Tribunal website. Suffice to say that the minimum period of suspension or disqualification imposed was two months and ten days for a part-time stablehand who did not attend race meetings. The other three cases resulted in respective penalties of four months disqualification; a three month mix of suspension and disqualification; and three months suspension. Interestingly, the last mentioned penalty was imposed on each of six licensed persons who attended a private gathering.

We also take into account that the period which you spent at the Airbnb was considerably shorter than that of others who have been charged. However, bearing in mind the nature of COVID-19 and the speed with which it can be transmitted, this is a factor of limited importance.

The bottom line is this. Weighing up all of the above, we are of the opinion that a penalty of three months suspension is fair, reasonable and appropriate. Indeed, some people might consider it to be quite merciful.

The appeal is dismissed.

1. **The breach of AR 232 (i)**

You have also pleaded guilty to a breach of this Rule. You admit that you gave to the Stewards evidence that was false and misleading.

This charge also relates to the event at the Mornington Airbnb and your attendance at it. When interviewed over the telephone just before midday on Saturday 28 August 2020, you told the Stewards that rumours that you had been at the Mornington gathering were not correct, going on to say that you had “definitely” not been there.

In excess of five and a half hours later, you rang back and confessed that you had been at the Airbnb gathering. By this time, the Saturday metropolitan meeting would have been over.

As we said in the decision in Ms Gaudray’s case, the giving of false evidence to the Stewards is understandably a serious offence, even at the best of times. Their work is demanding enough without having to put up with false or misleading evidence and the wasting of time which results.

It is even more serious in the context of COVID-19 and the restrictions on movement and assembly. The giving of false evidence could have had disastrous consequences.

We again take into account the various matters concerning your good record, the impact of this upon you, the financial impact and the like. General deterrence is again relevant.

Having considered all these matters, we are of the opinion that there should be an additional penalty of suspension for this offence, over and above that for the breach of AR 232 (b). We agree with the duration of this further penalty suggested by the Stewards, which seems fair and reasonable. You are suspended for a period of two months cumulative upon the penalty of three months suspension imposed above.

However, one month of that two month suspension is in turn suspended for two years on the basis that you do not breach this particular Rule during that period. We appreciate that the Stewards have suggested that one month should be served concurrently with the suspension for the breach of AR 232 (b). We are of the view that a partially suspended suspension is more appropriate. It will serve as a reminder to you of these very unfortunate events and the great importance of being candid and truthful with the Stewards.

1. **CONCLUSION**

You are suspended for a total period of four months. A further suspension of one month is in turn suspended for a period of two years on the basis that you do not breach AR 232 (i) during that period.

Mark Howard
Registrar, Victorian Racing Tribunal