



RACING APPEALS TRIBUNAL
of New South Wales

Case Title: Malcolm Diebert v Harness Racing NSW

Hearing Date(s): Submissions: 15 September 2011, 26 September 2011 and 6 October 2011

Decision Date: 2 November 2011

Jurisdiction: Racing Appeals Tribunal

Before: Kavanagh J

Decision:

1. The charge against Malcolm Diebert under rule 149(2) of the Australian Harness Racing Rules is upheld.
2. The penalty of a suspension of Malcolm Diebert's driving licence for four weeks is confirmed from today's date.
3. The Stay of Penalty granted 8 September 2011 is lifted.
4. The appeal bond is retained by HRNSW

Rules Cited: Australian Harness Racing Rules

Category: Principal Judgment

Parties: Malcolm Diebert (Appellant)
Harness Racing NSW (Respondent)

DECISION

- 1 On 26 August 2011, Stewards of Harness Racing New South Wales ("HRNSW") opened an inquiry into the driving tactics adopted by Malcolm Diebert, a harness racing driver, in his driving of the horse "*Ohokas Roman*" in Race 5 on 26 August 2011 at Wagga. The Stewards determined to charge Mr Diebert under Rule 149(2) of the Australian Harness Racing Rules ("the Rules") which states:

Race to win or for best position

- 149.** (1) ...
(2) A person shall not drive in a manner which in the opinion of the Stewards is unacceptable.
(3) A person who fails to comply with sub-rule (1) or (2) is guilty of an offence.

The particulars of the charge against Mr Diebert read as follows:

... that, after firstly challenging for the first 200 metres for the position of the lead, it is unacceptable then the manner in which you drove for the next 200 metres in challenging for the position of the lead where, in our view, it was not a legitimate position to be gained at that point, and in doing so that your drive has contributed to your horse giving ground over the concluding stages to be beaten approximately 49 metres.

- 2 Mr Diebert pleaded not guilty to the charge.

The Stewards' Inquiry

- 3 The Chairman observed that Mr Diebert, from an early stage in the race, showed gate speed and challenged "*Khanbelucky*" for the lead into the first turn. As a result, the horse, *Ohokas Roman*, ran a lead time of 39.2 seconds - a very fast time for the particular track. After initially challenging for the lead in the first 200 metres, Mr Diebert continued to challenge over the next 200 metres before taking up a position behind the leader. The Chairman observed Mr Diebert had continued to challenge despite it being apparent there was little hope of *Ohokas Roman* gaining the lead after its initial challenge. The horse, *Ohokas Roman*, then tired over the concluding stages of the race and was beaten by a distance of 49.6 metres.
- 4 The Stewards questioned Mr Diebert and Mr J Painting, the driver of *Khanbelucky*, reviewed DVD footage of the relevant race and reviewed betting information. The evidence satisfied the Stewards that Mr Diebert had committed an offence under r 149(2) of the Rules, namely, the drive on the relevant date was unacceptable.

- 5 Mr Diebert further addressed the Stewards in mitigation of penalty, noting that he had not before been charged under the relevant rule during his career as a driver, which spanned approximately 25 years.
- 6 The Stewards determined Mr Diebert was an experienced driver with an excellent record. They took into account the circumstances of the race but also considered the public interest and their obligation to ensure the integrity of harness racing in NSW. They determined Mr Diebert's drive affected the outcome of the race and also affected the finishing position of both horses, namely: *Ohokas Roman* and *Khanbelucky*.
- 7 Mr Diebert was suspended from driving for a period of four weeks commencing midnight 2 September 2011.
- 8 Mr Diebert applied for a Stay of Penalty on 5 September 2011. A Stay of Penalty was granted by the Tribunal on 8 September 2011.
- 9 Mr Diebert sought leave to have his appeal heard "on the papers" as he lives a long distance from Sydney (6.5 hours away). Both parties agreed the Tribunal consider the appeal "on the papers".

The Appeal

- 10 The transcript of proceedings before the Stewards was placed in evidence before the Tribunal, together with submissions from the parties and a DVD of the relevant race. Mr Diebert included with his submissions a copy of *Ohokas Roman's* racing performance summary.
- 11 Mr Diebert relies upon two grounds in appeal:
1. He did not commit an offence; and
 2. Penalty is excessive and disproportionate to any offence.
- 12 The relevant race was over a distance of 2165 metres from a mobile start and was for horses assessed as three year old "CO's" or better. Mr Diebert

looked for the lead in the first 200 metres then challenged aggressively over the next 200 metres. Mr Diebert ultimately ceased the challenge falling behind the leader. With the speed of the race then decreasing *Ohokas Roman* tired over the concluding stages and finished in eight position, beaten by a distance of some 49 metres.

13 Mr Diebert, in submissions, accepted *Ohokas Roman's* performance in the relevant race was disappointing but contended that it was not the result of his driving. Mr Diebert submitted that he was following instructions from *Ohokas Roman's* trainer to lead, that the horse had been working well in training and that he was driving the horse to its ability in the relevant race. He conceded the horse disappointed and did not perform. Mr Diebert revealed he could recall a race about three years ago in which a horse posted a lead time of 36 seconds contending that, therefore, *Ohokas Roman's* 39.2 seconds lead time was not highly unusual. Mr Diebert also contended, in explaining why *Ohokas Roman's* lead time was faster than average, that three year old "COs" were usually non-winners, but relevantly *Ohokas Roman* had already won two races. Mr Diebert explained that he continued to challenge for the lead after the initial 200 metres as *Khanbelucky* had raced roughly into the first turn and he felt that if he continued to apply pressure and as *Khanbelucky* could not handle the turn he would be able to gain advantage and cross to the front. He had assessed *Khanbelucky's* form as rough on the turns.

14 Evidence satisfies that lead times at Wagga for the 2165 metre start are, on average, between 41 and 44 seconds and that the lead time of 39.2 seconds run by Mr Diebert's horse was speedy. Records revealed there had been only one other occasion during 2011 in which a driver had driven a horse to run a lead time inside 40 seconds at Wagga, which driver was consequently charged and suspended for a period of four weeks.

15 HRNSW confirmed three year old horses that have won two races are still classified as "COs". HRNSW, therefore, does not accept, as relevant to

the charge, any particular distinguishing racing feature in regards to the drive of *Ohokas Roman*.

- 16 During the Steward's inquiry, Mr Diebert conceded he had misread the form of *Khanbelucky*. It was not a horse that raced roughly when pressured. Further, the DVD of the race clearly indicates the appellant had, in his driving, failed to gain the lead within a suitable distance yet he continued to challenge for a lead that continued to elude him, thereby exhausting the horse.
- 17 This is an appeal which asks for a review of in-race driving conduct. Rule 149 of the Rules is premised with the heading "Race to Win or for Best Position". Rule 149 therefore places an obligation on HRNSW to ensure that all races be conducted with the driver racing his horse "to win or for best position".
- 18 The heart of the allegation is Mr Diebert drove *Ohokas Roman* so quickly, very early in the race to gain the lead, that the horse could not maintain the speed Mr Diebert required of him and, therefore, the horse was not driven to win or achieve its best potential placement. Mr Diebert's plan to take the lead from the start failed and then his urging over the next 200 metres, in continuing to push the horse to take the lead, exhausted the horse causing it to be beaten by some 49 metres.
- 19 Rule 149(2) of the Rules requires, of the Stewards, a professional assessment that the driving of the horse was in a manner unacceptable in their opinion. For the appeal to succeed there must be a challenge to the professional assessment of the Stewards. The Stewards relied upon the speed of the race over the first 400 metres, the fact the horse dropped back to eighth position at the finish and the horse was beaten by a distance of some 49 metres.
- 20 Mr Diebert defends his driving asserting he was following instructions to take the horse to the lead; the horse had good form (it had won two

previous starts); other horses had raced the distance over the same/a similar time; and *Khanbelucky* was racing roughly giving him some hope in the second 200 metres.

21 Such propositions, while each may have some force when considered independently, do not, however, negate the essence of the charge which is: the way Mr Diebert drove *Ohokas Roman* in the race was unacceptable because in being driven in that manner, the horse could not win or achieve its best potential position.

22 I do not find the explanation as to conduct sufficient to overrule the Stewards' professional and experienced opinion that the horse was driven in the race in a manner unacceptable, which manner did not allow *Ohokas Roman* to win or achieve its best position in the race. While Mr Diebert may only have misjudged his tactics, the result was a breach of the Rules.

Penalty

23 The Stewards gave Mr Diebert the penalty of a four week suspension. It was a reduced penalty from that required for such an offence under the guidelines used by HRNSW. A suspension allows Mr Diebert to keep up some activities within the industry.

24 Mr Diebert relies upon his driving record as a driver with over 25 years experience and without any prior charges under the relevant rule. He also revealed, in his application for a Stay of Penalty, he works full-time in the harness racing industry and has no other source of income. HRNSW, at the Stewards' inquiry, accepted that Mr Diebert has an excellent record, but submitted penalty is necessary to deter others from adopting such tactics in similar circumstances. It was the view of the Stewards Mr Diebert's drive was unacceptable and contributed to the finishing position of both horses, namely: *Ohokas Roman* and *Khanbelucky*.

25 Therefore the penalty cannot be viewed as excessive. This is a circumstance where the driver makes his living solely from harness racing,

but that fact must be balanced with the obligation held by HRNSW to the public to ensure each horse races to win or for its best possible position, I find the reduced penalty of four weeks suspension proper in the circumstances and therefore not excessive and certainly not disproportionate to the offence.

Orders

1. The charge against Malcolm Diebert under rule 149(2) of the Australian Harness Racing Rules is upheld.
2. The penalty of a suspension of Malcolm Diebert's driving licence for four weeks is confirmed with credit for any time served.
3. The Stay of Penalty granted 8 September 2011 is lifted.
4. The appeal bond is retained by HRNSW