



**RACING APPEALS TRIBUNAL**  
of New South Wales

Case Title: Kevin Pizzuto v Harness Racing NSW

Hearing Date(s): 2 November 2011; 28 November 2011

Ex tempore Decision Date: 29 November 2011

Jurisdiction: Racing Appeals Tribunal

Before: Kavanagh J

Decision:

1. The charge against Mr Pizzuto under AHR Rule 147(2) is dismissed and the penalty of a 12 month suspension is set aside.
2. The charge against Mr Pizzuto under AHR Rule 149(1) is proven.
3. For the offence under AHR Rule 149(1), Mr Pizzuto shall be given a four month suspension of his harness driving licence to commence on and from 28 September 2011.

Category: Principal Decision

Parties: Kevin Pizzuto (Appellant)  
Harness Racing NSW (Respondent)

Representation: P Matters (Appellant)  
Harness Racing NSW (Respondent)

File number(s): RT27 of 2011

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**EX TEMPORE DECISION**

1 Mr Kevin Pizzuto (the appellant), a registered driver and trainer, was suspended from driving for two periods, one for 12 months and one for six months (to be served concurrently) following a determination by the Stewards of Harness Racing New South Wales (HRNSW) after an inquiry into the racing performance at Tabcorp Park Menangle on Tuesday 20

September 2011 of the standard breed of horse Our Amazing Art NZ in Race 7.

2 The appellant was suspended by HRNSW for having:

elected to cease driving your horse ... out to the finishing line over the final 150 metres of the race and as a result of this Our Amazing Art NZ has not been fully tested over the concluding stages of the event.

3 The formal particulars of the charge were as follows:

That at Menangle on 20 September 2011 whilst driving Our Amazing Art NZ in race 7 you had elected to cease driving your horse out to the finish line over the final 150 metres of the race and as a result of this Our Amazing Art NZ had not been fully tested over the concluding stages of the event ...

4 Mr Pizzuto's licence to drive in harness races was suspended for a period of twelve months in relation to the charge under Australian Harness Racing (AHR) Rule 147(2) and his licence to drive in harness races was suspended for a period of six months for the charge under AHR Rule 149(1).

5 The appellant appeals the decision of the HRNSW Stewards who found him in breach of both AHR Rule 147(2) and, in the alternative, AHR Rule 149(1).

6 Mr Pizzuto holds a trainer/driver's licence. There has been no stay granted of the penalties imposed by the Stewards. The effect of the penalties is that only the driving portion of his licence is affected by the suspension. Mr Pizzuto is still able to earn an income in the harness racing industry as a trainer.

7 Harness Racing NSW, on appeal, have pressed that the charge under AHR Rule 147(2) is the most serious charge and the charge under

Rule 149(1) is a less serious charge, as is reflected in the penalties that were imposed by the Stewards.

8 It is necessary to consider these charges in the context of the Australian Rules of Harness Racing.

9 Australian Harness Racing Rules 147, 149 and 150 are set out below:

**Racing on merits**

**147.** (1) A driver shall race a horse on its merits.

(2) Action or non action by a driver during the course of a race which prevents or impedes the horse driven by that driver from racing on its merits shall be sufficient to establish non compliance with sub rule (1).

(3) Sub rule (2) does not preclude non compliance being established by other means.

(4) A driver who fails to comply with sub rule (1) is guilty of an offence.

...

**Race to win or for best position**

**149.** (1) A driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field.

(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.

**Charges**

**150.** (1) Charges may be laid under rules 147 and 149 arising out of the same circumstances.

(2) If an offence is established under each rule penalties may be imposed in respect of each offence.

(3) Where penalties are imposed in respect of each offence the penalty imposed in respect of breach of rule 149 (1) shall be suspended pending the decision on any appeal.

(4) Subject to orders made on appeal, the suspension of a penalty occurring under sub-rule (3) shall become permanent where an appeal against conviction under rule 147 is dismissed or abandoned.

(5) Subject to orders made on appeal, the suspension of a penalty occurring under sub-rule (3) is removed where an appeal relating to conviction under rule 147 is successful.

10 On reading the Rules in context, these charges are brought in the alternative. While I accept that a charge under AHR Rule 147(2) is the most serious charge, Mr Pizzuto faces two separate charges. If the

charge under AHR Rule 147(2) is not established, the charge under AHR Rule 149(1) is enlivened (AHR Rule 150(5)) because of its suspension (AHR Rule 150(3)). This is especially in the circumstances revealed before me, as I will deal with later. Further, if the charge under AHR Rule 147(2) is not established on the evidence before the Tribunal, the charge under AHR Rule 149(1) must still be given consideration (AHR Rule 150(5)). This analysis as to the way such charges are to be read has been agreed with by both parties and also reflects the effect of AHR Rule 150 which clearly enunciates how the charges are to be dealt with.

- 11 It is contended on appeal by the appellant, the standard breed horse, Our Amazing Art NZ, ran to its merits; all actions of the appellant in driving Our Amazing Art NZ were to enable the horse to run on its merits; and there was no omission of the appellant that prevented Our Amazing Art NZ from running on its merits.
- 12 It is necessary to consider the conduct of the race on 20 September 2011 through the supporting DVD.
- 13 Mr Pizzuto was driving Our Amazing Art NZ in a mile race at Tabcorp Park Menangle. He progressed forward to gain a position outside the leader. He was able to gain a one-out, one-back position and remained in that position throughout the event until about the 400 metre mark. He then moved Our Amazing Art NZ from one-out, one-back to a three-wide position and entered the home straight. In moving up he was challenging Franco Torres, a horse Mr Pizzuto also trained, for the lead. Mr Pizzuto began using the whip at about the 300 metre mark. He brought the horse up to second behind Franco Torres. He properly handled the whip by flicking it to the rear of his horse. The action he used is called a flicking of the whip at or near the rump of the horse. Our Amazing Art NZ reacted to the whip and took ground from Franco Torres. However, in the final 100 metres, Mr Pizzuto desisted from using the whip. I am satisfied by this action Mr Pizzuto did not continue to put pressure on the horse and did not

even use the reins to urge his horse forward. When asked by Stewards at the Inquiry as to why he desisted from pressuring his horse, he said:

Well, my horse had had enough and that other horse had kept kicking back so I didn't want to keep on flogging him. I just got a suspension for driving them too hard.

14 The latter comment as to his harness driving refers to Mr Pizzuto's driving history which revealed Mr Pizzuto had been reprimanded, fined or suspended on four occasions in August 2011 for his excessive use of the whip. The Stewards were clearly cautioning him as to his action with the whip. I accept, by his immediate reaction to the Stewards' question regarding his driving, Mr Pizzuto revealed a sensitivity on this issue.

15 However, the DVD revealed one further incident in this race which I accept has a consequence. The DVD evidence reveals, as Mr Pizzuto moved passing the 100 metre mark, the seat from the harness rig attached to Franco Torres flew off. It is not necessary for me to comment that the driver of Franco Torres was able to sustain his balance and continue his drive in an amazing manner. However, the DVD, at the point the seat detached, reveals Mr Pizzuto turned to look at what flew past him from the harness of the lead horse, Franco Torres. It was from this point on that he did not re-apply the whip. When he was again asked, on the second day of the Stewards' Inquiry and after sighting the DVD of the race, why he did not continue with the whip, he said:

... I know I didn't hit him out that close to the line because that is where I was getting in trouble but also I looked down, I seen, I did look and I seen the seat fell off.

16 Harness Racing New South Wales makes the point that it was on the second day of the Inquiry after viewing the DVD that Mr Pizzuto referred to the incident. I am persuaded, however, that Mr Pizzuto was distracted for an instant by the flying object and looked around when the seat detached.

17 He also said:

That is where I was getting fined, the last 100 metres in my race. I was taking my hand off the whip and just having the whip in me hand. That is where I was getting the fines. I can't keep paying out the money. I am doing it hard at the moment.

18 Much evidence was also led by the appellant as to Our Amazing Art NZ's performance over the mile race as a three-year-old and the times he clocked in the third and fourth quarters of each race.

19 I accept the horse continued in the fourth quarter of the relevant race in accordance with his usual form and, as would be expected, at a faster pace in the last quarter. This point has been made by the appellant to assure the Tribunal the horse ran on its merits. I am persuaded the horse was not being "prevented or impeded" from racing on its merits.

20 Therefore, I am of the view, taking into account the fear of Mr Pizzuto as to his practice in the excessive use of the whip, his distraction from the flying seat and the race time achieved in the conduct of the race by the horse, that there was no wilful action by Mr Pizzuto to impede the horse.

21 The charge, therefore, under AHR Rule 147(2) is not established.

22 The Stewards, however, are highly qualified persons with an expertise in considering the conduct of a race. In this case, unusually, a witness was called to rebut their expert opinion as to the conduct of the race. When the Racing Appeals Tribunal is considering the conduct of a race, be it the conduct of the driver in the race or that related to the performance of a horse, or both issues, there must be evidence to rebut the expert opinion of the Stewards.

23 In this case, while I have accepted the conduct of the driver in the application of the whip, that is, his flicking at the horse's rump was good

conduct, nonetheless, I do not accept the expert evidence relied upon by the appellant (where the view was expressed that the further use of the whip would have not affected the horse's performance) persuades or rebuts the contention of the Stewards that in the driver's conduct, within the last 100 metres of the race, he took all reasonable and permissible measures to ensure the horse was given every opportunity.

24 Mr Pizzuto did not in the last 100 metres push his horse to the finish by flicking of the whip, nor did he put any pressure with the use of the reins on Our Amazing Art NZ.

25 There is evidence before me that at the next start of the horse, it performed well under the hand of a different driver and went on to win that race. While its success may not have been in a similar competitive field, nonetheless, the horse won. I am persuaded, whether because of any valid concerns held by Mr Pizzuto as to his use of the whip, Mr Pizzuto's distraction caused by the flying seat or simply because he used bad judgement in applying the whip too early in the race, or a combination of all the above factors, that Mr Pizzuto did not take all reasonable and permissible measures to give full opportunity to Our Amazing Art NZ in Race 7 on 20 September 2011 at Tabcorp Park Menangle.

26 Therefore, the charge under AHR Rule 149(1) is established.

### **Penalty**

27 As to penalty, the charge under AHR Rule 147(2) has not been established. Therefore, the penalty of a 12 month suspension of Mr Pizzuto's licence to drive is set aside.

28 As to penalty for the charge under AHR Rule 149(1), the Stewards determined a six month suspension was appropriate. The Stewards' reasoning for giving this six month suspension was that Mr Pizzuto was not to be disqualified. This is the lesser charge. I take into account Mr Pizzuto's driving record and, aside from the penalties he has served for his

excessive use of the whip, his driving record is good. The suspension of six months is, in the circumstances, in examining the guidelines of the Stewards, a little excessive. Mr Pizzuto should serve a four month suspension of his driving licence for the offence of AHR Rule 149(1) and, as no stay was granted, the suspension is backdated to the date of the second day of the inquiry held by the Stewards, being 28 September 2011.

29 The breach of Australian Harness Racing Rule 147(2) is dismissed. The penalty of a 12 month suspension of Mr Pizzuto's driving licence is set aside.

30 The breach of Australian Harness Racing Rule 149(1) is proven. Mr Pizzuto will have his driver's licence suspended for four months from 28 September 2011.

31 The Tribunal therefore finds:

1. The charge against Mr Pizzuto under AHR Rule 147(2) is dismissed and the penalty of a 12 month suspension is set aside.
2. The charge against Mr Pizzuto under AHR Rule 149(1) is proven.
3. For the offence under AHR Rule 149(1), Mr Pizzuto shall be given a four month suspension of his harness driving licence to commence on and from 28 September 2011.