15 December 2023

**DECISION**

**RACING VICTORIA**

**and**

**JAMIE KAH**

**Dates of hearings:** 13 November 2023 – Day 1

 27 November 2023 – Day 2

**Panel:** Judge John Bowman (Chairperson), Mr Des Gleeson and Ms Maree Payne.

**Appearances:** Mr Russell Hammill instructed by Mr Patrick Considine appeared on behalf of the Stewards – Day 1.

 Mr Damian Hannan instructed by Mr Patrick Considine appeared on behalf of the Stewards – Day 2.

 Mr Matthew Stirling appeared on behalf of Ms Jamie Kah.

 Ms Jamie Kah appeared as a witness.

Ms Ruby McIntyre appeared as a witness.

**Charge:** Australian Rule of Racing (“AR”) 228(a) states:

AR 228 Conduct detrimental to the interests of racing

A person must not engage in:

(a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere;

**Particulars of charge:** 1. You are, and were at all relevant times, a Jockey licensed by Racing Victoria and a person bound by the Rules of Racing.

2. Between 17 and 18 June 2023, you attended a gathering at your residential premises with two other persons (the Gathering), where Ruby McIntyre recorded you using an identification card in your hand to arrange a white powder substance into three lines (the Recordings).

3. The Recordings have been widely reported both in the media and on social media, with the perception amongst persons commenting on the posts being that those in attendance at the Gathering used an illicit substance, being cocaine.

4. Your conduct, as outlined in particular two, is prejudicial to the image, interests, integrity and/or welfare of racing.

**Plea:** Not Guilty

**DECISION**

In the following Reasons for Decision, any questions of law were determined by the Chairperson, but with invaluable assistance from Mr Gleeson and Ms Payne. Both had a very large input into this decision. The decision which we have reached is unanimous in every respect.

Ms Jamie Kah, you are pleading “Not Guilty” to a breach of AR 228 (a).

That Rule reads as follows:-

“A person must not engage in:

1. conduct prejudicial to the image, interests, integrity, or welfare of racing whether or not that conduct takes place within a racecourse or elsewhere”.

In the present case, the words “or elsewhere” are applicable. The relevant conduct essentially occurred in your residential premises in Somerville. It so occurred on the night of 17 June 2023 or in the early hours of 18 June 2023. Those present in addition to yourself were Mr Jacob Biddell, a friend of yours who was staying at those premises, and Ms Ruby McIntyre, a stable employee whom you had only met for the first time earlier that night. Ms McIntyre also stayed for the night at your premises and is a co-accused in these proceedings.

Whilst it is not entirely clear, it would appear that the crucial behaviour at the centre of this charge took place at your premises at approximately 12.30am – that is, about four hours after you first met Ms McIntyre.

In relation to that behaviour and what took place that night, we make the following findings of fact and refer to some remarks by you when interviewed by the Stewards:-

1. On the night of 17 June, you had dinner and some drinks with three other people at a bar or restaurant called “The Rocks”. This was from approximately 6.00pm until 7.30pm.
2. The group then went to another establishment, the Bay Hotel. After approximately an hour, Mr Biddell, Ms McIntyre and another person arrived and joined them. More drinks were consumed. Thus, it would appear that you met Ms McIntyre for the first time at approximately 8.30pm on 17 June 2023.

1. After a couple of hours, the group split up. You, Ms McIntyre and Mr Biddell went to your premises. The others did not. Thus, your group arrived at your premises at approximately 10.30pm.
2. Your group continued drinking.
3. As to what occurred at approximately 12.30am, we would refer to pages 125-126 of the Stewards’ Exhibit Book and the portion of the second interview with you on 5 July 2023.

At those pages, you admitted the following:-

1. You brought out a plate on which you had placed some white powder, assuming it to be an illegal substance.
2. You used an ID card belonging to Ms McIntyre to rake the powder into lines.
3. Having done that, you retired for the night. It is not suggested that you used any of the white powder.
4. When asked why you raked the lines, your answer was as follows:-

“I was just trying to be a friendly host. I know it was not very appropriate, but I just thought I was – yeah, I let her stay there at my house and I put the plate out for her and put everything out there for her and poured out glasses of wine for them”.

Whilst at times it is not entirely clear, it would appear that the above occurred at or about 12.30am on the 18June 2023.

We turn now to some further observations and findings.

(a) You claim that you did not know that Ms Mcintyre was using her mobile phone camera to record your raking of the powder into lines. A brief video of approximately six seconds duration was taken. You were aware that she had with her a mobile phone with the usual filming capacity and you had in fact used it earlier to take a group photo of the three of you.

(b) We have viewed the brief video and the still shot extracted from it. All that can be seen of you is your right arm and hand, with the hand using a card to rake the powder into lines. Part of another person in a white jumper can be seen in the background and that is almost certainly Mr Biddell.

(c) We accept that Ms McIntyre surreptitiously took the very short video from which the still photo was extracted. We also accept that you were unaware that this videoing was occurring. There is no real challenge to this proposition, which, at first blush, might seem unlikely. However, the weight of the evidence and the absence of a challenge of any substance lead us to the conclusion that the brief video was taken without your knowledge or consent, express or implied, and that it was not until a couple of days later that you were aware of its existence.

(d) It is also clear from the evidence that Ms McIntyre sent to another person the very short video or a still shot taken from it. We accept that this was done without your knowledge and you did not know of it until the newspaper publicity burst upon the scene. Exactly who provided this and the still “selfie” photograph to the newspapers is not clear.

(e) We would also make the following observation. There is a substantial difference in the amount of detail contained in the record of your original interview on 24 June 2023, when essentially you knew nothing about any white powder or what it might be, and the record of your second interview of 5 July 2023, when, for example, you supplied the information set out in paragraph 5 (iv) above.

This does not mean that your evidence is to be totally disregarded, but does indicate a potential lack of credibility at times.

We have weighed up all the evidence. Our opinion is that the history of events contained in the second record of interview and as set out above is essentially accurate. Accordingly, we make the following findings of fact in relation to the central issues:-

1. At your private premises, you produced the white powder.
2. You used Ms McIntyre’s card to divide the powder into lines.
3. You were not aware that a short video of you so doing was taken by Ms McIntyre.
4. Accordingly, you were not aware that the video or any part of it was forwarded by Ms McIntyre to another person.

Given the above conclusions, the next question to be answered is as follows:-

Did your conduct constitute a breach of AR 228 (a)?

We say at the outset that many would consider your admitted conduct on the night in question to have been immature, irresponsible and at least bordering on the reckless. Apart from anything else, the conduct took place in front of a person whom you had known for only about four hours. A key ingredient or factor relating to the alleged breach of the Rule is the publicity that resulted, which was centred upon your name and the image of the white lines of substance and the use of the card.

As stated, we accept that you were not aware that your behaviour with the lines of powder was being filmed or photographed. Accordingly, unless you were told, you could not have been aware that Ms McIntyre was proposing to send or did actually send any video or still shot of this to another person. It is to be remembered that this all occurred in the privacy of your own home.

In well-prepared and careful submissions by both counsel, amongst other things our attention was drawn to a number cases. However, in virtually each case, if not all cases, the actual offending conduct involved matters to do with racing or government administration – that is, not only were the personnel involved associated with racing, but the conduct constituting an alleged breach of the Rules was also associated with racing or government behaviour.

For example, counsel for the Stewards placed considerable focus on the case of *NSW* *Thoroughbred Racing Board* v *Waterhouse & Anor*. [2003] NSWCA 55. Certainly helpful observations can be found in the judgments of Young CJ and Hodgson JA, but it is to be remembered that the conduct at the heart of the case directly involved racing and betting. Similarly, in *Loy* v *Racing* *New South Wales* (21 March 2022), the misconduct involved abuse of a government official by a trainer concerning administration. In neither case was it behaviour in a private home not involving the actual conduct of racing, racing-related matters, or government administration. The same could be said of *Pollett* v *Racing New South Wales*  (16 March 2021). The conduct in question involved a racing programme called “Racing Rant”.

Those are three examples. The same could not be said of the present case, where the extent of the link to racing is that the participants are members of the racing industry, but the activity in which they were involved has no other racing link.

In the present case, the use of the mobile for taking of a photograph and a video took place in your residence. One of the photographs was taken by you on Ms McIntyre’s mobile and is simply an innocuous snap of the three of you. A photo extracted from the brief video is the one that has caused all the trouble – the photograph of the lines of white powder and the card. As stated, after some consideration we accept that you did not know that this video or the photograph extracted from it had been taken. We accept that you did not know that it had been sent by Ms McIntyre, to a friend or elsewhere.

As stated, it could be said that you behaved recklessly by setting up the white lines and the card when there was a comparative stranger on your premises. The question then is whether that behaviour, that recklessness, is sufficient to comfortably satisfy us that there has been a breach of AR 228(a). Comfortable satisfaction is required by the well-known test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 – see, for example, the discussion in *Pollett*.

We are not so satisfied. Your behaviour may have been immature, irresponsible and reckless, but there are two important features of it that have led us to our conclusion. Firstly, you did not know that the relevant very short video or photo had been taken. Secondly, you did not know at any relevant stage that it had been sent on to another person or that it was proposed to be so sent.

Without our comfortable satisfaction as to those two features, we are of the opinion that the charge should be dismissed and that is the order which we make.

Mark Howard

Registrar, Victorian Racing Tribunal